Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Updating Part 1 Competitive Bidding Rules	)	WT Docket No. 14-170
	)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions	)	GN Docket No. 12-268
	)	
Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver	)	RM-11395
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)	WT Docket No. 05-211

REPORT AND ORDER; ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER; THIRD ORDER ON RECONSIDERATION OF THE SECOND REPORT AND ORDER; THIRD REPORT AND ORDER

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By the Commission: Chairman Wheeler and Commissioners Clyburn and Rosenworcel issuing separate statements; Commissioners Pai and O'Rielly dissenting and issuing separate statements.

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I. INTRODUCTION AND BACKGROUND

1. This *Report and Order* modernizes and reforms the Commission's Part 1 competitive bidding rules to reflect profound changes in the wireless industry over the last decade. In modernizing our rules, we provide greater flexibility to smaller companies to build wireless businesses that can spur additional investment in businesses and bring greater choice to consumers. We also provide—for the first time—a bidding credit to eligible rural service providers to help them compete for spectrum licenses more effectively and to provide consumers in rural areas with competitive offerings. Through these changes, and in furtherance of our statutory obligations, we recommit and refocus our efforts to providing meaningful opportunities to *bona fide* small businesses and rural service providers, including businesses owned by members of minority groups and women (collectively "designated entities," or "DEs") to participate in auctions and in the provision of spectrum-based services, and in providing such opportunities, to prevent unjust enrichment.[1]

2. The reforms we adopt today reflect that the wireless market is vastly different than when our rules were first adopted nearly two decades ago—and since they were last comprehensively revised in 2006. Consumer demand is exploding, data usage is growing exponentially, and faster 4G networks enable ever more data services.[2] Although this kind of growth should naturally lead to greater opportunities for businesses of all sizes and types, small businesses and rural service providers have faced significant challenges to entering the market and competing against larger carriers. Our rules have not kept pace with the dynamic changes in the market.

3. When the DE rules were first adopted, the wireless industry was in its infancy. The rules governing a nascent industry, and even rules adopted ten years ago, could not have envisioned the changes that have occurred in the industry. The wireless market has matured significantly since that time, and today more than 98 percent of mobile subscribers are served by the top four national providers. In recent years, even new large-scale wireless providers, backed by well-capitalized corporations have

[1] 47 U.S.C. §§ 309(j)(4)(E); *see also id*. 309(j)(3)(C).

[2] *See infra* para. 11.

struggled to develop successful business models to compete in today's wireless marketplace.[3] If major corporations cannot enter the market as new providers and deploy facilities-based services to consumers, it is wholly unrealistic to expect small businesses to do so.[4]

4. Therefore, the rules we adopt today provide greater flexibility for small businesses to gain an on-ramp into the wireless industry by leveraging leasing and other spectrum use agreements to gain access to capital and operational experience. We anticipate that, with experience in operations and investment, smaller companies may ultimately engage in more robust competition, including as facilities-based providers in certain markets, which has been—and remains—a goal of the Commission.[5] Likewise, we expect that a new bidding credit targeted toward eligible rural service providers will both encourage their greater participation in future auctions, and increase their provision of wireless broadband services to unserved and underserved communities, including persistent poverty areas. Ensuring that multiple rural service providers have the ability to compete effectively to acquire spectrum licenses is crucial to promoting consumer choice and competition throughout rural America, as well as to fostering innovation in the marketplace.[6]

5. We undertake these rule revisions with an understanding that the opportunity to acquire low-band spectrum licenses in the upcoming Broadcast Television Spectrum Incentive Auction ("Incentive Auction")[7] will not be replicated in the foreseeable future.[8] As mentioned above, the growth in consumer demand for mobile broadband has led to a growing need for spectrum. But not all spectrum is created equal. Low-band spectrum has distinct propagation advantages for network deployment over long distances and is likely to be necessary for existing providers that wish to expand their coverage in rural areas, as well as for new providers that wish to provide service in a rural market. As discussed in detail below, the rule changes we adopt today specifically address the difficulties that small businesses and rural service providers confront in today's marketplace, including raising capital to compete in an auction, securing the far greater financial resources necessary to support the construction and operation of a

[3] *See* Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses, *Memorandum Opinion and Order and Declaratory Ruling*, 27 FCC Rcd 10698 (2012) (*Verizon Wireless-SpectrumCo Order*).

[4] As Commissioner Copps noted in 2006, while ensuring against unjust enrichment, ". . . we must also be cautious about overshooting the mark and harming the very small carriers and entrepreneurs that Congress meant to protect. Legitimate DEs must have access to capital to compete meaningfully against the large carriers. I would not support any measures that improperly compromised their ability to do so." Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753, 4809 (2006) (separate statement), *vacated and remanded in part sub nom. Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010).

[5] Over the years, the Commission's DE program has provided an opportunity for several small businesses to grow into competitive, facilities-based providers. Most notably, both MetroPCS Communications and Leap Wireless International/Cricket began as DEs. Both companies are credited with developing and successfully operating a prepaid wireless services business model. By the time T-Mobile acquired MetroPCS in 2011, MetroPCS was serving 9 million customers and had become the fifth largest facilities-based provider of broadband wireless services in the United States. Similarly, when AT&T acquired Leap/Cricket in 2014, Leap was serving over 4.5 million customers in 35 states. T-Mobile and AT&T, respectively, are still providing wireless services under the MetroPCS and Cricket brand names. *See* ARC *Part 1 NPRM* Comments at 4-6; MetroPCS, Why MetroPCS, https://www.metropcs.com/content/metro/en/desktop/metro/why.html; Cricket, Why Cricket, https://www.cricketwireless.com/why-cricket.

[6] Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, *Report and Order*, 29 FCC Rcd 6133, 6143-44 ¶ 17 (2014) (*Mobile Spectrum Holdings Report and Order*).

[7] *See, e.g.*, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, *Report and Order*, 29 FCC Rcd 6567, 6762 ¶ 474 (2014) (*Incentive Auction R&O*).

[8] *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6207 ¶ 180.

wireless broadband network, and developing a successful business model based on current market structures and consumer needs. We anticipate that these changes will allow *bona fide* small businesses and eligible rural service providers a greater opportunity to participate in spectrum auctions and in the provision of wireless services.[9]

6. At the same time, we adopt common sense reforms that recognize that with increased flexibility comes additional responsibility. We remain mindful of our obligation to ensure that the benefits we provide through DE bidding credits flow only to those intended by Congress. That is why today's *Report and Order* establishes a cap on the total value of bidding credits that we will award to an eligible applicant in a Commission auction. We also adopt targeted measures to ensure that *bona fide* small businesses and eligible rural service providers are "calling the shots," by limiting the amount of spectrum capacity that a disclosable interest holder in a DE applicant or licensee may use on a license-by-license basis during the unjust enrichment period and by clarifying the types of agreements that will require particularly close scrutiny during our evaluation of DE eligibility. Taken together, and based on experience gained by administering the Commission's auctions program, we believe these measures will ensure that benefits are provided only to eligible DEs.[10] This rulemaking therefore marks another chapter in the Commission's more than twenty-year effort to achieve a proper balance between the parallel goals of affording DEs reasonable flexibility to obtain the necessary resources to participate in auctions and in the wireless industry while also effectively preventing the unjust enrichment of entities that would be

[9] We observe that numerous commenters generally opined on the results of Auction 97 (AWS-3) and its impact on small businesses and rural service providers. *See* Cerberus *Part 1 NPRM* Comments at 2-3; Letter from Joan Marsh, AT&T, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 2 (filed Feb. 20, 2015); CCA *Part 1 NPRM* Comments at 5-6; AT&T *Part 1 NPRM* Comments at 2-7, 10; TPA *Part 1 NPRM* Comments at 4; RWA *Part 1 NPRM* Comments at 4, 15; Blooston Rural *Part 1 NPRM* Comments at ii, 2-6; DE Coalition *Part 1 NPRM* Comments at 8-13; CAGW *Part 1 NPRM* Comments at 3; Letter from Jeffrey H. Blum, DISH, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 (filed Feb. 23, 2015); Letter from Tamara Preiss, Verizon, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 (filed Feb. 27, 2015); ARC *Part 1 NPRM* Reply at 9; Spectrum Financial *Part 1 NPRM* Reply at 1-3; Verizon *Part 1 NPRM* Reply at 2-4; KSW *Part 1 NPRM* Reply at 1-2; Council Tree *Part 1 NPRM* Reply at 8, Att.; Letter from Sen. Claire McCaskill, U.S. Senator, to Hon. Thomas Wheeler, Chairman, FCC, WT Docket No. 14-170 at 1 (filed Feb. 26, 2015) (Sen. McCaskill February 26, 2015 *Ex Parte* Letter); Letter from Donald Herman, Jr., Counsel, Various Rural Telcos, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 2 (filed Mar. 25, 2015); Letter from Bennett Ross, Counsel, Vermont Telephone, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 1 (filed Mar. 26, 2015); Letter from Erin Fitzgerald, Assistant Regulatory Counsel, RWA, *et al.*, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 2 (filed Apr. 1, 2015); Letter from Jonathan Spalter, Chairman, Mobile Future, *et al.*, to Hon. Thomas Wheeler, Chairman, FCC, WT Docket No. 14-170 at 2 (filed Apr. 2, 2015); Letter from Erin Fitzgerald, Counsel, Rural Telcos, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 1-2 (filed Apr. 23, 2015) (Rural Telcos April 23, 2015 *Ex Parte* Letter); Letter from Anthony Veach, Counsel, PTCI and Pine Belt, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 1-2 (filed Apr. 23, 2015); AT&T *Part 1 PN* Comments 2, 6-8; Rural Coalition *Part 1 PN* Comments at 3-4; RWA/NTCA *Part 1 PN* Comments at 3-4; Rural-26 *Part 1 PN* Comments at 7; Blooston Rural *Part 1 PN* Comments at 2; Council Tree *Part 1 PN* Comments, Att. at 4; AT&T *Part 1 PN* Reply at Appendix; RWA/NTCA *Part 1 PN* Reply at 4; KSW *Part 1 PN* Reply at Exhibit 1, 3-6; Letter from Thomas Gutierrez; Counsel, KSW, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170, Att. at 7 (filed Jun. 3, 2015); Letter from John Muleta, Chief Executive Officer, Atelum LLC, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 5 (filed Jun. 25, 2015) (Atelum June 25, 2015 *Ex Parte* Letter).

[10] In this regard, we note that although we do address concerns raised generally by commenters about how designated entities partner with larger entities, this rulemaking does not resolve any of the specific allegations made against any particular applicant or applicants in Auction 97 under the Commission's prior rules. *See* Petition to Deny of Citizen Action Illinois (filed May 6, 2015); Petition to Deny of VTel Wireless, Inc. (May 11, 2015); Petition to Deny of Central Texas Telephone Investments LP and Rainbow Telecommunications (May 11, 2015); Petition to Deny of Communications Workers of America and the National Association for the Advancement of Colored People (filed May 11, 2015); Petition to Deny of Ev Ehrlich (filed May 11, 2015); Petition to Deny of Americans for Tax Reform *et al.* (filed May 11, 2015); Petition to Deny of National Action Network (filed May 11, 2015). Those matters will be handled in the normal course of the petition to deny process for that auction.

ineligible to receive DE benefits in their own right.[11]

7. In this *Report and Order*, we also modify our competitive bidding processes and compliance rules to increase transparency and efficiency, as well as to protect the integrity of the Commission auction process. Chief among these modifications is our prohibition of joint bidding, with limited exceptions, and related changes we make to our rules regarding multiple applications by commonly controlled entities and prohibited communications. These changes will still afford opportunities for non-nationwide providers and DEs to pool their resources but will update our rules to promote more robust competition in future auctions and in today's evolving mobile wireless marketplace, especially when anonymous bidding is utilized. We also amend our rule governing former defaulters to simplify the auction process and minimize administrative and implementation costs for bidders. Taken together, we expect that these rule changes will improve the competitive bidding process for all participants.

8. Accordingly, in this *Report and Order*, we:

- Modify our eligibility requirements for small business benefits, and update the standardized schedule of small business sizes, including the gross revenues thresholds used to determine eligibility;
- Establish a new bidding credit for eligible rural service providers;
- Implement a cap on the overall amount of bidding credits available for eligible entities in any one auction;
- Strengthen and target attribution rules to prevent the unjust enrichment of ineligible entities;
- Retain and clarify DE reporting requirements;
- Revise the former defaulter rule, consistent with the waiver the Commission granted in Auction 97;
- Adopt rules prohibiting joint bidding arrangements with limited exceptions, and make related updates to our rule on prohibited communications; and
- Adopt rules prohibiting the same individual or entity as well as entities that have controlling interests in common from becoming qualified to bid on the basis of more than one short-form application in a specific auction, with a limited exception for certain rural

[11] *See, e.g.*, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2388–2400 ¶¶ 227-97 (1994) (*Competitive Bidding Second Report and Order*) (implementing the DE policies of section 309(j) of the Act), *recon. Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994); Implementation of Section 309(j) of the Communications Act— Competitive Bidding, *Fifth Report and Order*,9 FCC Rcd 5532, 5571-5625 ¶¶ 93-217 (1994) (adopting DE rules for broadband PCS), *recon.*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994) (*Competitive Bidding Fifth Memorandum Opinion and Order*), *modified*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Report and Order*, 11 FCC Rcd 136 (1995) (*Competitive Bidding Sixth Report and Order*), *aff'd sub nom, Omnipoint v. FCC*, 78 F.3d 620 (D.C. Cir. 1996) (adopting bidding credits for minority- and women-owned businesses and then, in light of *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) *(Adarand Constructors*), amending the rules to apply to all eligible small businesses); Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15296-97 ¶¶ 4-5, 15323-27 ¶¶ 58-67 (2000) (*Part 1 Fifth Report and Order*) (adopting as the Commission's general attribution rule a controlling interest standard for determining which applicants qualify as small businesses); Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003) (*Secondary Markets First Report and Order*); Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004) (*Secondary Markets Second Report and Order*) (adopting rules allowing wireless licensees to lease their spectrum, with restrictions for small business lessors); Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Second Report and Order and Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753 (2006) (*DE Second Report and Order*) (adopting additional restrictions for, *inter alia*, leasing by small business lessors).

wireless partnerships and individual members of such partnerships.

II. ELIGIBILITY FOR BIDDING CREDITS

A. Attribution Rules and Small Business Policies

9. ***Background.*** Today we revisit our DE eligibility rules in an effort to address the difficulties that small businesses and rural service providers confront in a dynamic, rapidly evolving wireless marketplace. In establishing the Commission's auction authority, Congress vested the Commission with broad discretion to balance a number of competing objectives.[1] Among these are special provisions to ensure that DEs, including small businesses and rural service providers, have the opportunity to participate in competitive bidding and in the provision of spectrum-based services.[2] For such purposes, Congress granted the Commission the ability to consider the use of bidding preferences.[3] At the same time, the Congress directed the Commission to prevent unjust enrichment as a result of the methods it employs to issue licenses.[4] Congress also directed the Commission, through its auction design, to seek to promote several other objectives, including the following: the development and rapid deployment of new technologies, products, and services without administrative delays; economic opportunity and competition through the dissemination of licenses among a wide variety of applicants, including DEs; recovery for the public of a portion of the value of the public spectrum resource made available for commercial use; and efficient and intensive use of the electromagnetic spectrum.[5] Over the course of the auctions program, the Commission has periodically re-evaluated its rules to strike the right balance among these competing statutory objectives.

10. As its principal means of fulfilling the statutory objectives for DEs,[6] the Commission offers auction bidding credits to eligible small businesses whose gross revenues, in combination with those of its "attributable" interest holders, fall below applicable service-specific size limits.[7] Since 2000, the Commission has applied a "controlling interest" standard in all services when making these attribution determinations for small business eligibility.[8] Under this standard, the Commission measures an applicant's size by attributing to it the gross revenues of the applicant, its controlling interests, its affiliates, and the affiliates of the applicant's controlling interests.[9] In 2006, the Commission added a bright-line test to require a small business applicant or licensee to automatically attribute to itself the gross revenues of any entity with which it has an "attributable material relationship" ("AMR").[10] An applicant or licensee has an AMR when it has one or more agreements with any individual entity for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including wholesale arrangements) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license held by the applicant or licensee.[11]

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[1] *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999); *accord, Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (*Fresno Mobile Radio*).

[2] 47 U.S.C. § 309(j)(3)(B), 309(j)(4)(D).

[3] 47 U.S.C. § 309(j)(3)-(4).

[4] 47 U.S.C. § 309(j)(3)(C), (4)(E).

[5] 47 U.S.C. § 309(j)(3)(A)-(D).

[6] 47 U.S.C. § 309(j)(4)(D).

[7] 47 C.F.R. § 1.2110. A bidding credit operates as a percentage discount on the winning bid amount of a qualifying small business. *See* 47 C.F.R. § 1.2110(f)(1).

[8] *See Part 1 Fifth Report and Order*, 15 FCC Rcd at 15296-97 ¶¶ 4-5, 15323-27 ¶¶ 58-67.

[9] *See id.* at 15323-24 ¶ 59.

[10] *See DE Second Report and Order*, 21 FCC Rcd at 4763-64 ¶¶ 25-27.

[11] *See id*. at 4763 ¶ 25; 47 C.F.R. § 1.2110(b)(3)(iv)(A).

11. Since the adoption of the AMR rule, small businesses have asserted that it impedes their ability to compete successfully in the wireless industry.[12] In the *NPRM*, we discussed the significant industry changes that have occurred over the past two decades and in particular during the ten years since the Commission last undertook a major update of the DE eligibility requirements.[13] During this time, the marketplace for mobile wireless services has evolved significantly, both in terms of consumer demand for services and in market structure. According to UBS Investment Research, the total estimated number of wireless customer connections in the United States reached 376.2 million at the end of 1Q 2015, up from 352.5 million at the end of 2014, an increase of 23.7 million connections.[14] The deployment of next generation networks has contributed to an increase of more than 200,000 percent in the number of LTE subscribers alone, from approximately 70,000 in 2010 to over 140 million in 2014.[15] Consumers today expect to be able to use mobile wireless services—especially mobile broadband—at home, at work, and while on the go. The marketplace has seen the rapid and widespread adoption of smartphones and tablet computers and an increase in the use of mobile applications, as well as in the deployment of high-speed 3G and 4G technologies, the combination of which has led to more intensive use of mobile networks.[16] For instance, according to providers responding to the most recent CTIA survey, active smartphones topped 208 million in 2014, up 19 percent from 175 million in 2013, and 35.4 million active wireless-enabled tablets and laptops were reported (up 40.5 percent year-over-year) in the same time period.[17] Consequently, mobile data traffic has grown dramatically, increasing from 388 billion MB in 2010[18] to 4.06 trillion MB at the end of 2014,[19] which represents a greater than ten times increase in the volume of data that was reported just four years ago. Despite technological improvements that have led to more efficient use of existing spectrum and increased investment in infrastructure,[20] this skyrocketing consumer demand for high-speed data has increased providers' need for spectrum at an unprecedented rate.

12. Additionally, the wireless market structure continues to evolve. While the mobile wireless marketplace once consisted of six near-nationwide providers and a substantial number of regional and small providers, over the last ten years there has been consolidation, leaving four nationwide providers and fewer small and regional mobile wireless service providers.[21] As mentioned above, today more than

[12] *See, e.g.*, Brief of Petitioners Council Tree Communications, Inc., Bethel Native Corporation, and the Minority Media and Telecommunications Council, *Council Tree Commc'ns, Inc. v. FCC*, 503 F.3d 284 (3d Cir. 2006) (No. 06-2943); *see also* S. Jennell Trigg & Jeneba Jalloh Ghatt for the Minority Media & Telecom Council, *Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry*, GN Docket No. 12-268 (filed Feb. 27, 2014) (*Digital Déjà Vu*) (arguing, among other things, that DE participation in spectrum auctions dramatically decreased after the Commission adopted its 2006 rule modifications).

[13] *See* Updating Part 1 Competitive Bidding Rules, *Notice of Proposed Rulemaking*, 29 FCC Rcd 12426 (2014) (*Part 1 NPRM* or *NPRM*). We received comments, reply comments, or both from a total of 22 parties.

[14] UBS Investment Research, "US Wireless 411: Version 56," (May 14, 2015).

[15] In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5636 ¶ 89 (2015) (*Open Internet Order*).

[16] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6146 ¶ 23; *see also* Cisco, "The Zettabyte Era: Trends and Analysis," (May 2015) (forecasting that global "[t]raffic from wireless and mobile devices will exceed traffic from wired devices by 2016"); Cisco, "Visual Networking Index: Forecast and Methodology, 2014–2019," (May 27, 2015) (forecasting that "[i]n the United states, mobile data traffic will grow 7-fold from 2014 to 2019, a compound annual growth rate of 47%" and that "mobile data traffic in 2019 will be equivalent to 8x the volume of the entire U.S. internet in 2005").

[17] CTIA, "Annual Wireless Industry Survey, Year-End 2014 Results," (June 17, 2015).

[18] *Open Internet Order*, 30 FCC Rcd at 5636 ¶ 89.

[19] CTIA, "Annual Wireless Industry Survey, Year-End 2014 Results," (June 17, 2015).

[20] *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6146-47 ¶ 24.

[21] *Id.* at 6144 ¶ 18, 6146-47 ¶ 24. Although some regional and local service providers have achieved significant market shares within particular local markets, often the most rural markets, they have typically relied on roaming

98 percent of mobile subscribers are served by the top four providers, which combined serve more than 375 million consumers.[22] This concentration of mobile service providers contributes to the difficulties experienced by small businesses in the wireless marketplace. Moreover, the costs of spectrum and network deployment—especially for small businesses—have increased in the last 20 years.[23] These market realities require DEs to have increased flexibility to gain access to capital in order to acquire licenses and benefit from the different opportunities available to participate in the provision of spectrum-based services. Interested parties therefore urged the Commission to re-examine its rules and policies to provide small businesses more operational flexibility to enable them to grow their operations and to develop new and innovative products and services.[24] As noted in the *NPRM*, the SBA's Office of Advocacy raised similar concerns.[25]

13. To address these concerns and changing conditions, we sought comment in the *NPRM* on whether to eliminate the AMR rule and revisit the policy that has required that small businesses seeking bidding credits to directly provide facilities-based service for the benefit of the public with each of their licenses.[26] We also sought comment on standards for evaluating small business eligibility, and on revising the rules for spectrum manager leasing by DE licensees.[27] During the initial comment cycle, several parties suggested alternate approaches to our proposals, others offered additional suggestions, and some raised questions beyond those covered in the *NPRM*. Accordingly, to assure a more complete record, we released a public notice in April 2015 seeking additional comment on these proposals, suggestions, and questions, as well as on other associated issues.[28]

14. In the *Part 1 PN*, we acknowledged that we had received comments both in favor of and against our proposed repeal of the AMR rule, and we sought further comment on various methods of modifying our DE eligibility rules.[29] We asked, for example, whether, instead of repealing the AMR rule, we should retain it, in either its existing or a modified form.[30] We sought additional comment on whether we should continue to require DE lessors to provide primarily facilities-based service.[31] We asked whether we should distinguish between types of secondary market arrangements (such as wholesale and resale agreements) entered into by DEs.[32] We sought comment on whether the rules that we apply to secondary market arrangements between DEs and nationwide wireless providers should be different from the ones that we apply to arrangements between DEs and other lessees.[33] We solicited input on whether to have any limit on the amount of spectrum that a DE would be permitted to lease to another DE or a rural

agreements with nationwide facilities-based providers to extend the geographic reach of their networks. *Id*. at 6147 ¶ 25.

[22] UBS Investment Research, "US Wireless 411: Version 56," (May 14, 2015).

[23] *See Part 1 NPRM*, 29 FCC Rcd at 12429 ¶ 6 (citing *Sixteenth Report*, 28 FCC Rcd 3700, 3766–69 ¶¶ 79-84 (2013) (*16th Mobile Wireless Competition Report*)).

[24] *See Digital Déjà Vu*; Letter from Council Tree Investors, Inc. to Marlene H. Dortch, Secretary, FCC (Mar. 18, 201[4]); *see also* Letter from Council Tree Investors, Inc. to Marlene H. Dortch, Secretary, FCC (May 9, 2014).

[25] *Part 1 NPRM*, 29 FCC Rcd at 12433 ¶ 16 & n.43.

[26] *See DE Second Report and Order*, 21 FCC Rcd at 4754-55 ¶ 3, 4759-60 ¶ 15, 4763 ¶ 26, 4763-64 ¶ 27.

[27] *See generally Part 1 NPRM*, 29 FCC Rcd at 12434-42 ¶¶ 20-41.

[28] Request for Further Comment on Issues Related to Competitive Bidding Proceeding; Updating Part 1 Competitive Bidding Rules, *Public Notice*, 30 FCC Rcd 4153 (2015) (*Part 1 PN*).

[29] *Id*. at 4154-58 ¶¶ 5-10, 4159 ¶ 12.

[30] *Id*. at 4154-56 ¶¶ 5-8.

[31] *Id*. at 4156-57 ¶ 9.

[32] *Id*. at 4156 ¶ 7.

[33] *Id*. at 4156 ¶ 8.

carrier.[34] And, among other possibilities, we sought comment on whether we should reconsider a bright-line test for determining who is considered a controlling investor in a DE.[35]

15. Based on the entirety of the record, including the comments filed both in the initial comment cycle and in response to the *Part 1 PN*, we believe that the revised rules we adopt will increase the ability of small businesses to become spectrum licensees. Together, these changes update our eligibility rules to take into account current market realities, namely that DEs need increased flexibility to gain access to capital and, in turn, have greater opportunities to participate in the provision of spectrum-based services. This *Report and Order* addresses the specific obstacles these participants face, including raising the capital necessary to compete in an auction; finding sufficient financial resources to support network construction and business operations; and developing a business model based on market needs. It responds to concerns voiced by licensees and potential licensees that our DE rules have not kept pace with today's environment.[36] And, of equal importance, it updates our rules to ensure that only *bona fide* small businesses qualify for and benefit from the designated entity program. With these rules, we allow small businesses to take advantage of opportunities available under our rules to utilize their spectrum capacity and gain access to capital similar to those afforded to larger licensees.

16. The record demonstrates that, while commenters are divided on the best approach to implement our DE program, they are nonetheless in agreement that it is time for us to recalibrate our rules to achieve an improved statutory balance.[37] The fundamental changes in the market described above, coupled with the evolution of DE participation in Commission's auctions since 2006, has led us to conclude that it is time to revise our rules and revisit their statutory underpinnings. First, as set forth in detail below, we eliminate the AMR rule. Second, we adopt a two-pronged test to determine eligibility for the award and retention of small business benefits, largely as proposed in the *NPRM*. This test retains the foundation of the controlling interest standard, including the attribution and affiliation requirements of section 1.2110 of our rules,[38] but applies these requirements in a more precise manner, based upon a careful review of all of a DE's relevant relationships and agreements.[39] Under this test, we will apply existing rules requiring attribution of the controlling interests in, and the affiliates of, a small business venture to determine whether the applicant: (1) meets the applicable small business size standard, and (2) retains control over the spectrum associated with the individual licenses for which it seeks benefits.[40] Pursuant to this more tailored review, eligibility for small business benefits will be determined, as we proposed in the *NPRM*, on a license-by-license basis to ensure that the small business makes independent decisions about its business operations.[41]

17. To better ensure that only eligible entities enjoy the valuable bidding credits that we award DEs, we adopt an additional attribution requirement under which during the five year unjust enrichment

[34] *Id*. at 4156 ¶ 8.

[35] *Id*. at 4157-58 ¶ 10.

[36] *See, e.g.*, ARC *Part 1 NPRM* Comments at 4, 8-9, 18; ARC *Part 1 NPRM* Reply at 8; CCA *Part 1 NPRM* Comments at 9-10; CCA *Part 1 NPRM* Reply at 7-8; CCA *Part 1 PN* Comments at 7-8; Council Tree *Part 1 NPRM* Reply Att. at 6; Council Tree *Part 1 PN* Comments at 10, 12, 13, 15, 22, 23, 29, 34; DE Coalition *Part 1 NPRM* Comments at 16-26; KSW *Part 1 NPRM* Reply at 11-12; MMTC *Part 1 PN* Comments at 3, 4, 6, 9; NCAI *Part 1 PN* Comments at 4; NTCA *Part 1 NPRM* Comments at 2, 5, 6-7; RWA *Part 1 NPRM* Comments at ii, 9, 10-11; Tristar *Part 1 PN* Comments at i, 2, 9; USCC *Part 1 PN* Comments at 15, 18.

[37] *See, e.g.*, AT&T *Part 1 NPRM* Comments at 2; ARC *Part 1 NPRM* Comments at 2; ARC *Part 1 NPRM* Reply at 1, 3; CCA *Part 1 NPRM* Comments at 4-5; CCA *Part 1 NPRM* Reply at 2; Cerberus *Part 1 NPRM* Comments at 1-2, 5; DE Coalition *Part 1 NPRM* Comments at 2-3;NTCA *Part 1 NPRM* Reply at 3; RWA *Part 1 NPRM* Comments at 2; T-Mobile *Part 1 NPRM* Reply at 1-2; WISPA *Part 1 NPRM* Comments at 1-2.

[38] 47 C.F.R. § 1.2110(a)-(g).

[39] *See, e.g.*, 47 C.F.R. § 1.2110(c)(5)(vii)-(x).

[40] *See* 47 C.F.R. § 1.2110.

[41] *See Part 1 NPRM*, 29 FCC Rcd at 12437-39 ¶¶ 28-32.

period, the gross revenues (or the subscribers, in the case of a rural service provider) of a disclosable interest holder in a DE applicant or licensee will become attributable, on a license-by-license basis, for any license acquired with a bidding credit and still subject to unjust enrichment requirements of which the disclosable interest holder uses (or has an agreement to use) more than 25 percent of the spectrum capacity. Lastly, we rely on the language of section 309(j), as opposed to the Commission's prior interpretation of its legislative history, to conclude that there is no statutory requirement for DEs to provide facilities-based service directly to the public with each license they hold.[42] Together, these changes will permit DEs the same flexibility as other licensees under our rules to avail themselves of a wider range of the opportunities to participate in the provision of spectrum-based services. For these same reasons, we modify the language of section 1.9020 as we proposed doing to make clear that DE lessors may fully engage in spectrum manager leasing under the same *de facto* control standard as non-DE lessors.[43]

1. AMR Rule

18. We eliminate the AMR rule, which required a *per se* bright-line attribution of revenues to a DE applicant, even in circumstances where there may have been no control of the DE's overall operations or the DE's spectrum by the spectrum user. Instead, we employ a totality-of-the-circumstances analysis to evaluate an entity's eligibility for, and retention of, small business benefits.[44] Further, as detailed below, we add a more targeted, license-by-license rule, to ensure that DE benefits do not flow to ineligible entities.

19. Throughout the course of this proceeding, we have received comments that variously advocate keeping, eliminating, or modifying the AMR rule. Many commenters, however, agree with our proposal to repeal the AMR rule,[45] stating that repeal of the rule will afford small businesses the flexibility needed to obtain the capital necessary to participate in the provision of spectrum-based services.[46] These commenters note that the proposal to adopt a two-pronged standard for evaluating the eligibility for small business benefits relies on well-established Commission standards for evaluating *de jure* and *de facto* control[47] and can be coupled with stronger unjust enrichment provisions to better prevent the abuse of

[42] *See, e.g.*, *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17541 ¶ 76, 17544 ¶ 82; *DE Second Report and Order*, 21 FCC Rcd at 4754-55 ¶ 3, 4759-60 ¶ 15, 4762 ¶¶ 21, 23; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Order on Reconsideration of the Second Report and Order*, 21 FCC Rcd 6703, 6704-05 ¶ 3 (2006) (*Order on Reconsideration of the DE Second Report and Order)*.

[43] *See* 47 C.F.R. § 1.9010; *see also* 47 C.F.R. § 1.9020(d)(4).

[44] *See Part 1 NPRM*, 29 FCC Rcd at 12434 ¶ 20, 12437-39 ¶¶ 28-31, 12439-40 ¶ 33.

[45] *See* ARC *Part 1 NPRM* Comments at 3, 16, 17-18; ARC *Part 1 NPRM* Reply at 2, 8; Atelum June 25, 2015 *Ex Parte* Letter at 2, 6-7; CCA *Part 1 NPRM* Comments at 9-10; CCA *Part 1 NPRM* Reply at 7-8; CCA *Part 1 PN* Comments at 3, 7-8, 9-10; ; CCA *Part 1 PN* Reply at 3-4, 4-7; Council Tree *Part 1 NPRM* Reply at Att. at 6; Council Tree *Part 1 PN* Comments at 6-8, 15, 33-34; Council Tree *Part 1 PN* Reply at 5-6; DE Coalition *Part 1 NPRM* Comments at i, 4, 16-25; KSW *Part 1 NPRM* Reply at 12; NTCA *Part 1 NPRM* Comments at 2, 5, 6-7; MMTC *Part 1 PN* Comments at 12-13; Tristar *Part 1 PN* Comments at 2-3, 6-7, 9; USCC *Part 1 PN* Comments at 3, 11-18, 21 and Att. at 29-30; USCC *Part 1 PN* Reply, Att. at 29; WISPA *Part 1 NPRM* Comments at 10, 12; Letter from E. Ashton Johnson, M/C Partners, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170 at 3 (filed May 21, 2015) (M/C Partners May 21, 2015 *Ex Parte* Letter); Letter from Jamie Belcore Saloom, Assistant Chief Counsel, SBA Office of Advocacy, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170 at 2 (filed June 8, 2015) (SBA Office of Advocacy June 8, 2015 *Ex Parte* Letter); Letter from Marc H. Morial, President and Chief Executive Officer, National Urban League, to Hon. Tom Wheeler, Chairman, FCC, WT Docket No. 14-170 at 1 (filed Jul. 9, 2015) (NUL July 9, 2015 *Ex Parte* Letter).

[46] *See* ARC Comments at 17-18; ARC Reply at 2, 8; CCA Comments at 9-10; CCA Reply at 8-9 (noting also, support for a rule change that prohibits a DE from leasing all or substantially all of its spectrum acquired with bidding credits); Council Tree Reply at 8, Att. at 6; DE Coalition Comments at 16; NTCA Comments at 5-7; WISPA Comments at 10-11. *But see* Blooston Rural Reply at 1-2; C Spire Reply at 3.

small business benefits.[48] In asking the Commission to eliminate the AMR rule, ARC, for example, indicates that a return to a case-by-case analysis of eligibility using the Commission's control and affiliation standards will align the Commission's policy with marketplace realities.[49] ARC notes that by allowing relationships between DEs and "large, successful entities, including mobile wireless incumbents," DEs will be able to acquire the capital needed to win licenses and "participate in the provision of spectrum-based services."[50] According to ARC, DEs can have such relationships without relinquishing control of their businesses.[51] Similarly, Tristar maintains that we should "allow DEs to engage in any activities with its licenses that are available to non-DEs, without limit," suggesting that a limitation is contrary to the "plain language" of section 309(j).[52] CCA also supports eliminating the AMR rule in favor of *de jure* and *de facto* control standards but cautions that repeal of the rule must be accompanied by safeguards to protect against abuse.[53] In addition, U.S. Cellular argues that setting any absolute limit on the amount of spectrum that a DE may lease or resell will continue to have negative consequences.[54]

20. Other parties oppose the repeal of the AMR rule.[55] T-Mobile argues that doing so will increase the likelihood that DE benefits could flow to ineligible entities or spectrum "speculators" in contravention of Congressional intent,[56] and others express similar concerns.[57] Further, some commenters argue that the AMR rule should not only be retained but strengthened. For example, T-Mobile and C Spire advocate that the Commission prohibit a DE from leasing more than 25 percent of its spectrum in the aggregate across one or more licenses.[58] C Spire also argues that, if the AMR rule is retained, a DE should not be allowed to lease more than 25 percent of its total spectrum to any one wireless operator.[59]

21. Although we acknowledge the concerns of parties who urge the Commission to retain or strengthen the AMR rule, we conclude that our collective rule revisions, including the adoption of a more targeted attribution rule that limits the ability of a disclosable interest holder in a DE to use spectrum awarded with a bidding credit (as explained below), decreases the likelihood that DE benefits will flow to ineligible entities in contravention of Congress's intent. Moreover, because our revised approach below

[47] CCA Comments at 9-10; *see also* ARC Comments at 18; Atelum June 25, 2015 *Ex Parte* Letter at 6-7; DE Coalition Comments at 16; NTCA Comments at 7; WISPA Comments at 11.

[48] CCA Comments at 10; *see also* DE Coalition Comments at 18.

[49] *See* ARC *Part 1 NPRM* Comments at 18.

[50] ARC *Part 1 NPRM* Comments at 17-18; ARC *Part 1 NPRM* Reply at 2 n.3, 8.

[51] ARC *Part 1 NPRM* Comments at 17-18.

[52] Tristar *Part 1 PN* Comments at 6-7.

[53] CCA *Part 1 PN* Comments at 3, 7-8, 9-10; CCA *Part 1 PN* Reply at 3-4, 4-7; *see also* CCA *Part 1 NPRM* Comments at 9-10; CCA *Part 1 NPRM* Reply at 7-8.

[54] USCC *Part 1 PN* Comments at 12-13.

[55] Blooston Rural *Part 1 NPRM* Comments at ii, 1, 5-6, 7; Blooston Rural *Part 1 NPRM* Reply at 1-2, 5-8, 11-12; Blooston Rural *Part 1 PN* Comments at 11; C Spire *Part 1 NPRM* Reply at 1-2; RWA *Part 1 NPRM* Comments at ii-iii, 13-15; RWA *Part 1 NPRM* Reply at i, 7-8; Taxpayer Advocates *Part 1 NPRM* Comments at 9-10; T-Mobile *Part 1 NPRM* Comments at 4-5, 13-14; T-Mobile *Part 1 NPRM* Reply at 6-9; T-Mobile *Part 1 PN* Comments at 3-4.

[56] T-Mobile *Part 1 NPRM* Comments at 13; *see also id*. at 4-5, 14.

[57] *See* Blooston Rural *Part 1 NPRM* Comments at 7; Blooston Rural *Part 1 NPRM* Reply at 11; C Spire *Part 1 NPRM* Reply at 3; Taxpayer Advocates *Part 1 NPRM* Comments at 9-10.

[58] T-Mobile *Part 1 NPRM* Comments at 4-5, 17; *see also* T-Mobile *Part 1 NPRM* Reply at 6-9; T-Mobile *Part 1 PN* Comments at 3-4; C Spire *Part 1 NPRM* Reply at 3; Taxpayer Advocates *Part 1 NPRM* Comments at 10 (suggesting that the Commission "retain, strengthen, and clarify the contours of the AMR rule").

[59] C Spire *Part 1 NPRM* Reply at 3.

utilizes our existing controlling interest and affiliation standards[60] to determine what revenues are attributable to an applicant based upon a rigorous review of all relevant relationships and agreements on a license-by-license basis, we conclude that we no longer need a bright-line, across-the-board, attribution rule to ensure that a small business makes independent decisions about its business operations.[61] Based on our auction experience, and in light of the totality of the record in this proceeding, we are persuaded that the AMR rule is overbroad.[62]

22. Eliminating the AMR rule, and replacing it with a more targeted license-by-license attribution rule, will allow small businesses greater flexibility to engage in business ventures that include increased forms of leasing and other spectrum use arrangements, while still having the ability to attract capital investment, even from large providers. DEs, like other licensees, will enjoy greater flexibility to adopt more individualized business models for each license they hold—some that include DE benefits and potentially some that do not. We anticipate that small businesses will, as a result, gain greater access to capital, and in turn, increase their likelihood of participating in auctions and in the provision of spectrum-based services. Under the license-by-license approach for a DE's acquisition and retention of bidding credits that we adopt below, a DE will not necessarily lose its eligibility for all current and future small business benefits solely because of a decision associated with any particular license.[63]

23. Although we agree that the Commission's rules must prevent ineligible entities from thwarting the spirit of the DE program and benefitting from bidding credits intended for small businesses, we disagree that the continuation of the AMR rule achieves that goal.[64] Rather than employing the overly broad attribution standard that has been applied since the adoption of the AMR rule, we conclude that we can balance our competing statutory objectives more effectively and at the same time better empower small businesses to acquire spectrum and operate in today's wireless marketplace. The Commission adopted the AMR rule in 2006 with the goal of preventing unjust enrichment to ineligible entities and ensuring that DEs had opportunities to become independent, facilities-based service providers with each of their licenses.[65] Thus, the AMR rule, in contrast with the other provisions of the Commission's DE eligibility rules, established a bright-line for triggering the attribution of revenues where a lease was for more than 25 percent of the spectrum capacity of any individual license, regardless of whether the DE retained control of its overall operations or its spectrum. The Commission was concerned about a lessee's "potential to significantly influence" the DE applicant.[66] It also noted "the potential" for the relationship to impede a DE's "ability to become a facilities-based provider," and sought to avoid a relationship that was "ripe for abuse."[67] The bright-line application of the AMR rule was therefore a tool that the Commission chose to implement in its effort to balance its statutory objectives.[68] Yet commenters in this proceeding have argued that, based on experience, the Commission's current rules, which include the AMR rule, may not be effective in limiting the award of bidding credits to *bona fide* small businesses.[69]

24. We further note that the adoption of the AMR rule was a departure from the Commission's

[60] 47 C.F.R. § 1.2110.

[61] *See, e.g.*, 47 C.F.R. § 1.2110(c)(5)(vii)-(x).

[62] We therefore agree with commenters that say an overbroad rule is unnecessary and serves to impede, rather than further, Congressional intent. *See, e.g.*, NTCA *Part 1 NPRM* Comments at 2, 5, 7.

[63] *Contra DE Second Report and Order*, 21 FCC Rcd at 4763 ¶ 25.

[64] *See* AT&T *Part 1 NPRM* Comments at 16.

[65] *See DE Second Report and Order*, 21 FCC Rcd at 4762 ¶ 21.

[66] *Id*. at 4762 ¶ 22.

[67] *Id*. at 4762 ¶¶ 22-23.

[68] *DE Second Report and Order*, 21 FCC Rcd at 4762 ¶ 21, 4763 ¶ 26.

[69] *See, e.g.*, AT&T *Part 1 NPRM* Comments at 4-5, 15-16; AT&T *Part 1 NPRM* Reply *at 3-4, 8-12;* AT&T *Part 1 PN* Comments at 2-3, 4-8; RWA *Part 1 NPRM* Comments at ii-iii, 13-15; RWA/NTCA *Part 1 PN* Comments at ii, 15-17.

earlier, more comprehensive analysis of how a DE's relationships might lead to attribution of gross revenues, as well as its initial approach to evaluating how much leasing was permissible for DEs at the outset of its secondary market policies.[70] Over the last ten years, industry developments have demonstrated that this regulatory adjustment to prevent unjust enrichment, may have operated to the detriment of the Commission's other equally important statutory objectives, and may not be achieving the goals for which it was adopted. By re-examining the statutory underpinnings of our rules and policies and refining our eligibility rules to reflect current market realities, including the niche roles DEs may play in a mature wireless industry, we can better promote the statutory goal of disseminating licenses among a wide variety of applicants, including small businesses, while also following our competing statutory obligations.[71] Moreover, the revised rules we adopt here refocus our efforts to thwart speculation by narrowly tailoring the attribution of revenues of those that control the DE's business, control the DE's spectrum, or have an interest in the DE and an agreement to use a spectrum license.

25. Based on our most recent auction experience, the changes in the wireless marketplace, and the comments and other submissions filed in the record, we agree with those commenters that contend that the Commission cannot realistically continue to expect DEs to compete successfully at auction or in the marketplace against their larger counterparts while, unlike those competitors, being subject to an across the board, all or nothing rule that limits their ability to make rational, business-based decisions on how best to utilize their licensed spectrum capacity.[72] Absent additional flexibility to gain access to capital through increased secondary market opportunities, on terms similar to their better-financed and more-experienced competitors, it is our predictive judgment that DEs will not be able to build viable, competitive wireless businesses. The decisions we reach today collectively recognize that permitting DEs to make independent business judgments on how to best provide service—either on their own, directly or indirectly, or in connection with others—will better ensure that DEs themselves are the driving forces of their business operations.[73] Thus, provided that a DE remains fully in control of its primary business and complies with all of the provisions of section 1.2110, as amended, we conclude that the degree to which a small business engages in a spectrum use agreement on any particular license need not, without more, presumptively require the bright-line attribution of revenues of the user to the DE in all circumstances.

26. In addition, we rely on the express language of section 309(j) to conclude that there is no statutory requirement for DEs to directly provide facilities-based service to the public with each license they hold. As we noted in the *NPRM*, that policy arose from the Commission's analysis of a part of the legislative history of section 309(j) that explained that anti-trafficking restrictions and unjust enrichment payment obligations were needed to deter "participation in the licensing process by those who have no intention of offering service to the public."[74] As we recognized in the *NPRM*, there are other more narrowly tailored methods that we can adopt, and do in fact implement below, to prevent unjust enrichment and accomplish that same goal.[75] More important, as we also noted in the *NPRM*, "[i]n interpreting statutes, "[a]nalysis of the statutory text, aided by established principles of interpretation, controls."[76] Section 309(j) does not refer to any requirement of "offering service to the public," much less

[70] *Id*. at 4762-63 ¶ 24; *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17538 ¶ 71, 17541 ¶ 76, 17544 ¶ 82.

[71] *See* 47 U.S.C. § 309(j)(3)(B).

[72] *See, e.g.*,CCA *Part 1 NPRM* Reply at 7-8; Blooston Rural *Part 1 NPRM* Reply at 11-12; Council Tree *Part 1 NPRM* Reply at 10, n.24 ("Implicit in such an approach is a desire to force new entrant DEs to start up a business with an outsized, immediate, and prohibitively expensive retail component and presence").

[73] None of the decisions we reach today relieve a DE of its service-specific obligations to meet its build obligations either individually or through a spectrum manager lessee. Thus, the provision of service for the benefit of consumers is not impeded by our repeal of the AMR rule.

[74] *See Part 1 NPRM*, 29 FCC Rcd at 12435 ¶ 22; *see also DE Second Report and Order*, 21 FCC Rcd at 4754-55 ¶ 3 & n.9, 4759-60 ¶ 15; *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17538 ¶ 71.

[75] *See Part 1 NPRM*, 29 FCC Rcd at 12436-37 ¶¶ 24-25.

the provision of facilities-based telecommunications services directly to the public.[77] Nor does it specify what measures the Commission must implement to address unjust enrichment concerns. Rather, it leaves to the Commission the design of auction rules to include those "as may be necessary."[78] Pursuant to the specific language of section 309(j), the Commission has broad discretion to balance many factors.[79]

27. In this regard, we disagree with the concerns of CAGW and others regarding the retention of the prior policy of direct facilities-based service to the public by licensees that were awarded bidding credits. Specifically, CAGW argues that by "allowing non-facilities-based entities to qualify for the DE discounts, smaller facilities-based carriers will find it more difficult to obtain the necessary spectrum required to expand their coverage and service."[80] To the contrary, we find that in light of the combined rule modifications we adopt today, a singular focus on requiring DEs to provide primarily facilities-based service directly to the public with each and every license they hold is not necessary to prevent unjust enrichment, operates as an impediment to the competing statutory goals described above, and hinders the ability of small businesses to participate effectively in the provision of spectrum-based services.[81]

28. As we explain more fully below, although we eliminate the AMR rule, we nonetheless emphasize that we fully preserve the Commission's ability to assess whether the terms of any particular spectrum use agreement with a DE, or any other aspect of a relationship between a DE and another party, requires the attribution of that party's gross revenues to the DE generally or on a license-by-license basis under section 1.2110, as amended. Contrary to a bright-line application of the AMR rule, this approach should better reflect the nature of the relationship between DEs and the parties with which they are securing financing and/or engaging in spectrum use agreements. The AMR rule was overly broad insofar as it foreclosed DEs from the business flexibility afforded to other licensees and yet also overly narrow insofar as it did not foreclose other possible misuses of the bidding credits awarded DEs. Accordingly, we revise our rules to determine more precisely what entities have the ability to dictate the DE's business and spectrum use decisions such that their gross revenues should be attributed to the DE applicant for purposes of determining its eligibility for and retention of small business benefits.

29. *Two-Pronged Standard for Evaluating Eligibility for Small Business Benefits*. To assess more accurately an applicant's size for determining eligibility for DE benefits, we adopt a two-pronged

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[76] *Part 1 NPRM*, 29 FCC Rcd at 12436 ¶ 23 & n.66, *quoting PM Wonderful LLC v. Coca-Cola*, 134 S. Ct. 2228, 2236 (2014).

[77] *See id.*; H.R. Rep. No. 103-111, at 257-58 (1993). The language in this conference report cited by the Commission in its 2004 and 2006 orders related to the "unjust enrichment" provision of Section 309(j)(4)(E). *Id.* Similar language related to the "performance requirements" of Section 309(j)(4)(B). *Id.* at 256. Significantly, the conferees did not use such language in describing Section 309(j)(4)(D), which is the subsection that specifically requires the Commission to provide DEs with the "opportunity" to "participate in the provision of spectrum-based services." The wording of that subsection does not suggest that such participation should be limited to the provision of facilities-based service. Surely, if Congress had intended such a limitation it would not have purposefully used the broadly worded provision, "opportunity to participate in the provision," rather than simply saying "provide." Our reading is supported by the structure and other text of the statute, which as noted below grants the Commission the discretion to balance a wide range of statutory goals. These include "avoiding excessive concentration of licenses" and "disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies . . . ." As the Supreme Court recently observed, we "construe statutes, not isolated provisions." *King v. Burwell*, No. 14-114 (U.S. June 25, 2015), slip op. at 9, 11-12, 15.

[78] 47 U.S.C. § 309(j)(4)(E).

[79] *See National Ass'n of Broadcasters v. FCC*, No. 14-1154 (D.C. Cir. June 12, 2015), slip op. at 30, citing *Fresno Mobile Radio*, 165 F.3d at 971 (Commission "reasonably balanced the Spectrum Act's competing imperatives").

[80] *See* CAGW *Part 1 NPRM* Comments at 3.

[81] *See, e.g.*, USCC *Part 1 PN* Comments at 21 (citing HAROLD FURCHTGOTT-ROTH, ECONOMIC AND REGULATORY PERSPECTIVES ON STRUCTURING DESIGNATED ENTITY PROGRAMS FOR COMMISSION AUCTIONS 4-6 (May 2015)) (arguing that facilities-based requirement has formed a second class of spectrum license, one that is less sensitive to market forces and likely less efficiently allocated).

standard. Under this test, we will use our existing controlling interest and affiliation rules to determine whether an applicant (or licensee): (1) meets the applicable small business size standard, and (2) retains control over the spectrum associated with the licenses for which it seeks small business benefits.

30. Under the first prong of the standard, we will apply our existing controlling interest and affiliation rules to determine the gross revenues attributable to a DE. This analysis must determine those that have *de jure* or *de facto* control of, or are affiliated with, the applicant's overall business venture.[82] *De jure* control is typically evidenced by the holding of greater than 50 percent of the voting stock of a corporation or, in the case of a partnership, general partnership interests.[83] *De facto* control is assessed on a case-by-case basis to determine whether the licensee has actual control over its business.[84] Pursuant to section 1.2110, control and affiliation may also arise through, among other things, ownership interests, voting interests, management and other operating agreements, or the terms of any other types of agreements—including spectrum lease agreements—that independently or together create a controlling, or potentially controlling, interest in the DE's business as a whole.[85] By separating the issue of who controls, or has the potential to control, the DE in regard to its overall business from the inquiry into who uses or controls the license(s) acquired with DE benefits for any particular license, the Commission can more accurately determine the extent to which these benefits are unjustly enriching an ineligible entity. In this way, the Commission can continue to fulfill its statutory objectives by facilitating the ability of small businesses to acquire licenses and participate in the provision of spectrum-based services to the public, while also promoting its competing statutory objectives.

31. This reformed approach received the endorsement of most commenters specifically addressing the two-pronged standard.[86] Under this approach, we will rely on our existing controlling interest and affiliation standards[87] to determine which revenues are attributable to an applicant based upon a careful review of all of its relevant relationships and agreements to ensure that small businesses make independent decisions about their business operations.[88] The Commission's existing attribution rules examine the extent to which a small business may combine its efforts, property, money, skill, and knowledge with another party.[89] Further, where there is an agreement to share profits and losses in proportion to each party's contribution to the business operation, the existing rules allow us to consider this in determining whether to attribute the revenues of parties to that agreement to the applicant.[90] The

[82] 47 C.F.R. § 1.2110.

[83] 47 C.F.R. § 1.2110(c).

[84] *Id. See Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324 ¶ 61 (incorporating long-standing principles of control into section 1.2110 of the Commission's rules).

[85] *See, e.g.*, 47 C.F.R. § 1.2110(c)(5)(vii)-(x) (explaining how affiliation can arise where one concern has the power to control or potentially control the other concern). As we discuss below, except under the limited provisions provided for spectrum manager lessors, our decision to discontinue the Commission's policy requiring DE licensees to operate as primarily facilities-based providers of service directly to the public does not alter the rules that require us to consider whether facilities sharing and other agreements confer control of or create affiliation with the applicant.

[86] *See* Atelum June 25, 2015 *Ex Parte* Letter at 6-7; ARC *Part 1 NPRM* Comments at 2-3; CCA *Part 1 NPRM* Comments at 2; CCA *Part 1 NPRM* Reply at 7-10; CCA *Part 1 PN* Comments at 4; DE Coalition *Part 1 NPRM* Comments at 16-25; Rural-26 Coalition *Part 1 PN* Comments at i, 4-5; USCC *Part 1 PN* Comments at 3, 11, 12, 18, Att. at 28; WISPA *Part 1 NPRM* Comments at 11; *but see* Blooston Rural *Part 1 NPRM* Comments at 5; RWA *Part 1 NPRM* Comments at ii-iii, 13-15.

[87] 47 C.F.R. § 1.2110.

[88] *See, e.g.*, 47 C.F.R. § 1.2110(c)(5)(vii)-(x). We note, for example, that standard passive investor protections generally do not give cause for concern, but provisions that limit the DE's use, deployment, operation, or transfer of its spectrum license(s) or business may warrant closer scrutiny. *See infra* para. 32.

[89] *See generally* 47 C.F.R. § 1.2110.

[90] 47 C.F.R. § 1.2110(c)(5)(x).

rules we adopt today, taken together, will continue to apply a totality-of-the-circumstances approach to allow the Commission to evaluate where an agreement or relationship warrants the attribution of revenues for the purposes of evaluating eligibility.[91] This approach will better enable the Commission to evaluate the various investors in a DE, both controlling and non-controlling, to ensure that a DE remains in command of its business. We emphasize that this review process will therefore provide us the ability to determine, pursuant to our existing rules, whether an entity with a non-controlling interest in more than one DE has created a relationship of affiliation between applicants for bidding credits such that the revenues of one need to be attributable to the other. We will also evaluate whether participation of a non-controlling interest holder in more than one applicant renders it an affiliate of both (or multiple) applicants such that the revenues of the non-controlling interest holder (as well as those of its controlling interests, its affiliates, and the affiliates of its controlling interests) should be considered attributable, with respect to either, both, or multiple applicants for purposes of determining eligibility for bidding credits on any particular license or as a general matter.[92] For instance, where a party has a non-controlling interest in more than one DE applicant or licensee, we will carefully review its investments in, and agreements with, the applicants to evaluate overlapping interests with respect to issues like the use of licensed spectrum capacity, jointly used facilities, shared office space, managerial authority, operational contracts, as well as how the parties may generally be combining their efforts, capital, skill and knowledge.[93] Thus, whether DEs are affiliated with each other or with a common investor, for example, could be informed by the nature of their relationships with that common investor.

32. As in the past, we will carefully review an applicant's claim of eligibility for bidding credits on a case-by-case basis. In so doing, we will examine the facts in the context of both the specific eligibility standards set forth in our rules, and the totality of the circumstances and facts presented by the applicant. While no two cases are the same and each case must be judged on its own facts, we emphasize that some management, loan, and organizational documents, such as limited liability company agreements, and other types of operational agreements could raise concerns that warrant particular scrutiny as part of our application review. These include agreements and arrangements in which a disclosable interest holder, lender, spectrum lessee, or other interest holder has a role in the day-to-day operations and business of a DE applicant or licensee, as well as provisions that would, taken together or separately, limit the DE's use, deployment, operation, or transfer of its license(s) or business, extending the role of these entities beyond the standard and typical role of a passive investor. While "[w]e will look at the totality of the circumstances in each particular case[,]" we also continue to "emphasize that our concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections."[94]

33. If an entity qualifies as a DE under the first prong, we will evaluate whether it is eligible for benefits on a license-by-license basis under the second prong. Under the second prong, we will evaluate whether a small business is entitled to benefits based on whether it will maintain *de jure* and *de facto* control of the particular license at issue under the terms of any use agreements for each license.[95] For instance, if a DE has a network sharing agreement on a particular license that calls into question whether, under affiliation rules the users revenues should be attributed to the DE for that particular license, rather than for its overall business operations, we may conclude that the DE is ineligible to acquire or retain benefits with respect to that particular license. Under this more targeted review, an entity will not necessarily lose its eligibility for all current and future small business benefits, as it did under the application of the AMR rule, solely because of a decision associated with any particular license.[96]

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[91] *See infra* para. 45.

[92] *See, e.g.*, 47 C.F.R. § 1.2110(c)(5)(vii)-(x).

[93] *Id*.

[94] *See Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 456 ¶ 96.

[95] 47 C.F.R. § 1.2110(c)(2)(ii)(A).

[96] *Contra DE Second Report and Order*, 21 FCC Rcd at 4763 ¶ 25.

Instead, while a small business will lose DE eligibility (and possibly incur unjust enrichment obligations) if it relinquishes *de jure* or *de facto* control of any particular license for which it claimed benefits, the DE could maintain its eligibility for benefits on its other existing and future licenses so long as the DE continues to meet the relevant small business size standard. Thus, an applicant need not be eligible for small business benefits on each of the spectrum licenses it holds in order to demonstrate its overall eligibility for such benefits.

34. As we emphasized in the *NPRM*, under the new standard, small businesses, like all Commission licensees, will remain subject to section 310(d) of the Communications Act, as well as our rules prohibiting unauthorized transfers of control of license authorizations.[97] Accordingly, if a DE executes a spectrum use agreement that does not comply with the Commission's relevant standard of *de facto* control,[98] it will be subject to unjust enrichment obligations for the benefits associated with that particular license, as well as the penalties associated with any violation of section 310(d) of the Communications Act and related regulations. If that spectrum use agreement (either alone or in combination with the DE controlling interest and attribution rules described above), goes so far as to confer control of the DE's overall business, the gross revenues of the additional interest holders will be attributed to the DE, which could render the DE ineligible for all current and future small business benefits on all licenses.[99] Except where the leasing standard of *de facto* control applies under sections 1.9010 and 1.9020 of the secondary market rules, the criteria of *Intermountain Microwave* and *Ellis Thompson*[100] continue to apply to every Commission licensee for purposes of assessing whether it can demonstrate that it retains *de facto* control of its business venture and spectrum license.

35. <u>*Standard for Evaluating DE Leasing*</u>. For the same policy reasons discussed above, we also adopt our proposal to apply to DE spectrum manager lessors the same *de facto* control standard that we apply to non-DE spectrum manager lessors,[101] and we modify section 1.9020 of our rules accordingly.

36. The limited comment we received on this issue was generally supportive of adopting the rule modifications proposed in the *NPRM*.[102] The DE Coalition, USCC, and WISPA all support the proposed modifications of the rules to clarify that DE lessors may fully engage in spectrum leasing under the same *de facto* control standard and to the same extent as non-DE lessors under a spectrum manager lease.[103] WISPA further states that a uniform standard makes the application process for spectrum leases more predictable, eliminates the need for special filings, and reduces administrative burdens.[104] WISPA also maintains that the proposal will enable small businesses to enter into leasing arrangements that are well understood and utilized within the marketplace, and will ensure that small business licensees retain control over certain obligations, preventing any sham arrangements or unjust enrichment for non-small business entities.[105] Blooston Rural, however, argues that, while some relaxation of the leasing restrictions is in order, our *NPRM* proposals will invite abuse of the bidding credit program by allowing

[97] Section 310(d) of the Communications Act prohibits the transfer or assignment of a construction permit or station license, or any attendant rights, unless authorized by the Commission. 47 C.F.R. § 310(d). *See also* 47 C.F.R. § 1.9010.

[98] *See* 47 C.F.R. § 1.9010 (*de facto* control for spectrum leasing arrangements); *see also Intermountain Microwave*, 12 FCC 2d 559, 559-60 (1963) (*Intermountain Microwave*) (*de facto* control for non-leasing situations); 47 C.F.R. § 1.2110(c) (*de facto* control for DEs); *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324 ¶ 61 (incorporating the *Intermountain Microwave* principles of control into section 1.2110 of the Commission's rules).

[99] Our proposal does not alter the requirement of full dilution in 47 C.F.R. § 1.2110(c)(2)(ii)(A).

[100] Application of Ellis Thompson Corporation, CC Docket No. 94-136, *Summary Decision*, 10 FCC Rcd 12554, 12555 ¶ 9 (ALJ decision 1995) (*Ellis Thompson*).

[101] *Part 1 NPRM*, 29 FCC Rcd at 12440 ¶ 37.

[102] *Id.* at 12440 ¶ 38.

[103] DE Coalition *Part 1 NPRM* Comments at i, 4; USCC *Part 1 PN* Comments at 15; WISPA *Part 1 NPRM* Comments at 12; SBA Office of Advocacy June 8, 2015 *Ex Parte* Letter at 2.

[104] WISPA *Part 1 NPRM* Comments at 12.

the largest carriers to invest in a DE, and then use spectrum leases to gain full access to spectrum obtained with the small business benefits.[106]

37. In order to allow DEs the ability to make independent business judgments about how to best utilize the spectrum capacity of each of their licenses, we revise section 1.9020(d)(4) of our rules to remove the conflicting reference to the control standard of section 1.2110, as we proposed to do in the *NPRM*.[107] We agree with WISPA that this modification will enable small businesses to enter into leasing arrangements that are well understood and utilized within the marketplace, and ensure that small business licensees retain sufficient control of their overall operations and regulatory obligations to safeguard the award of bidding credits.

38. Pursuant to this modification, a DE will, like any other spectrum manager lessor, be considered to have *de facto* control over the portion of a spectrum license for which it, as lessor, has a spectrum manager lease provided that it: (1) maintains an active, ongoing oversight role in ensuring that the lessee complies with Commission rules and policies; (2) retains responsibility for all interactions with the Commission required under the license related to the use of the leased spectrum; and (3) remains primarily and directly accountable to the Commission for any lessee violation of these policies and rules.[108] We stress however, that we will not allow spectrum manager leases of licenses subject to DE benefits to automatically go into effect under the Commission's 21 day processing period.[109] Instead, staff will carefully review DEs' requests to engage in spectrum manager leasing, and review such requests as necessary to determine whether the terms of the spectrum management lease agreement include provisions that confer *de jure* or *de facto* control of the DE lessor's business venture. These rule modifications will allow a DE to participate in the secondary market under the same control standard as other wireless licensees.

39. We nonetheless recognize Blooston Rural's concerns[110] and agree that in relaxing our rules with respect to leasing generally, we must counterbalance such modifications to ensure that ineligible entities cannot invest in a DE and then use spectrum leases to gain full access to spectrum obtained with the small business benefits.[111] Accordingly, to address the scenario raised by Blooston Rural, we adopt a specific attribution rule that will serve to limit the amount of spectrum capacity a disclosable interest holder in a DE applicant or licensee will be able to utilize during the five-year unjust enrichment period under any use agreement.

2. Attribution Rules

40. In the *Part 1 PN*, we sought comment on various recommendations from commenters for modifying our attribution rules to better ensure that only *bona fide* small businesses qualify for bidding credits.[112] These recommendations include, among other things, modifications to the applicable attribution, controlling interest or affiliation rule to alter the types of equity arrangements available to a DE applicant by (a) attributing to a DE the revenues and spectrum of any entity holding certain interests of more than ten percent, (b) restricting certain large carriers or companies from providing a certain

[105] WISPA *Part 1 NPRM* Comments at 12.

[106] Blooston Rural *Part 1 NPRM* Comments at 6-7.

[107] *Part 1 NPRM*, 29 FCC Rcd at 12441-42 ¶ 40.

[108] 47 C.F.R. § 1.9010; *Secondary Markets First Report and Order*, 18 FCC Rcd at 20610 ¶ 11. A DE's ongoing control over any non-leased portion of a license for which it has benefits is, of course, evaluated according to section 1.2110 and the criteria set forth in *Intermountain Microwave* and *Ellis Thompson*. *See* 47 C.F.R. § 1.2110; *see also Intermountain Microwave; Ellis Thompson*.

[109] *See* 47 C.F.R. § 1.9020.

[110] *See supra* para. 36.

[111] Blooston Rural *Part 1 NPRM* Comments at 6-7.

[112] *Part 1 PN*, 30 FCC Rcd at 4157-58 ¶ 10.

amount of capital or otherwise exercising control over a DE, and (c) adopting a rebuttable presumption that equity interest of 50 percent or more represents *de facto* control of the DE.[113] We also invited comment on other suggestions by commenters regarding DE eligibility for benefits, such as: (1) adopt a 25 percent minimum equity requirement for DEs; (2) limit the total dollar amount of DE benefits that any DE (or group of affiliated DEs) may claim during any given auction, based on particular criteria; (3) limit the overall amount that a small business can bid based on a revenues or population-based metric; (4) narrow the scope of the affiliation rules to exclude individuals and entities whose revenues are currently attributable to a DE, such as directors and certain family members; and (5) clarify the affiliation rules to prevent rural telephone companies from losing DE status because they hold a fractional interest in a cellular partnership if the rural telephone company has no ability to control the partnership's day-to-day operations and/or strategy.[114]

41. After review of the comments submitted in response to our inquiry, we adopt a new attribution rule to establish a limit on how much spectrum capacity a disclosable interest holder in a DE applicant or licensee (which for the purposes of this rule we define as any party holding ten percent or greater interest of any kind in the DE, including but not limited to, a ten percent or greater interest in any class of stock, warrants, options or debt securities in the applicant or licensee) can use in any particular license awarded with DE benefits, and reject the remaining suggestions.

42. *Limitation on Spectrum Use by a Disclosable Interest Holder in a DE*. To ensure that DE benefits are awarded to only eligible, *bona fide* small businesses, we adopt a new attribution rule that will serve as an additional safeguard to prevent the circumvention of the Commission's rules during the unjust enrichment period for any license awarded with bidding credits. Specifically, we adopt an additional attribution requirement under which, during the five-year unjust enrichment period, the gross revenues (or the subscribers in the case of a rural service provider) of a disclosable interest holder in a DE applicant or licensee will become attributable, on a license-by-license basis, for any license in which the disclosable interest holder uses, in any manner, more than 25 percent of the spectrum capacity of a DE's license awarded with bidding credits.

43. A number of commenters suggested that we restrict larger nationwide and regional carriers,[115] entities with a certain number of end-user customers,[116] and/or other large companies[117] from providing a material portion of the total capitalization of DE applicants or otherwise exercising control over such applicants as part of the definition of 'material relationship.[118] In responding to our inquiry on this matter, several commenters offer various suggestions on whether and to what extent we should implement such a restriction. Blooston Rural, for instance, supports a restriction on leasing spectrum to nationwide carriers that have invested in the applicant/licensee, along with large regional carriers and other large companies.[119] Tristar argues that some restriction on DE financing arrangements involving other participants and incumbent service providers is merited.[120] In support of a new restriction, AT&T reasons that, given the capital costs for deploying a service, the cost of the licenses should be a small fraction of a DE's operational fund; thus, if a DE has the financial wherewithal to compete in urban markets and fulfill the Commission's performance benchmarks, "it seems unlikely that the [DE] is the type of business that

[113] *See id.*

[114] *See id.*

[115] NTCA *Part 1 NPRM* Comments at 7-8.

[116] *See* AT&T *Part 1 NPRM* Comments at 15-17 (arguing that tax-payer funded spectrum subsidies are intended for "small" businesses); Blooston Rural *Part 1 NPRM* Comments at 6.

[117] T-Mobile *Part 1 NPRM* Reply at 10-11 (arguing that, for [NTCA's] proposition to be fair, it "would need to cover all large companies – not just the carriers.")

[118] NTCA *Part 1 NPRM* Comments at 7.

[119] Blooston Rural *Part 1 PN* Comments at 12; Blooston Rural *Part 1 PN* Reply at 7-8.

[120] Tristar *Part 1 PN* Comments at i, 4-5.

any rational small business program is meant to assist."[121] At the same time, AT&T/Rural Carriers caution that any new restrictions should include an exception for arms-length commercial loans to bidding entities.[122]

44. Other commenters also opine that a restriction should also be imposed on entities utilizing the rural service provider bidding credit. Among these commenters, Blooston Rural supports the adoption of some restriction that would limit the ability of a DE to lease spectrum that is acquired with the rural service provider bidding credit to an investor, provided that the Commission carve out an exception for an investor that is "a rural telephone company or rural telco subsidiary/affiliate with wireless or wireline presence in the original license area (as established by its existing ETC designation), or to an independent wireless ETC that is certif[ied] in the original license area and that has fewer than 100,000 subscribers."[123] RWA/NTCA agrees with Blooston Rural's restriction, including the exception, but would also apply the restriction to nationwide wireless carriers who are not investors of the DE and impose the restriction for the initial license term.[124]

45. Based on the common theme in commenters' proposals, we incorporate into section 1.2110 a new attribution rule under which, during the five year unjust enrichment period, the gross revenues (or the subscribers in the case of a rural service provider) of a disclosable interest holder in a DE applicant or licensee will become attributable, on a license-by-license basis, for any license in which the disclosable interest holder uses, in any manner, more than 25 percent of the spectrum capacity of a DE's license awarded with bidding credits.[125] As noted above, for the purposes of this rule, we define a disclosable interest holder as any party holding a ten percent or greater interest of any kind in the DE, including, but not limited to, a ten percent or greater interest in any class of stock, warrants, options, or debt securities in the applicant or licensee. Despite receiving a number of the alternative proposals from commenters, we decline to specifically restrict financing or agreements with large or regional carriers, because doing so may impede a DE's ability to raise capital and gain operational experience. Instead, the rule we adopt today should safeguard the award of valuable bidding credits by carefully targeting the concerns of commenters, which generally seek to ensure ineligible entities don't improperly benefit from DE bidding credits by gaining full unrestricted access to use the spectrum license.

46. For DEs that acquire licenses with the new rural service provider bidding credit,[126] however, we will include an exception to this new attribution rule, similar to that suggested by Blooston Rural,[127] to apply to any disclosable interest holder that would independently qualify for a rural service provider bidding credit. Pursuant to this exception, a rural service provider may have spectrum license use agreements with a disclosable interest holder, without having to attribute the disclosable interest holder's subscribers, so long as (a) the disclosable interest holder is independently eligible for a rural service

[121] AT&T *Part 1 PN* Comments at 12.

[122] Letter from Joan Marsh, VP – Federal Regulatory, AT&T, et al., to Roger Sherman, Chief, Wireless Telecommunications Bureau, FCC, WT Docket 14-170 (filed May 10, 2015) at 2 (AT&T/Rural Carriers Joint Proposal).

[123] Blooston Rural *Part 1 PN* Reply at 5-6; *see also* Blooston Rural *Part 1 PN* Comments at 9-10 (providing also, that the Commission should prohibit an entity from assigning a license won with the rural service provider bidding credit to an applicant's investor, that the prohibition period should be longer than the unjust enrichment period, and that the prohibition should not apply to investors that are independently eligible for the bidding credit).

[124] RWA/NTCA *Part 1 PN* Comments at 2 (stating that the exception should apply to another rural telephone company or rural telco subsidiary); RWA/NTCA *Part 1 PN* Reply at Att. A (arguing that the Commission "should impose restrictions on leasing or wholesale of agreements with nationwide wireless [carriers] in a fashion similar to that in the [AMR] rule").

[125] 47 C.F.R. § 1.2110. This new attribution rule applies to applicants of licenses acquired with the small business bidding credit or the rural service provider bidding credit.

[126] *See infra* Section II.B.2. (Rural Service Provider Bidding Credit).

[127] *See, e.g.*, Blooston Rural *Part 1 PN* Comments at 9-10.

provider credit and (b) the use agreement is otherwise permissible under our existing rules. This exception should ensure that rural service providers can work in concert to provide service to rural areas.

47. In adopting this new attribution rule, we disagree with commenters who oppose the adoption of limitations on the ability for an investor to engage in certain transactions with a designated entity concerning licenses acquired with bidding credits.[128] Specifically, Council Tree argues that such restrictions would contravene Congressional intent and impede the ability of DEs to acquire the necessary capital to compete with incumbents who already have a distinct operational advantage in the wireless marketplace.[129] Council Tree also maintains that "the adoption of any of these [*Part 1 PN*] proposals to restrict the size and impact of DEs in spectrum auctions [serves] the *private* financial interests of the largest, most entrenched incumbents."[130] CCA voices concern that the limitations would be too restrictive and create significant disincentives to investment.[131] USCC asserts generally that most of the proposals violate the principles of simplicity and avoiding different classes of licenses—and begs the question of why the Commission does not use *Intermountain Microwave*—as the ultimate test.[132] Moreover, USCC opines that "when individual, properly constituted DEs win auctions, that is not an abuse of the rules; [r]ather, it carries their intent."[133]

48. While we recognize the concerns echoed by various commenters that investor use limitations could restrict the ability for DEs raise capital, we conclude that this carefully targeted rule, applied on a license-by-license basis during the five year unjust enrichment period, is necessary to fulfill our responsibility of ensuring that DE benefits flow only to those intended by Congress.[134] We therefore adopt this rule to balance the increased flexibility we have granted to DEs to raise capital against our obligation to prevent investors from benefitting from bidding credits indirectly through their use of a DE's discounted license. The rule is also consistent with our two-pronged analysis of small business eligibility, allowing a DE to monetize individual licenses without losing its overall eligibility, while ensuring that the DE remains independent and in control of its business as a whole. Moreover, we disagree with USCC that such a rule is unnecessary because the application of the criteria in *Intermountain Microwave* sufficiently mitigates the additional risks that unjust enrichment and undue influence may arise after the elimination of the AMR rule and relaxation of our facilities-based service requirements.[135] Rather, by establishing this targeted rule to focus only on the intersection of a disclosable interest in a DE and the disclosable interest holder's use of 25 percent or more of the spectrum capacity of a license awarded with DE benefits, we can alleviate commenters' concerns regarding unjust enrichment and, at the same time, provide DEs with more transparency and predictability in the auctions and licensing process.

49. Because we are implementing this 25 percent use limit for disclosable interest holders in a DE, we will not incorporate into our rules any of the alternative attribution restrictions for which we sought comment.[136] For instance, we will not modify our rules to require a DE to attribute the revenues

[128] *See, e.g.*, CCA *Part 1 PN* Reply at 7 (opposing generally attribution proposals that would hinder small business participation).

[129] Council Tree *Part 1 PN* Comments at 10, 13 (stating that incumbents have the infrastructure and an existing subscriber base and therefore have lower operational costs); *see also* Letter from S. Jenell Trigg, Council Tree, Counsel, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170 at 2 (filed June 5, 2015) (discussing the "Bidder Effect" as a key metric that the Commission should use to evaluate the impact of a proposal that affects DEs) (Council Tree June 5, 2015 *Ex Parte* Letter).

[130] Council Tree *Part 1 PN* Comments at v.

[131] CCA *Part 1 PN* Reply at 7.

[132] USCC *Part 1 PN* Comments at 32.

[133] USCC *Part 1 PN* Comments at 9.

[134] 47 U.S.C. §§ 309(j)(3)-(4).

[135] USCC *Part 1 PN* Comment at 32.

[136] *See Part 1 PN*, 30 FCC Rcd at 4157-58 ¶¶ 10-11.

and spectrum of any entity that holds more than a ten percent interest in any type of DE,[137] and as explained above, will instead adopt the more targeted rule, evaluated on a license-by-license basis. Most commenters generally oppose the proposal that would attribute to a DE the revenues and spectrum of any spectrum holding entity that holds an interest, direct or indirect, equity or non-equity of more than ten percent.[138] Some of these commenters assert that the proposal is too restrictive[139] and impedes the ability of a DE to raise capital to compete successfully in spectrum auctions.[140] NTCH further opposes the notion that non-equity debt financing should be considered for determining DE eligibility because it would disadvantage small businesses who must often rely on non-institutional sources of debt financing.[141] We agree with these commenters, and decline to accept the positions of those like C Spire that support a more restrictive proposal.[142] We also agree with T-Mobile, which suggests that the ten-percent proposal, while a "step in the right direction, may be too restrictive."[143] Accordingly, we conclude that our more targeted attribution rule achieves the proper balance of our numerous policy goals.

50. Nor will we adopt a rebuttable presumption that equity interests of 50 percent or more represent *de facto* control of a DE, which would run counter to our overall policy goal of providing additional sources of access to capital.[144] We note that commenters are divided in response to the establishment of a rebuttable presumption that equity interests of 50 percent or more represent *de facto* control of a DE.[145] Some commenters, including Blooston Rural and Tristar, support this proposal, with some changes.[146] Blooston Rural would support the rebuttable presumption, provided that "properly insulated passive investors" are not "lumped together to determine a 50% or greater interest."[147] Tristar would also establish a rebuttable presumption that any provider of financial support of 25 percent or more, direct or indirect, should be considered a controlling interest of the DE.[148] T-Mobile argues that this proposal is a compromise position and is consistent with the Commission's existing standards for evaluating *de jure* control.[149] Opponents of the rebuttable presumption argue that such a provision may not withstand judicial scrutiny[150] and would create a "logistical nightmare" for small businesses and

[137] *See* AT&T *Part 1 NPRM* Comments at 17; *see also* C Spire *Part 1 NPRM* Reply at 2-3; T-Mobile *Part 1 NPRM* Reply at 10-11.

[138] *See* Blooston Rural *Part 1 PN* Comments at 12; KSW *Part 1 PN* Comments at 7-8; NTCH *Part 1 PN* Comments at 8-9; M/C Partners May 21, 2015 *Ex Parte* Letter at 2; CCA *Part 1 PN* Reply at 7.

[139] Blooston Rural *Part 1 PN* Comments at 12; CCA *Part 1 PN* Reply at 7.

[140] CCA *Part 1 PN* Reply at 7; NTCH *Part 1 PN* Comments at 8-9; M/C Partners May 21, 2015 *Ex Parte* Letter at 2; *see also* KSW *Part 1 PN* Comments at 3, 7 (opposing restrictions on non-equity holdings above certain levels).

[141] NTCH *Part 1 PN* Comments at 2.

[142] *See* C Spire *Part 1 NPRM* Reply at 2-3.

[143] T-Mobile *Part 1 NPRM* Reply at 10-11; *see also* T-Mobile *Part 1 PN* Comments at 5-6 (suggesting adoption of its rebuttable presumption proposal in lieu of AT&T's proposal).

[144] T-Mobile *Part 1 NPRM* Comments at 15; T-Mobile *Part 1 NPRM* Reply at 6-7.

[145] *Compare* Blooston Rural *Part 1 PN* Comments at 12 (generally support proposal), T-Mobile *Part 1 NPRM* Comments at 15(same), T-Mobile *Part 1 NPRM* Reply at 6-7 (same), T-Mobile *Part 1 PN* Comments at 5-6, *and* Tristar *Part 1 PN* Comments at 5, *with* Council Tree *Part 1 PN* Comments at 32 (generally opposing the proposal); KSW *Part 1 PN* Comments at iii, 10-11 (disagreeing with proposal).

[146] Blooston Rural *Part 1 PN* Comments at 12; Tristar *Part 1 PN* Comments at 5.

[147] Blooston Rural *Part 1 PN* Comments at 12.

[148] Tristar *Part 1 PN* Comments at 5.

[149] T-Mobile *Part 1 PN* Comments at 6.

[150] Council Tree *Part 1 PN* Comments at 32; KSW *Part 1 PN* Comments at 10-11; *see also* Council Tree *Part 1 PN* Reply at 16 (arguing that proponents of this policy fail to show that it remedies any fact-based problem and fails to show how these changes adhere to Statutory Mandates).

Commission staff.[151] Additionally, USCC argues that, like the minimum equity requirement, this policy would limit DEs' flexibility to attract financing and undercut the underlying policies of the DE program.[152] We agree with commenters that this type of restriction would impede a DE's access to capital without any counter-balancing benefits that cannot otherwise be achieved by our new targeted rule. Moreover, for similar reasons as those discussed above, we believe that the attribution rule we adopt today will address the concerns underpinning this type of proposal in a directed, practical, and effective way.

51. We also reject the suggestion to adopt a rule that would require a DE to provide, without outside investment, a minimum of 25 percent of the equity of its business, as such a requirement could be unachievable for many small businesses and rural service providers, particularly in capital intensive auctions.[153] For instance, in opposing this suggestion, KSW contends that "very few entities have 25 percent or more held by a single entity," and that "the result would be less DE funding, and far fewer and much smaller DEs."[154] Also rejecting this suggestion, USCC notes that the Commission previously declined to adopt a minimum equity requirement because "it would subject DEs to unnecessary competitive harms and conflict with the Commission's goal of providing DEs with 'maximum flexibility' in attracting financing."[155] CCA, however, reasons that a minimum equity requirement could be reasonable but that the suggested 25 percent requirement is too high.[156] The Commission has historically declined to adopt a minimum equity requirement for the controlling interests of a DE applicant, and we continue to do so here because we conclude it would be counter-productive to our efforts to afford DE applicants greater flexibility to gain access to capital.[157]

52. We note that each of the proposals we decline to adopt attempt to limit the ability of ineligible entities to circumvent our rules and reap the benefits of DE discounts through their investments in, and business involvements with, DEs.[158] After reviewing the record in this proceeding, and taking into account the Commission's experience in administering the bidding credits program, we conclude that the rule we adopt today will best achieve the ends these commenters seek without the associated drawbacks in furtherance of our statutory obligation to balance dual directives.

53. *Implementation of the New Eligibility Test and Attribution Rule*. We will implement our new eligibility test and attribution rule on a prospective basis, including for licenses in the 600 MHz band.[159] Additionally, we will apply this rule prospectively, so as to apply to all determinations of eligibility for designated entity benefits with respect to: any application filed to participate in auctions in which bidding begins after the effective date of the rules; all applications for a license authorization, assignment, or transfer of control; and any spectrum leases or reports of events affecting a designated entity's ongoing eligibility filed on or after the release date of this *Report and Order*. In light of the changes that we are making to our eligibility and attribution rules, we will require additional information from applicants and licensees in order to ensure compliance with the policies and rules adopted today. We will therefore

[151] KSW *Part 1 PN* Comments at 10-11.

[152] USCC *Part 1 PN* Reply at 8.

[153] *See* T-Mobile *Part 1 NPRM* Comments at 15; T-Mobile *Part 1 NPRM* Reply at 6-7; T-Mobile *Part 1 PN* Comments at 6. *But see* Blooston Rural *Part 1 PN* Comments at 12; KSW *Part 1 PN* Comments at iii, 11.

[154] KSW *Part 1 PN* Comments at 11; *see also* Council Tree *Part 1 PN* Reply at 14-15 (noting that T-Mobile's proposal "fails to identify an underlying, fact-based problem, fails to explain how the proposed change would remedy any such problem, and fails to show how the changes adhere to Statutory Mandates"); M/C Partners May 21, 2015 *Ex Parte* Letter at 2 (stating that such a proposal is a "poison pill" for DEs").

[155] USCC *Part 1 PN* Reply at 7.

[156] CCA *Part 1 PN* Reply at 5.

[157] *Part 1 Fifth Report & Order*, 15 FCC Rcd at 15325-26 ¶¶ 65-66.

[158] *See, e.g.*, AT&T *Part 1 NPRM* Comments at 17; T-Mobile *Part 1 NPRM* Comments at 15.

[159] *See generally Incentive Auction R&O*, 29 FCC Rcd 6567.

modify our FCC forms and the Universal Licensing System (ULS) to implement these new rule changes.

54. *Attribution of Revenues Where the Applicant Holds an Interest in a Cellular General Partnership*. In the *Part 1 PN*, we invited comment on whether we should modify our affiliation rules to prevent an applicant from losing eligibility for small business bidding credits because it holds an interest in a cellular partnership that was established as part of the cellular B Block settlement process that applied to wireline companies in the mid to late 1980s.[160] Commenters have noted that despite being a partner, a rural telephone company typically holds only a fractional ownership interest in these partnerships and thus has no ability to control the partnership's day-to-day operations.[161] Commenters therefore request that the Commission not attribute the revenues of the partnership to such an applicant when it is seeking eligibility for a small business bidding credit.[162]

55. While we understand that some rural telephone companies may not be eligible for a small business bidding credit because they hold an attributable interest in a cellular general partnership, we must make every effort to ensure that our DE benefits inure only *bona fide* eligible entities. Accordingly, we decline to adopt a rule that would exempt an applicant that is a controlling interest, or an affiliate of a cellular partnership, from attributing the revenues of the partnership for the purposes of complying with the size standards for eligibility for small business bidding credits. As discussed fully below, however, we have adopted a bidding credit for eligible rural service providers based upon the number of subscribers of the applicant (as well as its controlling interests, affiliates and the affiliates of its controlling interest), and for that bidding credit we have created exception to our attribution rules for existing rural partnerships.

56. *Attribution of Immediate Family Members and of Officers and Directors*. We also decline to adopt changes to two of our other attribution rules. In the *Part 1 PN*, we sought comment on whether we should narrow the scope of two of our attribution requirements where an immediate family member or a particular officer or director is unlikely to exercise control over the applicant.[163] Under the kinship affiliation requirement, immediate family members are rebuttably presumed to "own or control or have the power to control interests owned or controlled by other immediate family members."[164] Under the officer/director attribution requirement, officers and directors of an applicant (or of an entity that controls an applicant or licensee) are considered to have a controlling interest in the applicant (or licensee).[165]

57. Both NTCH and Tristar propose relaxing the kinship affiliation requirement, arguing that the existing rule is too broad and requires attribution of the revenues of family members who are unlikely to have involvement with the applicant.[166] NTCH also contends that the Commission must narrow the officer/director attribution requirement, claiming that it encompasses officers "who have no executive authority whatsoever."[167] Blooston Rural, on the other hand, advises caution before we narrow either

[160] *Part 1 PN*, 30 FCC Rcd at 4158 ¶ 10 (citing to Blooston Rural *Part 1 PN* Comments at 10); *see also* Blooston Rural Reply at 5-6.

[161] *See* Blooston Rural *Part 1 NPRM* Comments at 10-11; Blooston Rural *Part 1 PN* Comments at 13; Blooston Rural *Part 1 PN* Reply at 2 (expressing continued support for an exception in the affiliation rules); RWA/NTCA *Part 1 PN* Comments at 17; *see also* Letter from D. Cary Mitchell, Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP Counsel to the Blooston Rural Carriers, et al., to Marlene H. Dortch, Secretary, FCC (filed Jul. 8, 2015) at 4 (Blooston Rural/RWA/NTCA July 8, 2015 *Ex Parte* Letter).

[162] Blooston Rural *Part 1 NPRM* Comments at 11.

[163] *Part 1 PN*, 30 FCC Rcd at 4158 ¶ 10.f.

[164] 47 C.F.R. §1.2110(c)(5)(iii)(B).

[165] 47 C.F.R. §1.2110(c)(2)(ii)(F).

[166] NTCH *Part 1 NPRM* Comments at i, 1; NTCH *Part 1 PN* Comments at 1, 2, 3; Tristar *Part 1 PN* Comments at 11-12. NTCH specifically objects to the treatment of "all of an applicant's in-laws, half-siblings, and step-relations as presumptively controlling the applicant." NTCH *Part 1 NPRM* Comments at 1.

[167] NTCH *Part 1 NPRM* Comments at i, 1-2; NTCH *Part 1 PN* Comments at 1, 2, 4. NTCH similarly argues that the Commission's former defaulter rule should be modified to prevent its application "in the corporate context to

rule, noting that officers and directors of privately held companies often have significant control and pointing out that the kinship affiliation presumption is, by its terms, rebuttable.[168]

58. We find our current rules help ensure that only *bona fide* small businesses receive small business bidding credits. Accordingly, we will leave both rules intact. There is minimal record support for eliminating or modifying these rules, particularly the officer/director attribution requirement. Moreover, we have found the kinship affiliation rule to be effective in forcing the attribution of revenues of close relatives who are likely to exercise control over an applicant.[169] Thus, the rule continues to serve the purpose for which the Commission first adopted it in 1994 for broadband PCS.[170] The Commission explained then that the reason for the rule is twofold, to ensure that entities receiving DE benefits are actually in need of special financial assistance and to prevent otherwise ineligible entities from circumventing the rules by funding family members who purport to be eligible applicants.[171] The Commission further explained that it was adopting bright-line tests for determining when the financial interests of spouses and other family members should be attributed, because, as a practical matter, it would not be able to resolve all questions pertaining to the individual circumstances of particular applicants for an auction before bidding began.[172]

59. At the same time, the Commission acknowledged that a non-spousal family relationship may not carry the same potential for abuse that a relationship between spouses does.[173] Accordingly, while the Commission adopted spousal attribution of revenues as a non-rebuttable standard (unless the spouses are legally separated),[174] it implemented the kinship rule as a rebuttable presumption.[175] Now, as then, a winning bidder may rebut the presumption by showing that close family members cannot exercise control over the business, i.e., that "the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters."[176] We therefore conclude that the rule is not overly broad and continues to serve a specific necessary purpose.

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controlling shareholders or executive officers (presidents, CEOs CFOs and COOs) of the formerly defaulting applicant who hold similar positions in a current auction applicant that is, or is affiliated with, the former defaulting company." NTCH *Part 1 NPRM* Comments at 8. We address this argument in our discussion of the former defaulter rules. *See infra* Section III.A (Former Defaulter Rule).

[168] Blooston Rural *Part 1 PN* Comments at 13.

[169] *See* Ztark Communications, LLC, *Memorandum and Order*, 28 FCC Rcd 14755 (WTB/BD 2013).

[170] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5623-24 ¶ 212.

[171] *Id*.

[172] *Id*. at 5624-25 ¶¶ 213-17.

[173] *Id*. at 5623-25 ¶¶ 210-217; 47 C.F.R. § 24.720(k)(3)(i) (1994)

[174] *See* 47 C.F.R. § 1.2110(c)(5)(iii)(A).

[175] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532 at 5623-25 ¶¶ 210-217.

[176] 47 C.F.R. §1.2110(c)(5)(iii)(B). In adopting the kinship affiliation requirement for spectrum auctions in 1994, the Commission chose a rebuttable presumption, rather than patterning its auction rule after the rules for the attribution of the media interests of family members in multiple ownership and cross-ownership situations. In these media situations, the Commission considers, as it did in 1994, the following seven factors relevant in making case-by-case determinations regarding family attribution: (1) representations about the independence of family members' media interests; (2) commingling of media business interests; (3) family members' participation in the financial affairs, programming and personnel decisions of each other's media interests; (4) prior broadcast experience of the individuals seeking to establish independent interests; (5) financial independence; (6) sharing of personnel, equipment, contractors or programming information; and (7) involvement by family members in the acquisition or application process. *See* Clarification of Commission Policies Regarding Spousal Attribution, *Policy Statement*, 7 FCC Rcd 1920 (1992) ("*Media Bureau Family Attribution Policy Statement*"); *see also* Meridian Communications of Idaho, Inc., Application for Construction Permit for New Television Station on Channel 20 Idaho Falls, Idaho, *Memorandum Opinion and Order*, 26 FCC Rcd 678, 681 (2011) (failing to find a substantial and material question as to common control based on analysis using criteria of the *Media Bureau Family Attribution Policy Statement*).

60. Likewise, we believe that defining officers and directors as controlling interests of a DE applicant or licensee similarly helps ensure that "only those entities truly meriting small business status qualify for our small business provisions."[177] NTCH argues that the attribution rule discourages individuals from taking seats on an applicant's board of directors, because their "private revenue information" would have to be disclosed.[178] Contrary to NTCH's concerns, personal net worth, including personal income, of the officers and directors need not be disclosed.[179] More important, the revenue information of officers and directors need be disclosed only if their company is seeking a substantial public benefit by applying for a bidding credit. Finally, NTCH has provided no specific examples of instances where it thinks that the rule should not have been applied and has therefore not convinced us that changing the rule is in the public interest. We remind NTCH and all interested parties that if an applicant considers a waiver of the rule to be warranted in its case, it may seek one under section 1.925 of our rules.[180]

61. *Tribal Exclusion from affiliation coverage*. In the *Part 1 PN*, we sought comment on a request that the Commission "eliminate the preferential treatment for [Alaska Native Corporations ("ANCs")] that do not meet the standard definition of small business under the Commission's attribution rules."[181] Under the Commission's small business attribution rules, applicants or licensees affiliated with Indian tribes or ANCs are not required to include revenues of those tribes or ANCs, other than gaming revenues, in their gross revenues for purposes of determining their eligibility for bidding credits.[182] When the Commission adopted this exclusion from the affiliation requirements in 1994, it sought to ensure that its rules remained consistent with other federal laws, policies, and regulations, most notably the affiliation rules of the Small Business Administration ("SBA").[183] We asked in the *Part 1 PN* whether the Commission should now eliminate the exclusion, whether the rules concerning Indian tribes or ANCs remain consistent with other federal policies, and whether these rules increase the risk of unjust enrichment.[184] We also asked commenters to tell us whether and how we should amend the rules.[185]

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[177] *See Part 1 Fifth Report and Order*, 15 FCC Rcd at 15323-24 ¶¶ 59, 63 & n.203. Since the earliest competitive bidding rules on DE eligibility, the Commission has considered officers and directors to be controlling interests because of their ability to exert influence over companies in which they have significant managerial responsibility. *See, e.g.*, Amendment of the Commission's rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5006 ¶ 120 (1994). In this regard, the Commission's competitive bidding rules are similar to corresponding rules for the attribution of media multiple ownership interests, under which "[o]fficers and directors of a broadcast licensee, cable television system or daily newspaper are considered to have a cognizable interest in the entity with which they are so associated." 47 C.F.R § 73.3555 Note 2g.

[178] NTCH *Part 1 PN* Comments at 4.

[179] 47 C.F.R. §1.2110(c)(2)(ii)(F).

[180] 47 C.F.R. § 1.925.

[181] Sen. McCaskill February 26, 2015 *Ex Parte* Letter at 2. This letter has been placed in the docket of these proceedings.

[182] *See* 47 C.F.R. §1.2110(c)(5)(xi); *see also* 47 C.F.R. §§ 1.2110(b) and (c)(5).

[183] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Order on Reconsideration*, 9 FCC Rcd 4493, 4494 ¶ 5 (1994) (*Order on Reconsideration of Competitive Bidding Second Report and Order*) (adopting a broadband PCS exclusion from affiliation coverage for Indian tribes and ANCs that was the precursor of our current rule); *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*, 13 FCC Rcd 374, 392-93 ¶ 28 (1997) (*Competitive Bidding Third Report and Order*).

[184] *Part 1 PN*, 30 FCC Rcd at 4159 ¶ 12.

[185] *Id*.

62. We have received no record support for this proposal. Fourteen commenters, all tribes or tribal organizations, oppose elimination of the affiliation exclusion.[186] NCAI emphasizes "the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions," amounting to a fiduciary trust relationship.[187] NCAI also explains that the Commission's preservation of the tribal attribution exclusion is essential because of the economic disparities that exist on tribal lands and the well-documented challenges of deploying communications infrastructure there.[188] Several of the tribal entities explain that they still lack high-speed and dependable telecommunications services and face daunting barriers to obtaining spectrum licenses for the provision of commercial mobile wireless services on tribal lands.[189] Under these circumstances, the commenters tell us, access to capital is crucial. As one commenter asserts, any adverse modification of the affiliation exclusion will effectively nullify the Commission goal that telecommunications services be deployed to tribal communities.[190]

63. Native Public observes that "[t]he Commission has repeatedly found that Native Americans have had less access to telecommunications services than any other segment of the population[,]" adding that the Commission's DE tribal policies "advance the interests of an underserved minority population group, those of the Tribal governments which have a sovereign right to set their own communications policies and goals for the welfare of their members."[191] And Nez Perce encourages the Commission to retain its "well established and rooted policies to bolster a tribe's resources to deploy wireless services on their land to serve the communication needs of their population."[192] Other commenters all express similar views.[193]

64. When the Commission decided to include this exclusion under its definition of the term "affiliate," it concluded that the exclusion would ensure that Indian tribes and Alaska Regional or Village Corporations have a meaningful opportunity to participate in spectrum-based services from which they would otherwise be precluded, and that such an exclusion for these specified entities would not entitle them to an unfair advantage over entities that are otherwise eligible for small business status.[194] The affiliation exclusion for ANCs is based on their "unique legal constraints" imposed by statute that are inapplicable to other businesses.[195] These constraints preclude ANCs from "utilizing two important means of raising capital: (1) the ability to pledge the stock of the company against ordinary borrowings, and (2) the ability to issue new stock or debt securities."[196] In addition, land holdings held by Indian tribes cannot be used as collateral for purposes of raising capital, "because the land holdings are owned in

[186] *See* DCA *Part 1 PN* Comments at 3-6; Leech Lake *Part 1 PN* Comments at 1-2; NCAI *Part 1 PN* Comments at 4-6; Native Public *Part 1 PN* Comments at 3-4; *see* Coquille *Part 1 PN* Reply at 2; Grand Traverse *Part 1 PN* Reply at 2; Jamestown Tribe *Part 1 PN* Reply at 2; NTTA *Part 1 PN* Reply at 2-3; Omaha Tribe *Part 1 PN* Reply at 2; NTUA *Part 1 PN* Reply at 2; Nez Perce *Part 1 PN* Reply at 2; Shoalwater *Part 1 PN* Reply at 1; Tohono *Part 1 PN* Reply at 2; Tulalip Tribes *Part 1 PN* Reply at 1-2; Twenty-Nine Palms *Part 1 PN* Reply at 2. *See also* CCA *Part 1 PN* Reply at 4 (acknowledging broad support in the record for retaining the exemption for tribal entities).

[187] NCAI *Part 1 PN* Comments at 5-6, quoting FCC, Native Nations Consultation Policy (2000), available at https://www.fcc.gov/encyclopedia/native-nations-consultation-and-policy. *See generally* Cohen's Handbook of Federal Indian Law ch. 5 (N. Newton ed. 2012).

[188] NCAI *Part 1 PN* Comments at 6.

[189] *See* Coquille *Part 1 PN* Reply at 2; Grand Traverse *Part 1 PN* Reply at 2; Jamestown Tribe *Part 1 PN* Reply at 2; NTTA *Part 1 PN* Reply at 2; NTUA *Part 1 PN* Reply at 1-2; Omaha Tribe *Part 1 PN* Reply at 2; Tohono *Part 1 PN* Reply at 2; Twenty-Nine Palms *Part 1 PN* Reply at 2.

[190] Tulalip Tribes *Part 1 PN* Reply at 1 (also discussing the tribal land bidding credit).

[191] Native Public *Part 1 PN* Comments at 4-5.

[192] Nez Perce *Part 1 PN* Reply at 2.

[193] *See* DCA *Part 1 PN* Comments at 3-6; Leech Lake *Part 1 PN* Comments at 1-2.

[194] *See Competitive Bidding Third Report and Order*, 13 FCC Rcd 392-93 ¶ 28.

[195] *See Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 156 ¶ 34.

trust by the federal government or are subject to a restraint on alienation in the government's favor."[197] The exception was carefully tailored so as not to extend it to gaming revenues, which are not subject to the same constraints.[198] We have also not been presented with any evidence that our rule is no longer consistent with other federal laws, policies, and regulations, most notably the affiliation rules of the SBA such that we should revisit the exclusion. In light of commenters' significant opposition and the absence of a record supporting the elimination or modification of this attribution exclusion, we retain the exclusion in its current form.

B. Bidding Credits

65. In the *Part 1 NPRM*, we took a fresh look at the Commission's bidding credit program to ensure that it remains a viable avenue for DEs to meaningfully participate in auctions and thereby create additional competition and investment in the wireless marketplace.[199] The Commission's bidding credit program was adopted in 1994 and is the primary way the Commission facilitates participation by designated entities in auctions.[200] Section 309(j)(4)(D) of the Act states that the Commission must consider using bidding preferences when prescribing regulations for acquiring service-specific licenses through competitive bidding.[201] A bidding credit provides a percentage discount on winning bids for eligible DEs.[202] The Commission defines bidding credit eligibility requirements for DEs on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service.[203]

66. After reviewing the record, we revise our rules for the Commission's bidding credit program as set forth below. Specifically, we update our small business eligibility requirements to better reflect the capital-intensive nature of the wireless industry, while retaining our overall three-tiered approach that links the percentage of the small business bidding credit to the size of the business. We also adopt a new bidding credit for eligible rural service providers to increase their participation in auctions and provide greater opportunities for bringing crucial wireless voice and broadband services to rural areas, including underserved and unserved areas and areas of persistent poverty.[204] By adopting this new bidding credit, we facilitate greater access by multiple entities to valuable, low-band spectrum, thereby fulfilling our statutory goals of promoting competition and ensuring the efficient use of spectrum. As a further step to ensure these benefits continue to flow only those intended beneficiaries, we also adopt a reasonable limitation or cap on the total amount of benefits that a small business or rural service provider can receive in any particular auction.

67. We adopt these rule changes specifically for the 600 MHz service, for which licenses will be

[196] *Id.*, citing Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.*

[197] *See Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 428 ¶ 43.

[198] *Id*. at 428-429 ¶ 44.

[199] *See Part 1 NPRM*, 29 FCC Rcd at 12444 ¶ 50.

[200] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391-2392 ¶¶ 241-42 (specifying the DEs eligible for bidding credits in the individual services rules). The generally applicable small business definitions and corresponding bidding preference were adopted in 1997. *See* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Tenth Report and Order*, 13 FCC Rcd 374, 402-405 ¶¶ 44-48 (1997) (*Competitive Bidding Tenth Report and Order*).

[201] *See* 47 U.S.C. § 309(j)(4)(D) ("[The Commission must] ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of . . . bidding preferences.").

[202] *See Part 1 NPRM*, 29 FCC Rcd at 12445 ¶ 51.

[203] *See id.*

[204] Only 25 counties that have been identified as persistent poverty counties are not in rural areas. *See* ERS, Geography of Poverty, http://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/geography-of-poverty.aspx (last visited July 16, 2015).

offered in the Incentive Auction, to provide eligible small businesses and rural service providers with additional tools to compete meaningfully for low-band spectrum and to promote overall competition in auctions and in the wireless marketplace. On a prospective basis, we will determine the award of bidding credits for small businesses and rural service providers on a service-specific basis taking into account the capital requirements and other characteristics of each particular service, as we currently do.

68. We decline to adopt at this time specific bidding preferences for other types of entities, including those that serve unserved/underserved areas or areas with persistent poverty, as well as those that have overcome disadvantages. We expect, however, that such parties should benefit from the changes we make to our bidding credit program for small businesses and rural service providers. Finally, we decline to consider any modification of the tribal lands bidding credit because the record does not support revisions to our current policies for the award of this benefit.

1. Small Business Bidding Credit

69. ***Background.*** The Commission's small business bidding credit program consists of a three-tiered schedule of bidding credits corresponding to small business size definitions that are based on an applicant's average annual gross revenues for the preceding three years.[205] Applicants with average gross revenues not exceeding $3 million are potentially eligible for a 35 percent bidding credit; applicants with average gross revenues not exceeding $15 million are potentially eligible for a 25 percent bidding credit; and applicants with average gross revenues not exceeding $40 million are potentially eligible for a 15 percent bidding credit.[206] In order to qualify for a small business bidding credit, an applicant must demonstrate that its average annual gross revenues, in combination with those of its "attributable" interest holders, fall below the applicable financial thresholds.[207] The Commission takes into account the capital requirements and other characteristics of a particular service in establishing which small business definitions to apply to a specific service.[208]

70. In the *Part 1 NPRM*, we sought comment on whether the Commission's small business bidding credit program continues to align with the operational demands of small businesses that acquire spectrum and build out services in a formidable wireless marketplace.[209] We invited comment on whether to increase the gross revenue thresholds for defining the small business size for the bidding credit, using the price index for the U.S. Gross Domestic Product ("GDP price index") as the standard for measuring the increase of the thresholds.[210] Specifically, the Commission proposed to increase the average annual gross revenues thresholds from $3 million to $4 million for applicants potentially eligible for a 35 percent bidding credit; from $15 million to $20 million for applicants potentially eligible for a 25 percent bidding credit; and from $40 million to $55 million for applicants potentially eligible for a 15 percent bidding credit.[211] We also sought comment on alternative indices, criteria, or methods that may better reflect the development and relevant range of economic activity in the wireless industry.[212]

71. We invited comment on whether to modify the current bidding credit percentages and whether to add additional tiers of bidding credits.[213] We also asked whether we should continue to evaluate the definition of a small business on a service-by-service basis.[214] Moreover, we sought comment on whether any adopted changes to our Part 1 rules should be incorporated into the 600 MHz

[205] *See* 47 C.F.R. §1.2110(f)(2).

[206] *See id.*

[207] *See* 47 C.F.R. §1.2110(b).

[208] *See* 47 C.F.R. §1.2110(c)(1).

[209] *See, e.g., Part 1 NPRM*, 29 FCC Rcd at 12444 ¶ 50.

[210] *Id.* at 12446-47 ¶¶ 55-59.

[211] *Id.* at 12446-47 ¶ 57.

[212] *Id.* at 12447 ¶¶ 57-59.

[213] *Id.* at 12448 ¶ 62.

service rules.[215] In addition, we asked whether we should apply our revised Part 1 rules to re-auctioned licenses for existing services.[216] Based on comments received in response to the *Part 1 NPRM*, we sought additional comment in the *Part 1 PN* on alternative proposals that would increase the gross revenue thresholds based on other standards,[217] increase the small business bidding credit percentages for all or some of the tiers,[218] and decline to make any changes to the small business bidding credit program until the Commission addressed perceived DE eligibility issues stemming from Auction 97.[219]

72. ***Discussion.*** We adopt our proposal in the *Part 1 NPRM* to increase the gross revenues thresholds that define the three tiers of small business bidding credits and to retain the existing percentage levels of the small business bidding credits.[220] Consistent with past practice, we will select, on a service-by-service basis, the small business bidding credits and corresponding definitions that will be available for the applicable auction based on the capital requirements of a particular service.[221] For the Incentive Auction, we will continue to utilize the 25 percent and 15 percent bidding credits, but we will apply the increased gross revenue thresholds that we adopt today to the small business size definitions for those bidding credits.[222] As discussed below, we expect that these measures will advance our statutory goals by providing small businesses with an opportunity to remain competitive in an evolving wireless marketplace by facilitating participation in auctions and in the provision of spectrum-based services.[223]

73. *Updating the Standardized Schedule of Small Business Sizes*. We retain our existing three-tiered schedule for determining eligibility for bidding credits, but update the gross revenues thresholds to reflect the capital challenges small business face in the current wireless industry. The Commission has previously found that robust competition depends critically upon the availability of spectrum for provisioning services.[224] Given the ever-increasing competitive nature of the wireless marketplace, several commenters advocate for modifications to our bidding credit program in order to facilitate a higher rate of participation in auctions by small businesses that might otherwise find it difficult to acquire sufficient capital to compete in spectrum auctions.[225] In this regard, many commenters favor increasing

[214] *Id.* at 12448-49 ¶ 63.

[215] *Id*. at 12449 ¶ 64.

[216] *Id.*

[217] *See Part 1 PN*, 30 FCC Rcd at 4161-62 ¶ 18; *see, e.g.*, ARC *Part 1 NPRM* Comments at 22 (generally supports increase of gross revenue thresholds but would measure the increase on a MHz per pop basis).

[218] *See* ARC *Part 1 NPRM* Comments at 23 (recommending 25 percent, 35 percent, and 50 percent credits for the three existing tiers); ARC *Part 1 NPRM* Reply at 5 (supporting NTCH's proposal of a 50 percent bidding credit for entities who hold less than 40 megahertz in a market and are not nationwide providers); Blooston Rural *Part 1 NPRM* Reply at 5 (agreeing that the percentage should be increased to at least 40 percent); Council Tree *Part 1 NPRM* Reply at Att. at 6 (seeking 35 percent for the Incentive Auction); DE Coalition *Part 1 NPRM* Comments at 4, 33 (raising to 40 percent across all bidding credit categories); KSW *Part 1 NPRM* Comments at 1-2 (seeking an increase of up to 40 percent); KSW *Part 1 NPRM* Reply at 13 (increasing the 25 percent and 15 percent bidding credit to 40 percent and 25 percent, respectively); NTCH *Part 1 NPRM* Comments at 5 (requesting 50 percent credit for DEs); WISPA *Part 1 NPRM* Comments at 7 (supporting MMTC's recommendation to increase the 35 percent bidding credit to 40-45 percent and to adjust the other tiers proportionately).

[219] *See* CAGW *Part 1 NPRM* Comments at 3; AT&T *Part 1 NPRM* Reply at 12.

[220] *See Part 1 NPRM*, 29 FCC Rcd at 12446-47 ¶¶ 55-59.

[221] *See* 47 C.F.R. § 1.2110(c)(1).

[222] *See Incentive Auction R&O*, 29 FCC Rcd at 6762-63 ¶¶ 475-76.

[223] *See* 47 U.S.C. § 309(j)(4)(D).

[224] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, *Seventeenth Report*, 29 FCC Rcd 15311, 15356 ¶ 92 (*17th Mobile Wireless Competition Report*).

the gross revenue thresholds,[226] with some advocating for higher increases than those proposed in the *Part 1 NPRM*.[227] RWA, for instance, supports the Commission's proposal but also urges it to increase the threshold for the lowest tier from $40 million to $100 million.[228] Council Tree and Blooston Rural also favor using annual gross revenues as the basis for defining the small business size for bidding credits.[229]

74. We find that our three-tiered system for providing small business bidding credits, when properly tailored and implemented, serves the underlying policy interests of our bidding credit program. Therefore, we modify section 1.2110(f) to increase the three tiers of gross revenue thresholds defining eligibility for each small business bidding credit to the following:

- Businesses with average annual gross revenues for the preceding three years not exceeding $4 million would be eligible for a 35 percent bidding credit;
- Businesses with average annual gross revenues for the preceding three years not exceeding $20 million would be eligible for a 25 percent bidding credit; and
- Businesses with average annual gross revenues for the preceding three years not exceeding $55 million would be eligible for a 15 percent bidding credit.[230]

75. Consistent with our statutory objectives, we find that increasing the gross revenue thresholds

[225] *See, e.g.*, CCA *Part 1 NPRM* Reply at 4-5 (arguing that the use of bidding credits "should be expanded to encourage more robust competitive participation and to improve the opportunities for success for competitive carriers in future auctions"); Council Tree *Part 1 PN* Comments at 21 (stating that adjusting the current revenues-based size standard as proposed in the *NPRM* reflects the high costs of providing wireless services, and the need to foster competition on a local, regional, and national basis); NTCA *Part 1 NPRM* Reply at 2 (noting that bidding credits bolster the bidding success rate of small companies who lack the resource of large companies often vying for the same resource); WISPA *Part 1 NPRM* Comments at 7 (agreeing that increasing gross revenues thresholds will facilitate a higher rate of participation by entities at auctions).

[226] *See Part 1 PN*, 30 FCC Rcd at 4161-62 ¶¶ 18-19; ARC *Part 1 NPRM* Comments at 22 (generally supports increase of gross revenue thresholds but would measure the increase based on the cost of auctioned spectrum on a MHz per pop basis); ARC *Part 1 NPRM* Reply at 2; Blooston Rural *Part 1 NPRM* Comments at 8 (supports increases as measured by the GDP price index); Blooston Rural *Part 1 PN* Comments at 10; CCA *Part 1 NPRM* Comments at 7 (supporting the GDP price index as the standard); CCA *Part 1 NPRM* Reply at 5; Council Tree *Part 1 PN* Comments at 21; DE Coalition *Part 1 NPRM* Comments at 35 n.103 (supports general increase of gross revenue thresholds); KSW *Part 1 NPRM* Reply at 14; NTCA *Part 1 NPRM* Reply at 3 (agreeing with proposed increases based on the GDP price index); RWA *Part 1 NPRM* Comments at 8 (urging adoption of increases using the GDP price index but would modify the third tier); RWA *Part 1 NPRM* Reply at 2-3; RWA/NTCA *Part 1 PN* Comments at 15-16; Tristar *Part 1 PN* Reply at 2; WISPA *Part 1 NPRM* Comments at 6-7; *see also* CCA *Part 1 PN* Comments at 13-14 (also encouraging consideration of the SBA's employee-based size standard); MMTC *Part 1 PN* Comments at 16; M/C Partners May 21, 2015 *Ex Parte* Letter at 3.

[227] *See, e.g.*, RWA *Part 1 NPRM* Comments at 8-9 (arguing for an increase of a $100 million for the third tier); RWA *Part 1 NPRM* Reply at 3; ARC *Part 1 NPRM* Comments at 22 (advocating for increases of $9 million, $45 million, $120 million for all tiers respectively).

[228] *See* RWA *Part 1 NPRM* Comments at 8-9; RWA *Part 1 NPRM* Reply at 3.

[229] *See* Council Tree *Part 1 PN* Comments at 21; Blooston Rural *Part 1 NPRM* Comment at 8; Blooston Rural *Part 1 PN* Comments at 10; *see also* CCA *Part 1 NPRM* Comments at 7-8 (supporting the increase in gross revenue thresholds but would use primarily SBA's small business employee-based size standard).

[230] In considering how much to adjust the gross revenues thresholds in our small business definitions, we proposed to use as a guide the price index for the U.S. Gross Domestic Product ("GDP price index") published by the U.S. Department of Commerce on a quarterly basis as part of its National Income and Product Accounts. *See generally* BEA, Interactive Data, http://www.bea.gov/itable. We adjusted the current gross revenues thresholds with the percentage change in the GDP price index between 1997 and 2013. We determined that the GDP price index increased by 36.4 percent from 1997 to 2013. Based on this 36.4 percent increase, we proposed new gross revenues thresholds that were obtained by multiplying the current thresholds by 1.364 and rounding to the nearest million. *See Part 1 NPRM*, 29 FCC Rcd at 12446-47, 12446 nn.111-16.

will enhance the ability of small businesses to acquire and retain capital thereby facilitating their ability to compete meaningfully in today's auctions.[231] At the same time, we avoid setting the small business size thresholds at a level that may be over inclusive and result in DE benefits flowing to entities for which such credits are not necessary. In so doing, we agree with commenters in favor of using the GDP price index as the basis for calculating the increase for each tier defining the small business size for purposes of the bidding credit.[232] As noted in the *Part 1 NPRM*, the currently available wireless industry price indices do not reflect the dramatic shift from a voice-centric to a data-centric wireless industry, along with the tremendous growth of mobile broadband data services.[233] Moreover, the SBA recently used the GDP price index to adjust its receipts-based industry size standards as part of its size standards review.[234]

76. In adopting this methodology for increasing the gross revenue thresholds for defining small business eligibility for bidding credits, we decline to adopt alternative proposals for adjusting the small business size definitions. For example, ARC would adjust the small business size definition to the cost of auctioned spectrum on a MHz per pop basis.[235] CCA opposes ARC's proposal, noting that it would create uncertainty for DEs as the value of spectrum varies by band and market conditions.[236] We agree with CCA's assessment and further find that ARC's proposal would be administratively burdensome to implement without providing a meaningful corresponding benefit. Rather, by using the GDP price index, we establish a simple bright-line standard to improve the efficiency of the auction process, serve the public interest, and avoid additional implementation costs for small businesses.

77. Additionally, we will not disturb our earlier decision declining to adopt SBA's employee-based business size standard for adjusting our small business size definitions.[237] Council Tree states that the SBA's standard is too inclusive for purposes of establishing DE eligibility.[238] However, CCA promotes the use of SBA's employee-based standard because "expanding eligibility, rather than shrinking it, may be warranted given the increasing disparity between the largest carriers . . . and all other carriers."[239] As noted in the *Part 1 NPRM*, we previously concluded that by adopting the SBA's standard, we would allow many large carriers to take advantage of DE benefits not intended for them.[240] Additionally, we note that there is no data in the record to support reconsideration of our previous conclusion. We will therefore rely on the GDP price index for establishing the small business size definitions to reflect the increased operational costs for small businesses and the need to foster competition in spectrum auctions and in the wireless marketplace.[241]

78. We also decline to adopt proposals favoring a single bidding credit in lieu of the current three-tiered system.[242] AT&T/Rural Carriers, for instance, advocate for the creation of a new 25 percent

[231] *See* 47 U.S.C. § 309(j)(3)-(4).

[232] *See, e.g.*, Blooston Rural *Part 1 NPRM* Comments at 8; NTCA *Part 1 NPRM* Reply at 3. *See generally Part 1 NPRM*, 29 FCC Rcd 12446 ¶ 56, 12446 nn.111-16.

[233] *Part 1 NPRM*, 29 FCC Rcd at 12446-47 ¶ 56.

[234] *Id.*

[235] ARC *Part 1 NPRM* Comments at 22.

[236] CCA *Part 1 PN* Comments at 14-15.

[237] *Part 1 NPRM*, 29 FCC Rcd 12447-48 ¶ 61 (referencing *AWS-3 Report and Order*, 29 FCC Rcd 4610, 4680-81 ¶ 189).

[238] *See* Council Tree *Part 1 PN* Comments at 18.

[239] CCA *Part 1 PN* Comments at 14.

[240] *Part 1 NPRM*, 29 FCC Rcd at 12447-48 ¶¶ 61-62.

[241] *See* 47 U.S.C. § 309(j)(3)-(4).

[242] AT&T/Rural Carriers Joint Proposal at 2; Rural-26 Coalition *Part 1 PN* Comments at 9; *see also* AT&T *Part 1 PN* Comments at 9.

single bidding credit for small businesses with average gross revenues of less than $55 million.[243] AT&T also notes that this proposal would fulfill the DE program's original vision and safeguard against gamesmanship.[244] Opponents of the single bidding credit argue that the proposal is too limiting[245] and is inconsistent with the Commission's statutory mandates.[246] We find that AT&T/Rural Carriers' proposal ignores the various sizes and types of small businesses that participate in Commission auctions. Because not all small businesses are alike in the wireless marketplace, we adopted our three-tiered bidding credit system in 1997 so that as a small business grew, it would receive reduced benefits from our DE program.[247] In doing so, our graduated approach allows for other new small businesses to gain a foothold in the marketplace using additional DE benefits. We find that this approach continues to be relevant and complements our policy for defining bidding credits on a service-by-service basis in order to tailor small business bidding preferences to the capital requirements of a particular service. Thus, we refrain from disturbing our long-standing policy.

79. With respect to the percentage levels of the small business bidding credits, we decline to increase any of the current percentages as proposed by some commenters.[248] These commenters, including ARC, WISPA, KSW, and the DE Coalition, assert that the Commission should increase the bidding credit percentages across all or specific tiers.[249] ARC, for instance, would increase the percentages of all three bidding credit tiers, from the largest to the smallest tier, to 25 percent, 35 percent, and 40 percent respectively.[250] WISPA recommends adjusting the maximum bidding credit up to 45 percent and increasing the other tiers proportionately.[251] Moreover, KSW seeks to change the bidding credit percentages to 40 percent for applicants below the $15 million threshold and 25 percent for applicants below the $40 million threshold.[252]

80. We believe that our decision to eliminate the AMR rule and to increase the gross revenues thresholds for our small business size definitions will sufficiently enhance the benefits of the DE program by helping small businesses obtain access to capital and thereby increase participation and competition in auctions. We are, however, concerned about expanding the scope of DE benefits to a level that may

[243] AT&T/Rural Carriers Joint Proposal at 2; AT&T *Part 1 PN* Comments at 2.

[244] AT&T *Part 1 PN* Comments at 9.

[245] CCA *Part 1 PN* Reply at 10.

[246] CCA *Part 1 PN* Reply at 10; Council Tree *Part 1 PN* Reply at 12-14.

[247] *See Competitive Bidding Tenth Report and Order*, 13 FCC Rcd at 402-405 ¶¶ 44-48.

[248] *See, e.g.*, ARC *Part 1 NPRM* Comments at 23 (25 percent, 35 percent, and 50 percent); DE Coalition *Part 1 NPRM* Comments at 33 (arguing for 40 percent across all tiers); Letter From Thomas Gutierrez, Counsel, Tristar License Group, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, at 2 (filed Jun. 10, 2015) (Tristar June 10, 2015 *Ex Parte* Letter) (seeking an increase to 40 percent).

[249] *See* ARC *Part 1 NPRM* Comments at 23 (recommending 25 percent, 35 percent, and 50 percent credits for the three existing tiers); ARC *Part 1 NPRM* Reply at 5 (supporting NTCH's proposal of a 50 percent bidding credit for entities who hold less than 40 megahertz in a market and not nationwide providers); Blooston Rural *Part 1 NPRM* Reply at 5 (agreeing that the percentage should be increased to at least 40 percent); Council Tree *Part 1 NPRM* Reply at Att. at 6 (seeking 35 percent for the Incentive Auction); DE Coalition *Part 1 NPRM* Comments at 33 (raising to 40 percent across all bidding credit categories); KSW *Part 1 NPRM* Comments at 1-2 (seeking an increase of up to 40 percent); KSW *Part 1 NPRM* Reply at 13 (increasing the 25 percent and 15 percent bidding credit to 40 and 25 percent respectively); NTCH *Part 1 NPRM* Comments at 5 (requesting 50 percent credit for DEs); WISPA *Part 1 NPRM* Comments at 7 (supporting MMTC's recommendation to increase the 35 percent bidding credit to 40-45 percent and adjust the other tiers proportionately).

[250] ARC *Part 1 NPRM* Comments at 23; *see also* ARC *Part 1 NPRM* Reply at 5 (agrees with NTCH's proposal of a 50 percent bidding credit for entities who hold less than 40 megahertz in a market and not nationwide providers).

[251] WISPA *Part 1 NPRM* Comments at 7.

[252] KSW *Part 1 NPRM* Reply at 13; *see also* KSW *Part 1 NPRM* Comments at 1-2 (stating that the increase of bidding credit percentage is the most important change).

incentivize gamesmanship of the program in the current wireless marketplace. Rather, in light of all the other changes we are making to our rules, we will proceed with care, so that we may assess the impact of our changes to the rules. In this regard, we will revisit these rules as may be necessary in light of our future auction experience. In declining to adopt those proposals to increase the bidding credit percentages, we conclude that the use of the small business size standards and credits set forth in our updated Part 1 schedule, when coupled with our other changes, align with our statutory objectives. They also provide a simple, consistent, and predictable avenue for facilitating small business participation in auctions and in today's wireless marketplace.[253]

81. We also decline to adopt PK's proposal for a new entrant bidding credit.[254] Under PK's suggested policy, a new entrant bidding credit would be explicitly designed to attract "new and innovative technologies," noting that "nothing in the [Act] precludes the use of bidding credits to large businesses to achieve [the Commission's] statutory goals."[255] Thus, PK's proposal could provide a bidding preference to well-financed entities that would not otherwise qualify for a bidding credit under our adopted small business size definitions.[256] Tristar submits that well-financed new entrants, among others, should be entitled to some benefits in the upcoming Incentive Auction, but not the same benefits that are available to DEs.[257] CCA opposes this proposal, arguing that "[it] would be complicated to administer and could lead to unintended consequences and possible gaming."[258] The Rural-26 Coalition submits that large, well-financed companies, like an Apple or a Google, "do not need a helping hand from the American taxpayer" to be competitive in spectrum auctions.[259] We agree with commenters that the proposal would conflict with our principles against the unjust enrichment of ineligible entities. Deciding the eligibility criteria for a new entrant would also be difficult to administer and may undercut the underlying policies of the DE program by exacerbating the challenges current DEs face to compete meaningfully in spectrum auctions. We also note that PK did not offer any details regarding how such a proposal could be implemented. Although we decline to adopt PK's proposal today, we expect that our new rules for the small business bidding credit program will also help new entrants face the capital challenges of entering the wireless marketplace, provided that they meet the eligibility standards for the bidding credit.

82. Finally, the revisions we have made to modernize and improve our Part 1 competitive bidding rules generally respond to the calls by commenters urging us to avoid implementing any bidding credit increases until there is surety that ineligible entities will not benefit from our bidding credit program.[260] We anticipate that the collective rule changes we have made today will provide such safeguards. We therefore conclude that the time is ripe to update our standardized Part 1 bidding credit schedule prior to the Incentive Auction. Our actions today reflect the current nature of the wireless marketplace and renew our commitment to providing DEs with the opportunity to participate meaningfully in Commission auctions. Further, we adopt targeted measures to ensure that valuable bidding credits are available only to

[253] *See* 47 U.S.C. §§ 309(j)(3)-(4).

[254] Letter from Harold Feld, Senior Vice President, Public Knowledge to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, at 1 (filed May 18, 2015) (PK May 18, 2015 *Ex Parte* Letter).

[255] PK May 18, 2015 *Ex Parte* Letter at 3.

[256] *See id*. at 1.

[257] Tristar *Part 1 PN* Reply at 3-4 (submitting also, that "by carefully designing separate sets of incentives or benefits to entities which do not qualify as a DE, such as a separate classifications for "new entrants" or "regional carriers," the Commission can fulfill the somewhat conflicting objectives of section 309(j) while protecting the sanctity of the auction process.").

[258] CCA *Part 1 PN* Reply at 8.

[259] Rural-26 Coalition *Part 1 PN* Reply at 4 (arguing that making credits "essentially useless" for Google or Apple if capped, "is exactly the point" since a new entrant such as Apple or Google has enough capital to bid on a major metropolitan market and therefore does not need help from the American taxpayer).

[260] CAGW *Part 1 NPRM* Comments at 3; AT&T *Part 1 NPRM* Reply at 12.

those Congress intended.[261]

83. *Implementation of the Revised Standardized Schedule of Small Business Sizes*. Our changes to the Part 1 schedule for small business bidding credits will be available to any particular auction prospectively, including for 600 MHz licenses in the Incentive Auction.[262] Specifically, these new rules changes will apply to all Commission auctions in which the short-form deadline falls on or after the release date of this *Report and Order*. Moreover, applicants claiming any small business bidding credits will continue to be subject to the Commission's DE rules under section 1.2110, as amended herein.[263]

84. NTCH supports the incorporation of our rule changes to the Incentive Auction,[264] with Council Tree and WISPA arguing for the adoption of a 35 percent bidding credit (the lowest tier) for the Incentive Auction as well.[265] We decline to reconsider our previous decision in the *Incentive Auction R&O* not to adopt a 35 percent bidding credit for the Incentive Auction.[266] Because of the similarities between the 600 MHz and 700 MHz bands, in the Incentive Auction proceeding, the Commission determined that licensees utilizing the 600 MHz band may face challenges similar to licensees utilizing the 700 MHz, including issues and costs related to developing markets, technologies, and services.[267] In light of the similar characteristics and capital requirements for both services, we affirm our prior conclusion that it is appropriate to offer the same two bidding credit percentages in the Incentive Auction proceeding as in the 700 MHz auction.[268] Additionally, by increasing the gross revenue thresholds for this schedule, entities that previously exceeded the legacy thresholds may now fall within the new thresholds, and thus become eligible for small business bidding credits. Similarly, we note that bidders that previously exceeded the legacy thresholds as a result of the AMR rule may now be eligible for a bidding credit under the current thresholds. By adopting our revised three-tiered schedule, we aim to better reflect the potential capitalization costs for new entrants and small businesses in the wireless marketplace and encourage a greater level of participation and competition by small businesses in an auction that offers a significant opportunity for interested applicants to acquire licenses for below-1-GHz spectrum.[269]

85. Consistent with our current practices, we will continue evaluating the definition of small business on a service-by-service basis, determined by the associated characteristics and capital requirements of each service.[270] Thus, the Commission will resolve, on a service-by-service basis, the DEs eligible for bidding credits, the licenses for which bidding credits are available, the amount of the bidding credits, and other procedures.[271] Moreover, we will apply the small business size definition and

[261] *See* 47 U.S.C. §§ 309(j)(3)-(4).

[262] *See Incentive Auction R&O*, 29 FCC Rcd at 6761-67 ¶¶ 472-83.

[263] *See* 47 C.F.R. § 1.2110.

[264] *See* NTCH *Part 1 NPRM* Comments at 6-7; *see also* WISPA *Part 1 NPRM* Comments at 7 (supporting the adoption of all three tiers for the Incentive Auction); Council Tree *Part 1 NPRM* Reply Att. at 6 (seeking 35 percent credit for the Incentive Auction); KSW *Part 1 NRPM* Comments at 2 (stating that its proposed percentage increase of bidding credits, if adopted, should be implemented for the Incentive Auction).

[265] Council Tree *Part 1 NPRM* Reply at Att. at 6; WISPA *Part 1 NPRM* Comments at 7. Under the current three-tiered system, the third tier provides a 35 percent bidding credit for very small businesses with average gross revenues not exceeding $3 million. 47 C.F.R. 1.2110(f)(2).

[266] *See Incentive Auction R&O*, 29 FCC Rcd at 6762-63 ¶¶ 474-76.

[267] *See id.*

[268] *See id.*

[269] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6168 ¶ 68 (discussing market concentration of below-1-GHz in the hands of large nationwide providers, and that competition may be hindered without taking affirmative policies in light of upcoming the Incentive Auction).

[270] *See* 47 C.F.R. §1.2110(c)(1).

[271] *Id*.

associated bidding credit to any spectrum license in that service assigned through subsequent auctions, absent further action by the Commission. We did not receive any comments squarely addressing these matters, except that WISPA would apply all three tiers of bidding credits to every spectrum auction, including the Incentive Auction.[272] However, WISPA fails to provide data detailing the benefit of a blanket application of the rule in comparison to using a tailored, service-by-service approach.[273] We conclude that a service-specific proceeding is the appropriate avenue for evaluating the capital costs and technical challenges associated with the deployment of a service which will, in turn, drive the selection of the appropriate small business size definition and bidding credit. In taking a service-by-service approach, we will better serve the public interest by promoting the rapid deployment of wireless services. We also intend to review our small business definitions on a more regular basis in the future to ensure that the DE program continues to align with the strategic and operational demands of small businesses in the wireless marketplace.[274]

2. Rural Service Provider Bidding Credit

86. ***Background***. Under section 309(j), Congress mandated that the Commission design auctions to "include safeguards to protect the public interest in the use of the spectrum," including the objectives to disseminate licenses "among a wide variety of applicants," including rural telephone companies, and to promote the deployment of new technologies, products, and services to "those residing in rural areas."[275] Section 309(j)(4) also directs the Commission to "ensure" that various entities – again, specifically including rural telephone companies – "are given the opportunity to participate in the provision of spectrum-based services." To this end, it requires the Commission to "consider the use of . . . bidding preferences" and other procedures.[276] Historically, the Commission has concluded that section 309(j)(4)(D) does not warrant adoption of an independent bidding credit for rural telephone companies because such entities had not demonstrated that they had experienced significant barriers to raising capital, particularly when compared to other DEs, like small businesses.[277] In the *Incentive Auction R&O*, the Commission found that the record in that proceeding did not provide a sufficient basis to revisit those prior determinations nor sufficient support for adoption of a rural bidding credit.[278]

87. We recognized in the *Part 1 NPRM* that the marketplace for wireless services has evolved significantly since the Commission last comprehensively updated its DE eligibility rules in 2006.[279] Based on this industry-wide evolution, the *Part 1 NPRM* asked commenters to provide data demonstrating whether rural telephone companies lack access to capital or face barriers to formation similar to those faced by other DEs.[280] In response to the *Part 1 NPRM*, several commenters highlighted the fact that rural service providers had difficulty obtaining licenses in Auction 97 and urged the

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[272] WISPA *Part 1 NPRM* Comments at 7.

[273] *Id.*

[274] We observe, for example, that the SBA revisits its small business size definitions every five years. *See* 13 C.F.R. § 121.102(c).

[275] *See* 47 U.S.C. § 309(j)(3)(a)-(b).

[276] 47 U.S.C. 309(j)(4)(D).

[277] When the Commission initially considered the issue in 1994, it found that rural telephone companies did not have the same difficulty accessing capital as other groups, such as small businesses. *See Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 457-8 ¶ 100 (1994). The Commission later affirmed this policy determination. *See, e.g.*, *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15320-21 ¶ 52; *Paging Third Report and Order Reconsideration*, 14 FCC Rcd at 10,091-92 ¶ 114 (1999); *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476-77 ¶ 41 (2000); *24 GHz Report and Order*, 15 FCC Rcd at 16968-69 ¶ 81; *Lower 700 MHz R&O*, 17 FCC Rcd at 1089-91 ¶¶ 175-176.

[278] *See Incentive Auction R&O*, 29 FCC Rcd at 6764-65 ¶ 479.

[279] *See Part 1 NPRM*, 29 FCC Rcd at 12445-45 ¶ 54.

[280] *See id*. at 12450 ¶ 66.

Commission to adopt a rural bidding credit for future auctions.[281] The *Part 1 PN* then sought comment on a number of issues related to whether the Commission should establish a bidding credit for rural telephone companies, including whether a bidding credit would better enable rural telephone companies to compete more successfully at auction.[282] Subsequently, in response to the *Part 1 PN*, AT&T/Rural Carriers submitted a joint proposal that urged adoption of a rural service provider bidding credit.[283] Other stakeholders also offered alternative suggestions for structuring the credit.[284]

88. ***Discussion.*** As discussed below, we adopt a 15 percent bidding credit for eligible rural service providers that provide commercial communications services to a customer base of fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers and serve primarily rural areas. We agree with commenters that a targeted bidding credit will better enable rural service providers to compete for spectrum licenses at auction, thereby speeding the availability of wireless voice and broadband services in rural areas. Based on the record established in this proceeding, we anticipate that providing eligible rural service providers with a meaningful opportunity to compete for spectrum licenses will be particularly important in the upcoming Incentive Auction, which will offer multiple blocks of licenses for low-band spectrum. Our action today is thereby consistent with other efforts we took in the *Incentive Auction R&O* to facilitate competition in rural areas. We will only permit an eligible small and rural entity to claim one bidding credit though, rather than benefit from both a small business and a rural service provider bidding credit. We believe that the rural service provider bidding credit we adopt today will allow a diversity of service providers to compete more effectively for spectrum licenses in rural areas, in furtherance of statutory objectives, while also preventing unjust enrichment of ineligible entities.

89. Our decision today incorporates many of the suggestions offered by commenters, though we decline to adopt in full any single proposal offered by stakeholders for establishing a rural service provider bidding credit. For instance, the AT&T/Rural Carriers Joint Proposal recommended that in order to be eligible for the credit, an applicant must be in the business of providing commercial communications services to a customer base of fewer than 250,000 combined wireless and wireline customers.[285] Under their particular proposal, however, eligible auction applicants would be permitted to claim a credit of 25 percent, but the credit would be capped at $10 million per bidding entity. Other commenters support the adoption of a rural bidding credit, but under different terms. For example, RWA/NTCA jointly propose a "Rural Telco Bidding Credit" of 25 percent that is capped at $10 million and is "available only to rural telephone companies (or their affiliates/subsidiaries) that seek spectrum in an area in which they are designated as an eligible telecommunications carrier."[286] Under the RWA/NTCA proposal, the bidding credit would be separate from, and in addition to, any small business bidding credit for which an applicant would qualify.[287] We note that this proposal is also supported by other rural stakeholders, such as the Blooston Rural Carriers and the Rural Carrier Coalition.[288] Cerberus proposes a 35 percent bidding credit for rural telephone companies, in addition to any small business bidding credit for which an applicant would qualify.[289]

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[281] *See* Blooston Rural *Part 1 NPRM* Comments at 9; NTCA *Part 1 NPRM* Comments at 5; RWA *Part 1 NPRM* Comments at 3-4.

[282] *Part 1 PN*, 30 FCC Rcd 4153, 4162-63 ¶ 22.

[283] *See* AT&T/Rural Carriers Joint Proposal at 1-2.

[284] *See* RWA/NTCA *Part 1 PN* Reply at 2.

[285] *Id.* at 1-2.

[286] RWA/NTCA *Part 1 PN* Reply at 2.

[287] *Id*. at 5.

[288] *See* Blooston Rural *Part 1 PN* Comments at 2-10; Rural Coalition *Part 1 PN* Comments at 5 ("The Coalition supports the adoption of a Rural Telephone Company… Bidding Credit as it has been proposed by the Rural Wireless Association, NTCA-The Rural Broadband Association, and the Blooston Rural Carriers.").

[289] Cerberus *Part 1 NPRM* Comments at 3-4.

90. Council Tree, however, claims that rural telephone companies do not have "the same access to capital issues as other DEs, especially New Entrant DEs." Accordingly, Council Tree urges that the Commission not "elevate" rural providers "to a special class of DEs superior to any other DE class."[290] CCA "does not support proposals for the establishment of a separate rural telephone company bidding credit," because of "administrative complexity." Accordingly, it urges the Commission to keep a "simple and straightforward approach of maintaining small business as the touchstone of any bidding credit mechanism."[291]

91. *The Need for a Rural Service Provider Bidding Credit*. Based upon the record established in this proceeding and our experience garnered over the history of the auctions program, including Auction 97, we now conclude that creating a 15 percent rural service provider bidding credit will better enable eligible rural service providers to compete for spectrum licenses at auction and speed the availability of wireless voice and broadband services to rural areas, consistent with our statutory objectives.[292] In the past, we have noted that due to certain traditional financing programs, rural providers "may have greater ability than other designated entities to attract capital."[293] While as discussed below we do not believe that rural service providers warrant as great a bidding credit as other DEs, several factors demonstrate that they face obstacles to wireless deployment that are more challenging in their service areas. First, the evidence confirms these difficulties, which are reflected in their inability to provide service that competes with larger providers in rural areas.[294] Second, as discussed elsewhere, we observe that the wireless industry has undergone significant consolidation during the past decade and that concentration in the market share of the major providers has also increased during that time period. Additionally, many rural service providers, although relatively small, are not eligible for small business bidding credits under our size standards to assist them in competing against larger carriers at auction. The record also demonstrates that rural service providers have encountered challenges in their efforts to obtain financing because the rural areas they seek to serve are not as profitable as more densely-populated markets.[295] In a recent NTCA survey, for example, sixty-two percent of survey respondents characterize the process of obtaining financing for wireless projects as "somewhat difficult" or "very difficult," and roughly half reported that their ability to obtain spectrum at auction was a concern.[296]

92. Furthermore, commenters have argued that the challenges that rural service providers face in competing for spectrum were reflected in the results of Auction 97, which postdated the Commission's review of this question in the *Incentive Auction R&O*. In Auction 97, 38 qualified bidders were rural telephone companies, or rural telephone company affiliates, and only 28.9 percent of those entities won licenses.[297] Contrary to Council Tree's assertion that the reason many rural telephone companies were unsuccessful in Auction 97 was due to their reduced interest in spectrum and unwillingness to bid

[290] Council Tree *Part 1 PN* Reply at n.27; Letter from S. Jenell Trigg, Council Tree, Counsel, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170 at 2 (filed June 4, 2015) (Council Tree Jun. 4, 2015 *Ex Parte* Letter).

[291] CCA *Part 1 PN* Reply at 8-9.

[292] *See* 47 U.S.C. § 309(j)(3)(A)-(B).

[293] *Incentive Auction R&O*, 20 FCC Rcd at 6764-65 ¶ 479 n.1370.

[294] As of January 2014, one quarter of U.S. Land area was unserved by any mobile voice providers; over one-third, by less than two such providers; and over half, by less than three such providers. *See 17th Mobile Wireless Competition Report*, 29 FCC Rcd at 15334 ¶ 48. Providing mobile broadband service in rural areas is even more of a challenge. *See id.* at 15335 ¶ 51 (42.4 percent of land area served by less than two mobile broadband providers; 29.8 percent unserved by any such providers).

[295] RWA/NTCA *Part 1 PN* Comments at 3 (noting that because they focus on rural areas where distances are great and densities are low, it is difficult for rural providers to find outside investors seeking a quick return on investment and they must therefore look toward traditional sources of capital that are generally more limited and difficult to obtain).

[296] *See* NTCA, NTCA 2014 WIRELESS SURVEY REPORT 3 (2014), http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2014ntcawirelesssurvey.pdf.

competitively in the auction,[298] rural service providers have asserted that they did not bid more aggressively in the auction because many were unable to qualify as DEs under our rules and thus competed against DEs and well-funded national carriers without the benefit of bidding credits.[299]

93. Based on our review of the record, along with the results of Auction 97, we conclude that a rural service provider bidding credit may have assisted such entities to acquire spectrum suitable for mobile broadband services had a bidding credit been available. Rural service provider commenters have provided evidence illustrating recent increased challenges in securing traditional financing which has resulted in difficulties in competing successfully in auctions.[300] In view of the record and our experience in running the Commission's competitive bidding program, we are therefore convinced that a bidding credit for eligible rural service providers is warranted to ensure that designated entities of all types have the opportunity to acquire spectrum and participate in spectrum based services. We therefore adopt a rural service provider credit for the first time.

94. Under the rules we adopt today, rural service providers will be able to demonstrate eligibility for a 15 percent bidding credit if they serve fewer than 250,000 subscribers and serve predominantly rural areas.[301] Accordingly, this rule change will provide an incentive for rural service providers to participate more vigorously in upcoming spectrum auctions, including the Incentive Auction. Further, as the Rural-26 Coalition notes, we anticipate that "more rural companies, including Rural-26 members, likely will participate in the upcoming Incentive Auction than participated in Auction 97, given the favorable propagation characteristics of the 600 MHz spectrum and the opportunity for rural providers to use this spectrum to provide mobile and fixed wireless broadband services in rural markets."[302]

95. This bidding credit is particularly important in advance of the Incentive Auction, a once-in-a-generation opportunity for small and rural providers to gain access to below-1-GHz spectrum. Spectrum below 1 GHz, referred to as "low-band" spectrum, has distinct propagation advantages for network deployment over long distances and is therefore particularly well-suited for deployment in rural areas.[303] Today, two nationwide carriers control the vast majority of this low-band spectrum. Given the limited supply of this spectrum, the continued concentration of low-band spectrum will have a pronounced effect on competition and consumers in rural areas. Indeed, currently, 92 percent of non-rural consumers, but only 37 percent of rural consumers, are covered by at least four 3G or 4G mobile wireless providers' networks.[304]

96. Our adoption of the rural service provider bidding credit is consistent with many of the

[297] *See* RWA/NTCA *Part 1 PN* Comments at 4. Moreover, Council Tree notes that RLEC participation in Auction 97 declined by 71 percent from the last major spectrum auction. Council Tree *Part 1 PN* Reply at 8.

[298] *See* Letter from S. Jenell Trigg, Counsel, Council Tree, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, at 1, 12 (filed June 17, 2015) (Council Tree Jun. 17, 2015 *Ex Parte* Letter).

[299] *See* Rural Coalition *Part 1 PN* Comments at 3-5; Blooston *Part 1 PN* Comments at 2.

[300] *See, e.g.*, Blooston *Part 1 NPRM* Comments at 2; Rural-26 Coalition *Part 1 PN* Comments at 7, Att. B; RWA/NTCA *Part 1 PN* Comments at 3-4; RWA *Part 1 PN* Reply at 5-6.

[301] We decline to adopt a specific threshold for the proportion of an applicant's customers who are located in rural areas, but put prospective applicants on notice that it is our intent that in order for an applicant to be eligible for a rural service provider bidding credit, the primary focus of its business activity must be the provision of services to rural areas.

[302] Letter from Donald L. Herman, Jr., Counsel, Rural-26 Coalition, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 2 (filed July 7, 2015) (Rural-26 Coalition Jul. 7, 2015 *Ex Parte* Letter).

[303] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6161 ¶ 57; *see also* Rural-26 Coalition *Part 1 PN* Comments at 2; RWA/NTCA *Part 1 PN* Comments at 3.

[304] *See* Fact Sheet: FCC Mobile Spectrum Holdings Rules May 15, 2014. Estimates based on census block analysis of provider coverage maps using Mosaik Solutions, LLC, January 2014 Coverage Right ©2013-2014. 4G is defined as deployed HSPA+, LTE, or WIMAX air interface technologies. Population and area data are from the 2010 Census, and include the United States (50 states plus the District of Columbia) and Puerto Rico.

actions we took in the *Incentive Auction R&O* that were designed to facilitate competition in rural areas. For example, the *Incentive Auction R&O* reserved a modest amount of low-band spectrum in each market for providers that lack low-band capacity.[305] It also adopted Partial Economic Areas (PEAs) to encourage entry by providers that contemplate offering wireless broadband service on a more localized basis.[306] The Commission concluded in the *Incentive Auction R&O* that licensing on a PEA basis is consistent with the requirements of section 309(j) because it will promote spectrum opportunities for carriers of different sizes, including small businesses and rural telephone companies.[307] Finally, the Commission required handset interoperability to "promote rapid deployment of the 600 MHz band, particularly in rural areas."[308] These policy decisions reflect our commitment to address the challenges that rural providers face in competing for spectrum and ensure that consumers in rural areas have access to wireless voice and broadband services.[309] The bidding credit we adopt today will build on these policies and support our statutory objectives to disseminate licenses among a wide variety of applicants, ensure that rural telephone companies have an opportunity to participate in the provision of spectrum-based services, and promote the availability of innovative services to rural America.[310]

97. We do not adopt Blooston Rural's proposal to permit a winning bidder to deduct from its auction purchase price the pro rata value of any area partitioned to a rural telephone company, where the area includes all or a portion of the rural telephone company's service area.[311] Under this proposal, the larger carrier "would be compensated twice for making spectrum available in rural areas—a discount on its final auction payment, plus whatever payment it negotiates with the rural carrier."[312] ARC supports this proposal and argues that the rule would "benefit DEs by providing incentives for partitioning and promote secondary market transactions, which further the prospect of rural telcos obtaining licenses for rural and other underserved/unserved areas where they have an excellent service record."[313] We find that the Blooston Rural proposal would be overly burdensome and challenging to implement. Not only would it require the Commission to review post-auction transactions to determine how much of a discount to apply, but it would also require the Commission to modify its short-form applications to accommodate larger carriers' that intend to receive bidding credits for areas that they partition to rural service providers. Moreover, we note that it would provide a benefit to carriers for choosing *not* to serve rural areas, which is inconsistent with our goals. Notably, the Commission did not receive any feedback from larger carriers on Blooston Rural's proposal, thus it appears that larger carriers lack interest in participating in such a complex undertaking. While CCA was generally supportive of this proposal in its response to the *Part 1 NPRM*, it reverses course in its response to the *Part 1 PN* and states that "the nuances of determining which areas should qualify for such credits would introduce undue complexity into already-complex auction processes."[314]

[305] *See Incentive Auction R&O*, 29 FCC Rcd at 6573 ¶ 10 n.19, citing *Mobile Spectrum Holdings Report and Order*.

[306] *See Incentive Auction R&O*, 29 FCC Rcd at 6603-04 ¶ 80. PEAs generally separate out the urban and rural areas, which will provide for greater auction participation by rural service providers and will allow them to bid on geographic area licenses that better match their service area.

[307] *Id.*

[308] *See Incentive Auction R&O*, 29 FCC Rcd at 6868 ¶ 735.

[309] As of January 2014, 92 percent of non-rural consumers, but only 40 percent of rural consumers, lived in a census block that was covered by at least four mobile broadband providers' networks. *See 17th Mobile Wireless Competition Report*, 29 FCC Rcd at 15339 ¶ 55 (Chart III.A.5); *see also Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6206 ¶ 179 (". . . more than 1.3 million people in rural areas have no mobile broadband access.").

[310] *See* 47 U.S.C. § 309(j)(3)(A),(B), and (D).

[311] *See* Blooston Rural Carriers *Part 1 NPRM* Comments at 11-13.

[312] *See id*. at 12.

[313] *See* ARC *Part 1 NPRM* Reply at 4.

[314] CCA *Part 1 PN* Comments at 15.

98. *Eligibility for a Rural* Service *Provider Bidding Credit*. For purposes of our rules, as amended, we define designated entities to include eligible rural service providers. To be eligible for a rural service provider bidding credit, an applicant must be in the business of providing commercial communications services to a customer base of fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers and must also serve predominantly rural areas.[315] We note that there is broad consensus in the record to support a benchmark of fewer than 250,000 combined subscribers, which should encompass carriers that provide a variety of services to rural areas, while excluding larger entities that do not have the same demonstrated need for a bidding credit. Moreover, by establishing the eligibility threshold for a rural service provider bidding credit as those with fewer than 250,000 subscribers, rather than 100,000 access lines or less, we selected a criterion that is large enough to permit rural service providers to seek spectrum licenses at auction, expand their coverage areas, grow their subscriber base, and continue to be eligible for bidding credits in future spectrum auctions. Based on the record in this proceeding, we find that a benchmark of fewer than 250,000 combined subscribers will best ensure that only smaller rural service providers that serve predominantly rural areas receive the bidding credit.[316]

99. To determine whether a provider has fewer than 250,000 subscribers, we will follow an approach similar to how we attribute revenues in the small business bidding credit context, and will determine eligibility by attributing the subscribers of the applicant, its controlling interests, its affiliates, and the affiliates of its controlling interests.[317] As with our existing small business bidding credits, we anticipate that this approach for establishing eligibility will ensure that applicants are *bona fide* in nature and that a rural service provider credit is only awarded to a designated entity, as Congress intended. Thus, like small businesses, affiliates of rural service provider applicants include entities or individuals that directly or indirectly control or have the power to control the applicant, directly or indirectly are controlled by a third party that also controls the applicant, or have an "identity of interest" with the applicant."[318] Likewise, controlling interests include those that have *de jure* or *de facto* control of the applicant.[319]

100. Blooston Rural, RWA, and NTCA argue that the Commission should not aggregate the subscribers attributed to an applicant seeking a rural service provider bidding credit in the same manner as we aggregate the gross revenues of a small business seeking a sized based bidding credit.[320] Instead, they contend that the Commission should award a rural service provider bidding credit when the applicant, and its controlling interests and affiliates each independently demonstrate eligibility for the credit.[321] We disagree, and conclude that rather than creating greater parity among designated entities, adopting such a method to determine eligibility for a rural service provider bidding credit would undercut our existing small business bidding credit program. In sum, the approach recommended by commenters would permit an applicant that far exceeds the size standard we have established to be an eligible rural service provider,

[315] A provider may count any subscriber as a single subscriber even if that subscriber receives more than one service. That is, a subscriber receiving both wireline telephone service and broadband would be counted only as a single subscriber.

[316] *See* AT&T/Rural Carriers Joint Proposal at 1-2; Blooston Rural *Part 1 PN* Comments at 4-5 ("[t]he 250,000 access line threshold is an easily verifiable way to determine eligibility"); AT&T *Part 1 PN* Comments at 9 ("[b]y basing eligibility on the number of customers, the reformed DE program will properly exclude large, well-funded established providers as well as speculators who have no intention of serving customers"); Rural-26 Coalition *Part 1 PN* Comments at 8.

[317] *See* 47 C.F.R. § 1.2110(c).

[318] 47 C.F.R. § 1.2110(c)(5).

[319] 47 C.F.R. § 1.2110(c)(2).

[320] Letter from John Prendergast, Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, Counsel for Blooston Rural Carriers et al., to Marlene H. Dortch, Secretary, FCC, WT Docket 14-170 at 5 (filed July 8, 2015) (RWA/NTCA/Blooston Rural July 8, 2015 *Ex Parte* Letter).

[321] *Id.*

potentially in exponential amounts, to obtain and control spectrum licenses awarded with a bidding credit. Such an applicant would also likely have access to the financial resources of its controlling interests and affiliates and thus granting it a 15 percent bidding credit would be inequitable and contrary to our policy of providing a bidding credit to those designated entities that have difficulty in obtaining access to capital. Accordingly, we deny this request.

101. Our rules provide options for several parties to combine resources and participate in an auction. Like small businesses seeking eligibility for bidding credits, we will allow rural service providers to form a consortium for this purpose. Under the rules for a rural service provider consortium, we will not aggregate the subscribers of each of the members of the consortium, but will instead determine the eligibility of each individual member for the bidding credit. If the consortium wins a license at auction, either an individual member of the consortium or a new legal entity comprising two or more individual consortium members may apply for the license(s).[322] Moreover, contrary to the concerns of commenters we are not limiting rural service providers to bidding through a consortium model and stress that applicants seeking a rural service provider bidding credit have many options to structure their businesses in a manner that complies with our eligibility rules.[323]

102. We also recognize the concerns of commenters that attributing subscribers of rural service providers in the same manner as we do for the revenues of small businesses will unfairly disadvantage existing rural partnerships, including those that were structured under cellular settlements with numerous controlling interests, yet as a policy matter, still warrant a bidding credit to create greater parity among designated entities.[324] Accordingly, in order not to penalize rural partnerships that were formed for purposes having nothing to do with participation in competitive bidding and to promote more fully the increased participation of rural service providers generally in upcoming auctions, we adopt an exception to our attribution rules for existing rural partnerships. Specifically, for rural partnerships providing service as of the date of the adoption of this decision, we will determine eligibility for the 15 percent rural service provider bidding credit by evaluating whether the members of the rural wireless partnership each individually have fewer than 250,000 subscribers, and for those types of rural partnerships, the subscribers will not be aggregated.[325] This exception will permit eligible rural service providers to receive the benefit of a bidding credit without having to interrupt their existing business relationships or the provision of service to consumers.

103. Notably, because each member of the rural partnership must individually qualify for the bidding credit, by definition a partnership that includes a nationwide provider as a member will not be eligible for the benefit.[326] We do clarify, as commenters request, that members of such partnerships may also apply as individual applicants or as members of a consortium to the extent it is otherwise permissible to do so under the rules as amended in this decision, and seek eligibility for a rural service provider bidding credit.[327]

104. In regard to the definition of "rural area," while the Communications Act does not include a statutory definition of what constitutes a rural area,[328] the Commission has used a "baseline" definition of rural as a county with a population density of 100 persons or fewer per square mile.[329] We will use this same definition for purposes of determining whether a carrier serves predominantly rural

[322] *See* 47 C.F.R. § 1.2107(g).

[323] RWA/NTCA/Blooston Rural July 8, 2015 *Ex Parte* Letter at 3.

[324] *Id.*

[325] Thus we would essentially evaluate eligibility for an existing rural wireless partnership on the same basis as we would for an applicant applying for a bidding credit as a rural service provider consortium. *See* 47 C.F.R. § 1.2110(b)(3)(i).

[326] Similar to attribution in the small business revenue context, we stress that applicants, including rural wireless partnerships, that do not have identifiable controlling interests will have all of the subscribers of all of their interest holders evaluated for the purposes of determining eligibility for the bidding credit. *See* 47 C.F.R. § 1.2110(b)(3)(ii).

[327] RWA/NTCA/Blooston Rural July 8, 2015 *Ex Parte* Letter at 4.

areas. To qualify for a rural service provider bidding credit, an applicant must certify in its short-form application that it serves predominantly rural areas.

105. Several commenters argue that the Commission should limit the rural service provider bidding credit's eligibility to geographic licenses where the applicant, or one of its members, or affiliates, has Eligible Telecommunications Carrier ("ETC") status to provide wireline service.[330] Blooston Rural argues that "ETC status is an objective and easily-verifiable criterion for determining those geographic markets where the bidder or one of its members has 'presence,' while at the same time preventing the credit from being used to reduce bid price for large urban PEAs."[331] We find that limiting a rural service provider bidding credit to an area where the provider has been certified for ETC status would be overly restrictive and challenging to implement. While we envision rural service providers will bid primarily on geographic licenses that overlap with their service area, we do not want to restrict small rural service providers from being able to expand their service area by bidding on licenses that are outside of their service area.

106. We recognize the consumer benefits that stem from multiple providers being able to utilize the unique and highly valuable characteristics of low-band spectrum. It is therefore our goal to encourage significant competition in the Incentive Auction for licenses in rural areas. We find that the bidding credit cap, discussed in greater detail below, will protect against a provider using a rural service provider bidding credit to win a license in a major metropolitan area. As Council Tree notes, "[i]n Auction 97, 87 percent of the licenses sold were valued at more than $40 [million]" and "[s]uch caps effectively preclude DEs from acquiring medium- and large-sized urban markets."[332] Moreover, we find that it would be overly cumbersome to implement a bidding credit that would vary on a provider-by-provider and market-by-market basis. Consistent with our overall goals in this proceeding, we seek to streamline and simplify the implementation of our rural service provider bidding credit where possible. For these reasons, we do not limit a rural service provider bidding credit to an area where the service

[328] The federal government has multiple ways of defining rural, reflecting the multiple purposes for which the definitions are used. *See Eighth Report*, 18 FCC Rcd at 14834; Facilitating the Provision of Spectrum-Based Service to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *See also Notice of Proposed Rulemaking*, 18 FCC Rcd 20802, 20808-11 (2003). The Commission has used Rural Services Areas (RSAs) as a proxy for rural areas for certain purposes, such as the former cellular cross-interest rule and the former CMRS spectrum cap, stating that "other market designations used by the Commission for CMRS, such as [EAs], combine urbanized and rural areas, while MSAs and RSAs are defined expressly to distinguish between rural and urban areas." *See* 1998 Biennial Regulatory Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers, *Report and Order*, 15 FCC Rcd 9219, 9256 ¶ 84, n.203 (1999).

[329] Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, *Report and Order*, 19 FCC Rcd 19078, 19087-88 (2004) ("We recognize, however, that the application of a single, comprehensive definition for 'rural area' may not be appropriate for all purposes. . . . Rather than establish the 100 persons per square mile or less designation as a uniform definition to be applied in all cases, we instead believe that it is more appropriate to treat this definition as a presumption that will apply for current or future Commission wireless radio service rules, policies and analyses for which the term 'rural area' has not been expressly defined. By doing so, we maintain continuity with respect to existing definitions of 'rural' that have been tailored to apply to specific policies, while also providing a practical guideline").

[330] *See* Blooston Rural *Part 1 PN* Comments at 3, 6; Blooston Rural *Part 1 PN* Reply Comments at Att. A (suggesting rural service provider bidding credits be limited to ETCs by stating that a rural service provider bidding credit should only be available in areas that overlap with the existing service area as defined by existing ETC designations); Rural Coalition *Part 1 PN* Comments at 6; RWA/NTCA *Part 1 PN* Comments at 7 ("So long as qualified rural telephone companies or their affiliates have control of the bidding entity, the bidder should be eligible for the Rural Telco Bidding Credit in areas where one of its members operates and has ETC status"); RWA/NTCA *Part 1 PN* Reply at Att. A. *See also* Rural-26 Coalition *Part 1 PN* Comments at 3, 5-9 (supporting the AT&T/Rural Carriers Joint Proposal but not specifically referencing ETC status in its comments).

[331] Blooston Rural *Part 1 PN* Comments at 6.

[332] *See* Council Tree June 5, 2015 *Ex Parte* Letter at 2.

provider has been certified for ETC status.

107. *Rural Service Provider Bidding Credit*. The Commission's current rules provide a schedule of small business definitions and corresponding bidding credits.[333] The bidding credits range from a 15 percent bidding credit to a 35 percent bidding credit.[334] These bidding credits are based on the businesses' average annual gross revenues, and not the number of subscribers, or the number or percentage of rural counties served. AT&T, the Rural-26 Coalition, and several other rural entities propose a rural service provider bidding credit of 25 percent.[335] Some commenters argue that the Commission should adopt a rural service provider bidding credit equal to the average credit available to small businesses—currently 25 percent—and argue that "the funds saved by a 25% bid credit would enable rural carriers to use more of their scarce resources on build out and upgrading of their existing networks, rather than spectrum acquisition, thereby ensuring better and faster service to rural consumers."[336] We note, however, that rural service providers are already eligible to receive funding for network build-out through various Commission and Federal government programs, such as the Universal Service Fund. Moreover, rural service providers generally have greater access to capital and infrastructure than other small businesses or new entrants. Accordingly, we establish a rural service provider bidding credit of 15 percent.[337] We believe that a bidding credit of 15 percent will strike the right balance between our existing DE system where rural service providers are often unable to receive a bidding credit at all and the requested 25 percent bidding credit that may provide an existing rural service provider with an unnecessary advantage in certain markets.

108. *Small Business and Rural Service Provider Bidding Credits Will Not Be Cumulative*. An applicant is permitted to claim a rural service provider bidding credit or a small business bidding credit, but not both. While several rural stakeholders argue that the rural service provider bidding credit should be cumulative with a small business credit,[338] we do not believe that a cumulative rural bidding credit is necessary or appropriate at this time. Both of these credits are designed to be tailored to the circumstances appropriate for eligible bidders. While we find that the adoption of a rural service provider bidding credit will serve the public interest by fostering competition in rural areas, we do not believe that a provider should be permitted to "double-dip" and benefit from both a small business bidding credit and a rural service provider bidding credit. Indeed, many of the service providers that are now eligible for the rural service provider bidding credit have well over $55 million in annual revenues and thus have far greater access to capital than most small businesses. We therefore decline to adopt a bidding credit higher than 15 percent because we are mindful of concerns of small businesses that granting higher credits could serve to undercut the effectiveness of our existing small business bidding credit program. For similar reasons, we also decline to adopt a tiered approach for rural service providers. There is no evidence in the record to support a tiered credit, or that smaller rural service providers face significantly unique or

[333] 47 C.F.R. § 1.2110(f).

[334] *Id.*

[335] *See* AT&T/Rural Carriers Joint Proposal at 1; Rural-26 Coalition *Part 1 PN* Comments at 6; Blooston Rural *Part 1 PN* Comments at 3; Rural Carrier Coalition *Part 1 PN* Comments at 5; RWA/NTCA *Part 1 PN* Comments at 7.

[336] RWA/NTCA/Blooston Rural July 8, 2015 *Ex Parte* Letter at 2.

[337] *See Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 457-58 ¶ 100 (1994). *See also* Council Tree *Part 1 PN* Reply at n. 27 (stating that rural service providers do not have "the same access to capital issues as other DEs, especially New Entrant DEs). RLECs, both large and small, have existing subscribers and revenue, and can more easily secure traditional loans as well as assistance from the U.S. Dept. of Agriculture's Rural Utility Service and state-based financial support. Many RLECs also receive federal Universal Service Funding support to help construct their wireless networks . . . New Entrant DEs have none of this financial support at the early stage of auction participation.").

[338] Blooston Rural *Part 1 PN* Comments at 3; Rural Coalition *Part 1 PN* Comments at 5. *But see* Rural-26 Coalition *Part 1 PN* Comments at 9 (noting that "[w]hile there may be some entities that would qualify for both the Rural Operator Credit and the New Entrant Credit, these credits should not be cumulative – meaning that an entity would have to choose which bidding credit it desires.").

different challenges than larger ones. Moreover, to the extent a smaller rural service provider would qualify as a small business, we anticipate that it would elect to claim a small business bidding credit, rather than a rural service provider bidding credit. Accordingly, we agree with the AT&T and Rural-26 Joint Proposal that the rural service provider bidding credit should not be cumulative with the small business bidding credit.[339] Therefore, an applicant must choose between one bidding credit and the other.

3. Small Business and Rural Service Provider Bidding Credit Caps

109. ***Background.*** In the *Part 1 NPRM*, the Commission sought comment on various proposed changes to its DE program designed to realize more effectively the goals of providing meaningful opportunities for *bona fide* small businesses and eligible rural service providers to participate at auction, without compromising our responsibility to prevent unjust enrichment. The Commission asked whether, in an effort to achieve that balance, it should consider reducing the level of bidding credits it awards in light of its proposals to increase a DE's flexibility in other respects, including eliminating the AMR rule and increasing small business size standards.[340] Several parties submitted additional proposals that expand the criteria for, or offer alternatives to, how the Commission evaluates DE eligibility, including proposals to limit the total dollar amount of DE bidding credits that any DE (or DE consortium) can claim in an auction through a cap on the total benefits awarded,[341] or through another limiting metric that would tie bidding credits more closely to a typical business plan of a *bona fide* small business or eligible rural service provider.[342] Based on the comments and proposals received in response to the *NPRM*, we sought additional comment in the *Part 1 PN* on various options, including a bidding credit cap that would limit the amount of bidding credits that a DE could receive in an auction.[343]

110. ***Discussion.*** We received a range of comments on this issue in response to the *NPRM* and the *Part 1 PN*. Although some commenters oppose the imposition of any sort of limit on the amount of DE bidding credits that a DE may be awarded in an auction,[344] several parties support adopting a cap or limit on the overall amount that may be awarded to any applicant or group of applicants.[345] Moreover, some of the commenters opposing the imposition of a cap on the award of bidding credits appear to be

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[339] *See* Rural-26 Coalition *Part 1 PN* Comments at 9; AT&T *Part 1 PN* Comments at 10.

[340] *See Part 1 NPRM*, 29 FCC Rcd at 12448-49 ¶ 63.

[341] *See e.g.*, AT&T *Part 1 NPRM* Comments at 4, 17 (proposing a limit of $32.5 million in bidding credits); CCA *Part 1 NPRM* Reply at 9 (stating that "a cap on DE benefits would help to ensure that the total amount that a DE bids at auction is commensurate with its qualification as a 'small business.'"); C Spire *Part 1 NPRM* Reply at 2 (proposing to limit "small business benefits to small businesses").

[342] *See* CCA *Part 1 NPRM* Reply at 10 (proposing "[a]s an alternative to a cap on discount amounts, the FCC should consider another metric like population, to tie discounts more closely to a typical business plan of a small business").

[343] *See Part 1 PN*, 30 FCC Rcd at 4157-58 ¶ 10.

[344] MMTC *Part 1 PN* Comments at 16 (urging the Commission to reject proposals that impose arbitrary caps on bidding credits); USCC *Part 1 PN* Comments at 30 (opposing any type of cap on the amount of bidding credits a DE may claim in a given auction any dollar cap "would permit the largest carriers to engage in anti-competitive bidding strategies" because they "could easily calculate the price they would have to bid for a license in order to place it above the threshold for a capped DE benefit.").

[345] *See* AT&T *Part 1 NPRM* Comments at 4, 17; CCA *Part 1 NPRM* Reply at 9; C Spire *Part 1 NPRM* Reply at 2; AT&T *Part 1 PN* Comments at 3, 12; AT&T/Rural Carriers Joint Proposal at 2; Blooston Rural *Part 1 PN* Comments at 12-13; CCA *Part 1 PN* Comments at 15-16 (a cap could help ensure that the amounts DEs are bidding are consistent with the smaller size and revenues of a small business, but should be set at a level that does not unnecessarily restrict DEs from competing with other bidders or having a meaningful opportunity to participate in auctions); Rural-26 Coalition *Part 1 PN* Comments at 4, 10-11 (impose a strict cap of $10 million on the bidding credit available to an eligible applicant); Tristar *Part 1 PN* Comments at 5-6 (adopt an aggregate $35 million cap on small business bidding credits).

more concerned by the appropriate level of any such cap than a cap as a general matter.[346] As explained in detail below, we adopt a cap on the monetary amount of DE bidding credits we will award in future auctions.

111. We agree with commenters that contend that the imposition of a cap, if properly designed, will help the very entities that we seek to benefit, as well as provide some level of assurance that bidding activity by small businesses and rural service providers is consistent with their relative business size and plans.[347] AT&T notes, for example, that a cap "could help to ensure that the amounts DEs are bidding are consistent with the smaller size and revenues of a small business."[348] This approach is also consistent with the approach that other federal agencies have taken. The SBA, for example, limits the total dollar value of sole-source contracts that an individual participant in its 8(a) business development program may receive.[349]

112. Commenters also argue that the implementation of a bidding credit cap may discourage entities that seek to game the Commission's rules at taxpayer expense. As Blooston Rural notes, a cap "would serve as a substantial disincentive to truly large entities that may be tempted to configure an applicant that is designed to qualify for a small business status."[350] The Rural-26 Coalition agrees, stating that a cap will "deter large entities backed with Wall Street capital from gaming the rules and denying the U.S. taxpayers billions in revenues."[351] We note that, as the cost of spectrum continues to grow, the incentives for structuring transactions to obtain bidding discounts increases significantly. Thus, while we remain committed to strict enforcement of our DE rules, we believe that by imposing a bright-line cap on

[346] *See, e.g.,* ARC *Part 1 NPRM* Reply at 6 (opposes the proposal for a $32.5 million cap because "[a]s the price of spectrum continues to soar, a fixed dollar cap on DE benefits would have the perverse effect over time of automatically reducing the dissemination of licenses to DEs"); KSW *Part 1 NPRM* Reply at 11 ("It is also difficult to imagine that a cap as low as that proposed by AT&T could help the FCC meet its statutory mandate of 'providing opportunity and competition' given the very limited number of licenses a DE could acquire under AT&T's proposal."); *see also* CCA *Part 1 PN* Comments at 16 ("Proposals to cap a DE's discount at $32.5 million or less is far too limiting and fails to recognize that competition in the wireless industry is based in part on achieving sufficient scope and scale within a market to be effective competitor against the nation's two largest carriers."); Council Tree *Part 1 PN* Comments at 18-19, 30 (takes issue with AT&T's proposed $32.5 million cap on DE benefits as applying the "wrong SBA size standard and being otherwise unreasonable and inappropriate based on the history of the DE program and marketplace realities," (citing to ARC *Part 1 NPRM* Reply at 6-7) and separately states that "[i]f DEs' bidding credits are capped at a low level, large investors would have no incentive to ally with them, and would not choose to invest their capital in auctions."); KSW *Part 1 PN* Comments at 12 (a $10 million cap would "not permit DEs to bid, then operate on a sustainable scale," which is critical to its survival); MMTC *Part 1 PN* Comments at 16 (the Commission should reject proposals that impose arbitrary caps on bidding credits because "a cap would only serve to impede the ability of DEs to compete in a highly competitive marketplace now and in the future"); USCC *Part 1 PN* Comments at 3, 19-20 ("The caps proposed by some commenters are unreasonable, arbitrary, and could preclude meaningful participation by DEs in future auctions if they are too low to promote scalable robust competition" and would effectively prevent DEs from competing for spectrum in heavily-populated markets and deny them access to some scale economies by limiting the number of licenses they can acquire; AT&T's proposed $32.5 million cap is unreasonable and does not acknowledge that capital costs a business must incur often dwarf its annual revenues).

[347] *See, e.g.,* AT&T *Part 1 PN* Comments at 5; Blooston Rural *Part 1 PN* Comments at 12-13.

[348] *See* AT&T *Part 1 PN* Comments at 5.

[349] The SBA 8(a) Business Development Program was established to help small, disadvantaged businesses compete in the marketplace, with an ultimate goal of helping these firms graduate and thrive in a competitive business environment. Under the program, qualified participants can receive sole-source contracts up to $100 million or five times the value of its primary NAICS code. NAICS codes are used to establish SBA's small business size standards and are based on an entity's primary business. *See* SBA, About the 8(a) Business Development Program, About the 8(a) Business Development Program, https://www.sba.gov/content/about-8a-business-development-program (last visited July 8, 2015).

[350] *See* Blooston Rural *Part 1 PN* Comments at 12-13.

[351] *See* Rural-26 Coalition *Part 1 PN* Comments at 4-5.

the overall amount of bidding credits we will award to a *bona fide* small business or eligible rural service provider, we will provide an important additional safeguard—or backstop—that will prevent misconduct in a manner that is simple and straightforward to implement, and as noted below if set appropriately will not impose an artificial restriction on the amount DEs are likely to bid. We therefore concur with Tristar that "[a]n aggregate limitation … does not frustrate the purposes of section 309(j), but instead assists in protecting the integrity of the DE program and the auction itself."[352]

113. In adopting an overall limit on the amount of bidding credits we will award to any DE applicant, we acknowledge that the effectiveness of a cap will depend, in significant measure, on how high—or low—it is set for any particular auction. To establish an appropriate amount generally, we are guided by our statutory directives to promote the "development and rapid deployment of new … services for the benefit of the public, including those residing in rural areas;"[353] "disseminat[e] licenses among a wide variety of applicants;"[354] and ensure the "efficient and intensive use of the electromagnetic spectrum."[355] Finally, we note that small businesses and rural service providers generally have different business plans and associated capital requirements that must also be considered in setting our cap amounts. In balancing these objectives and concerns, we conclude that we can establish a cap on an auction specific basis in a manner that will allow *bona fide* small businesses and eligible rural service providers to participate in spectrum auctions and in the provision of service in a meaningful and measured way.

114. After carefully considering the record on this issue, and taking into account the changes we make today to increase a DE's flexibility in other respects, we adopt a process for establishing a reasonable monetary limit or cap on the total amount of bidding credits that an eligible small business or rural service provider may be awarded in any particular auction. As a general matter, we establish the parameters to implement a bidding credit cap for all future auctions on an auction-by-auction basis, based on an evaluation of the expected capital requirements presented by the particular service being auctioned, and the inventory of licenses to be auctioned. As more fully explained below, we resolve that the amount of the bidding credit cap for a small business in any particular auction will not be less than $25 million, and the bidding credit cap for the total amount of bidding credits that a rural service provider may be awarded will not be less than $10 million. Given the potential number of licenses and their expected value in the Incentive Auction, we do not foresee it likely that any subsequent auction would include a bidding cap that exceeds the one we establish below for that auction.

115. In establishing the aggregate bidding credit cap floor for any particular auction at $25 million for each eligible small business, and $10 million for each eligible rural service provider, we use data from Auctions 66, 73, and 97 as a starting point. We observe that a $25 million cap would have allowed the vast majority of small businesses to take full advantage of the Commission's bidding credit program.[356] We also note that there is support in the record that a $25 million cap for a small business would still provide "a significant benefit to the vast majority of small businesses and entrepreneurs participating in a spectrum auction, since it would represent a 25% discount on bids of up to $100 million."[357]

116. Likewise, we note that rural service providers have collectively advocated for a $10

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[352] *See* Tristar *Part 1 PN* Comments at 5.

[353] 47 U.S.C. § 309(j)(3)(A).

[354] 47 U.S.C. § 309(j)(3)(B).

[355] 47 U.S.C. § 309(j)(3)(D).

[356] A $25 million cap would have allowed 94.74 percent of small businesses in Auction 66, 98.21 percent of small businesses in Auction 73, and 73.33 percent of small businesses in Auction 97 to realize the full value of their bidding credit based on their gross winning bid amounts. We observe that the percentage dropped in Auction 97 due in large part to the winning bid amounts of two particular entities claiming small business bidding credits.

[357] Blooston Rural *Part 1 PN* Comments at 12-13.

million cap on the newly-established rural service provider bidding credit, which they claim will assist in their ability to participate successfully in competitive bidding and ensure that DE benefits are used for spectrum acquisition in rural markets.[358] Additionally, based on past auction data for Auctions 66, 73, and 97, we find that if a 15 percent bidding credit had been offered in each of those auctions, each winning bidder self-identifying as a rural telephone company would not have been affected by the $10 million cap as applied to their respective gross winning bids.[359] Indeed, RWA/NTCA also conclude that a "[bidding] credit up to $10 million as proposed is sufficient and appropriate," based on its own review of past auction data.[360] As such, we find that the smaller cap requested by the rural service providers reflects their more targeted approach to bidding generally, which is usually focused on competing for a few select license areas that align with their existing service territories or adjacent areas.

117. Given the different nature of their business plans and financial resources, we conclude that different bidding credit caps, and the methodology for implementing them in the Incentive Auction, are warranted for small businesses and rural service providers.[361] As noted above, rural service providers generally have targeted business plans focused primarily on a smaller number of license areas within their established service areas.[362] Moreover, we observe that some rural service providers may have greater access to capital than small businesses, including access to universal service funds and other forms of federal support.[363] At the same time, we note that a cap would limit the benefits that a rural service

[358] *See* Letter from D. Cary Mitchell and John A. Prendergast, Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP et al., Counsel to the Blooston Rural Carriers, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211 (filed Jul. 2, 2015) at 2 (RWA/NTCA/Blooston Rural July 2, 2015 *Ex Parte* Letter); *see also* Letter from Donald L. Herman, Jr., Gregory W. Whiteaker, and Sarah L. J. Aceves, Counsel for Rural-26 DE Coalition, to Roger Sherman, Chief, Wireless Telecommunications Bureau, FCC, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211 (filed June 24, 2015) (Rural-26 Coalition June 24, 2015 *Ex Parte* Letter). *See also, e.g.*, Blooston Rural *Part 1 PN* Comment at 9; Rural/NTCA *Part 1 PN* Comments at 11; Rural-26 Coalition *Part 1 PN* Comments at i.

[359] Auction applicants may disclose whether they are a rural telephone company on their FCC short-form 175. Summarily, 73 bidders in Auction 66 self-identified as being rural telephone companies with the highest gross winning bid among those bidders being $3,108,000.00 million for KTC AWS Limited Partnership ($466,200.00 with the hypothetical 15 percent discount); in Auction 73, 82 bidders self-identified as being rural telephone companies with the highest gross winning bid among those bidders being $8,469,000.00 million for Horry Telephone Cooperative, Inc. ($1,270,350.00 with the hypothetical 15 percent discount); and in Auction 97, 24 bidding self-identified as being rural telephone companies with the highest gross winning bid among those bidders being $1,303,200.00 million for Atlantic Seawinds Communications, LLC ($195,480.00 with the hypothetical 15 percent discount). In applying a 15 percent to each of the highest gross winning bids, we find that none of them would have met the $10 million cap. We reviewed auction results derived from all markets each auction.

[360] RWA/NTCA *Part 1 PN* Comments at 11.

[361] *See, e.g.*, RWA/NTCA/Blooston Rural July 2, 2015 *Ex Parte* Letter at 2 ("In addition to providing bid credit parity between rural carriers and Special Purpose DEs, increasing the rural carrier credit from 15% to 25% will provide rural carriers and their customers a much better chance for success when bidding against nationwide and regional carriers"); Letter from D. Cary Mitchell and John A. Prendergast, Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP et al., Counsel to the Blooston Rural Carriers, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211 (filed Jun. 24, 2015) at 2 (RWA/NTCA/Blooston Rural June 24, 2015 *Ex Parte* Letter) ("A [bifurcated] cap helps ensure that the funds are used for spectrum acquisition in truly rural markets and while up to $10 million would be a substantial help for small rural carriers, the credit is small enough to be unappealing to outside investors and helps guard against any concerns of "unjust enrichment" by rural carriers."); *see also* CCA *Part 1 PN* Reply at 16; CCA *Part 1 NPRM* Reply at 10.

[362] *See* RWA/NTCA/Blooston Rural July 2, 2015 *Ex Parte* Letter at 3 (noting that the bifurcation of the caps based on market size would "help level the playing field for bona bide rural bidders competing against entities that want to pursue smaller PEA markets as an investment strategy").

[363] *But see* RWA/NTCA *Part 1 PN* Comments at 14 n.30 (arguing that "[w]hile the Universal Service Fund will help ensure that rates are kept comparable in rural areas and that companies can build networks, the Rural Telco Bidding

provider could obtain in a service area that is predominantly urban, particularly if it seeks multiple licenses in the auction (and thereby has its bidding credits apportioned over those licenses). This point is largely offset by the fact that the substantial majority of the licenses available in the Incentive Auction include significant amounts of spectrum in rural areas.

118. We disagree with entities that believe that adoption of a cap "would essentially end the DE program"[364] and could significantly limit a DE's ability to obtain spectrum in more than one market.[365] USCC, for instance, explained that a bidding credit cap "could prevent DEs from operating with sufficient scale to sustain itself in the industry."[366] As a general matter, we find that taking an auction-by-auction approach for establishing bidding credit caps will enable us to look carefully at, among other challenges, the capitalization costs for a particular service that DEs may face in order to compete in that auction and provide service to the public. Using this process will also provide commenters with the flexibility to provide specific, data-driven arguments in support of the bidding credit caps for that particular service. We also note that our rule changes today will not foreclose the ability for designated entities to participate in auctions when their auction bids fall above the cap; rather, such entities may still receive a bidding credit discount of up to designated cap for that auction and then pay the excess above that amount.[367] Nor has USCC provided any basis for the scenario in which non-DEs will outbid the cap simply to deprive DEs of the licenses. First, because the cap is an aggregate one, rather than a per-license one, such a strategy would appear to be impracticable, particularly in auctions where anonymous bidding is utilized. More important, there is no basis for concluding that non-DEs would exceed an aggregate cap (on whatever licenses they may seek) unless they believe the licenses' value exceeds the cap – in which case doing so would promote section 309(j)'s goal of efficient and intensive use of the spectrum.

119. We also disagree with various comments that, in sum, argue that the implementation of bidding credit caps is inconsistent with our statutory mandates.[368] We find no merit in these arguments. The Commission is vested with broad discretion when balancing various statutory objectives.[369] Additionally, we have consistently determined that section 309(j) does not charge the Commission with providing entities with generalized economic assistance or a path to success, but rather with the responsibility and the discretion to provide opportunities for small business while preventing the unjust enrichment of ineligible entities.[370] We further note that the statutory goal cited by commenters requiring the Commission to promote economic opportunity and competition by a wide dissemination of licenses is

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Credit will help ensure that spectrum on which a network can be built is made available to rural carriers," and more pertinently "that rural telephone companies are not the only telecommunications service providers that receive USF support.").

[364] *See* USCC *Part 1 PN* Reply at 2.

[365] *See* MMTC *Part 1 PN* Comments at 17.

[366] *See* Letter from Leighton T. Brown, Counsel, United States Cellular Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170 at 1-2 (filed June 15, 2015) (USCC June 15, 2015 *Ex Parte Letter*)

[367] The designated entity must be otherwise qualified to compete in the auction and comply with our DE eligibility rules. *See* 47 C.F.R. §§ 1.2105, 1.2110.

[368] Council Tree argues that "any effort to limit the DE program to facilitating only *small* bids by DEs in *small* markets is wholly inconsistent with the Statutory Mandates, which direct the Commission to use mechanisms such as DE bidding credits to promote competition in markets of all sizes – small, medium, large, regional, and nationwide – so as to widely disseminate licenses, avoid license concentration, and equitably distribute licenses and services among geographic areas." Council Tree *Part 1 PN* Reply at 13. S*ee also* Council Tree *Part 1 PN* Comment at 18; MMTC *Part 1 PN* Comments at 16; USCC *Part 1 PN* Comment at 3, 19; ARC *Part 1 PN* Reply at 7; USCC *Part 1 PN* Reply at 2, 5, 6.

[369] *Fresno Mobile Radio*, 165 F.3d at 971.

[370] *See Order on Reconsideration of the DE Second Report and Order*, 21 FCC Rcd at 6718 ¶ 40; *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17538 ¶ 70.

"subject to a variety of reasonable interpretations,"[371] and must be balanced against a number of other competing statutory objectives. In striking that balance, "only the Commission may decide how much precedence particular policies will be granted when several are implicated in a single decision."[372] As discussed above, we find that appropriate bidding credit caps will protect the integrity of the DE program by providing opportunities for qualified designated entities, while mitigating the incentives for abuse, consistent with our statutory mandates.[373]

120. Finally, we decline to adopt other proposals that would restrict the amount a small business can bid at auction,[374] or that would base a bidding credit cap on another metric such as population.[375] We believe that such proposals would be unduly burdensome on DEs to implement and might negatively affect competition, unlike those we adopt today.[376] Indeed, as Blooston Rural notes, placing a limit on bid amounts is arbitrary and establishing standards based on population contravenes the long-standing economic principle that "a license available for auction should go to the entity that values it the most."[377]

121. The bidding credit caps we adopt today will enable small businesses and rural service providers to attract capital and participate in the Incentive Auction, as well as future Commission auctions, in a meaningful way, consistent with their business plans. We adopt these bidding credit caps based on our experience in administering the Commission's auctions program, and based on data regarding bidding credits DEs have utilized to date. By establishing parameters significant enough to assist eligible entities to have the opportunity to compete at auction, but reasonable enough to ensure that ineligible entities are not encouraged to undercut our rules, we conclude that we achieve our dual statutory goals of benefitting DEs and at the same time preventing unjust enrichment.

122. *Adoption of DE Bidding Credit Caps for the Incentive Auction*. Given the significant advantages of the low-band spectrum licenses being auctioned, and the associated capital requirements, we establish a higher cap on the total amount of bidding credits that a small business may receive for the Incentive Auction than what we anticipate in other future auctions.[378] Specifically, we establish a $150 million cap for small businesses and maintain a $10 million cap for rural service providers on the total amount of bidding credits that a winning bidder may receive. We find that these cap amounts are appropriate given the unique characteristics of the 600 MHz spectrum being auctioned, our analysis of past auction data, and record evidence. Further, for the purposes of the upcoming Incentive Auction, we also employ a market-based differential for how the cap will be imposed on a winning DE bidder in both larger and smaller markets. Taken together, we believe that these cap amounts will allow small businesses and rural service providers to attract capital and compete in the Incentive Auction in an equitable and meaningful way, consistent with their respective business plans.

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[371] *Melcher v. FCC*, 134 F.3d 1143, 1154 (D.C. Cir. 1998).

[372] *Id*. (citing *MobileTel, Inc. v. FCC*, 107 F.3d 888, 895 (D.C. Cir. 1997)).

[373] *See, e.g.*, CCA *Part 1 PN* Comments at 15 ("Proposals to cap the discounts a DE can receive through bidding credits could help to ensure that the amounts DEs are bidding are consistent with the smaller size and revenues of a small business . . . the overarching purpose of Section 309(j) is to promote economic activity and competition"); *see infra* para. 121.

[374] Taxpayer Advocates *Part 1 NPRM* Comments at 10-11 (proposing that "DE nevertheless remains a 'small Business' for the purposes of receiving a discount on spectrum" and "to institute a cap on a DE's bidding, perhaps at 10 times its annual revenues.").

[375] *See* CCA *Part 1 NPRM* Reply at 10; *see also* CCA *Part 1 PN* Comments at 16 (suggesting limiting eligibility for or decrease the amount of DE benefits to markets smaller than the 40 largest PEAs in the Incentive Auction).

[376] *See, e.g.*, Blooston Rural *Part 1 PN* Comments at 13 (opposing arbitrary dollar limits on the total amount a DE can bid and arbitrary population limits on DE bidding and stating that reasonable caps on maximum bidding credits should be sufficient); *see infra* para. 15.

[377] *See* Blooston Rural *Part 1 PN* Comments at 13.

[378] *See supra* para. 110.

123. We find that a significant upwards adjustment from the $25 million baseline for small businesses is warranted in light of the significant value of the 600 MHz spectrum to be auctioned and associated capital requirements. As the Commission indicated in the *Mobile Spectrum Holdings Report and Order*, low-band spectrum is known to have superior propagation characteristics to mid-or high-band spectrum.[379] Low-band spectrum is also less costly to deploy and provides higher coverage quality. As noted by T-Mobile, "[t]he the 600 MHz spectrum is particularly valuable because it penetrates buildings more readily and covers a much wider geographic area with fewer transmitters than higher-band spectrum."[380] According to CostQuest, the cost of deploying networks using mid-band spectrum (1900 MHz) would require nearly 300 percent more in total investment than a comparable network deployed using low-band spectrum (700 MHz).[381] We therefore find that a $150 million cap is warranted given the significant difference in value between low-band and higher-band spectrum. This will ensure that smaller businesses are not disadvantaged vis-à-vis larger bidders and have the opportunity to compete in a meaningful way.

124. Based on past auction data, we also find that a $150 million cap would accommodate the bidding thresholds of a higher percentage of small business participants than the $25 million baseline would. We observe, for example, that in Auctions 66, 73, and 97, nearly all of the small businesses that claimed bidding credits – for licenses in both large and small markets – would have fallen under a $150 million cap amount.[382] In addition, we note that when applying Auction 97 prices to 10-megahertz PEA licenses (the same configuration as in the Incentive Auction), a $150 million cap would not affect a 15 percent or 25 percent bidding credit discount for any individual license bid except in the top two markets (NY and LA). We therefore expect that a $150 million cap would give small businesses a meaningful opportunity to compete for a wide variety of licenses in both large and small market areas, consistent with their overall business plans.

125. While USCC suggests that the use of past auction data for determining the bidding credit cap is not an accurate reflection of the ever-increasing cost of spectrum,[383] we do not find this argument to be persuasive. Commenters, such as AT&T and RWA/NTCA, have used past auction data to support their proposed caps for the Incentive Auction.[384] In addition, Council Tree has used past auction data to

[379] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6160 ¶ 54 ("low-band spectrum has significantly greater propagation advantages both in wide-area coverage and in serving the growing number of wireless uses within buildings").

[380] Letter of Neville Ray, Chief Technology Officer, T-Mobile USA, Inc., to Tom Wheeler, Chairman, FCC, GN Docket No. 12-268, WT Docket No. 12-269 (June 2, 2015) (T-Mobile June 2, 2015 *Ex Parte* Letter).

[381] COSTQUEST ASSOCIATES, T-MOBILE USF MOBILITY MODEL REPORT 16 (2012), http://apps.fcc.gov/ecfs/document/view?id=7521069118 (CostQuest Report).

[382] Approximately, 127 designated entities won licenses collectively in Auctions 66 (AWS-1), 73 (700 MHz), and 97 (AWS-3). Specifically, 40 DEs won licenses in Auction 66; 56 DEs won licenses in Auction 73; and 31 DEs won licenses in Auction 97. We note that AT&T also provided past auction data from publicly available auction results to bolster its argument for a $10 million bidding credit. AT&T *Part 1 PN* Reply at 6, App. at 1. Nonetheless, the Commission conducted an independent analysis on past auction data for determining whether the $150 million cap for the small business bidding credit is appropriate.

[383] *See* USCC June 15, 2015 *Ex Parte* Letter at 2 ("[T]he 600 MHz licenses that will be offered in the Incentive Auction likely will go for a premium given the unique value of low-band spectrum, which would make any bidding credit cap based on the results of recent auctions for mid-band spectrum speculative"); *see also* KSW June 3, 2015 *Ex Parte* Letter at 10 ("[T]he proposal to cap bid credits [at $10 million] means that no DE could ever obtain more than one license for a market the size of Nashville"); Letter from Leighton T. Brown, Counsel, USCC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170 at 2-3 (filed June 3, 2015) (USCC June 3, 2015 *Ex Parte* Letter) (stating that "the unreasonably low caps proposed by some commenters would effectively prevent DEs from competing for spectrum in heavily-populated markets").

[384] AT&T *Part 1 PN* Reply at 5-6, App. at 1-5; RWA/NTCA *Part 1 PN* Comments at 11 ("A careful analysis of rural telephone companies' bidding history and ability to financially compete for spectrum indicates that a credit of up to $10 million as proposed is sufficient and appropriate.").

support their advocacy for certain policy positions.[385] Moreover, as part of determining what DE benefits to adopt for a particular service, the Commission traditionally reviews the service rules for spectrum bands that have similar propagation characteristics. In the Incentive Auction for instance, we determined the appropriate small business size definitions and associated bidding credits based in part on our service rules for the licenses in the 700 MHz band.[386] Therefore, consistent with the Commission's past practices and the approach taken by several commenters in this proceeding, past auction data will be a factor, among others, in establishing a reasonable cap for DE benefits in the Incentive Auction.

126. As discussed above, capping the rural service provider bidding credit at $10 million for the Incentive Auction is also appropriate based on a similar examination of past auction data and is supported by the majority of rural service providers. Assuming that these same entities will participate in the Incentive Auction, we expect that our bidding credit limits will capture nearly all of the gross winning bids of these entities thereby minimizing any negative impact on DEs in general. By establishing these caps, we intend to provide *bona fide* small businesses and eligible rural service providers with sufficient flexibility to obtain the necessary capital to compete in spectrum auctions and achieve the appropriate size and scale to operate in the wireless marketplace and serve the public interest.

127. *Implementation of the DE Bidding Credit Caps, Based on Market Population, for the Incentive Auction*. To create parity in the Incentive Auction among small businesses and eligible rural service providers competing against each other in smaller markets, we establish a ceiling on the overall amount of bidding credits that any winning DE bidder may receive in connection with winning licenses in markets with a population of 500,000 or less, i.e., PEAs 118 through 416.[387] Specifically, no winning DE bidder will be able to obtain more than $10 million in bidding credits for licenses won in PEAs 118-416, with the exception of PEA 412 (Puerto Rico), which exceeds the 500,000 pop threshold.[388] To the extent a small business does not claim the full $10 million in bidding credits in the smaller markets, it may apply the remaining balance to its winning bids on larger licenses, up to the aggregate $150 million cap for small businesses.[389]

128. We expect that this approach will provide small businesses the flexibility to pursue a variety of business models that may include bidding in both large and small markets, while ensuring they compete on equal footing with rural service providers in smaller markets. We also note that this flexible approach is generally consistent with alternative proposals put forth by commenters and agree that it strikes a measured and reasonable balance to help protect against potential abuse of the DE program while also allowing larger DEs a higher cap in larger service areas.[390]

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[385] Council Tree *Part 1 PN* Comments at 11-12, Ex. 3 (using past auction data to respond to criticisms that small businesses that have allied with large investors are not "small").

[386] *See Incentive Auction R&O*, 29 FCC Rcd at 6579 ¶ 31.

[387] *See* Wireless Telecommunications Bureau Provides Details about Partial Economic Areas, GN Docket No. 12-268, Public Notice, 29 FCC Rcd 6491 (2014) ("*PEAs PN*"); *see also* Rural Coalition June 24, 2015 *Ex Parte* Letter (for the proposal that "higher cap of $100 million could apply in the top 40 Partial Economic Areas ("PEAs") or in those PEAs with a population of 500,000 or more"); RWA/NTCA/Blooston Rural July 2, 2015 *Ex Parte* Letter ("[T]he $10 million ceiling on the use of bid credits in smaller markets (e.g., PEA markets with 500,000 POPs or less) should help level the playing field for bona fide rural bidders vis a vis entities that want to pursue smaller PEA markets as an investment strategy.").

[388] This excludes PEA 412 (Puerto Rico), which has a population of 3.725 million. *PEAs PN*, 29 FCC Rcd at 6501.

[389] *See, e.g.*, Letter from Grant B. Spellmeyer, Vice President, Untied States Cellular Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170 at 2 (filed June 26, 2015) ("[A]ggregate caps below $150 million nationwide would make it very difficult for DEs to partner with mid-sized carriers or otherwise obtain the financing necessary to acquire spectrum resources sufficient to compete in today's wireless marketplace.") (USCC June 26, 2015 *Ex Parte* Letter).

[390] *See generally* Letter from Erin P. Fitzgerald, Counsel, SRT Communications, Panhandle Telephone Cooperative, Inc., Copper Valley Telephone Cooperative, Nemont Telephone Cooperative, Inc., Pine Belt Telephone Company, Inc., and Central Texas Telephone Cooperative, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, GN

129. We determine that a market threshold based on a license area with 500,000 or less pops is consistent with record evidence, an analysis of past auction data, and our experience in auctions and licensing matters. We also find that the 500,000 population threshold provides an objective and easily administrable delineation between larger urban and smaller rural markets.

130. Several commenters strongly advocated for placing a ceiling on the amount of bidding credits that could be applied in those areas with a population of 500,000 or less.[391] These commenters note that, in light of record support for a larger cap in urban markets, it may be advantageous to vary the cap levels for larger urban and smaller rural markets.[392] The RWA/NTCA/Blooston Rural and Rural-26 Coalition, for example, propose using a 500,000 threshold to differentiate between such markets.[393] We concur that a 500,000 threshold is a reasonable benchmark to distinguish between larger and smaller license areas. We note, for example, that the population density of PEAs with population of 500,000 or less correlates more closely with that of rural areas,[394] as well as the average population of a Cellular Market Area (CMA), a smaller geographic license area favored by small and rural carriers. [395] Given these characteristics, we note that these smaller markets are ones where rural service providers are most likely to offer service and where an opportunity to compete on equal footing is of particular importance. [396] In addition, based on the results of Auction 97, we estimate that the cap for any entity eligible with a

Docket No. 12-268, RM-11395, WT Docket No. 05-211 (filed Jul. 8, 2015) (Rural Carriers July 8, 2015 *Ex Parte* Letter); Rural-26 Coalition June 24, 2015 *Ex Parte* Letter; RWA/NTCA/Blooston Rural June 24, 2015 *Ex Parte* Letter.

[391] *See, e.g.*, Rural-26 Coalition June 24, 2015 *Ex Parte* Letter at 2 ("[I]n order to encourage participation by larger DEs in urban markets, Rural-26 would support a bifurcated cap, with differing cap levels for the larger urban and smaller rural markets . . . . [T]his approach would help to protect legitimate DEs and rural telecommunications providers from potential abuse of the DE program and from being foreclosed by spectrum speculators, while also allowing larger DEs a higher cap in urban areas."); Letter from Donald Herman, Jr., Counsel, Rural-26, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 2 (filed July 10, 2015); Letter from Erin Fitzgerald, Counsel, Rural Carriers, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 2-3 (filed Jul. 8, 2015); Letter from D. Cary Mitchell and John A. Predergast, Counsel to the Blooston Rural Carriers, et al., to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 3 (filed Jul. 8, 2015); Letter from Donald Herman, Jr., Counsel, Rural-26, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 1 (filed Jul. 7, 2015). *But see* Letter from Carl W. Northrop, Telecommunications Law Professionals PLLC, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 2-3 (filed July 10, 2015). ARC argues that 500,000 is not the appropriate threshold because it covers more than 70 percent of all PEAs (ARC July 10, 2015 *Ex Parte* Letter).

[392] *See* RWA/NTCA/Blooston Rural July 2, 2015 *Ex Parte* Letter at 2-3; Rural-26 Coalition June 24, 2015 *Ex Parte* Letter at 3.

[393] *See id. See also* ARC July 10, 2015 *Ex Parte* Letter (offering 179,000 and 100,000 as possible population threshold alternatives).

[394] The average population density of PEAs with a population greater than 500,000 (PEAs 1-117 and 412) is 333 pops/mile, whereas the average population density for the smaller PEAs (PEAs 118-416, except for 412 – Puerto Rico) is 76 pops/mile. We observe that 76 pops/mile roughly corresponds with the 100 pops/mile approach we take in defining rural areas. Geographic area and population data can be found on the Commission's website at:www.fcc.gov/auctions.

[395] CMAs covering the 50 states have an average population of 431,209.

[396] *See generally* Rural-26 Coalition June 24, 2015 *Ex Parte* Letter; RWA/NTCA/Blooston Rural June 24, 2015 *Ex Parte* Letter. *See also* CCA *Part 1 PN* Reply at 16 ("[T]he Commission could limit eligibility for or decrease the amount of DE benefits to markets smaller than the 40 largest PEAs, which would ensure that discounts are more consistent with the typical business plan of a small carrier. In addition, the amount of the bidding credit for these smaller markets could be capped at a limit that is proportionately lower for markets with higher populations, and graduated higher for smaller markets with lower populations and less density. Adjusting bidding caps in this manner would reduce incentives for speculative acquisitions in PEAs with greater revenue potential, while ensuring that smaller carriers competing for licenses in their own service territories have a fair opportunity against larger carriers."); CCA *Part 1 NPRM* Reply at 10.

15 percent bidding credit or larger would not be exhausted in any these areas.[397] In light these considerations, we find that 500,000 is a reasonable threshold and provides DEs with sufficient flexibility to adjust their strategic and capitalization demands in order to compete meaningfully in the Incentive Auction. We therefore decline to implement the proposal recommended by ARC in its late-filed *ex parte* to divide the markets into thirds and to implement a $10 million cap for PEAs in the bottom third tier (i.e., PEA 278 and below) or alternatively to implement a $10 million cap for PEAs with populations below 100,000.[398] We note that ARC makes no showing as to why this alternative approach is superior or better serves our goal of establishing parity for small and rural providers competing in the smallest markets.

4. Other Bidding Preferences/Types of Credit

131. The *Part 1 NPRM* sought comment on whether to extend bidding preferences to entities based on criteria other than business size.[399] Specifically, we sought comment on the possibility of offering credits to members of the groups named in the statute besides small businesses—i.e., rural telephone companies and businesses owned by minority groups and women. We also sought comment on whether to extend bidding preferences based on the provision of service to unserved/underserved areas and areas of persistent poverty, as well as to entities owned by persons who have overcome substantial disadvantages.[400] We noted that the Commission's ability to implement other types of bidding credits is constrained by both our statutory authority and standards of judicial review, and sought specific comment on how any alternative proposals could overcome such limitations.[401] In response to suggestions submitted in response to the *Part 1 NPRM*, we sought comment in the *Part 1 PN* on whether we should offer other bidding preferences or types of credits such as those "based on criteria other than business size."[402]

132. With the exception of the rural service provider bidding credit discussed above,[403] we decline to adopt bidding preferences or credits based on criteria other than business size at this time. The limited record support for any of the proposals beyond the rural service provider bidding credit is insufficient to justify departure from our existing DE program, except as described above. We believe that repeal of the AMR rule, the expanded size standards for eligibility for the DE program, and new rural service provider bidding credit will help to address the challenges that such groups face today, including: raising capital to compete in an auction; finding a revenue stream to support network construction and business expansion; and developing a business model based on market needs.

a. Minority- and Women-Owned Businesses

133. ***Background.*** The Commission's ability to target bidding credits to certain types of entities is constrained by its statutory authority and constitutional standards of judicial review.[404] Following the Supreme Court's decisions establishing judicial standards for government programs based upon gender and race,[405] it has been the Commission's policy to employ gender- and race-neutral

[397] In Auction 66, Denali, Barat, and Atlantic Wireless are the only three bidders claiming bidding credits that would have been affected by a $10 million cap on 15 percent bidding credit, and that is based on all markets. In Auction 73, King Street and Continuum 700 are the only bidders claiming bidding credits that would have been affected (based on all markets).

[398] ARC July 10, 2015 *Ex Parte* Letter.

[399] *Part 1 NPRM*, 29 FCC Rcd at 12449 ¶ 65.

[400] *Id.* at 12449-53 ¶¶ 65-76.

[401] *Id.* at 12249 ¶ 65.

[402] *Part 1 PN*, 30 FCC Rcd at 4162 ¶ 20.

[403] *See* Seciton II.B.2. (Rural Service Provider Bidding Credit).

[404] *Part 1 NPRM*, 29 FCC Rcd at 12427 ¶ 1 n.1, 12449 ¶ 65.

[405] *See Adarand Constructors*, 515 U.S. at 227-30 (holding that any federal program in which the "government treats any person unequally because of his or her race" must satisfy the "strict scrutiny" constitutional standard of review),

provisions, offering credits instead to businesses based on the size of its business.[406] The Commission has long recognized that many minority- and women-owned businesses are eligible for a small business bidding credit.[407] However, the Commission has never foreclosed on the possibility of finding additional ways to directly or indirectly support opportunities for participation by minorities and women in auctions and the wireless marketplace within the bounds of its authority. In the *Part 1 NPRM*, we sought comment on whether our current small business provisions are sufficient to promote participation by businesses owned by minorities and women and, if not, how additional provisions to ensure participation by minority- or women-owned businesses could be crafted to meet the relevant standards of judicial review.[408] While commenters did not advocate for preferences targeted specifically toward minority- and women-owned businesses, several urged the Commission to adopt race- and gender-neutral updates to the DE rules that would aid all eligible entities, including minorities and women.[409]

134. ***Discussion.*** We decline to adopt a bidding credit for minority- and women-owned businesses. We note that no party advocated for such a preference, nor provided evidence to demonstrate that such a credit could meet the constitutional standards for review.[410] Instead, we agree with commenters that updating our DE rules through the actions we take today should provide smaller businesses—including enterprises owned by minorities and women—a better on-ramp into the wireless business.

b. Unserved/Underserved Areas and Persistent Poverty Preferences

135. ***Background***. We sought comment in the *Part 1 NPRM* on whether the Commission should extend bidding credits to winning bidders that deploy facilities and provide service to unserved or underserved areas,[411] or to those that provide service to persistent poverty counties.[412] We also sought comment on our tentative conclusion that section 309(j) of the Act authorizes us to offer bidding credits using these criteria.[413] Further, we encouraged commenters to offer data-driven suggestions and address any potential implementation issues.[414]

136. ***Discussion***. We decline to adopt specific additional bidding credits on the basis of whether the license area correlates with unserved/underserved areas or persistent poverty counties at this time. Some commenters support a bidding credit for persistent poverty areas.[415] Others argue for a bidding credit in conjunction with addressing unserved/underserved areas,[416] or that the Commission should focus on strengthening its current DE program, rather than considering the adoption of new

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United States v. Virginia, 518 U.S. 515, 531-34 (1996) (holding that a state program that makes distinctions on the basis of gender must be supported by an "exceedingly persuasive justification" in order to withstand constitutional scrutiny).

[406] Implementation of Section 309)(j) of the Communications Act—Competitive Bidding, *Tenth Report and Order*, 11 FCC Rcd 19974, 19975-77 ¶¶ 1-3 (1996).

[407] *See, e.g.*, *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15318-19 ¶¶ 45-48 (2000).

[408] *Part 1 NPRM*, 29 FCC Rcd at 12449-50 ¶ 66.

[409] *See* DE Coalition *Part 1 NPRM* Comments at 33; NTCH *Part 1 NPRM* Comments at 5 (proposing a "diversity bidding credit that would "aid in allowing minorities and women to acquire licenses . . . "); NTCH *Part 1 PN* Comments at 5.

[410] *See* NTCH *Part 1 NPRM* Comments at 5 (arguing for a diversity bidding credit "without any unconstitutional taint of racial or gender discrimination").

[411] *Part 1 NPRM*, 29 FCC Rcd at 12450 ¶ 67.

[412] *Id.* at 12450 ¶ 68.

[413] *Id*. at 12451 ¶ 70.

[414] *Part 1 PN*, 30 FCC Rcd at 4162 ¶ 21.

[415] CCA *Part 1 NPRM* Comments at 8; WISPA *Part 1 NPRM* Comments at 9; NTCH *Part 1 NPRM* Comments at 5-6; RWA *Part 1 NPRM* Reply at 7.

bidding credits.[417] We emphasize that it remains a goal of the Commission, through its various universal service and other programs and policies, to promote the deployment of broadband facilities and services to unserved and underserved areas and persistent poverty counties. Today, we further those goals by adopting a rural service provider bidding credit and repealing the AMR rule. According to the Department of Agriculture's Economic Research Service ("ERS"), a large portion of unserved or underserved areas and persistent poverty counties are located in rural areas.[418] Thus, the rural service provider bidding credit we adopt today is intended to better ensure that consumers in unserved/underserved areas and persistent poverty counties have access to more competition and improved services. Nevertheless, we will continue to monitor the effectiveness of the proposals we adopt today in advancing the deployment of spectrum-based services in unserved/underserved and persistent poverty areas. To the extent the policies we adopt today are not sufficient, we encourage parties to provide us with contrary evidence so that the Commission may reexamine these policies based on a more complete record.

c. Overcoming Disadvantages Preference

137. ***Background.*** In response to renewed interest raised in the Incentive Auction proceeding, the *Part 1 NPRM* sought further comment on a recommendation by the Commission's Advisory Committee on Diversity for Communications in the Digital Age ("Advisory Committee") to implement a bidding preference for persons or entities who have overcome substantial disadvantage (referred to as an "overcoming disadvantages preference," or "ODP").[419] We sought detailed and specific comment on our statutory authority to adopt such a preference and the benefits of doing so, as well as eligibility for, and administration of, the preference.[420] We also noted that the Advisory Committee's proposal raised a number of challenges to be resolved before any ODP could be designed and implemented.[421] We received

[416] *See* DE Coalition *Part 1 NPRM* Comments at 33-34; WISPA *Part 1 NPRM* Comments at 9 (arguing for such a bidding credit to be available to any entity that meets the deployment obligations in unserved/underserved areas); ARC *Part 1 NPRM* Comments at 3, 23-24 (proposing a "localism" bidding credit for a resident for more than one year of an unserved or underserved area for a license that covers such an area); NTCH *Part 1 NPRM* Comments at 5-6 (proposing a 75 percent bidding credit to service providers, who are not nationwide providers and who hold less than 40 megahertz of the CMRS spectrum in any given market, to provide service in unserved/underserved areas); RWA *Part 1 NPRM* Reply at 7 (advocating for bidding credits for winning bidders who deploy facilities to unserved or underserved areas).

[417] KSW *Part 1 NPRM* Reply at 15; CCA *Part 1 PN* Comments at 15 (advising the Commission to carefully consider "new or different bidding credits that serve only a small group of applicants."). *See also* Blooston Rural *Part 1 NPRM* Reply at 3-4 (expressing concern that bidding credits for unserved and underserved areas may be too difficult to administer in the context of the Broadcast Incentive Auction or become confused by the Mobility Fund.).

[418] *See* ERS, Geography of Poverty, http://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/geography-of-poverty.aspx (last visited July 16, 2015) ("The large majority (301 or 85.3 percent) of the persistent-poverty counties are nonmetro, accounting for 15.2 percent of all nonmetro counties.").

[419] Advisory Committee of Diversity for Communications in the Digital Age, *Recommendations to Federal Communications Commission: Preference for Overcoming Disadvantage*, Oct. 14, 2010, http://www.fcc.gov/DiversityFAC/meeting101410.html (*ODP Recommendation*). In that recommendation, the Advisory Committee proposed that the Commission should provide an auction bidding credit for otherwise qualified persons or entities that have overcome substantial disadvantages, to allow them to compete on an equal footing with other applicants.

[420] *Part 1 NPRM*, 29 FCC Rcd at 12452 ¶ 72.

[421] *Id*. at 12453 ¶ 76. Nine comments and two reply comments were filed in response to a public notice issued by the Media and Wireless Telecommunications Bureau seeking comment on additional information that would be helpful in evaluating whether and how to pursue the Committee's proposal. Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage, GN Docket No. 10-244, *Public Notice*, 25 FCC Rcd 16854 (2010) (*Overcoming Disadvantage Preference Public Notice*). The commenters who supported the Advisory Committee's Recommendation largely did so with reservations, or simultaneously expressed support for

only two comments on this issue, which are divided on the desirability and feasibility of an ODP.[422]

138. ***Discussion.*** We decline to adopt the Advisory Committee's ODP proposal. The *Part 1 NPRM* reflects our uncertainties about how eligibility for such a preference could be defined and/or administered in the auction context.[423] The comments we received in response to the *Part 1 NPRM* did not alleviate any of our concerns about the complexity in implementing such a preference. In addition, the policy decisions adopted today—including the repeal of the AMR rule, the expansion of the small business bidding credit thresholds, and the new rural service provider bidding credit—will benefit those persons or entities who have overcome substantial disadvantage. These decisions are intended to promote the provision of spectrum-based services by all *bona fide* small businesses and eligible rural service providers, including those that have overcome a substantial disadvantage. We also believe that this approach is simpler than adoption of the Advisory Committee's ODP proposal. While the *ODP Recommendation* provided a non-exhaustive list of disadvantages, it is not clear what proof should be required from those individuals or entities seeking to receive such a preference and how to apply the ODP on a neutral basis. We are also concerned that our review of such a claim would involve a costly and lengthy process.[424] Accordingly, we decline to adopt the Advisory Committee's ODP proposal.

d. Tribal Lands Bidding Credit

139. ***Background.*** NTCH urges the Commission to consider ending its tribal lands bidding credit,[425] and we sought additional comment on this topic in the *Part 1 PN*.[426] The tribal lands bidding credit program awards a discount to a winning bidder for serving qualifying tribal land that has a wireline telephone subscription rate equal to or less than 85 percent based on Census data.[427] NTCH argues that tribal lands may not merit *per se* qualification as a disadvantaged category because some tribes have multiple business enterprises and some receive subsidies from grant programs to target telecommunications deficits.[428] NTCH provides no citation or reference to empirical data to substantiate its position. NTCH suggests instead that the Commission determine need for a tribal lands bidding credit on a case-by-case basis to avoid granting bidding credits that may be "unnecessary and actually unfair to others," but does not explain specifically how such an individualized qualification process might be administered.[429] Several tribal entities involved in the telecommunications industry detail the chronic lack of wireless services on tribal lands, explain that tribal entities may encounter unique challenges in participating in spectrum auctions, and oppose any changes to the tribal lands bidding credit program.[430]

140. ***Discussion.*** We decline to adopt any modifications to our tribal lands bidding credit in this proceeding. A substantial number of comments and reply comments from various tribes and tribal entities uniformly oppose NTCH's suggestion. Several tribal entities involved in the telecommunications industry detail the chronic lack of wireless services on tribal lands, explain that tribal entities may encounter unique challenges in participating in spectrum auctions, and oppose any changes to the tribal

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other diversity initiatives. Few commenters responded in detail to the questions presented.

[422] DE Coalition *Part 1 NPRM* Comments at 34-35; NTCH *Part 1 NPRM* Comments at 3-4.

[423] *Part 1 NPRM*, 29 FCC Rcd at 12451-53 ¶¶ 71-76.

[424] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2375-76 ¶¶ 162-63 (explaining benefits of a streamlined auction application process).

[425] NTCH *Part 1 NPRM* Comments at 4. 1.2110(f)(3) of the Commission's rules, 47 C.F.R. § 1.2110(f)(3), provides for bidding credits to be granted for serving federally recognized tribal land, if certain qualifying measures are met.

[426] *Part 1 PN*, 30 FCC Rcd at 4162 ¶¶ 20-21.

[427] 47 C.F.R. § 1.2110(f)(3).

[428] NTCH *Part 1 NPRM* Comments at 4.

[429] *Id*.

[430] *See* previous related discussion in paras. 61-64, *supra*.

lands bidding credit program.[431] Numerous reply comments voice support for these comments and asked that NTCH's suggestion be rejected.[432] We have been presented with no evidence or information suggesting that our policy of providing tribal lands bidding credits has been rendered unnecessary or does not further our objective in promoting further deployment and use of spectrum over tribal lands. Thus, we decline to make any alterations to the established tribal lands bidding credits here.

C. Unjust Enrichment

141. ***Background.*** Under the Commission's rules, a DE seeking approval of a transfer of control or an assignment of a license acquired with a bidding credit to a non-DE within five years after its initial issuance must reimburse the government a portion of the bidding credit.[433] This reimbursement obligation is governed by a five-year unjust enrichment schedule, with the amount of repayment decreasing over time.[434]

142. As part of our effort to balance the policy objectives for the DE program, we sought comment in the *Part 1 NPRM* on whether any changes are needed to strengthen our unjust enrichment rules.[435] We invited comment on whether the existing five-year unjust enrichment period and repayment schedule continue to provide sufficient safeguards against potential misuse,[436] or whether there is a need to extend the schedule to ten years or some other time period.[437] In addition, we sought comment on the ability of a small business to raise capital and participate at auction, and to provide service, if the Commission were to repeal the AMR rule, as proposed in the *NPRM*, and also tighten the unjust enrichment rules—particularly when compared to the existing unjust enrichment rule.[438] We also asked whether there are other unjust enrichment provisions we should consider, such as requiring full repayment of benefits if a small business loses eligibility prior to meeting the applicable construction requirement, and whether a different reimbursement percentage (i.e., less than 100 percent) is preferable.[439]

143. In the *Part 1 PN*, we sought comment on some of the alternative viewpoints expressed by parties in response to the *Part 1 NPRM*.[440] We asked for additional comment on whether the unjust

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[431] *See generally*, Doyon, Limited and Chugach Alaska Corporation *Part 1 PN* Comments, Leech Lake Telecommunications *Part 1 PN* Comments, Native Public Media *Part 1 PN* Comments, and the National Congress of American Indians *Part 1 PN* Comments.

[432] *See* Grand Traverse Band of Ottawa and Chippewa Indians *Part 1 PN* Reply at 2; Shoalwater Bay Indian Tribe *Part 1 PN* Reply; Tohono O'odham Utility Authority *Part 1 PN* Reply at 2; Twenty-Nine Palms Band of Mission Indians *Part 1 PN* Reply at 2; Coquille Indian Tribe *Part 1 PN* Reply at 2; National Tribal Telecomm Association *Part 1 PN* Reply at 2; Omaha Tribe of Nebraska and Iowa *Part 1 PN* Reply at 2; Navajo Tribal Utility Authority *Part 1 PN* Reply at 2; Jamestown S'Klallam Tribe *Part 1 PN* Reply at 2; Tulalip Tribes *Part 1 PN* Reply at 2. *See also* Letter from Fred S. Vallo, Sr., Governor of The Pueblo of Acoma, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 14-170 and 05-211, at 1-2 (filed May 27, 2015) (Pueblo of Acoma May 27, 2015 *Ex Parte* Letter).

[433] *See* 47 C.F.R. § 1.2111(b). This requirement also applies to a designated entity that proposes to take any other action relating to ownership or control that will result in loss of eligibility as a designated entity. *Id.*

[434] *See* 47 C.F.R. § 1.2111(d)(2). Specifically, if a designated entity loses its eligibility for a bidding credit for any reason or seeks to assign or transfer the license to an entity that does not meet the eligibility criteria for a bidding credit during the first two years of the license term, 100 percent of the bidding credit, plus interest, is owed. During year three of the license term, 75 percent of the bidding credit, plus interest, is owed. During year four, 50 percent of the bidding credit, plus interest, is owed, and during year five, 25 percent of the bidding credit, plus interest, is owed.

[435] *See Part 1 NPRM*, 29 FCC Rcd at 12442-44 ¶ 42-49.

[436] *See id*. at 12443 ¶ 44.

[437] *See id*. at 12443 ¶¶ 44-45.

[438] *See id.* at 12443 ¶ 45.

[439] *See id*. at 12443 ¶ 46.

[440] *See Part 1 PN*, 30 FCC Rcd at 4159-61 ¶¶ 13-16.

enrichment period should be extended to apply for a specified number of years (e.g., ten years), to the entire license term, or linked to an interim construction milestone.[441] We also asked if there are other alternatives we should consider, such as revisiting the percentage amounts associated with the unjust enrichment schedule.[442] In addition, we requested comment on whether we should, as T-Mobile suggests, require the repayment of any profit or some multiple of the bidding credit received,[443] and invited commenters to discuss whether the DE benefits associated with any and all of a DE's licenses should be forfeited if a DE loses its eligibility.[444] We invited comment on whether we should consider T-Mobile's proposal to impose additional build-out and reporting obligations specific to DEs that would require them to determine "tangible steps toward development" [445] and, if so, what the appropriate timeframe(s) for such a requirement would be.[446] We also asked whether there are any other options we should consider to prevent spectrum warehousing and encourage expeditious spectrum build-out, such as requiring repayment of some percentage of a bidding credit if a DE fails to meet a construction benchmark.[447] Finally, we asked commenters to address any tradeoffs related to these proposals, including the extent to which they would restrict a DE's ability to access capital, prevent abuse of the designated entity program, and avoid unjust enrichment.[448]

144. We received a range of comments in response to our proposals in both the *Part 1 NPRM* and *Part 1 PN*. Most parties oppose any extension of the unjust enrichment period,[449] with many maintaining that the existing five-year period sufficiently protects against unjust enrichment while at the same time providing small businesses with the flexibility to obtain access to capital.[450] Several of these parties also highlight the potentially adverse impact that extending the unjust enrichment period could

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[441] *See id*. at 4160-61 ¶ 16.

[442] *See id*.

[443] *See* T-Mobile *Part 1 NPRM* Comments at 17; T-Mobile *Part 1 NPRM* Reply at 7.

[444] *See id.*

[445] *See* T-Mobile *Part 1 NPRM* Comments at 14; T-Mobile *Part 1* Reply at 9.

[446] *See Part 1 PN*, 30 FCC Rcd at 4160-61 ¶ 16.

[447] *See id.*

[448] *See id.*

[449] *See* Council Tree *Part 1 PN* Comments at 31-32; Council Tree *Part 1 PN* Reply at 14-17; KSW *Part 1 PN* Comments at 11; MMTC *Part 1 PN* Comments at 14; Tristar *Part 1 PN* Comments at; MMTC *Part 1 PN* Comments at 14; M/C Partners *Part 1 PN* Reply at 2; Council Tree *Part 1 NPRM* Reply at 11; KSW *Part 1 NPRM* Reply at 12; RWA *Part 1 NPRM* Comments at 10-11; Blooston *Part 1 PN* Comments at 7; USCC *Part 1 PN* Comments at Att. at 32; ARC *Part 1 NPRM* Reply at 2; Blooston Rural *Part 1 NPRM* Reply at 9; CCA *Part 1 NPRM* Comments at 10; DE Coalition *Part 1 NPRM* Comments at 26 (noting the Third Circuit Court of Appeal's concerns regarding ten-year hold rule); USCC *Part 1 PN* Reply at 8-9; WISPA *Part 1 NPRM* Comments at 13; Letter from E. Ashton Johnson, Telecommunications Law Professionals PLLC, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211 (filed May 21, 2015) at 2 (M/C Partners May 21, 2015 *Ex Parte* Letter); Letter from Peter M. Connolly, Counsel, USCC, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211 (filed May 29, 2015) at 2 (USCC May 29, 2015 *Ex Parte* Letter); Letter from E. Ashton Johnston, Telecommunications Law Professionals PLLC, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211 (filed June 1, 2015) at 3 (Columbia Capital June 1, 2015 *Ex Parte* Letter); Letter from John Muleta, CEO, Atelum LLC, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211 (filed June 25, 2015) at 9 (Atelum June 25, 2015 *Ex Parte* Letter); USCC June 26, 2015 *Ex Parte* Letter at 2.

[450] *See* Blooston *Part 1 PN* Comments at 7; USCC *Part 1 PN* Comments at Att. at 32; M/C Partners May 21, 2015 *Ex Parte* Letter at 2; ARC *Part 1 NPRM* Reply at 2; Blooston Rural *Part 1 NPRM* Reply at 9;; CCA *Part 1 NPRM* Comments at 10; DE Coalition *Part 1 NPRM* Comments at 26 (noting the Third Circuit Court of Appeal's concerns regarding ten-year hold rule); RWA *Part 1 NPRM* Comments at 10-11; WISPA *Part 1 NPRM* Comments at 13.

have on their ability to retain capital to operate their businesses. RWA and WISPA, for example, warn that an extended unjust enrichment period locks DEs into business plans[451] and hinders new entrants.[452] Council Tree maintains that extending the period to ten years "would be debilitating for investors and effectively end DE bidding at higher levels."[453] M/C Partners submits that "[t]he practical effect of extending the unjust enrichment period beyond five years and removing the payback tiers would be to discourage venture capital investments in DEs,"[454] while Columbia Capital notes that "limiting a DE's flexibility to transfer or assign licenses during the entire term likely would rule out investments in DEs by such funds."[455] MMTC similarly states that "in a rapidly changing industry, no one will invest in a company from which exit is impossible . . . for a decade."[456] MMTC further notes that an extension of the unjust enrichment period to ten years would further hamper or eliminate a DE's ability to raise and retain capital and operate its business with the same level of flexibility afforded to other businesses in the wireless industry.[457] M/C Partners and Columbia Capital maintain that extending the unjust enrichment period to ten years would effectively foreclose private equity investments in DEs because most venture capital and private equity funds have a ten-year investment horizon, with investments typically occurring in the first few years, average realization periods of three to seven years from the time of initial investment, and the last few years devoted to planning an exit.[458] The DE Coalition, RWA, WISPA, KSW, and Atelum likewise express concern that an extension of the unjust enrichment period could limit a small business' access to capital.[459] As KSW states in opposing a ten-year unjust enrichment period, "ten years is a lifetime in wireless, and financial institutions are far less willing to provide money for a ten-year period."[460] CCA recognizes the need for strong unjust enrichment protections, but opposes proposals to extend the unjust enrichment penalties to apply throughout the entire license term because it could cause DEs to experience difficulties in attracting and obtaining outside investment which would constrain small business participation in auctions.[461] CCA submits that "adopting a rigorous two-pronged eligibility combined with the current five-year unjust enrichment restriction and payment schedule represents a sensible calibration of policy objectives that strikes a balance between increasing participation of small businesses in auctions and promoting the deployment of spectrum-based services."[462] RWA similarly

[451] *See* RWA *Part 1 NPRM* Comments at 10.

[452] *See* WISPA *Part 1 NPRM* Comments at 13.

[453] *See* Council Tree *Part 1 NPRM* Reply at 11.

[454] M/C Partners May 21, 2015 *Ex Parte* Letter at 2.

[455] Columbia Capital June 1, 2015 *Ex Parte* Letter at 3. Columbia Capital notes that such an outcome would "be inconsistent with the Commission's goal of expanding opportunities [for DEs] to gain access to capital and thereby participate in the provision of spectrum-based services." *Id.*

[456] *See* MMTC *Part 1 NPRM* Comments at 14. *See also* MMTC *Part 1 PN* Comments at 15. MMTC suggests that in lieu of extending the unjust enrichment period to a ten year period, the Commission should instead strengthen the DE reporting requirements and take strong enforcement action against violators of the DE rules. MMTC *Part 1 NPRM* Comments at 14; MMTC *Part 1 PN* Comments at 15.

[457] *See* MMTC *Part 1 PN* Comments at 15.

[458] M/C Partners May 21, 2015 *Ex Parte* at 2; Columbia Capital June 1, 2015 *Ex Parte* at 3.

[459] *See* DE Coalition *Part 1 NPRM* Comments at 26; KSW *Part 1 NPRM* Reply at 12; KSW *Part 1 PN* Comments at iii, 11; RWA *Part 1 NPRM* Comments at 10-11; WISPA *Part 1 NPRM* Comments at 13; Atelum June 25, 2105 *Ex Parte* Letter at 9; USCC June 26, 2015 *Ex Parte* Letter at 2 (contending that extending the unjust enrichment period would make it even more difficult, and perhaps impossible, for DEs to obtain financing).

[460] *See* KSW *Part 1 NPRM* Reply at 12; KSW *Part 1 PN* Comments at 11.

[461] *See* CCA *Part 1 PN* Reply at 6. CCA notes that the Commission has tried this approach before and that the previously consensus opinion was that a 10 year unjust enrichment payment period was too restrictive to facilitate a successful DE program. *Id*. (citing *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 245, 256 n.10 (3d Cir. 2010)).

[462] *See* CCA *Part 1 NPRM* Comments at 10-11. *See also* CCA *Part 1 PN* Reply at 6.

states that a five-year period "nicely balances the competing goals of preventing unjust enrichment to ineligible entities with small and rural carriers' need for flexibility and access to capital."[463]

145. A few parties, however, support making certain adjustments to strengthen our unjust enrichment rules. T-Mobile and Native Public support extending the unjust enrichment period to the full license term.[464] T-Mobile also advocates requiring licensees to repay the windfall profit, plus interest, from the sale of a license obtained with a bidding credit,[465] while Taxpayer Advocates supports requiring a DE that leases or sells a significant portion of spectrum acquired with a bidding credit within the first five years to pay back all or part of the discount it received.[466] Native Public supports allowing a license acquired with a bidding credit to be sold during the license term only by repaying the bidding credit used to obtain the license or selling the licenses to the tribe or ANC whose DE eligibility was used to obtain the credit.[467] T-Mobile also supports adopting a build-out requirement that is uniquely applicable to DEs or tethered to service-specific performance requirements to prevent spectrum warehousing and to promote facilities-based service. Specifically, T-Mobile asks that the Commission require DEs to show some evidence of build-out activity within one year after acquiring a license or clearing incumbent users.[468]

146. Most commenters, however, strongly oppose any build-out requirements that are uniquely applicable to DEs.[469] Council Tree argues that if a unique build-out restriction is imposed on DEs, the associated licenses would be less valuable and investor capital would be more difficult to obtain,[470] while KSW maintains that it would be "counter-productive to require enhanced build-out showings from those who are least equipped to do so" and that there is no reason to apply a heightened standard to DEs in this regard.[471] Rural Telcos maintain that the Commission's rules should prevent DE program abuse before licenses are granted, rather than imposing additional regulatory burdens on *bona fide* DEs (i.e., rural telephone companies) that can least afford them.[472] Although CCA supports the concept of requiring DEs to ensure they are utilizing their spectrum in order to deter speculators from using bidding credits to acquire and warehouse spectrum, it cautions against adopting any requirements that would hamstring small carriers' ability to compete or raise capital for the auction, or create undue

[463] *See* RWA *Part 1 NPRM* Comments at 10-11; *see also* M/C Partners May 21, 2015 *Ex Parte* Letter at 2 ("The current five-year rule effectively balances private and public policy interests, and should not be changed.").

[464] *See* T-Mobile *Part 1 NPRM* Comments at 17; T-Mobile *Part 1 PN* Comments at 8; Native Public *Part 1 PN* Comments at 6.

[465] *See* T-Mobile *Part 1 NPRM* Comments at 17; T-Mobile *Part 1 PN* Comments at 8.

[466] *See* Taxpayer Advocates *Part 1 NPRM* Comments at 10.

[467] *See* Native Public *Part 1 PN* Comments at 6.

[468] T-Mobile *Part 1 NPRM* Comments at 14; T-Mobile *Part 1 NPRM* Reply at 9; T-Mobile *Part 1 PN* Comments at 7; *see also* Leech Lake *Part 1 PN* Comments at 2 (recommending an adjustment to the unjust enrichment rule specifically with respect to spectrum over tribal lands to ensure that a licensee that shows no evidence of build-out in the first year of the term be required to first offer the license to tribal nations once unjust enrichment is triggered). AT&T/Rural Carriers do not specifically advocate adoption of any DE-specific build-out requirements, but do support requiring any winning bidder that obtains a license with a bidding credit to meet any and all interim performance requirements the Commission may adopt before the sale of a given license, or else forfeit the entire bidding credit associated with that individual license. *See* AT&T/Rural Carriers Joint Proposal at 2; *see also* AT&T *Part 1 NPRM* Comments at 11.

[469] KSW *Part 1 PN* Comments at 11; Council Tree *Part 1 NPRM* Comments at 30; RWA/NTCA *Part 1 NPRM* Comments at 16 (oppose any more regulatory hoops like T-Mobile's build-out plan); RWA/NTCA *Part 1 PN* Reply at 7; USCC *Part 1 PN* Reply at 9-10; Rural Telcos April 23, 2015 *Ex Parte* Letter at 3 (opposing the imposition of additional build-out/reporting requirements on DEs); USCC May 29, 2015 *Ex Parte* Letter at 2.

[470] *See* Council Tree *Part 1 NPRM* Comments at 30.

[471] *See* KSW *Part 1 PN* Comments at 11.

[472] *See* Rural Telcos April 23, 2015 *Ex Parte* Letter at 3.

burdens for DEs that are legitimately using spectrum.[473] CCA therefore urges the Commission to avoid impairing smaller competitors through accelerated build-out schedules or expansive coverage requirements that are disproportionately onerous for smaller entities.[474] USCC states that, in addition to imposing burdensome obligations exclusively on those that are least equipped to deal with them, treating DEs differently in this manner could also lead to other harms.[475] USCC notes, for example, that based on the currently anticipated schedule for the Incentive Auction, the 600 MHz band will be cleared about one to two years before the expected rollout of 5G; a non-DE licensee could delay construction until 5G becomes available, however, if a DE is required to demonstrate some level of build-out within a year after clearing, it would be forced to begin building out prior to the rollout of 5G even though, without the participation of the rest of the industry, 4G equipment for the band would not be available.[476] USCC submits that as a result, DE licensees would not be able to comply with an accelerated build-out despite their best efforts.[477] Tristar, on the other hand, maintains that DEs that are not rural telephone companies should not be held to the same build-out standards as non-DEs and should instead be given a much longer build-out timeframe and the ability to "save" all licenses through build-outs over some portion of the aggregate population of their licenses.[478]

147. Proponents of a rural service provider bidding credit support applying the same unjust enrichment rules adopted for small business bidding credits to any adopted rural service provider bidding credit with some modest changes.[479] Specifically, Blooston Rural, Rural Coalition, and RWA/NTCA support requiring an unjust enrichment payment if a rural service provider licensee assigns or transfers a license acquired with a bidding credit to a non-eligible entity within the unjust enrichment period.[480] These parties maintain, however, that neither an unjust enrichment payment nor the prohibition should apply to a license recipient that is (1) another rural telephone company or rural telco subsidiary/affiliate with a wireless or wireline presence in the applicable license area,[481] or (2) an independent wireless ETC certified in the original license area with fewer than 100,000 subscribers.[482]

148. ***Discussion.*** After a careful review of the record, we conclude that the Commission's existing rules provide a sufficient safeguard to ensure that designated entity benefits are provided only to *bona fide* small businesses and eligible rural service providers. We therefore decline to make any

[473] *See* CCA *Part 1 PN* Comments at 10; CCA *Part 1 PN* Reply at 6.

[474] *See* CCA *Part 1* PN Comments at 10. CCA states that if the Commission chooses to adopt DE-specific build-out requirements, they should be implemented in a manner that balances the interests of preventing warehousing with ensuring that smaller carriers have expanded opportunities to acquire and deploy scare spectrum, and must account for circumstances beyond a small carrier's control. *See id.* (citing the bifurcation of the Lower 700 MHz band after Auction 73 as an example of circumstances that are beyond a carrier's control). CCA submits that one way for the Commission to balance its policy objectives in this regard by creating parity between the unjust enrichment provisions and the build-out requirements for a given service by extending the unjust enrichment penalty period to coincide with the service's initial construction milestone. By way of example, CCA states that in connection with the upcoming 600 MHz auction, the Commission could extend the unjust enrichment period from five years to six years to coincide with the initial construction milestone, while proportionately maintaining the traditional descending repayment schedule as the license term progresses. *Id.* at 11.

[475] USCC *Part 1 PN* Reply a 9-10.

[476] *Id*.

[477] *See id*. at 10.

[478] Tristar *Part 1 PN* Comments at 9-10; Tristar *Part 1 PN* Reply at 3.

[479] *See, e.g.*, Rural Coalition *Part 1 PN* Comments at 3, 7.

[480] See Blooston Rural *Part 1 PN* Comments at 3, 7, 9-10; Rural Coalition *Part 1 PN* Comments at 7; RWA/NTCA *Part 1 PN* Comments at 9, 11-12.

[481] Rural Coalition *Part 1 PN* Comments at 7; *see also* Blooston Rural *Part 1 PN* Comments at 3 (stating that service "presence" should mean ETC status).

[482] Rural Coalition *Part 1 PN* Comments at 7; RWA/NTCA *Part 1 PN* Comments at 9.

adjustments to the unjust enrichment period and repayment schedule. We agree with commenters that increasing the unjust enrichment period will impede the ability of DEs to both access capital and participate in auctions.[483] As WISPA notes, investors in the telecommunications industry typically want to recover their investments within five years.[484] RWA also notes that a five year unjust enrichment period allows small businesses and rural carriers to quickly respond to rapid industry changes, changing business models, and capital demands, thereby providing them with the necessary flexibility to compete against larger carriers.[485] Overall, the record does not provide us with sufficient evidence to demonstrate that an extension of the current unjust enrichment period will yield greater protections without causing undue harm to *bona fide* small businesses and eligible rural service providers. To the contrary, the record is replete with evidence from the numerous parties that oppose extending the unjust enrichment period that it will impede DEs' ability to raise and retain capital and successfully participate in auctions.

149. The Commission's current unjust enrichment rules—in combination with the other actions we take today—balance commenters' concerns regarding the unjust enrichment of ineligible entities with the need to provide increased operational flexibility to DEs given the evolving wireless marketplace. Specifically, our adoption of a totality-of-the-circumstances approach in evaluating the eligibility of DEs will allow us to consider all the agreements and relationships that a DE maintains with its investors. In addition, our decision to limit the ability of a DE's disclosable interest holders to use the spectrum in any way during the five-year unjust enrichment period where the nexus of use is more than 25 percent and the interest in the DE is ten percent or greater will prevent the benefits of the program from flowing to the financial investors in a DE. As our revised rules demonstrate, we will remain vigilant in undertaking a careful review of all applications by entities seeking to acquire or retain bidding credits. In so doing, we expect to properly execute our statutory responsibility to continue to prevent unjust enrichment of ineligible entities.

150. We also decline to adopt T-Mobile's proposal that we impose additional build-out and reporting obligations specific to DEs.[486] There is very limited support for such a requirement in the record, and the few parties that support it offer no evidence of the benefit it would provide or the harm that will result in the absence of any such requirement. Conversely, the record contains ample evidence from the numerous parties that oppose such a requirement that it is likely to be burdensome, both administratively and in terms of their ability to raise capital.[487] After weighing how the proposal may affect a small business's ability to access capital, prevent abuse of the designated entity program, and avoid unjust enrichment, we are persuaded that any potential benefit that might be gained from adopting such a requirement a would be outweighed by the harms it would cause. We agree with commenters opposing such a requirement that a construction requirement specifically targeted to DEs would likely impose unnecessary administrative and operational burdens with no demonstrated benefit. This requirement could also have the effect of hindering initiatives to spur additional marketplace competition by *bona fide* small businesses and eligible rural service providers. Accordingly, we do not adopt any DE-specific construction requirements.

151. *Application of Unjust Enrichment Rules to Recipients of Rural Service Provider Bidding Credit*. As discussed above, we will apply our existing unjust enrichment rules to licensees that take

[483] Blooston *Part 1 PN* Comments at 7; Council Tree *Part 1 PN* Comments at 31; KSW *Part 1 PN* Comments at iii, 11; MMTC *Part 1 PN* Comments at 14; USCC *Part 1 PN* Comments at Att. at 32; CCA *Part 1 PN* Reply at; CCA *Part 1 NPRM* Comments at 10; Council Tree *Part 1 PN* Reply at 11-17; M/C Partners *Part 1 PN* Reply at 2; ARC *Part 1 NPRM* Reply at 2; Blooston Rural *Part 1 NPRM* Reply at 9; Council Tree *Part 1 NPRM* Reply at 11;KSW *Part 1 NPRM* Reply at 12; CCA *Part 1 NPRM* Comments at 10; DE Coalition *Part 1 NPRM* Comments at 26; RWA *Part 1 NPRM* Comments at 9-11; WISPA *Part 1 NPRM* Comments at 13.

[484] WISPA *Part 1 NPRM* Comments at 13.

[485] RWA *Part 1 NPRM* Comments at 10-11.

[486] T-Mobile *Part 1 NPRM* Comments at 14; T-Mobile *Part 1 NPRM* Reply at 9; T-Mobile *Part 1 PN* Comments at 7.

[487] *See supra* note 479.

advantage of the new rural service provider bidding credit we adopt today. Therefore, a licensee that assigns or transfers a license acquired with a rural service provider bidding credit to an entity that meets the eligibility requirements for such credit will not be required to make an unjust enrichment payment. But if the licensee assigns or transfers a license acquired with a rural service provider bidding credit to an entity that is not eligible for such a credit within the unjust enrichment period, an unjust enrichment payment will be required.

D. Alternatives to Promote Small Business Participation in the Wireless Sector

152. In the *Part 1 NPRM*, we sought comment on suggestions that would enable the DE program to remain a viable mechanism for small businesses to gain flexibility to access capital, compete in auctions, and participate in new and innovative ways to provision services in a mature wireless industry.[488] Several commenters offered alternatives they contend the Commission could pursue to facilitate small business access to benefits in both the auction and secondary market contexts. AT&T suggests that providing incentives for secondary market transactions or virtual networks may offer a more direct path to including more valuable small businesses in the telecommunications industry and may be a more effective mechanism for DE participation in wireless markets than facilitating participation in auctions due to the cost of licenses and capital needed to build networks.[489] Blooston Rural advocates allowing a winning bidder to deduct from the auction purchase price the *pro rata* portion of its winning bid payment for any area that is partitioned to a rural telephone company or cooperative to provide another avenue for rural service providers to obtain licenses for smaller areas that correspond to their existing service areas.[490] CCA and ARC agree that Blooston Rural's proposal would benefit DEs by providing incentives for partitioning and promoting secondary market transactions,[491] but ARC states that the incentives would be even greater if the winning bidder received a 125 percent credit for partitioning to any DE, not just a rural telco.[492] NTCH states that diverse ownership has been shown to enhance competition, spur innovation in services, permit local-based service to customers, and spread the benefits of spectrum to a broader segment of the population, and proposes giving a 50 percent "diversity credit" to bidders who can deliver this important diversity benefit by acquiring licenses.[493] ARC agrees that such a credit would promote wide dissemination of licenses as required by the Communications Act.[494]

153. Based on the comments received in response to the *NPRM*, we sought comment in the *Part 1 PN* on these alternatives.[495] We also asked whether strengthening the Commission's build-out requirements and improving processes to reclaim licenses provide opportunities for small businesses to gain access to spectrum and increase diversity of license holders, and whether there are alternative frameworks that the Commission should consider to promote a diverse telecommunications ecosystem, including incentives for secondary market transactions or virtual networks that could provide a more direct path into the industry for all entities, including DEs.[496] RWA/NTCA support Blooston Rural's rural partitioning bidding credit proposal, submitting that it would encourage larger carriers to facilitate rural carrier participation in the provision of wireless services.[497] MMTC proposes that we consider a variety

[488] *See Part 1 NPRM*, 29 FCC Rcd at 12440 ¶ 36, 12443-44 ¶ 47, 12444 ¶ 50, 12471 ¶ 127.

[489] *See* AT&T *Part 1 NPRM* Reply at 11-12.

[490] *See* Blooston Rural *Part 1 NPRM* Comments at 11-12; Blooston Rural *Part 1 NPRM* Reply at 1-2. *See also* Blooston Rural *Part 1 PN* Comments at 14-15; Blooston Rural *Part 1 NPRM* Reply at 6.

[491] *See* CCA *Part 1 NPRM* Reply at 5-6; ARC *Part 1 NPRM* Reply at 4.

[492] *See* ARC *Part 1 NPRM* Reply at 4.

[493] *See* NTCH *Part 1 NPRM* Comments at 5.

[494] *See* ARC *Part 1 NPRM* Reply at 5.

[495] *Part 1 PN*, 30 FCC Rcd at 4163-64 ¶¶ 23-24.

[496] *Id.*

[497] *See* RWA/NTCA *Part 1 PN* Comments at 14-15.

of options that would add to a reformed DE program, among them, consideration of secondary market transactions as a factor in evaluating market competition and in reviewing waiver requests relating to ownership(including in the mergers and acquisitions and IP transition contexts), restoration of our former tax certificate policy, and establishment of a new bidding credit or installment payment program for entities that engage in secondary market transactions.[498] The National Urban League suggests that any carrier that participates in secondary market transactions with designated entities could be provided a bidding credit for future auctions.[499] NTCH suggests that the concentration of spectrum in a handful of companies can be reduced by offering significant discounts to entities that hold less than 20 megahertz of spectrum in a given market and that are not also counted as nationwide providers as defined by the Commission in the *Part 1 NPRM*, and reiterates its earlier proposal to provide a 50 percent "diversity credit" to such entities.[500] CCA asks the Commission to consider supplemental measures to small business bidding credits that address the challenges smaller carriers face in the secondary market for spectrum, and proposes that we provide incentives in the secondary market by offering carriers a license term extension in exchange for partitioning or disaggregating unused portions of their spectrum to small carriers or to serve rural areas.[501]

154. As more fully explained below, based on the record, we decline at this time to adopt any of the alternatives recommended by interested parties.

155. *Rural Partitioning Bidding Credit*. We decline to adopt a rural partitioning bidding credit for entities that partition their licenses area to a rural telephone company or cooperative. We note that none of the commenters supporting this approach provided any details about how such a proposal could be implemented, and we are concerned that the proposal would be complicated to implement without providing any meaningful benefit. Moreover, we conclude that the policy concern the proposal seeks to address, which relates to facilitating access to spectrum by rural service providers, is sufficiently addressed by our adoption of a rural service provider bidding credit, as discussed above.

156. *Diversity Bidding Credit*. As discussed above, to avoid having an excessive concentration of licenses held by a small number of providers, NTCH proposes a 50 percent "diversity credit" for entities that hold less than 20 megahertz of spectrum in the market at issue and who are not also counted as nationwide providers.[502] We note that in its *Mobile Spectrum Holdings Report and Order*, the Commission considered and rejected requests to offer bidding credits based on the level of spectrum holdings.[503] We find that the very limited record in this proceeding offers no new evidence to support disturbing our prior conclusion.

157. *Enhanced Build-Out Rules*. Based on the record, we decline to adopt any enhanced build-out rules to give smaller providers an opportunity to obtain spectrum that has not been built out by a licensee. We acknowledge the importance of our build-out rules; however, we did not receive any specific comments on this question in response to our inquiry and, therefore, conclude that the record is not sufficiently developed to warrant any the adoption of any enhanced build-out rules at this time.[504]

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[498] *See* MMTC *Part 1 PN* Comments at 18-19.

[499] NUL July 9, 2015 *Ex Parte* Letter at 2.

[500] *See* NTCH *Part 1 PN* Comments at 2, 5-6.

[501] *See* CCA *Part 1 PN* Comments at 16-17.

[502] *See* NTCH *Part 1 NPRM* Comments at 5; NTCH *Part 1 PN* Comments at 2, 5-6. *See also* ARC *Part 1 NPRM* Reply at 5.

[503] *See Mobile Spectrum Holding Order*, 29 FCC Rcd at 6202 ¶ 168 ("We also find that our market-based spectrum reserve is more likely to achieve our purposes more effectively than proposals by CCA and DISH to offer bidding credits based on the level of spectrum holdings.")

[504] As more fully discussed in Section II.C. (Unjust Enrichment), the limited comment we received concerning build-out requirements was specifically in response to our requests in the *NPRM* and the *Part 1 PN* for comment on how to strengthen our unjust enrichment rules, from commenters proposing that we impose additional build-out and

158. *Incentives for Secondary Market Transactions or Virtual Networks*. As noted above, AT&T suggested in its comments on the *NPRM* that providing incentives for secondary market transactions or virtual networks may offer a more direct path for more valuable small businesses in the telecommunications industry and may be more effective than facilitating participation in auctions due to the cost of licenses and capital needed to build networks. However AT&T did not offer any specific proposals in connection with this suggestion, and did not further comment on this topic in response to the *Part 1 PN*. As discussed above, MMTC suggested in response to the *Part 1 PN* that the Commission consider a variety of options to augment a reformed DE program.[505] We decline to adopt MMTC's recommendation that we consider secondary market transactions as a factor in deciding whether to grant a carrier rule waivers relating to ownership.[506] In its Mobile Spectrum Holdings proceeding, the Commission addressed commenters' recommendations that the Commission adopt a similar consideration in the spectrum holdings context, namely, that elements of a proposed transaction that facilitate diversity be considered in balancing the benefits and harms of the transaction.[507] We declined in the *Mobile Spectrum Holdings Report and Order* to adopt a formal set of guidelines, noting that the Commission retains the authority to consider all factors that could affect the likely competitive impact of a proposed transaction.[508] We find that the limited record in this proceeding does not provide sufficient justification to support adopting such a requirement, and therefore decline to adopt MMTC's recommendation. We note again that the Commission retains the right to consider such factors in evaluating specific future transactions, as the Commission has "encouraged the use of secondary market transactions … to transition unused spectrum to more efficient use and allow network providers to obtain access to needed spectrum for broadband deployment."[509] We also decline to adopt MMTC's recommendation that we consider secondary market transactions as a factor in determining whether to report to Congress that the wireless marketplace is competitive.[510] We note that the Wireless Telecommunications Bureau recently sought comment on the role of secondary market transactions in a public notice in connection with the annual report on the state of competition in mobile wireless.[511] Accordingly, we will address the issue of secondary market transactions as a factor in determining whether access to sufficient spectrum exists for multiple service providers to be able to provide robust competition in the context of that proceeding. With regard to MMTC's other recommendations, MMTC did not offer any specific details about how they might be implemented, nor did we receive any comment from other commenters on this topic or on MMTC's recommendations.[512] Moreover, we observe that MMTC's recommendation that we restore our previous tax certificate policy appears to be outside the scope of our authority.[513] We therefore conclude

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reporting obligations on DEs by requiring them to demonstrate tangible steps toward deployment within one year of acquiring license(s) or clearing incumbent spectrum users. We declined to adopt any build-out requirements specifically applicable to only DEs. *See* Section II.C. (Unjust Enrichment Section).

[505] MMTC *Part 1 PN* Comments at 18-19.

[506] *Id*.

[507] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6138-39 ¶¶ 281-82.

[508] *Id*. at 6139 ¶ 282.

[509] *See Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10715 ¶ 46 (citing Federal Communications Commission, Connecting America: The National Broadband Plan, Recommendation 5.7, at 83(rel. Mar. 16, 2010)).

[510] *See* MMTC *Part 1 PN* Comments at 19.

[511] Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition, *Public Notice*, 30 FCC Rcd 5062, 5066 (2015) (seeking comment on whether there is access to sufficient spectrum, either through Commission auctions or through secondary market transactions for multiple service providers to be able to provide robust competition in connection with the 18th Mobile Wireless Competition Report).

[512] We note that AT&T did not further comment on this topic in response to the *Part 1 PN*, nor did we receive comment on this topic from any other commenters.

[513] *See* Pub. L. No. 104-7 § 2, 109 Stat. 93 (1995) (Repeal of Nonrecognition on FCC Certified Sales and Exchanges).

that the record is not sufficiently developed to allow us to act on this suggestion.

159. *License Term Extension in Exchange for Partitioning*. We decline to adopt CCA's proposal that we provide licensees with a license term extension in exchange for partitioning or disaggregating unused portions of their spectrum to small carriers or to serve rural areas. We note that CCA did not offer any details about how such a proposal could be implemented. Moreover, we did not receive comments from other any party on this proposal. We therefore conclude that the record is not sufficiently developed to allow us to act on CCA's proposal.

E. DE Reporting Requirements

160. ***Background.*** Section 1.2110(n) of our rules requires DE licensees to file an annual report with the Commission that includes, at a minimum, a list and summaries of all agreements and arrangements, extant or proposed, that relate to eligibility for DE benefits.[514] The list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement.[515] DEs are required to file a report for each of their licenses no later than, and up to five business days before, the anniversary of the date of license grant.[516]

161. In the *Part 1 NPRM*, we proposed to repeal the annual DE reporting requirement, stating that the information that DEs are required to include in their annual reports is duplicative of information that DEs provide in their auction and license applications.[517] We also observed that for licensees with multiple auction licenses, each having a different grant date, the burden of the annual reporting requirement is exacerbated by the obligation to file multiple reports each year.[518]

162. ***Discussion.*** In light of the increased flexibility we grant to DEs in this proceeding, we conclude that our ability to oversee the award of DE benefits, and our responsibility to prevent unjust enrichment, will be better served by retaining the annual reporting requirement, as modified and clarified below. While the reporting requirement of section 1.2110(n) is similar to other requirements in our competitive bidding rules, it is not identical to any of them.[519] Moreover, the changes we adopt today will eliminate the reporting redundancies that two commenters mentioned.[520] We are also cognizant of the comments filed by the DE Coalition and MMTC, urging us to rely on our reporting requirements as part of an effective system of checks and balances on waste, fraud, and abuse in the DE program.[521]

163. In deciding to retain the annual reporting requirement, we have carefully evaluated the

[514] 47 C.F.R. § 1.2110(n); *see DE Second Report and Order*, 21 FCC Rcd at 4770 ¶¶ 47–48; *DE Order on Reconsideration*, 21 FCC Rcd at 6719 ¶ 42.

[515] *DE Second Report and Order*, 21 FCC Rcd at 4770 ¶¶ 47–48; *see id.* ¶ 46; 47 C.F.R. § 1.2110(n).

[516] 47 C.F.R § 1.2110(n).

[517] *Part 1 NPRM*, 29 FCC Rcd at 12453-54 ¶¶ 77-79; *see* 47 C.F.R. §§ 1.2110(j), 1.2112(b)(2)(iii); *see also id.* § 1.2114. We also acknowledged in the *Part 1 NPRM* that opposition to the annual reporting requirement was first lodged in the Petition for Partial Reconsideration and/or Clarification filed by Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP ("Blooston Rural") on June 2, 2006 ("Blooston Rural June 2, 2006 Petition"). *See also* Reply to Opposition to Petitions for Reconsideration, Blooston Rural (filed July 24, 2006); *Part 1 NPRM*, 29 FCC Rcd at 12453 n.151.

[518] *Part 1 NPRM*, 29 FCC Rcd at 12453-54 ¶ 78.

[519] *See* 47 C.F.R. §§ 1.2110(j), 1.2112(b)(2)(iii); *see also id.* § 1.2114.

[520] Blooston Rural *Part 1 NPRM* Comments at 11; Blooston Rural *Part 1 NPRM* Reply at 8-9; RWA *Part 1 NPRM* Comments at ii, 11; RWA *Part 1 NPRM* Reply at ii, 11; RWA/NTCA *Part 1 PN* Reply at 7-8.

[521] *See* DE Coalition *Part 1 NPRM* Comments at 32-33; MMTC *Part 1 PN* Comments at 14-15; *see also* T-Mobile *Part 1 NPRM* Reply at 9; T-Mobile *Part 1 PN* Comments at 7-8. T-Mobile also proposes that we impose additional build-out and reporting obligations on DEs. *See* T-Mobile *Part 1 NPRM* Comments at 14; T-Mobile *Part 1 NPRM* Reply at 9; T-Mobile *Part 1 PN* Comments at 7. We address this proposal below in a separate section of this order. *See infra* paras. 146, 150.

concerns of Blooston Rural and RWA, both of which support repeal of the annual DE reporting requirement.[522] The objections of Blooston Rural and RWA are twofold—that licensees with multiple auction licenses, each having a different grant date, must file multiple annual reports numerous times per year, and that the information provided under the annual reporting requirement is duplicative of information required to be reported by other Commission rules.[523] To resolve these concerns, we amend the annual DE reporting requirement and provide four clarifications.

164. To eliminate the burden for some DEs of having to file more than one annual report at various times of the year, we will modify our annual reporting requirement to require that all annual reports be filed no later than September 30 of each calendar year. This annual report will reflect the status of each individual license subject to unjust enrichment requirements that is held by a particular licensee as of August 31 of that same calendar year including all proposed or executed agreements or arrangements affecting DE benefit eligibility.[524] This September 30 deadline will apply regardless of the grant date of an individual license. This rule modification will reduce the administrative and related burdens that the annual reporting requirement might pose for certain small businesses or rural service providers without undermining our ability to obtain the information contained in the DE reports.

165. We also specify the following transition from our current annual report filing process to the newly-adopted modified requirement. Any designated entity licensee that would have had a report due between the release date of this order and the applicable effective date of the amended rule may defer filing its annual report until September 30, 2016. This transition will enable us to balance the goal of minimizing the administrative burden on DEs with our objective of having current DE information on file.

166. In addition, we modify our rules to reduce the administrative burden on DEs and address questions that the Commission has received in the past from DEs. First, the section 1.2110(n) annual reporting requirement applies only to licenses acquired with a DE bidding credit and still held subject to unjust enrichment obligations.[525] Second, when a DE assigns or transfers a license to another DE, the DE that holds the license on September 30 of the year in which the application for the transaction is filed is responsible for complying with section 1.2110(n). Finally, filers need not list agreements and arrangements otherwise required to be reported under section 1.2110(n) so long as they have already filed that information with the Commission and the information on file remains current. In such a situation, the filer must include in its annual report[526] both the ULS file number of the report or application containing the current information and the date on which that information was filed. We also clarify that the annual DE reporting requirement, and all DE reporting requirements, will, on the effective date of the rules we adopt today, apply to rural service providers as well as to other DEs.

167. Finally, we stress that, in light of the increased flexibility and benefits available to DEs under the rules we adopt today, we will continue to rely on the information produced pursuant to the DE reporting requirement to help us monitor the eligibility of those awarded DE bidding credits. Accordingly, we remind DEs that we expect them to comply fully with the annual reporting requirement, as modified and clarified herein. DEs also remain obligated to provide the Commission with all of the information relevant to their initial and ongoing eligibility to acquire and retain DE benefits under our

[522] *See* Blooston Rural *Part 1 NPRM* Comments at 11; Blooston Rural *Part 1 NPRM* Reply at 8-9, 11-12; RWA *Part 1 NPRM* Comments at ii, 11; RWA *Part 1 NPRM* Reply at ii, 11; *see also* USCC *Part 1 PN* Comments at Att. at 22-23.

[523] *Part 1 NPRM*, 29 FCC Rcd at 12453-54 ¶ 78.

[524] We believe that an August 31 cutoff date allows DEs to provide reasonably current information while affording them sufficient time to finalize their reports before the September 30 filing deadline.

[525] *See* 47 C.F.R. § 1.2111.

[526] *See* FCC Form 611-T; The Wireless Telecommunications Bureau Announces FCC Form 609-T and FCC Form 611-T Are Available for filing Designated Entity Reportable Eligibility Events and Annual Reports, *Public Notice*, 21 FCC Rcd 8828 (2006).

other reporting requirements, in a timely and accurate manner, which will be particularly important given the flexibility we have afforded them to determine eligibility for designated entity benefits on a license-by-license basis. Toward that end, we remind DEs that they have an ongoing obligation to provide information regarding any agreements entered into after the license grant(s) that, had they been in existence, would have had to be disclosed at the long-form application stage to demonstrate DE eligibility, including, for example, agreements between a DE and its investors that are relevant for evaluating control or spectrum use agreements that are relevant for compliance with our newly-adopted attribution rules.[527]

F. MMTC's White Paper Requests

168. ***Background.*** In February 2014, MMTC submitted a White Paper detailing several policy recommendations to advance minority and women spectrum license ownership.[528] In addition to requesting the elimination of the AMR rule, an increase in bidding credits, and a substantive review of proposed DE rules, all of which are addressed above, the White Paper requested that the Commission take action in several additional areas. In the *Part 1 NPRM*, we sought comment on MMTC's additional proposals, including our tentative conclusion that some of them are outside the scope of this proceeding, including: (1) incorporating diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions and secondary market spectrum transactions; and (2) supporting increased funding for and statutory amendments to the Telecommunications Development Fund (TDF).[529]

169. ***Discussion.*** Outside of the request to eliminate the AMR rule as discussed elsewhere, we decline to adopt MMTC's other proposals. Besides the comments regarding the repeal of the AMR rule, we received two comments on the other proposals including in MMTC's White Paper. The DE Coalition urged the Commission to adopt MMTC's proposals to incorporate diversity and inclusion into the Commission's public interest analysis of mergers and acquisitions and secondary market spectrum transactions, complete the *Adarand* studies updating the section 257 studies released in 2000, and finally regularize procedural requirements.[530] The National Urban League argues that the Commission should use proceeds from the incentive auction to "reinvigorate and fully underwrite the Telecommunications Development Fund."[531] As discussed above, we adopt our proposal to repeal the AMR rule and replace it with a two-pronged analysis.[532] The lack of a record on MMTC's proposals other than repeal of the AMR rule suggests that this is the key proposal in MMTC's White Paper and as stated above, we believe that repeal of the AMR rule and replacement with a two-pronged analysis adequately addresses MMTC's concerns regarding minority and women spectrum license ownership. We are committed to providing innovative, *bona fide* small businesses—including minority- and women-owned businesses—the opportunity to participate meaningfully in the Incentive Auction, and to spur additional competition, investment and consumer choice in the wireless marketplace. We believe that the other decisions being made here will promote the overall objectives that are the goals of MMTC within the bounds of our authority. Accordingly, except for repeal of the AMR rule, we decline to adopt MMTC's proposals.

III. OTHER PART 1 CONSIDERATIONS

[527] *See* 47 C.F.R. §§ 1.2110(j), 1.2112(b)(2)(iii)-(iv), 1.2114.

[528] *Digital Déjà Vu*.

[529] We note that MMTC's request with respect to "ongoing recordkeeping of DE performance" refers to "retain[ing] specific information about the [minority-owned business enterprises] and [woman-owned business enterprises] status of bidders, in addition to the small business status." *Id.* at 33. The Commission has sought comment in WT Docket No. 13-135 on the need to collect information on the participation of minority and women-owned enterprises in the mobile wireless industry, pursuant to similar MMTC requests. Wireless Telecommunications Bureau Seeks Further Comment on the State of Mobile Wireless Competition and the Role of Minority and Women-Owned Business Enterprises and Extends Period for Reply Comments, *Public Notice*, 28 FCC Rcd 9125 (2013).

[530] DE Coalition *Part 1 NPRM* Comments at 36-37.

[531] NUL July 9, 2015 *Ex Parte* Letter at 3.

[532] *See* Section II.A.1 (AMR Rule).

170. We continue to standardize and streamline our competitive bidding rules in advance of the Incentive Auction by adopting other revisions to our Part 1 competitive bidding rules. These revisions will improve transparency and efficiency of the auctions process, as well as ensure that appropriate safeguards are in place to maintain the integrity of the auctions process. Specifically, we revise the former defaulter rule consistent with relief granted to applicants for Auction 97, codify a prohibition on multiple auction applications by the same entities, and impose limits on the filing of applications by commonly-controlled entities. We also prohibit joint bidding arrangements, while permitting certain pre-existing operational, business, and pro-competitive relationships and make related modifications to the rule prohibiting certain communications. Finally, we harmonize the modifications adopted today with the Part 1 competitive bidding rules adopted in past proceedings.

A. Former Defaulter Rule

171. ***Background***. In the *Part 1 NPRM*, the Commission proposed to modify its former defaulter rule.[1] The former defaulter rule requires an applicant that has defaulted on any Commission license or has been delinquent on any non-tax owed to any federal agency, but has since remedied all such defaults and delinquencies, to pay an upfront payment that is 50 percent more than the normal upfront payment amount in order to be eligible to bid in an auction, provided that the applicant is otherwise qualified.[2] The Commission tentatively concluded that, given the tremendous growth of the wireless industry since the inception of the rule, the time was ripe to modify it.[3] Consistent with the provisions in the *Former Defaulter Waiver Order* adopted for applicants in Auction 97,[4] the *Part 1 NPRM* proposed to narrow the reach of the Commission's former defaulter rule by codifying four exclusions from the general rule that were first announced in the *Former Defaulter Waiver Order*.[5]

172. The Commission also sought comment in the *Part 1 NPRM* on several approaches to limit the scope of individuals and entities that an auction applicant must consider when determining its status as a former defaulter.[6] In the subsequent *Part 1 PN*, we asked for comment on additional viewpoints and suggestions from commenters, specifically whether to adopt an additional exclusion based on an applicant's credit rating, as suggested by AT&T or, alternatively, whether to eliminate the former defaulter rule entirely, as originally proposed by NTCH and Sprint.[7] Nearly all commenters support the

[1] *Part 1 NPRM*, 29 FCC Rcd at 12457-63 ¶¶ 86-97.

[2] 47 C.F.R. § 1.2106(a); *see also* 47 C.F.R. 1.2105(a)(2)(xi) (former defaulter certification requirements). *See also Part 1 Fifth Report & Order*, 15 FCC Rcd at 15317 ¶ 42, 15317 n.142.

[3] *Part 1 NPRM*, 29 FCC Rcd at 12457-58 ¶ 86.

[4] *See* Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules; Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014 (Auction 97), *Order*, 29 FCC Rcd 10828, 10828 ¶ 1 (2014) (*Former Defaulter Waiver Order*). We note that the *Former Defaulter Waiver Order* was based on a consensus position advanced by a wide cross section of industry trade groups in connection the Auction 97 waiver request by DIRECTV Group, Inc. and EchoStar LLC.

[5] *See Part 1 NPRM*, 29 FCC Rcd at 12457-58 ¶ 86;*Former Defaulter Waiver Order*, 29 FCC Rcd at 10828 ¶ 1 (2014).

[6] *Part 1 NPRM*, 29 FCC Rcd at 12462-63 ¶¶ 95-97.

[7] *Part 1 PN*, 30 FCC Rcd at 4164-65 ¶ 26; AT&T *Part 1 NPRM* Comments at 21-22 (proposing exemption based on applicant's credit rating); AT&T *Part 1 PN* Comments at 4 (urging elimination or significant reform of the rule); AT&T *Part 1 PN* Comments at 18-19 (same proposal as in NPRM); AT&T *Part 1 PN* Reply at 9-10 (arguing for the elimination of the rule or, alternatively, adoption of the proposed exclusions along with its proposed "credit rating" exclusion); AT&T *Part 1 PN* Reply at 10 (same proposal in NPRM); NTCH *Part 1 NPRM* Comments at 7 (asserting that the former defaulter rule "should either be deleted altogether or be modified to eliminate small, dated, non-final, and non-FCC defaults"); NTCH *Part 1 PN* Comments at 6; Sprint *Part 1 NPRM* Comments at 15-16; Sprint *Part 1 NPRM* Reply at 7-8; Letter from John T. Scott, VP & Deputy General Counsel, Verizon, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170, at 2 (extending support for tailoring the former defaulter rule).

NPRM's proposal to codify the four exclusions articulated in the *Former Defaulter Waiver Order*.[8] Some, such as AT&T and Chugach, request modest changes, such as the adoption of another exclusion based on an applicant's "investment grade" credit[9] or to index the proposed $100,000 threshold for inflation.[10] Moreover, AT&T, CCA, CTIA, and Chugach contend that the current rule sweeps too broadly and imposes unnecessary and disproportionate financial burdens on auction applicants.[11]

173. ***Discussion***. In an effort to simplify the auction process and minimize the administrative and implementation costs for bidders, we adopt the *NPRM's* proposed changes to the former defaulter rule, none of which any party opposes.[12] Specifically, we exclude any cured default on a Commission license or delinquency on a non-tax debt owed to a Federal agency for which any of the following criteria are met: (1) the notice of the final payment deadline or delinquency[13] was received more than seven years before the relevant short-form application deadline;[14] (2) the default or delinquency amounted to less than

[8] *See, e.g.*, AT&T *Part 1 NPRM* Comments at 21-22; Chugach *Part 1 NPRM* Comments at 3.

[9] *See* AT&T *Part 1 NPRM* Comments at 21-22.

[10] *See, e.g.*, Chugach *Part 1 NPRM* Comments at 2-3.

[11] *See* AT&T *Part 1 NPRM* Comments at 18-21; AT&T *Part 1 PN* Comments 18-19; CCA *Part 1 NPRM* Reply at 4, 12-13; CCA *Part 1 PN* Comments at 4, 17; Chugach *Part 1 NPRM* Comments at 2-3; CTIA *Part 1 NPRM* Comments at 3.

[12] We received a request for clarification of our rules concerning the treatment of debts when an entity is in bankruptcy, along with the subsequent treatment of that entity post-bankruptcy with respect to its former defaulter status. We note that the Commission has generally taken the view that a reorganized debtor under Chapter 11 of the Bankruptcy Code that has defaulted or been delinquent on any non-tax debt owed to any Federal agency prior to being in, or during, bankruptcy is not viewed as a former defaulter for purposes of evaluating the short-form certification under section 1.2105. *See* 47 C.F.R. §§ 1.2105(a)(2)(xi), 1.2109; NTCH *Part 1 NPRM* Comments at 7-8. This view is consistent with Section 525(a) of the United States Bankruptcy Code, which prohibits a governmental entity, when granting licenses, from discriminating against former debtors, or persons associated with such debtors, for failure to pay a debt dischargeable under the United States Bankruptcy Code. *See* 11 U.S.C. § 525(a).

[13] Depending on the origin of any federal non-tax debt giving rise to a default or delinquency, notice to a debtor may include notice of a final payment deadline or notice of delinquency and may be express or implied. For purposes of the certifications required on a short-form auction application, a debt will not be deemed to be in default or delinquent until after the expiration of a final payment deadline. *See, e.g.*, Letter to Cheryl A. Tritt, Esq., from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, 19 FCC Rcd 22907 (2004). Thus, to the extent that the rules providing for payment of a specific federal debt permit payment after an original payment deadline accompanied by late fee(s), such debts would not be in default or delinquent for purposes of applying the former defaulter rules until after the late payment deadline. In addition, we provide the following clarification with regard to defaults on Commission licenses. Any winning bidder that fails timely to pay its post-auction down payment or the balance of its bid payment or is disqualified for any reason after the close of an auction will be in default and subject to a default payment. *See* 47 C.F.R § 1.2109(c). Commission staff provide individual notice of the amount of such a default payment as well as procedures and information required by the Debt Collection Improvement Act of 1996, including the payment due date and any charges, interest, and/or penalties that accrue in the event of delinquency. *See, e.g.*, 31 U.S.C. §§ 3716, 3717; 47 C.F.R. §§ 1.1911, 1.1912, 1.1940. *See also* Auction of Advanced Wireless Services (AWS-3) Licenses Closes; Winning Bidders Announced for Auction 97, *Public Notice*, 30 FCC Rcd 630 (2015). For purposes of the certifications required on a short-form auction application, such notice provided by Commission staff assessing a default payment arising out of a default on a winning bid, constitutes notice of the final payment deadline with respect to a default on a Commission license.

[14] The *Former Defaulter Waiver Order* notes that several federal laws include provisions articulating the same time periods for certain debts and delinquencies. For instance, the Internal Revenue Service has a seven-year period to review a claim for a loss from worthless securities or bad debt deduction. *See Former Defaulter Waiver Order*, 29 FCC Rcd at 10834 ¶ 17. Some commenters directly support this exclusion. *See, e.g.*, AT&T *Part 1 NPRM* Comments at 18-21 (noting that the current rule's unlimited time period captures former defaults and delinquencies which are no longer relevant to an applicant's ability to meet its financial commitments to the Commission). *See*

$100,000;[15] (3) the default or delinquency was paid within two quarters (i.e., six months) after receiving the notice of the final payment deadline or delinquency;[16] or (4) the default or delinquency was the subject of a legal or arbitration proceeding and was cured upon resolution of the proceeding.[17] This approach aims to balance commenters' concerns that the rule is overly broad with the Commission's long-standing goals of ensuring that auction participants are financially responsible.[18] Additionally, we will implement our revised rules on a prospective basis, including for the Incentive Auction.[19]

174. We decline to adopt AT&T's proposal to exempt an applicant from former defaulter status if it has an "investment grade" credit rating by a credit agency such as Moody's and Standard and Poor's, or to accept letters of credit from a Federal Deposit Insurance Corporation member institution for those businesses that do not have a credit rating.[20] No comments squarely addressed these ideas. Investment credit ratings, standing alone, are not necessarily indicative of an entities' financial wherewithal to participate in a Commission auction.[21] Moreover, as a practical matter, we conclude that implementing the AT&T proposal, as part of our time-limited auction application review process, would be administratively burdensome and unnecessary given the additional flexibility we provide with the changes described above. Inevitably, we recognize there may be unique or unusual circumstances that may not squarely fall under one of the exclusions we adopt today. Consistent with the waiver standard of section

also CCA *Part 1 NPRM* Comments at 11-12; Chugach *Part 1 NPRM* Comments at 2-3; CTIA *Part 1 NPRM* Comments at 2-3.

[15] We decline to adopt Chugach's proposal to index the $100,000 against inflation because the proposal would be administratively burdensome to implement and may create uncertainty for auction applicants. *See* Chugach *Part 1 NPRM* Comments at 3.

[16] The date of receipt of the notice of a final default deadline or delinquency by the intended party or debtor is an appropriate triggering mechanism for verifying receipt of notice because it provides a concrete date for triggering the six-month time period under this provision. *Part 1 NPRM*, 29 FCC Rcd at 12461 ¶ 92 n.198 (citing *Former Defaulter Waiver Order*, 29 FCC Rcd at 10835-36 ¶ 19). Notably, this approach is consistent with the grace period provided in the installment payment context. *See* 47 C.F.R. § 1.2110(g)(4) (allowing two quarter [6 months] grace periods).

[17] We decline to adopt the proposals of NTCH and Sprint to include in this exception proceedings based on requests to waive rules requiring payment of debt or fixing the date by which a debt must be paid. *See* NTCH *Part 1 NPRM* Comments at 9; Sprint *Part 1 NPRM* Comments at 17. In support of its proposal, NTCH suggests that the Commission apply the "same policy here as [the Commission] uses in its application of the 'red light' rule." NTCH *Part 1 NPRM* Comments at 9. Our decision to exclude delinquent debt subject to pending waiver proceedings from the exception is in fact consistent with our limited application of the red light rule to current defaulters. Under the red light rule, debt to the Commission is not delinquent for red light purposes during the pendency of a judicial or administrative proceeding in which the validity or the amount of the debt is contested. 47 C.F.R. §1.1910(b)(3)(i). Because waiver requests do not contest the validity or amount of the debt at issue, the Commission's red light rules provide no exception for such requests, the red light rule applies, and the debt is delinquent for red light purposes. We note that our decision here is consistent with our decision in the *Former Defaulter Waiver Order*, where we also excluded proceedings based on requests for waiver of a rule requiring payment of a debt or delinquency from the exception. *See Former Defaulter Waiver Order*, 29 FCC Rcd at 10836 n.51. We also decline to address NTCH's proposal to apply this exclusion to *current* defaulters because the proposal falls outside the scope of this proceeding. *See Part 1 NPRM*, 29 FCC Rcd at 12455 ¶ 83 n.159.

[18] *See, e.g.*, AT&T *Part 1 NPRM* Comments at 20.

[19] *See generally Incentive Auction R&O*, 29 FCC Rcd at 6567.

[20] *See* AT&T *Part 1 NPRM* Comments at 21-22 (proposing exemption based on applicant's credit rating); AT&T *Part 1 PN* Comments at 18-19; AT&T *Part 1 PN* Reply at 10.

[21] *See, e.g.*, SEC. & EXCH. COMM'N, INVESTOR BULLETIN: THE ABCS OF CREDIT RATINGS 2 (2013), http://www.sec.gov/investor/alerts/ib_creditratings.pdf (stating that a "credit rating does not reflect other types of risks, such as market or liquidity risks").

1.925,[22] we will therefore consider requests for clarification and/or waiver of former defaulter status under the Commission's rules.[23]

175. We adopt in part commenters' proposals to narrow the scope of the individuals and entities considered for purposes of the former defaulter rule.[24] CCA contends that the scope should be limited to those that are in a position to affect whether the applicant meets its auction-related financial responsibilities.[25] NTCH would narrow the scope of the rule to controlling shareholders or executive officers of the former defaulter or affiliate thereof.[26] No commenters, however, oppose tailoring the scope of the individuals and entities evaluated under the rule. We agree that the relevant inquiry should be limited to those individuals and entities that have positions of control over the auction applicant or licensee and may be able to influence the ability of that entity to fulfill its auction-related financial obligations. We will therefore adopt a controlling interest definition for purposes of the certifications required under section 1.2105(a)(2) of the Commission's competitive bidding rules, including the certification as to whether an applicant has ever been in default on any Commission license or been delinquent on non-tax debt owed to any Federal agency.[27] Under the definition for this rule, a "controlling interest" includes individuals or entities with positive or negative *de jure* or *de facto* control of the licensee.[28] Under this new rule, the defaults or delinquencies of certain individuals and entities will no longer be attributed to the auction applicant for purposes of any former defaulter determination. By narrowing the scope of the former defaulter rule to attribute only defaults or delinquencies of controlling interests, we will ensure that the underlying purposes of the rule are met, while minimizing costs for auction applicants.

176. Finally, we reject calls of NTCH, Sprint, and AT&T to eliminate the former defaulter rule.[29] NTCH and Sprint reason that the rule is "ineffective" and "counterproductive,"[30] and point to a lack of evidence to support any material benefit of the rule.[31] AT&T suggests that the Commission could use other existing mechanisms in lieu of the rule, such as the Commission's Red Light Display System database.[32] While we recognize that the former defaulter rule was adopted during the nascent stages of

[22] 47 C.F.R. § 1.925.

[23] 47 C.F.R. §§ 1.2105(a)(2)(xi), 1.2106(a).

[24] CCA *Part 1 NPRM* Comments at 12; NTCH *Part 1 NPRM* Comments at 8.

[25] CCA *Part 1 NPRM* Comments at 12.

[26] NTCH *Part 1 NPRM* Comments at 8.

[27] *See* 47 C.F.R. § 1.2105(a)(4), as adopted herein.

[28] *De jure* control includes holding 50 percent or more of the voting stock of a corporation or holding a general partnership interest in a partnership. Ownership interests that are held indirectly by any party through one or more intervening corporations may 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 meets or exceeds 50 percent or represents actual control, it may be treated as if it were a 100 percent interest. *De facto* control is determined on a case-by-case basis. Examples of *de facto* control include constituting or appointing 50 percent or more of the board of directors or management committee; having authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; or playing an integral role in management decisions. 47 C.F.R. § 1.2105(a)(4).

[29] AT&T *Part 1 PN* Comments at 4; AT&T *Part 1 PN* Reply at 9-10; NTCH *Part 1 NPRM* Comments at 7; NTCH *Part 1 PN* Comments at 6; Sprint *Part 1 NPRM* Comments at 15-16; Sprint *Part 1 NPRM* Reply at 7-8.

[30] NTCH *Part 1 NPRM* Comments at 7.

[31] Sprint *Part 1 NPRM* Comments at 15-16.

[32] AT&T also suggests using a more individualized approach for prior auction defaulters, including the option to require a defaulting party to pay a larger upfront payment as a specific remedy, in addition to utilizing the "investment grade" exception it proposes, to accomplish the same goals as the former defaulter rule. AT&T *Part 1 PN* Comments at 17; AT&T *Part 1 PN* Reply at 9-10.

the auction program and mobile wireless industry, we believe that the underlying policy reasons for the rule continues to be relevant given the importance of ensuring that auction participants are financially responsible.[33] Because the integrity of the auctions program and the licensing process dictates requiring a more stringent financial showing from former defaulters, we decline to revisit these long-standing policies.

B. Joint Bidding Prohibition

177. Consistent with Congressional directives and the Commission's policy goals,[34] the Commission has adopted policies regarding joint bidding to promote competition in the mobile wireless marketplace and between bidders in auctions.[35] These rules and policies sought to provide additional safeguards designed to reinforce existing laws and facilitate detection of harmful anticompetitive conduct without being unduly burdensome so that they hinder parties from gaining access to the capital necessary to participate in Commission auctions.[36] The current joint bidding rules were adopted at the time when the mobile wireless industry was nascent.[37] As we note above, since that time, and particularly in the past decade, the wireless marketplace has changed significantly. After consideration of the record before us, we amend our rules to prohibit joint bidding. As explained in more detail below, we seek to prohibit certain arrangements involving auction applicants and relating to the licenses being auctioned that address or communicate bids or bidding strategies, including arrangements regarding price and specific licenses on which to bid, as well as any such arrangements relating to the post-auction market structure. We exclude from the prohibition certain agreements, including those that are solely operational and those we find will promote competition. These changes will provide additional clarity for potential applicants while affording opportunities for non-nationwide providers and DEs to pool their resources to promote more robust competition in future auctions and in today's evolving mobile wireless marketplace.

178. In the *NPRM*, we observed that joint bidding and other arrangements have the potential to promote competition by enabling greater participation in auctions.[38] However, we recognized that because some joint bidding and other competitor collaborations could reduce competition between participants post-auction, they raise the risk that spectrum licenses acquired at auction could be distributed in a manner that could harm the public interest.[39] Therefore, we tentatively concluded that

[33] *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Fourth Report and Order*, 13 FCC Rcd 15743, 15761 ¶ 34; *see also Part 1 Fifth Report and Order*, 15 FCC Rcd at 15317 ¶ 42. Additionally, the Red Light Display System does not contain records of Federal non-tax debts or delinquencies from other Federal agencies.

[34] Section 309(j)(3) of the Communications Act provides that, in designing systems of competitive bidding, the Commission must: (1) "include safeguards to protect the public interest in the use of the spectrum," and must seek to promote various objectives, including (2) "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants," (3) encouraging rapid deployment "including … in rural areas," and (4) promoting "efficient and intensive use" of spectrum. 47 U.S.C. § 309(j)(3). Our auction rules must also "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D).

[35] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-88 ¶¶ 221-26 (adopting rules to prevent collusion in the competitive bidding process prior to the Commission's first auction in 1994); *see also* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Report and Order*, 21 FCC Rcd 891, 892-93 ¶ 3 (2006) (*CSEA and Competitive Bidding Report and Order*) (adopting several modifications intended to enhance the effectiveness of the Commission's auction program).

[36] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-87 ¶ 221, 2387-88 ¶ 225.

[37] *Part 1 NPRM*, 29 FCC Rcd at 12468-69 ¶ 116.

[38] *Id*. at 12471 ¶ 125.

[39] *Id*. at 12471 ¶ 124.

joint bidding arrangements between nationwide providers likely would raise competitive concerns that would outweigh any public interest benefits from such arrangements.[40] In contrast, we tentatively concluded that joint bidding arrangements between non-nationwide providers were far less likely to lead to competitive harm or otherwise harm the public interest.[41] We sought comment on the policies and procedures that should apply to bidding arrangements between a single nationwide provider and other entities. Specifically, we sought comment on whether any limits should apply to these types of arrangements or whether we should continue to review such arrangements on a case-by-case basis.[42]

179. In the *Part 1 PN*, we sought further comment on specific, alternative proposals offered into the record in response to the *NPRM*.[43] We also sought to expand the record on our proposals in the *NPRM* to prohibit parties to a joint bidding agreement from bidding separately on licenses in the same market, prohibit communications between joint bidders when bidding on licenses in the same market, and prohibit any individual or entity from serving on more than one bidding committee.[44]

180. ***Discussion***. *Promoting Competition in Auctions and in the Marketplace*. In the *NPRM*, we stated that when assessing the competitive effects of joint bidding and other arrangements, we must ensure that our policies and rules facilitate access to spectrum licenses in a manner that promotes competition within auctions and in the current wireless marketplace.[45] In light of the changes in the structure of the wireless marketplace in recent years, we generally agree with commenters that updates to our joint bidding rules are necessary to promote more robust competition in future auctions and in today's evolving mobile wireless marketplace.[46] In addition, joint bidding arrangements among separate applicants in an auction generally raise the risk of undesirable strategic bidding during auctions, such as by means of "bid stacking."[47] In light of the evolution of the marketplace and the potential future risks of undesirable strategic and/or anticompetitive behavior, we take this opportunity to refine the definition of joint bidding arrangements, prohibit joint bidding arrangements generally, and adopt certain bright-line rules to promote competition. More specifically, we prohibit joint bidding arrangements between applicants (including any party that controls or is controlled by, such applicants), regardless of whether the applicants are nationwide or non-nationwide providers. In addition, we prohibit joint bidding arrangements involving two or more nationwide providers as well as joint bidding arrangements involving a nationwide and non-nationwide provider, where any one of the parties is an applicant for auction.

181. We note that the Commission has always made clear with respect to its rules and policies governing joint bidding that "conduct that is permissible under the Commission's Rules may be prohibited by the antitrust laws,"[48] review under which is subject to other and differing standards under

[40] *Id*. at 12472-73 ¶ 131.

[41] *Id*. at 12472 ¶ 129.

[42] *Id*. at 12474 ¶ 135.

[43] *Part 1 PN*, 30 FCC Rcd at 4167-68 ¶ 30.

[44] *Id*. at 4168 ¶ 31.

[45] *Part 1 NPRM*, 29 FCC Rcd at 12470 ¶ 122.

[46] *See e.g.*, AT&T *Part 1 NPRM* Comments at 6-8; CCA *Part 1 NPRM* Comments at 13, 15; T-Mobile *Part 1 NPRM* Comments at 2-3; C Spire *Part 1 NPRM* Reply at 3; KSW *Part 1 NPRM* Reply at 4-6; Verizon *Part 1 NPRM* Reply at 5-7.

[47] By "bid stacking," we refer to coordinated bidding activity among bidders to place multiple bids on the same licenses in an auction round. The potential for harm may be increased under anonymous bidding, when the number of bids on licenses are made public during the auction but not the identity or number of bidders making those bids. *See* USCC *Part 1 PN* Comments at 11 (referring to 'bid stacking' as "concerted bidding among connected entitites").

[48] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd 7684, 7689 ¶ 12 (1994).

the Sherman and Clayton Acts.[49] Our auction procedures public notices for specific auctions caution that "[c]ompliance with the disclosure requirements of section 1.2105(c) will not insulate a party from enforcement of the antitrust laws."[50] Auction applicants that are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may be subject to forfeiture, prohibition from auction participation, and other sanctions.[51]

182. *Joint Bidding Arrangements Between Nationwide Providers*. Consistent with our tentative conclusion in the *NPRM*,[52] we find that joint bidding arrangements between any two or more nationwide providers, of which there are currently four, have a potential to harm the public interest by negatively affecting the competitive bidding process during an auction as well as downstream competition in the provision of mobile wireless services.[53] We note that, while not all parties advocate the same responsive measures, the record does not include significant disagreement with our analysis of the underlying risk factors present in today's marketplace – high degrees of concentration, high barriers to entry, and high margins.[54] Collaboration between nationwide providers raises the risk of reduced competition in the greatest number of markets both during an auction and afterwards. In light of the record before us, and the underlying risk factors present in the marketplace today, we prohibit joint bidding arrangements between nationwide providers.

183. AT&T, Verizon Wireless, King Street Wireless, Tristar, and Spectrum Financial argue that the Commission should prohibit joint bidding arrangements altogether, including between nationwide providers, because such a restriction would be the most effective way to prevent anticompetitive bidding coordination in auctions.[55] In contrast, Sprint and T-Mobile argue that joint bidding arrangements between some nationwide providers can promote post-auction competition and have the potential to

[49] Joint bidding arrangements subject to section 1 of the Sherman Act are prohibited if they constitute a "contract, combination . . . , or conspiracy, in restraint of trade." 15 U.S.C. § 1. Joint bidding arrangements subject to section 7 of the Clayton Act are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. The Commission's review of joint bidding arrangements is subject to, among other things, the public interest goals set forth in section 309(j) of the Communications Act. *See* 47 U.S.C. § 309(j)(3), 309(j)(4)(D). The Commission's "competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles." *See also* Applications of SoftBank Corp., Starburst II, Inc., Sprint Nextel Corp, and Clearwire Corp., *Memorandum Opinion and Order, Declaratory Ruling, and Order on Reconsideration*, 28 FCC Rcd 9642, 9651-52 ¶ 25 (2013) ("The Commission and the Department of Justice ('DOJ') each have independent authority to examine the competitive impacts of proposed communications mergers and transactions involving transfers of Commission licenses, but the standards governing the Commission's competitive review differ somewhat from those applied by the DOJ.").

[50] *See, e.g.*, Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Scheduled for January 14, 2014, Notice and Filing Requirements, Reserve Price, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 96, AU Docket No. 13-178, *Public Notice*, 28 FCC Rcd 13019, 13030 ¶ 31 (2013) ("Regardless of compliance with the Commission's rules, applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace.").

[51] 47 C.F.R. § 1.2109(d).

[52] *Part 1 NPRM*, 29 FCC Rcd at 12474 ¶134.

[53] For purposes of our competitive bidding rules, the entities that qualify as nationwide providers will generally be identified in procedures public notices released before each auction.

[54] *See Part 1 NPRM*, 29 FCC Rcd at 12472-73 ¶ 131 (citing *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6165 ¶ 62).

[55] AT&T *Part 1 NPRM* Comments at 3; AT&T *Part 1 NPRM* Reply at 2-3; AT&T *Part 1 PN* Comments at 4, 13-14; AT&T *Part 1 PN* Reply at 8; Verizon *Part 1 NPRM* Reply at 4-5; KSW *Part 1 NPRM* Reply at 4-7; KSW *Part 1 PN* Comment at 8; Tristar *Part 1 PN* Comments at 12; Tristar *Part 1 PN* Reply at 4; Spectrum Financial *Part 1 NPRM* Reply at 2-3. *See also* USCC *Part 1 PN* Reply at 2 (arguing that the anticompetitive bidding alleged to have occurred in Auction 97 would be eliminated if the Commission clarifies its rules prohibiting coordinated bidding among multiple auction applicants).

increase consumer welfare.[56] Apparently focused on the upcoming Incentive Auction, Sprint specifically proposes that joint bidding arrangements should be permitted in areas in which parties to an agreement collectively hold less than 45 megahertz of sub-1 GHz spectrum.[57] T-Mobile argues that the Commission should not adopt any bright-line restrictions on joint bidding, and should instead address all joint bidding arrangements on a case-by-case basis.[58] T-Mobile additionally comments that if the Commission would limit joint bidding arrangements in some form, then T-Mobile supports Sprint's proposal to permit joint bidding arrangements where parties to an agreement hold less than 45 megahertz of sub-1 GHz spectrum.[59] This proposal, in effect, would allow joint bidding between Sprint and T-Mobile, the two nationwide providers currently without significant low-band spectrum holdings. CCA and T-Mobile support the proposal to prohibit parties to a joint bidding agreement from bidding separately on licenses in the same market.[60]

184. As we stated in the *NPRM* and based upon the record before us, we find that joint bidding arrangements between nationwide providers present significant risks by enabling market competitors to reduce competition within auctions in a large number of geographic areas. Nationwide providers, whether or not they have significant low-band spectrum holdings, all have significant resources and actively compete against one another across the country. Joint bidding among nationwide providers, who are the entities most likely to bid in auctions for licenses across the entire country, could significantly reduce rivalry within auctions to the detriment of the Commission's objectives for auctions, and increases the risk of facilitating anticompetitive behavior by dividing markets on a national scale, thus reducing competition in numerous markets.

185. The Commission has recognized the significance of access to low-band spectrum for promoting competition in the marketplace, as argued by Sprint and T-Mobile, but we disagree with their arguments that allowing them to enter into joint bidding arrangements with each other to obtain low-band spectrum is a necessary or appropriate response to promote competition.[61] We are mindful of the anticompetitive risk factors present in the marketplace today,[62] but we find that the risks of anticompetitive behavior by joint bidding between any nationwide providers outweigh the potential benefits that might come from allowing Sprint and T-Mobile, or any other nationwide providers that lack significant low-band spectrum holdings, to bid jointly. Therefore, we adopt our proposal to prohibit nationwide providers from entering into joint bidding arrangements in auctions.

186. We also find that the risk of anticompetitive behavior, including market division, from

[56] Sprint *Part 1 NPRM* Comments at 9; Sprint *Part 1 NPRM* Reply at 2-5; Sprint *Part 1 PN* Comments at 2; T-Mobile *Part 1 NPRM* Comments at 5, 18-23; T-Mobile *Part 1 NPRM* Reply at 11-12.

[57] Sprint *Part 1 NPRM* Comments at 11-13; Sprint *Part 1 NPRM* Reply at 4-5; Sprint *Part 1 PN* Comments at 4-6.

[58] T-Mobile *Part 1 NPRM* Comments at 18-20, 22-23; T-Mobile *Part 1 NPRM* Reply at 12; T-Mobile *Part 1 PN* Comments at 2.

[59] T-Mobile *Part 1 PN* Comments at 12. *See also* CCA *Part 1 PN* Reply at 11-12 (agreeing with Sprint's proposal as it understands it to align the eligibility standards for joint bidding arrangements with those for reserve-spectrum eligibility in the Incentive Auction).

[60] CCA *Part 1 PN* Comments at 19; T-Mobile *Part 1 PN* Comments at 12-13.

[61] Sprint *Part 1 NPRM* Comments at 9; Sprint *Part 1 NPRM* Reply at 2; Sprint *Part 1 PN* Comment at 2;T-Mobile *Part 1 NPRM* Comments at 5; T-Mobile *Part 1 NPRM* Reply at 2; 11-12. Rather, the Commission adopted two mechanisms in the *Mobile Spectrum Holdings Report and Order* to facilitate access by multiple providers to low-band spectrum that they need to compete. First, the Commission adopted a market-based spectrum reserve in the Incentive Auction that will reserve up to 30 megahertz of low-band spectrum in each market. *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6210-6211 ¶¶ 189-191. Second, the Commission adopted an enhanced factor review process for transactions involving aggregations involving low-band spectrum to ensure that such transactions are in the public interest. *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6239-40 ¶¶ 283-287. We anticipate that these two mechanisms will facilitate access by multiple providers, including Sprint and T-Mobile, to low-band spectrum in a competitive framework.

[62] *See infra* at para. 187.

these arrangements is not limited to circumstances where both nationwide providers are applicants in an auction. Accordingly, the prohibition against joint bidding between nationwide providers extends to bidding arrangements in which one (or more) of the nationwide providers is not itself an applicant in an auction.

187. *Joint Bidding Arrangements Between Non-Nationwide Providers*. In the *NPRM*, we tentatively concluded that the benefits of joint bidding between non-nationwide providers outweighed the risks of public interest harms, given the structure of the wireless marketplace, the current distribution of spectrum, and the lesser ability of non-nationwide providers to engage in anticompetitive behavior. After review of the record before us, we prohibit joint bidding arrangements between non-nationwide providers as separate applicants in an auction, given the risk of undesirable strategic bidding during auctions, but allow the use of joint ventures and consortia as single applicants, as described below.[63]

188. In response to the *NPRM* and the *Part 1 PN*, CCA, NCTA, ARC, and RWA emphasize the challenges faced by small and rural providers and these parties contend that joint bidding arrangements between non-nationwide providers are generally pro-competitive.[64] Several commenters note the financial difficulty that smaller rural providers face in bidding on larger geographic areas on their own,[65] and argue that given the high cost of spectrum, joint bidding arrangements between non-nationwide providers can enable smaller companies to compete effectively for licenses that they would otherwise be unable to acquire on their own.[66]

189. By contrast, as with joint bidding arrangements between nationwide providers, AT&T, Verizon Wireless, King Street Wireless, Tristar, and Spectrum Financial argue that the Commission should prohibit joint bidding arrangements among non-nationwide providers because of the risk of undesirable strategic behavior.[67] Some of these parties argue that if smaller providers want to pool resources, they can do so by forming joint ventures or bidding consortia and bidding through those entities.[68]

190. We recognize both the need to prohibit arrangements between multiple bidders to coordinate bidding during an auction, and the potential benefits, with relatively small risks, from non-nationwide providers working together to pool resources or otherwise realize financial economies of scale in our auctions. We also recognize, as some commenters point out, that joint ventures and bidding consortia allow smaller providers to combine resources,[69] thus promoting competition in the mobile

[63] For these purposes, "non-nationwide provider" refers to a provider of communications services that is not a "nationwide provider."

[64] ARC *Part 1 NPRM* Comments at 25; CCA *Part 1 NPRM* Comments at 13-14; RWA/NTCA *Part 1 PN* Reply at 6-7.

[65] ARC *Part 1 NPRM* Comments at 25; RWA/NTCA *Part 1 PN* Reply at 6-7. *See also* Blooston *Part 1 PN* Reply at 6 (noting that some rural providers may be unable to participate in bidding in larger PEAs on their own).

[66] ARC *Part 1 NPRM* Comments at 25; RWA/NTCA *Part 1 PN* Reply at 6-7.

[67] AT&T *Part 1 NPRM* Comments at 3; AT&T *Part 1 NPRM* Reply at 2-3; AT&T *Part 1 PN* Comments at 4, 13-14; AT&T *Part 1 PN* Reply at 8; Verizon *Part 1 NPRM* Reply at 4-5; KSW *Part 1 NPRM* Reply at 4-7; KSW *Part 1 PN* Comments at 8; Tristar *Part 1 PN* Comment at 12; Tristar *Part 1 PN* Reply at 4; Spectrum Financial *Part 1 NPRM* Reply at 3-4. *See also* USCC *Part 1 PN* Reply at 2 (arguing that the collusion alleged to have occurred in Auction 97 would be eliminated if the Commission clarifies rules prohibiting coordinated bidding among multiple auction applicants).

[68] AT&T *Part 1 NPRM* Comments at 3, 9; Verizon *Part 1 NPRM* Reply at 4-5. *See also* Tristar *Part 1 PN* Comments at 12; Tristar *Part 1 PN* Reply at 4 (arguing that the prohibition on joint bidding should be designed to allow entities to bid together through a single bidding entity).

[69] Under section 1.2110(b)(3)(i) and 1.2110(c)(6), a bidding consortium is limited to DE eligible bidders, the revenues of the participants are not aggregated, and the bidding consortium itself cannot hold the licenses following the auction. Section 1.2110(c)(5)(x) sets out the definition of joint venture for size determination purposes. For purposes of competitive bidding, consortium and joint ventures are defined in section 1.2105(a)(4).

wireless marketplace and facilitating competition between bidders at auction.[70] In our judgment, these arrangements can be an effective means of allowing smaller entities to compete in auctions, and, ultimately, promote post-auction competition. We find that joint ventures and consortia can capture the benefits sought by smaller providers wishing to combine resources while not risking the potential for anticompetitive behavior during the course of an auction. Accordingly, while we prohibit joint bidding arrangements among non-nationwide providers as separate applicants in an auction, we allow the use of joint ventures and consortia, as described below, in light of the potential for smaller providers to use consortia and joint ventures to realize the benefits of pooling resources that are sometimes associated with some kinds of joint bidding arrangements.[71] In addition, we do not prohibit joint bidding arrangements between non-nationwide providers where only one of the non-nationwide parties is the entity filing an auction application and other(s) are non-applicants.

191. *Joint Bidding Arrangements Between Nationwide and Non-Nationwide Providers*. In the *NPRM*, we sought comment on possible policies and procedures that could enable joint bidding between nationwide and non-nationwide providers to be in the public interest and suggested that we might consider these arrangements on a case-by-case basis. After review of the record, we prohibit joint bidding arrangements between nationwide and non-nationwide providers, rather than attempting to review such arrangements on a case-by-case basis.

192. In this proceeding, some commenters agree that the Commission should adopt a case-by-case approach to reviewing arrangements between nationwide and non-nationwide providers,[72] but also stress the importance of the Commission providing pre-auction clarity to bidders regarding the permissibility of such agreements.[73] A number of commenters urge the Commission to adopt bright-line rules to protect the integrity of auctions,[74] promote efficient pre-auction application review, and avoid undue delay of auctions.[75] We agree with commenters that providing pre-auction certainty to bidders regarding permissible joint bidding arrangements will facilitate competitive auctions. However, because we would need to determine with finality during pre-auction application review whether any particular joint bidding arrangement should be permitted during the auction, we find that case-by-case review of all such arrangements as part of that review process runs an unacceptable risk of significantly delaying auctions and therefore would not be in the public interest.[76]

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[70] AT&T *Part 1 NPRM* Reply at 6-7; KSW *Part 1 NPRM* Reply at 7; Verizon *Part 1 NPRM* Reply at 1-2.

[71] We also adopt a definitional framework below to help ensure that our joint bidding prohibition is not overly inclusive.

[72] CCA and ARC, for instance, argue that joint bidding arrangements involving a nationwide provider and other bidders should be permitted on a case-by-case basis because of potential pro-competitive benefits. ARC *Part 1 NPRM* Comments at 26; ARC *Part 1 NPRM* Reply at 10; CCA *Part 1 NPRM* Comments at 14-15; CCA *Part 1 NPRM* Reply at 11; CCA *Part 1 PN* Comments at 17-18; CCA *Part 1 PN* Reply at 4, 11.

[73] CCA *Part 1 NPRM* Comments at 15 (recommending that in order to provide certainty to auction participants, the Commission should allow parties to seek informal staff guidance regarding whether an arrangement is acceptable). Sprint *Part 1 NPRM* Comments at 14 (advocating that the public interest is best served by the Commission providing certainty to prospective bidders regarding compliance of joint bidding arrangements prior to auction). Sprint *Part 1 NPRM* Reply at 2 (proposing that the Commission should provide *ex ante* clarity for bidders ahead of the auction).

[74] *See e.g.*, T-Mobile *Part 1 NPRM* Comments at 3 (supporting "measures proposed in the NPRM designed to tighten competitive bidding rules to prevent bidding conduct that may distort or delay the auction process"). CCA *Part 1 PN* Comments at 19 (advocating for tailored, bright-line review procedures prior to the start of an auction).

[75] CCA *Part 1 PN* Comments at 19 (advocating that the Commission must conduct a thorough review of all applications for spectrum licenses, but should not permit this review process to delay making spectrum . . . available to competitive carriers). AT&T *Part 1 PN* Comments at 16-17 (emphasizing the need to simplify the process for preparing and reviewing short-form applications).

[76] In addition, we find that those commenters urging the pro-competitive benefits of such arrangements fail to provide evidence that the potential public interest benefits of such arrangements cannot be achieved by other,

193. In adopting bright-line rules governing joint bidding arrangements between nationwide and non-nationwide providers, we first observe that such arrangement among separate applicants raise the same concerns noted above with respect to the risk of undesirable strategic bidding during auctions. Accordingly, we prohibit joint bidding arrangements between nationwide and non-nationwide providers when parties to the arrangements are filing separate applications. Further, as with the prohibition against joint bidding between nationwide providers, our prohibition here extends to joint bidding arrangements that include providers that are not themselves an applicant in an auction. In particular, joint bidding arrangements that involve a nationwide provider could significantly reduce rivalry within auctions to the detriment of the Commission's objectives for auctions.

194. In addition, unlike our determination with respect to arrangements between non-nationwide providers, we do not permit nationwide and non-nationwide providers to participate in auctions through a joint venture. While we recognize that joint ventures formed between nationwide providers and non-nationwide providers could provide additional opportunities for those entities to participate in auctions, the potential for reduced rivalry within the auction outweighs any such benefits.

195. *Implementation of Joint Bidding Prohibition*. To promote clarity and certainty and to achieve our stated goals, we clarify that "joint bidding arrangements" for these purposes include arrangements relating to the licenses being auctioned that address or communicate, directly or indirectly, bidding at the auction, bidding strategies, including arrangements regarding price or the specific licenses on which to bid, and any such arrangements relating to the post-auction market structure.[77] Additionally, as discussed above and in more detail below, due to the potential benefits to smaller providers and for promoting post-auction competition, we are permitting DEs to join in bidding consortia and non-nationwide providers to form certain joint ventures to apply to participate at auction as a single entity. We note that "non-nationwide provider" refers to any provider of communications services that is not a "nationwide provider." We also make clear that the prohibition does not encompass agreements that are solely operational in nature, that is, agreements that address operational aspects of providing a mobile service, such as agreements for roaming, spectrum leasing and other spectrum use arrangements, or device acquisition, as well as agreements for assignment or transfer of licenses, provided that any such agreement does not both relate to the licenses at auction and address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid) or bidding strategies (including the specific licenses on which to bid or not to bid) or post-auction market structure. Consistent with our new approach to joint bidding agreements, we also revise our rule prohibiting communications relating to bids or bidding strategies. To provide transparency, we retain our long-standing requirement regarding disclosure of agreements to which auction an applicant is party, but revise it to more effectively monitor our new prohibition on joint bidding agreements.

196. As spelled out in the revised rules, each auction applicant must certify on behalf of itself and any party that controls, or is controlled by, such applicants,[78] that it has not entered and will not enter into a joint bidding arrangement with any other applicant(s), with any nationwide provider that is not an applicant, or, if the applicant is a nationwide provider, with any non-nationwide provider that is not an applicant, other than agreements that fall within the limited exceptions we provide.[79] We recognize that certain agreements and relationships may exist prior to an auction as well as that communications of information other than bids and bidding strategies may be permitted to continue during an auction if made pursuant to and within the scope of specified types of agreements that are excluded from the general

permitted means.

[77] CCA *Part 1 NPRM* Comments at 15; CCA *Part 1 PN* Comments at 18; Sprint *Part 1 PN* Comments at 3.

[78] Section 1.2105(a) will now contain a definition of "controlling interest" that includes all individuals or entities with positive or negative *de jure* or *de facto* control of the licensee. 47 C.F.R. §1.2105(a)(4)(i), as adopted herein. This definition is modeled on a similar term used in section 1.2110(c) (definitions for designated entities), though it differs in some respects from that rule. *Compare* 47 C.F.R. §1.2105(a)(4)(i), as adopted herein, with 47 C.F.R. §1.2110(c).

[79] *See* 47 C.F.R. § 1.2105(a)(2)(ix), as adopted herein.

prohibition and disclosed in the relevant short-form application(s).[80]

197. We do not include within our definition of prohibited joint bidding arrangements any agreement that is operational in nature, including agreements relating to roaming, spectrum leasing and other spectrum use arrangements, or device acquisition, as well as any agreements for assignment or transfer of licenses, provided that any such agreement expressly does not both relate to the licenses at auction and address or communicate directly or indirectly bidding at auction (including prices) or bidding strategies (including the specific licenses on which to bid) or post-auction market structure. Thus, when an applicant certifies to its compliance with our competitive bidding rules, it is certifying that any operational agreement that it may have does not involve a shared bidding strategy and therefore is solely operational. Similarly, any agreement for the transfer or assignment of licenses existing at the deadline for filing short-form applications will not be regarded as a prohibited arrangement, provided that it does not both relate to the licenses at auction and include terms or conditions regarding a shared bidding strategy and expressly does not communicate bids or bidding strategies. Further, we note that agreements between an applicant and another entity solely for funding purposes, i.e., with no agreements with regard to bids, bidding strategies, or post-auction market structure relating to the licenses at auction, are not prohibited joint bidding arrangements.

198. As discussed above, our prohibition on joint bidding agreements does not prevent certain agreements to form consortia or joint ventures, which result in one party applying to participate in an auction. In particular, to promote competition within auctions and in the marketplace, we continue to allow DEs to form and use consortia and are allowing non-nationwide providers to form joint ventures to bid in auctions. Eligible entities may use a consortium or joint venture to pool resources and realize financial economies of scale to compete more effectively in our auctions, and, ultimately, in the marketplace. In order to address the potential for undesirable strategic bidding through the use of these vehicles, we specify that: (1) DEs can participate in only one consortium in an auction, which shall be the exclusive bidding vehicle for its members in that auction, and (2) non-nationwide providers may participate in an auction through only one joint venture, which also shall be the exclusive bidding vehicle for its members in that auction. These provisions should effectively ensure that each auction participant, whether bidding individually, or through consortium or joint venture, has one bid per license per round.[81]

199. We also revise our rule prohibiting certain communications in light of our new rules prohibiting joint bidding agreements. Our revised prohibition on communications prohibits an applicant from communicating bids or bidding information, either directly or indirectly, with any other auction applicant, with any nationwide provider that is not an applicant, or, if the applicant is a nationwide provider, with any non-nationwide provider that is not an applicant. The revised rule provides limited exceptions for communications within the scope of any arrangement consistent with the exclusions from our rule prohibiting joint bidding, provided such arrangement is disclosed on the applicant's short-form.[82] An applicant may continue to communicate pursuant to any pre-existing agreements, arrangements, or understandings that are solely operational or that provide for a transfer or assignment of licenses, provided that such agreements, arrangements or understandings do not involve the communication or coordination of bids (including amounts), bidding strategies, or the particular licenses on which to bid and provided that such agreements, arrangements or understandings are disclosed on its application.

[80] Under our revised prohibited communications rule, parties to these specific kinds of agreements may communicate during this "quiet period" provided that any communications are within the scope of the pre-existing agreement that is disclosed on the applicants' short-form auction applications and do not convey specific bids or the substance of an applicant's bidding strategy.

[81] Under 47 C.F.R. §§ 1.2110(b)(4)(i) and 1.2110(c)(6), a bidding consortium is limited to DE eligible bidders, the revenues of the participants are not aggregated, and the bidding consortium itself cannot hold the licenses following the auction. Section 1.2110(c)(5)(x) sets out the definition of joint venture for size determination purposes. For purposes of the certification regarding joint bidding, the terms "consortium" and "joint venture" are defined in section 1.2105(a)(4).

[82] As noted above, we require the disclosure of all parties to agreements involving an auction applicant, consistent with our prior rule, along with a brief description of the agreement. 47 C.F.R § 1.2105(a)(2)(viii).

Moreover, as discussed elsewhere,[83] if an applicant has a non-controlling interest with respect to more than one application, we require the applicant(s) to certify that it has established internal control procedures to preclude any person acting on behalf of the applicant from possessing information about the bids or bidding strategies of more than one applicant or communicating such information with respect to either applicant to another person acting on behalf of and possessing such information regarding another applicant. We caution, however, that, as with certifications submitted to the Commission in other contexts, submission of such certification in an application will not outweigh specific evidence that a communication violating the Commission's rules has occurred, nor will it preclude the initiation of an investigation when warranted.[84]

200. *Authorized Bidders*. On a separate but related issue, we sought comment in the *Part 1 PN* on a proposal to prohibit an individual from serving as an authorized bidder for more than one auction applicant.[85] Commenters generally agree with this proposal,[86] and we adopt it here.[87] This prohibition ensures that an individual is not in a position to be privy to bidding strategies of more than one entity in the auction, and therefore not a conduit, intentional or not, for bidding information between auction applicants.

201. *Non-Controlling Interests*. We recognize that in some circumstances entities may have non-controlling interests in other entities and both entities may wish to bid in the auction. In so far as there is no overlap between the employees in both entities that leads to the sharing of bidding information, such an arrangement may not implicate our concerns over joint bidding among separate applicants. Such an arrangement, however, could allow for the non-controlling interest or shared employee to act as a conduit for communication of bidding information unless the applicants establish internal controls to ensure that bidding information would not flow between them. To address this possibility and ensure that such arrangements do not serve or appear as conduits for information, we adopt a rule requiring all applicants to certify that they are not, and will not be, privy to, or involved in, in any way the bids or bidding strategy of more than one auction applicant.[88] Commenters generally agree with the proposal to require a more comprehensive certification process.[89] Our new rules provide that an applicant can certify

[83] *See infra* para. 206.

[84] *See, e.g.*, 47 C.F.R. § 1.17 (prohibiting material misrepresentation to the Commission).

[85] *See Part 1 PN* at 4167 ¶ 30; T-Mobile *Part 1 NPRM* Comments at 9.

[86] CCA *Part 1 PN* Reply at 13-14; T-Mobile *Part 1 PN* Comments at 2, 10-11. *See also* C Spire *Part 1 NPRM* Reply at 3 (advocating for restrictions preventing an investor who holds an interest in multiple auction participants from directing or participating directly in the bidding of more than one of those participants, regardless of whether there is common control of the bidding entities).

[87] *See* 47 C.F.R. § 1.2105(a)(2), as adopted herein.

[88] 47 C.F.R. § 1.2105(c)(2), as adopted herein.

[89] AT&T *Part 1 NPRM* Comments at 3-4, 10; AT&T *Part 1 PN* Reply at 7 (proposing that each applicant should be required to file an anti-collusion certification stating that it is not colluding with any other applicant regarding bids or bidding strategy). CCA *Part 1 PN* Comments at 19; CCA *Part 1 PN* Reply at 13 (generally agreeing with commenters advocating for the adoption of certification requirements). T-Mobile *Part 1 NPRM* Comments at 3-4; T-Mobile *Part 1 NPRM* Reply at 5; T-Mobile *Part 1 PN* Comments at 2, 9-11 (proposing requiring disclosable interest holders listed on more than one short-form application to certify that they are not, and will not be, privy to, or involved in, the bidding strategy of more than one auction participant, with such a certification required of individuals or entities that have a 10 percent or greater interest in more than one applicant). *See also* C Spire *Part 1 NPRM* Reply at 3-4 (agreeing with T-Mobile's certification proposal); USCC *Part 1 PN* Comments at 9-11 (proposing that applicants submit certification with short-form applications that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified in Section 1.2105 (a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid, and proposing to also apply this certification to employees of a corporation that may have knowledge of the bid strategies of a licensee partner, and that such an employee should be "walled off" from participation in any additional bid strategies).

that it has established procedures to preclude its agents, employees, or related parties, from possessing information about the bids or bidding strategies of more than one applicant or communicating such information regarding another applicant. We caution, however, that submission of such certification by an applicant will not outweigh specific evidence that a communication violating the Commission's rules has occurred, nor will it preclude the initiation of an investigation when warranted.

C. Prohibition on Applications By Commonly Controlled Entities

202. ***Background.*** We have long had a practice of prohibiting the same individual or entity from submitting multiple short-form applications in any Commission auction.[90] In the *Part 1 NPRM*, we proposed to codify this established procedure and sought comment on our proposal.[91] We noted that the prohibition protects against the burden of duplicative, repetitious, or conflicting filings.[92] The *Part 1 NPRM* expressed concern that the same individual or entity could potentially use multiple short-form applications to engage in anticompetitive bidding activity by manipulating elements of the auction process.[93] The *Part 1 NPRM* invited comment on the related issue of whether to permit the filing of short-form applications by commonly controlled entities that could bid on any of the same licenses.[94] In doing so, we acknowledged that auction participation by commonly controlled applicants potentially could serve legitimate business purposes while also presenting possible risks to the auction process.[95]

203. In the *Part 1 PN*, we solicited input on commenters' proposals suggesting that applicants should be limited in holding ownership interests in multiple auction applicants.[96] Specifically we sought comment on how to define any such ownership limits or limits on financial investments by one entity in other auction applicants, including what attribution standards might be implemented in such context.[97]

204. Several commenters note that where an investor holds non-controlling interests in multiple auction applicants, such an arrangement could facilitate undesirable strategic bidding at auction.[98] T-Mobile asserts that entities sharing non-controlling cognizable interests could engage in problematic behavior and argues that the Commission should address the potential for coordinated behavior by bidders that are linked by common attributable interests.[99] C Spire points out that "an applicant that bids on a standalone basis but that also has multiple non-controlling investments in other

[90] "An individual or entity may not submit more than one short-form application for a single auction. If a party submits multiple short-form applications for any license(s) in the same or overlapping geographic area(s), only one of its applications can be found to be complete when reviewed for completeness and compliance with the Commission's rules." *See* Auction of Advanced Wireless Services (AWS-3) Licenses Schedule for November 13, 2014; Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97, AU Docket No. 14-78, *Public Notice*, 29 FCC Rcd 8386, 8408 ¶ 66 (2014) (*Auction 97 Procedures Public Notice*); *see also* Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Scheduled for January 14, 2014; Notice and Filing Requirements, Reserve Price, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 96, AU Docket No. 13-178, *Public Notice*, 28 FCC Rcd 13019, 13037 ¶ 59.

[91] *Part 1 NPRM*, 29 FCC Rcd at 12464 ¶ 102.

[92] *Id*.

[93] *Id*.

[94] *Id*. at 12464-65 ¶ 103-04.

[95] *Id*. at 12464-65 ¶ 104.

[96] *Part 1 PN*, 30 FCC Rcd at 4165-66 ¶ 27.

[97] *Id*.

[98] *See* CCA *Part 1 PN* Comments at 11-12; C Spire *Part 1 NPRM* Reply at 3; *see also* CCA *Part 1 NPRM* Comments at 12-13; T-Mobile *Part 1 NPRM* Comments at 3, 8; *see also* Sprint *Part 1 PN* Comments at 7 n.20 (explaining that such arrangements "warrant careful analysis").

[99] T-Mobile *Part 1 NPRM* Comments at 3, 8; *see also* Sprint *Part 1 PN* Comments at 7 n.20.

applicants may be privy to and participate in the financing and bidding strategy of multiple applicants."[100] KSW favors a "reasonable" prohibition on multiple auction entries by related parties[101] and proposes to prohibit parties from holding equity in multiple auction applicants, but would allow the holding of interests in multiple applicants where such interest does not exceed a "reasonable" threshold and in cases "where the party at issue is pulled into the auction and has no awareness or participation of bidding strategies."[102] Spectrum Financial proposed an ownership limit on cross-owned bidders of something "much less than controlling interest, certainly less than 50 percent."[103] We address concerns about applicants with shared non-controlling interests above through our prohibition on joint bidding and our revisions to our prohibited communications rule.[104]

205. ***Discussion.*** *Duplicate auction applications*. We confirm our long-standing prohibition on the filing of more than one auction application by the same individual or entity. This prohibition will minimize unnecessary burdens on the Commission's resources by eliminating the need to process duplicative, repetitious, or conflicting applications.[105] This rule will also protect against a party manipulating the auction by placing bids through two bidding entities. Accordingly, we conclude that our decision to codify our long-standing prohibition is in the public interest.

206. *Applications by entities controlled by the same individual or set of individuals*. Consistent with our prohibition on joint bidding agreements as described above, we will generally permit any entity to participate in a Commission spectrum auction only through a single bidding entity. This means that we will no longer permit the filing of applications by entities controlled by the same individual or set of individuals. We have previously recognized that the participation of commonly controlled entities in an auction may serve legitimate business purposes because such entities may have different business plans, financing requirements, or marketing needs, while acknowledging such situations might create risk to the competitiveness of the auction process.[106] We note, however, that such determination was made in the context of an auction conducted without the use of anonymous bidding where the identities of competing bidders were identified in each bidding round. Under the limited information procedures we have used in more recent auctions, certain information on bidder interests, bids, and bidder identities that typically had been revealed prior to and during prior Commission auctions are withheld until after the close of the auction.[107] The approach we adopt today is consistent with the views of commenters that broadly supported the *NPRM*'s proposal to prohibit the filing of short-form applications by entities under the common control of a single individual or set of individuals in a particular geographic license area or overlapping areas.[108] Sprint notes that this change should enhance the transparency of

[100] C Spire *Part 1 NPRM* Reply at 3; *see also* CCA *Part 1 NPRM* Comments at 13.

[101] KSW *Part 1 NPRM* Reply at ii, 8.

[102] KSW *Part 1 NPRM* Reply at 3, 8-9.

[103] Spectrum Financial *Part 1 NRPM* Reply at 3.

[104] *See* Section III.B. (Joint Bidding).

[105] If a party submits multiple short-form applications for any license(s) in a particular auction, only one of its applications can be found to be complete when reviewed for completeness and compliance with the Commission's rules.

[106] *See* Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., *Memorandum Opinion and Order*, 25 FCC Rcd 4036, 4063 ¶ 88 (2010).

[107] *See, e.g.*, Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76, AU Docket No. 07-157, *Public Notice,* 22 FCC Rcd 18141, 18144-45 ¶ 4 (2007) (*Auction 73 Procedures PN*); *Auction 97 Procedures PN* at 29 FCC Rcd 8386, 8428-29 ¶ 149.

[108] *See* AT&T *Part 1 NPRM* Comments at 3, 9-10; Sprint *Part 1 NPRM* Comments at 17; T-Mobile *Part 1 NPRM* Comments at 3; CCA *Part 1 NPRM* Reply at 11-12; C Spire *Part 1 NPRM* Reply at 3; KSW *Part 1 NPRM* Reply at 3, 8; T-Mobile *Part 1 NPRM* Reply at 4-5; Letter from John T. Scott, III, VP & Deputy General Counsel, Verizon, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170 at 2 (filed July 9, 2015) (Verizon July 9, 2015 *Ex Parte* Letter).

Commission auctions and minimize anti-competitive bidding activity.[109] Some commenters, however, suggest that this approach does not go far enough because the rule does not address situations when applicants with lesser degrees of shared ownership agree to coordinate bids.[110] We disagree because these concerns are now addressed by the prohibition on joint bidding agreements discussed above.[111] The prohibition on a single party, or commonly controlled parties, from filing multiple applications is designed to ensure that auction participants bid in a straightforward manner. Consistent with our newly-adopted prohibition on joint bidding agreements, this restriction will apply across all short-form applications in a particular auction without regard to the licenses or geographic areas selected.

207. We will determine common control for purposes of this prohibition using the controlling interest principle set out in section 1.2105(a)(4) of the Commission's competitive bidding rules.[112] Under this newly adopted definition, a "controlling interest" includes individuals or entities with positive or negative *de jure* or *de facto* control of the licensee.[113] This new rule will allow an applicant that has a disclosable non-controlling interest holder in another applicant to participate separately in an auction provided each applicant certifies that it has established internal control procedures to preclude any person acting on behalf of the applicant from possessing information about the bids or bidding strategies of more than one applicant or communicating such information with respect to either applicant to another person another person acting on behalf of and possessing such information regarding another applicant. We caution, however, that, as with certifications submitted to the Commission in other contexts, submission of such certification in an application will not outweigh specific evidence that a communication violating the Commission's rules has occurred, nor will it preclude the initiation of an investigation when warranted.[114]

208. We conclude that implementation of the principle that an entity may generally participate in bidding only through a single auction applicant will promote transparency in Commission auctions and will promote straightforward bidding activity by separate bidding entities. A transparent process will promote participation and competition in our future auctions, which is vital to ensuring the Commission meets its statutory goals. We find therefore that this prohibition is in the public interest.

209. *Limited Exception to Commonly Controlled Entity Limitation for Existing Rural Partnerships*. We establish a limited exception to the general prohibition on multiple applications by commonly controlled entities for existing rural partnership. A broad set of rural interests have expressed concern that this prohibition could adversely impact rural telephone companies that may have an ownership interest in more than one licensee in a particular market.[115] As the Rural-26 Coalition explains, "historic B Block cellular partnerships are a readily identifiable group of entities that were created as part

[109] Sprint *Part 1 NPRM* Comments at 17-18.

[110] *See, e.g.*, AT&T *Part 1 NPRM* Comments at 10 (noting that while having successfully coordinated bidding, "DISH may not have had 'exclusive control' of the designated entities within the meaning of the Commission's proposed rule."); Spectrum Financial *Part 1 NPRM* Reply at 3 (proposing that "[a]nti-collusion rules for future auctions ought to limit joint ownership to much less than controlling interest, certainly less than 50%").

[111] *See* Section III.B (Joint Bidding) for more information concerning an auction applicant's certification that it is not, and will not be, privy to, or involved in, the bids or bidding strategy of more than one auction applicant.

[112] *See* 47 C.F.R. § 1.2105(a)(4), as adopted herein.

[113] *De jure* control includes holding 50 percent or more of the voting stock of a corporation or holding a general partnership interest in a partnership. Ownership interests that are held indirectly by any party through one or more intervening corporations may 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 meets or exceeds 50 percent or represents actual control, it may be treated as if it were a 100 percent interest. *De facto* control is determined on a case-by-case basis. Examples of *de facto* control include constituting or appointing 50 percent or more of the board of directors or management committee; having authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; or playing an integral role in management decisions. 47 C.F.R. § 1.2105(a)(4).

[114] *See, e.g.*, 47 C.F.R. § 1.17 (prohibiting material misrepresentation to the Commission).

of the cellular settlement process for rural wireline carriers established by the Commission in CC Docket No. 85-388."[116] Without such an exception, our new rule could limit participation in auctions by such partnerships and the rural telephone companies that comprise those rural wireless partnerships. The Rural-26 Coalition points out that an "issue arises primarily with rural telcos that have telephone exchange areas in more than one Rural Service Area (RSA), and therefore ended up a part of more than one cellular RSA partnership as a result of the cellular B Block settlement process that applied to wireline companies in the mid to late 1980s."[117] Such settlements provided that each telephone carrier operating in a particular RSA would hold a partnership interest in a partnership to operate the B Block cellular license.[118] Often such rural wireless partnerships were structured with each partner holding a general partnership interest with one of the general partners serving as managing partner.[119] Because a rural telephone company may have operated telephone exchanges in more than one RSA, such company may be a partner in multiple rural wireless partnerships.[120] We recognize that such long-standing partnerships and their component rural telephone companies may each seek to participate in Commission auctions with different bidding objectives and that the unique ownership structures of such partnerships should not be an obstacle to these entities separate participation, particularly where, with the limits set out below, we believe that the anticompetitive concerns underlying the general prohibition are unlikely to be implicated.

210. Under this limited exception to our governing commonly controlled entities rule for existing rural partnerships, each qualifying rural wireless partnership and its individual members will be permitted to participate separately in an auction. For purposes of this rule, a qualifying rural wireless partnership is one that was established as a result of the cellular B block settlement process established by the Commission in CC Docket No. 85-388, no nationwide provider is a managing partner or a managing member of the management committee; and partnership interests have not materially changed as of the effective date of this Report and Order.[121] A partnership member would qualify if it is a partner or successor-in-interest to a partner in a qualifying partnership, does not have day-to-day management responsibilities in the partnership and holds 25 percent or less ownership interest; and certifies that it will insulate itself from the bidding process of the cellular partnership and any other members of the partnership (other than expressing prior to the deadline for resubmission of short-form applications the maximum it is willing to spend as a partner). Such individual qualifying members of a rural wireless partnership may bid separately at auction, in addition to the rural wireless partnership itself.

D. Miscellaneous Part 1 Revisions

211. ***Background.*** In the *NPRM*, we proposed changes to sections 1.2111 and 1.2112, both of which are in Part 1, Subpart Q, of our rules, the subpart that generally governs competitive bidding proceedings to assign spectrum licenses.[122] We received no comments on these proposals.

212. ***Discussion***. *Section 1.2111*. We proposed to repeal the first two paragraphs of section

[115] *See* Rural-26 Coalition June 24, 2015 *Ex Parte* Letter at 2; RWA/NCTA/Blooston Rural July 8, 2015 *Ex Parte* Letter at 3-4. *See also* Verizon July 9, 2015 *Ex Parte* Letter at 2 (explaining that "the rules for interests in multiple applicants should account for the wireline cellular partnerships that were established through the original cellular licensing regime."); USCC *Part 1 PN* Comments at 11.

[116] *See* RWA/NCTA/Blooston Rural June 24, 2015 *Ex Parte* Letter at 3.

[117] *Id.* at 2.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Our use of "materially changed" in regard to any changes over time in the composition of the rural wireless partnership is intended to allow this exception to apply even if the partnership has undertaken *de minimis* changes or partners have dropped out.

[122] *See* 47 C.F.R. § 1.2101 (explaining that the provisions of Subpart Q implement section 309(j) of the Act, as added by the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103-66) and subsequent amendments).

1.2111. We proposed to repeal section 1.2111(a), under which applicants for assignments or transfers during the first three years of a license term must provide the Commission with detailed contract and marketing information. As we discussed in the *NPRM*, this requirement appears to burden licensees without providing a corresponding benefit to the Commission or the public. We also proposed to repeal section 1.2111(b), a never-used unjust enrichment payment requirement for broadband PCS C and F block set-aside licenses. In the absence of opposition to either of these proposals, we adopt them both.

213. *Section 1.2112*. We proposed to modify section 1.2112 to clarify the auction application requirements for reporting an entity's percentage ownership in the applicant and in FCC-regulated entities. We proposed further changes to specify application requirements for bidding consortia. Finally, we proposed to correct two errors in the rule caused by the inadvertent substitution of an incorrect paragraph in the Code of Federal Regulations publication of the rule for the correct one published in the Federal Register summary of the *DE Second Report and Order*.[123] The first error was the addition of a requirement that DE short-form applicants list and summarize all their agreements that support their DE eligibility, a requirement that the Commission had intended to apply only to long-form applicants. We proposed to repeal this requirement for the short-form application. The second error was the deletion of a requirement that DE short-form applicants list the parties with which they have lease or resale arrangements for any of the DE applicants' spectrum licenses. We proposed to reinstate this requirement. In the absence of opposition to any of these proposed changes to section 1.2112, we adopt them all.

IV. ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER IN WT DOCKET NO. 05-211

214. ***Background***. In this and the next two sections, we address pending matters in WT Docket No. 05-211. In this *Order on Reconsideration of the CSEA and Competitive Bidding Report and Order*, we resolve two petitions for reconsideration filed in response to the 2006 amendments to the Commission's consortium exception to the attribution requirements of section 1.2110.[1] Under the Commission rules for determining eligibility for size-based bidding credits, the Commission allows parties that individually qualify as small businesses to form consortia and to apply for and participate in spectrum auctions together without being required to attribute their gross revenues to one another.[2]

215. In the 2006 *CSEA and Competitive Bidding Report and Order*, the Commission modified the consortium exception to its attribution rules for determining an applicant's eligibility for small business bidding credits.[3] After receiving no opposition to its proposals offered in the 2005 *CSEA and Competitive Bidding NPRM*,[4] the Commission adopted all three of the modifications discussed in its notice. Thus, the Commission amended its rules to require that (1) consortium members file individual long-form applications for their respective, mutually agreed-upon license(s), following an auction in which the consortium has won one or more licenses; (2) two or more consortium members seeking to be licensed together for the same license(s), or the disaggregated or partitioned portions thereof, form a legal

[123] *Compare* 71 Fed. Reg. 26245, 26253 (May 4, 2006) (publishing summary of *DE Second Report and Order*, 21 FCC Rcd 4753), *with* 47 C.F.R. § 1.2112 (Oct. 1, 2006).

[1] 47 C.F.R. § 1.2110. Prior to 2006, the rules were silent as to whether consortium members would continue to enjoy the attribution exception when filing a long-form applications and being granted licenses.

[2] *Id.* § 1.2110(b)(3)(i).

[3] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Report and Order*, 21 FCC Rcd 891, 910-12 ¶¶ 47-52 (2006) (*CSEA and Competitive Bidding Report and Order*). The CSEA—the Commercial Spectrum Enhancement Act—establishes a mechanism for reimbursing federal agencies out of spectrum auction proceeds for the cost of relocating their operations from certain eligible frequencies that have been reallocated from federal to non-federal use operations. *Id.* at 893-94 ¶ 4 & n.5; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Declaratory Ruling and Notice of Proposed Rulemaking*, 20 FCC Rcd 11268, 11269 ¶¶ 1-2 (2005) (*CSEA and Competitive Bidding NPRM*).

[4] *CSEA and Competitive Bidding NPRM*, 20 FCC Rcd at 11290 ¶ 54.

business entity, such as a corporation, partnership, or limited liability company, to hold the license(s); and (3) any such business entity to comply with the applicable financial limits for eligibility.[5] The Commission also clarified that the consortium exception is available only to short-form applicants and not to prospective licensees, assignees, or transferees.[6]

216. In adopting the changes, the Commission observed that the consortium exception had seldom been used, perhaps in part because of insufficient direction from the Commission as to how members of consortia that win licenses could be formally organized and how they could hold their licenses.[7] The Commission also explained that the rule changes should "invest the consortium exception with greater transparency, thereby promoting clearer planning by smaller entities, while continuing to allow them to enhance their competitiveness with efficiencies of scale and strategy."[8] The Commission noted as well that ensuring that licenses are granted only to legal business entities would facilitate enforcement of the Communications Act and of Commission rules and policies, particularly in the event of a disagreement among consortium members.[9]

217. ***Discussion***. We deny the two petitions for reconsideration filed in response to the 2006 amendments to the consortium exception, one by NTCA and the other by Blooston Rural,[10] and retain the rule modifications. While neither party filed comments in response to the *CSEA and Competitive Bidding NPRM*, both claimed in 2006 that the adopted rule modifications would limit the consortium exception's usefulness (and use) by preventing small entities that wished to be licensed as consortia from pooling their resources.[11]

218. In its petition, NTCA declares that previously unavailable information—the results of a late fall 2005 survey that NTCA conducted of its members—led to NTCA's petition for reconsideration.[12] According to NTCA, 62 percent of its survey respondents found it difficult to obtain financing for wireless projects, and 27 percent were concerned about their ability to obtain spectrum at auction.[13] We reject this position, however, because NTCA does not connect the survey to its concern with the consortium exception. Indeed, neither NTCA nor the NTCA 2005 Wireless Survey Report indicates that the survey, conducted several months after the Commission sought comment on possible changes to the consortium exception, considered the consortium exception.[14]

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[5] *CSEA and Competitive Bidding Report and Order*, 21 FCC Rcd at 911 ¶ 51; *see also* 47 C.F.R. §§ 1.2107(g), 1.2110(b)(3)(i). The Commission explained that a newly formed legal entity comprising two or more consortium members that did not qualify for as large a size-based bidding credit as that claimed by the consortium on its short-form application would be awarded a bidding credit, if at all, based on the entity's eligibility for such credit at the long-form filing deadline. *CSEA and Competitive Bidding Report and Order*, 21 FCC Rcd at 911 ¶ 51 n.94.

[6] *Id*. at 911-12 ¶ 52.

[7] *Id.* at 910 ¶ 48.

[8] *Id.* at 911-12 ¶ 52.

[9] *Id.*

[10] NTCA, Petition for Reconsideration (filed Mar. 9, 2006) ("NTCA Petition"); Blooston Rural, Petition for Clarification and/or Reconsideration (filed Mar. 9, 2006) ("Blooston Rural Petition").

[11] NTCA Petition at 3-4, 7-9; Blooston Rural Petition at 5-9.

[12] NTCA Petition at 5-6.

[13] *Id.*

[14] *Id.* For that matter, no subsequent NTCA wireless survey report references the consortium exception. *See* the NTCA Wireless Survey Reports for the years 2006 through 2014. (No wireless survey report for 2010 is evident on NTCA's survey report web page.) http://www.ntca.org/survey-reports/survey-reports.html (last visited Mar. 26, 2015).

219. Blooston Rural states that it did not comment in 2005 on possible changes to the consortium exception, because the effect of the changes put out for comment was unclear.[15] Blooston Rural also complains that the import of the possible modifications was obscured by the fact that they were part of a rulemaking focused on CSEA matters.[16] Blooston Rural argues further that the Commission did not make clear that a licensee comprising consortium members would have to meet the designated entity financial caps.[17] It contends that the Commission's clarification regarding the consortium exception with respect to the secondary market was not put out for comment in the *CSEA and Competitive Bidding NPRM* and is "contrary to prior statements and practices of the Commission in dealing with small business consortia."[18] Finally, Blooston Rural submits that notice of all consortium exception rule changes was inadequate because the Commission did not provide text of the proposed rule.[19]

220. We conclude that these objections are without merit. The *CSEA and Competitive Bidding NPRM* addressed non-CSEA matters at least as much as it did matters concerning the CSEA. A separate section of the non-CSEA portion of the item, identified as such in the table of contents, dealt solely with possible changes to the consortium exception.[20] Moreover, the Commission articulated in the *CSEA and Competitive Bidding NPRM* all of the primary elements of the rule changes ultimately adopted. The Commission sought comment, for example, on whether it "should adopt a new requirement that each member of the consortium file an individual long-form application for its respective, mutually agreed-upon license(s), following an auction in which a consortium has won one or more licenses," explaining that, "[t]o comply with this requirement, consortium members would, prior to filing their short-form application, have reached an agreement as to how they would allocate among themselves any licenses (or disaggregated or partitioned portions of licenses) they might win."[21]

221. Blooston Rural also claims that the Commission's NPRM did not articulate what would happen to a consortium at the licensing stage.[22] We disagree. The Commission sought comment on "whether, in order for two or more consortium members to be licensed together for the same license(s) (or disaggregated or partitioned portions thereof), they should be required to form a legal business entity, such as a corporation, partnership, or limited liability company, after having disclosed this intention on their short-form and long-form applications."[23] In particular, the Commission asked for comment on "whether such new entities would have to meet [the] small business or entrepreneur financial limits and whether allowing these entities to exceed the limits would be consistent with [the] existing designated entity and broadband PCS entrepreneur rules, as well as [the Commission's] obligations under the Communications Act."[24]

222. Thus the notice was sufficient to apprise even a casual reader of all the specific rule changes ultimately adopted. Further, notwithstanding Blooston Rural's intimations otherwise,[25] there is no requirement in the Administrative Procedure Act ("APA") that the specific wording of a proposed rule be provided in the notice. Rather, an agency must notify the public of "either the terms or substance of

[15] Blooston Rural Petition at 2-5, 7-8.

[16] *Id.* at 2-3, 7.

[17] *Id*. at 4-5.

[18] *Id.* at 6-7.

[19] *Id.* at 4, 7.

[20] *CSEA and Competitive Bidding NPRM*, 20 FCC Rcd at 11289-90 ¶¶ 51-54.

[21] *Id.* at 11290 ¶ 54.

[22] Blooston Rural Petition at 4.

[23] *CSEA and Competitive Bidding NPRM*, 20 FCC Rcd at 11290 ¶ 54.

[24] *Id.*

[25] *See* Blooston Rural Petition at 4, 7.

the proposed rule or a description of the subjects and issues involved."[26] Accordingly, the consortium exception provisions put out for comment in the *CSEA and Competitive Bidding NPRM* fulfilled the notice requirements of the APA.

223. Addressing Blooston Rural's procedural and substantive objection to the Commission's clarification that the consortium exception does not apply in secondary market transactions, we conclude that the clarification was an interpretive rule and thus exempt from APA notice requirements.[27] As modified, the consortium exception provides a benefit beginning with the short-form filing and continuing throughout the course of an auction to facilitate the pooling of resources for auction preparation and bidding. Given that participants in secondary market transactions are, by definition, not engaged in auction preparation or bidding, there is no rationale for assignees, transferees, or spectrum lessees (or their assignors, transferors, or spectrum lessors) to use the exception. And, while Blooston Rural claims that this clarification is contrary to prior Commission statements and practices,[28] it provides no examples to support the claim. Accordingly, the clarification will stand.

224. We also find the petitioners' substantive objections to the primary rule modifications to be without merit. Both Blooston Rural and NTCA argue that the rule changes will reduce use of the consortium exception, contrary to the statutory mandate that the Commission promote the involvement of small businesses in the provision of spectrum-based services.[29] NTCA contends, moreover, that under the modified exception small businesses will find spectrum financing more difficult than before, because they will not be able to "pool their resources and enhance the value of their bidding credits."[30]

225. Petitioners' unsubstantiated claims have not convinced us that the 2006 clarifications to the consortium exception have either limited its proper use—i.e., to facilitate the pooling of resources for auction preparation and bidding—or negatively affected spectrum financing for small businesses. The consortium exception was so rarely employed before the 2006 rule changes took effect that any benefit from its prior use should, at best, be characterized as negligible.[31] In the absence of evidence to the contrary, we continue to believe that the rule changes have not adversely affected small businesses and that the changes instead prevent many of the structural and contractual pitfalls to which members of a consortium lacking a legally enforceable organizational structure could be vulnerable, particularly should any members file for bankruptcy protection.

226. Equally important, the modifications to the consortium exception strengthen our ability to enforce Commission rules by allowing us to identify and maintain legal access to those parties receiving license grants. The result is more efficient regulation, which ultimately benefits both licensees and the public. We also find that the rule modifications help ensure that small businesses and now rural service providers are not able to use the consortium exception as a means of evading the requirements for designated entity eligibility. We therefore affirm the Commission's 2006 *CSEA and Competitive Bidding Report and Order* rule modifications to the consortium exception to the attribution rules for determining an applicant's eligibility for small business bidding credits.

V. THIRD ORDER ON RECONSIDERATION OF THE SECOND REPORT AND ORDER IN WT DOCKET NO. 05-211

227. In this *Third Order on Reconsideration of the DE Second Report and Order*, we resolve two remaining petitions for reconsideration received in response to the 2006 *DE Second Report and*

[26] 5 USC § 553(b)(3).

[27] 5 USC § 553(b)(3). The statue refers to "interpretative" rules; however, "interpretive" is the more common word today and the one we use in this order. *See Perez v. Mortgage Bankers Ass'n.*, 135 S. Ct. 1199, 1204 & n.1 (2015).

[28] *See supra* para. 198; Blooston Rural Petition at 6-7.

[29] NTCA Petition at 8; Blooston Rural Petition at 6.

[30] NTCA Petition at 6-7.

[31] *See CSEA and Competitive Bidding NPRM*, 20 FCC Rcd at 11290 ¶ 53.

Order, the Blooston Rural June 2, 2006 Petition and the Cook Inlet June 5, 2006 Petition.[1] As explained below, we dismiss the Blooston Rural June 2, 2006 Petition because all of the issues raised in that petition were either resolved in 2010 by the Third Circuit's *Council Tree* decision or have been rendered moot by other rule changes adopted today. In the interest of thoroughness, however, we nonetheless provide the clarification requested by Cook Inlet.

228. ***Background***. As detailed in our *Part 1 NPRM*, in its 2006 *DE Second Report and Order*, the Commission adopted two bright-line "material relationship" attribution rules—the AMR rule[2] and the "impermissible material relationship" ("IMR") rule—for the leasing or resale of spectrum held by designated entities.[3] At the same time, the Commission lengthened the unjust enrichment period from five to ten years[4] and adopted new DE reporting requirements, including an annual reporting requirement, to ensure compliance with its rules and policies.[5]

229. The Commission received three petitions for reconsideration of the *DE Second Report and Order*,[6] one opposition to the petitions,[7] and one reply to the opposition.[8] Council Tree, the Minority Media Telecommunications Council, and Bethel Native Corporation (collectively, the "Joint Petitioners") together filed a petition for expedited reconsideration before the Commission adopted, on its own motion, on June 1, 2006, the *Order on Reconsideration of the DE Second Report and Order*.[9] The Blooston Rural June 2, 2006 Petition and the Cook Inlet June 5, 2006 Petition were received by the Commission after its adoption of the *Order on Reconsideration of the DE Second Report and Order*.

230. The Commission addressed many of the arguments raised in these filings in the *Order on Reconsideration of the DE Second Report and Order*.[10] The Commission denied the petition filed by the Joint Petitioners in the *DE Second Order on Reconsideration of the Second Report and Order*.[11] Other arguments were subsequently resolved by the litigation initiated by the Joint Petitioners against the Commission in the United States Court of Appeals for the Third Circuit.[12] The litigation culminated in

[1] Blooston Rural, Petition for Partial Reconsideration and/or Clarification (filed June 2, 2006) ("Blooston Rural June 2, 2006 Petition"); Cook Inlet Region, Inc., Petition for Reconsideration and Clarification (filed June 5, 2006) ("Cook Inlet June 5, 2006 Petition").

[2] *See supra* para. 10.

[3] *DE Second Report and Order*, 21 FCC Rcd at 4759-65 ¶¶ 15-30.

[4] *Id.* at 4765-68 ¶¶ 31-41.

[5] *Id.* at 4768 ¶ 42, 4769-70 ¶ 46-48.

[6] Joint Petitioners, Petition for Expedited Reconsideration (filed May 5, 2006); Blooston Rural June 2, 2006 Petition; and Cook Inlet June 5, 2006 Petition.

[7] CTIA, Opposition to Petitions for Reconsideration, (filed July 14, 2006) (the "CTIA Opposition").

[8] Blooston Rural, Reply to Opposition to Petitions for Reconsideration (filed July 24, 2006) ("Blooston Rural July 24, 2006 Reply").

[9] *Order on Reconsideration of the DE Second Report and Order*, 21 FCC Rcd 6703. The Joint Petitioners' Petition was filed on May 5, 2006, and the *Order on Reconsideration of the DE Second Report and Order* was adopted on June 1, 2006.

[10] We received a single petition for reconsideration of the *Order on Reconsideration of the DE Second Report and Order*. Petition for Partial Reconsideration of Royal Street Communications, LLC (filed July 14, 2006). This petition was subsequently withdrawn. Letter from Paul C. Besozzi, Counsel to Royal Street Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jan. 9, 2007).

[11] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Second Order on Reconsideration of the Second Report and Order*, 23 FCC Rcd 5425 (2008) (*DE Second Order on Reconsideration of the Second Report and Order*) (formally denying the petition for expedited reconsideration filed by the Joint Petitioners).

[12] *See* Petition for Review and Emergency Motion for Stay Pending Review, filed jointly by the Joint Petitioners, 3rd Circuit No. 06-2943, dated June 7, 2006.

2010 with the Third Circuit's *Council Tree* decision in which the court vacated the IMR rule and the ten-year unjust enrichment period, holding that both provisions had been adopted with insufficient notice and opportunity for comment under the APA.[13] While the court upheld the AMR rule,[14] today, as detailed above, we have eliminated it. We have also addressed objections to annual DE reporting requirement, and we resolve the relevant aspect of Blooston Rural's June 2, 2006 petition accordingly.

231. ***Discussion***. With respect to the arguments that were still pending from the Blooston Rural June 2, 2006 Petition after the *Council Tree* decision,[15] we conclude that the actions we take today render these remaining arguments moot. In particular, the Blooston Rural June 2, 2006 Petition raised objections to the adequacy of notice and opportunity for comment on the Commission's AMR rule, as well as certain substantive objections about the rules' effectiveness.[16] Further, Blooston Rural objected to aspects of the DE annual reporting requirement. Because we have eliminated the AMR rule in today's order, Blooston Rural's June 2, 2006 objections to the rule are now moot.

232. Blooston Rural also objected to the DE annual reporting requirement. It criticized the rule on two bases: first, that the rule was unduly burdensome in that licensees with multiple auction licenses, each having a different grant date, would have to file multiple annual reports numerous times per year,[17] and, second, that the requirement was duplicative of the DE reporting requirements of other Commission rules.[18] In today's order, we have retained the annual DE reporting requirement, finding that it does not duplicate any of our other DE reporting requirements and continues to serve an important purpose, particularly in light of the additional flexibility we are affording DEs.[19] Thus, we deny Blooston Rural's request that the Commission eliminate the requirement.[20] Nevertheless, we conclude that, while we have not repealed the annual DE reporting requirement, itself, we have today eliminated any basis for Blooston Rural's objections to complying with the rule. For example, we have greatly reduced the burden on DEs by modifying the annual reporting requirement to give all filers the same deadline for all licenses of September 30 of each calendar year.[21] We have further reduced the filing burden on DEs, and eliminated any redundancy caused by the annual reporting requirement, by clarifying that filers need not report agreements and arrangements otherwise required to be reported under section 1.2110(n), so long as the current information is already on file in ULS and the filers provide in their annual reports the applicable ULS file number and filing date of the report containing the current information.[22] Thus, we conclude that, insofar Blooston Rural's June 2, 2006 Petition addresses the annual DE reporting requirement, it is, in part, denied and is otherwise moot.

233. The Cook Inlet June 5, 2006 Petition, in contrast, maintained that an issue raised in the Commission's *Order on Reconsideration of the DE Second Report and Order* required further clarification.[23] Cook Inlet asserted that the consideration of DE status in the context of an assignment or

[13] *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 254-55 (3d Cir. 2010) ("*Council Tree*"), *cert. denied*, 131 S. Ct. 1784 (2011).

[14] *Id*. at 251.

[15] As noted, the Commission received Blooston Rural's petition after the adoption of the *Order on Reconsideration of the DE Second Report and Order*.

[16] Blooston Rural June 2, 2006 Petition at 4-8; Blooston Rural July 24, 2006 Reply at 2-6. *See also* Cook Inlet June 5, 2006 Petition at 2-5 (expressing concern regarding retroactive application of the newly-adopted rule).

[17] Blooston Rural June 2, 2006 Petition at 9.

[18] *Id. at* ii, 9

[19] *See supra* Section II.E. (DE Reporting Requirements).

[20] Blooston Rural June 2, 2006 Petition at ii, 9; *see also* Blooston Rural July 24, 2006 Reply at 7-8.

[21] *See supra* paras. 162-167; *see also* Blooston Rural June 2, 2006 Petition at 9; Blooston Rural July 24, 2006 Reply at 7-8.

[22] *See supra* paras. 162-167.

transfer is unfair and discourages DEs from participating in the secondary market.[24]

234. Simply stated, we did not previously, and will not as a result of any of our rule changes today, evaluate the eligibility of a DE for benefits when that DE is a transferor or assignor in a secondary market transaction. Instead, in the context of such transactions, the Commission evaluates the eligibility, if any, of the transferee or assignee of a license. Accordingly, we conclude that Cook Inlet's arguments concerning retroactive consideration of DE status and section 309(j)(3)(E)(ii) are without foundation.[25]

VI. THIRD REPORT AND ORDER IN WT DOCKET NO. 05-211

235. Finally, in this *DE Third Report and Order*, we terminate consideration of proposals issued in a 2006 *DE Second Further Notice of Proposed Rule Making* (*DE Second FNPRM*), in which the Commission asked whether it should adopt any additional small business eligibility rules.[1] The majority of commenters responding to the *DE Second FNPRM* opposed any additional modification of the DE eligibility requirements. We conclude that this inquiry has been overtaken by the significant passage of time, the litigation regarding the rules adopted in the *DE Second Report and Order*,[2] and our efforts above to amend the Part 1 competitive bidding rules. Moreover, there was no record support for any of the changes the Commission was considering. We therefore decline to adopt any of the proposals raised in the 2006 *DE Second FNPRM*.

236. ***Background***. The *DE Second FNPRM* sought comment on additional proposals for eligibility restrictions on the relationships of DEs with certain other entities.[3] In particular, the Commission sought comment on whether additional eligibility restrictions should apply to the relationships of DEs with members of a certain entity class or classes,[4] the use of a financial threshold to define the class of entity triggering such restrictions, [5] applying a particular spectrum interest type to define an entity class,[6] and the possible adoption of an in-region component for the definition of relationships that should be subject to further eligibility restrictions.[7]

237. In addition to these class-based restrictions, the Commission sought comment on whether it should adopt additional rule changes restricting the award of small business benefits under certain circumstances and in connection with relationships with certain entities.[8] The Commission also requested comment on whether the relationships between DE applicants, or licensees, and other entities should be treated differently depending on the nature of the specific entity and the surrounding circumstances.[9] The

[23] As noted, the Commission received Cook Inlet's petition after the adoption of the *Order on Reconsideration of the DE Second Report and Order*. *See supra* para. 229.

[24] Cook Inlet June 5, 2006 Petition at 4-5.

[25] *See* 47 U.S.C. § 309(j)(3)(E)(ii).

[1] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Second Report and Order and Second Further Notice of Proposed Rule Making, Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753 (2006) (*DE Second FNPRM*).

[2] *See Council Tree*, 619 F.3d 235.

[3] *DE Second FNPRM*, 21 FCC Rcd at 4773-74 ¶¶ 60-63, 4776-77 ¶¶ 68-70.

[4] *Id.* at 4773 ¶ 59.

[5] *Id.* at 4773-74 ¶ 61.

[6] *Id.* at 4774 ¶ 62.

[7] *Id.* at 4776 ¶ 68.

[8] *Id.* at 4779-80 ¶ 78 (For example, the Commission sought comment on whether it should modify the definitions of "impermissible material relationships" and "attributable material relationships" to include additional types of agreements.).

[9] *Id.* at 4780 ¶ 79.

Commission further sought comment on the adoption of a personal net worth test for DE eligibility determinations.[10]

238. Ten parties filed comments in response to the *DE Second FNPRM*,[11] and five parties filed reply comments.[12] As noted above, the majority of commenters argued that the Commission should not adopt any further measures beyond the then-newly revised 2006 rules.[13]

239. ***Discussion***. We conclude that we will not adopt any designated entity eligibility rules based on the record acquired in the *DE Second FNPRM*, and we hereby close that inquiry. As discussed above, in the *DE Second FNPRM*, the Commission requested guidance on whether it "should adopt additional rule changes that would restrict the award of designated entity benefits" in certain circumstances and for relationships with certain types of entities.[14] The Commission also sought comment on the possible use of a personal net worth test in determinations of DE eligibility, citing a proposal to restrict individuals with a net worth of $3 million or more from having a controlling interest in a designated entity.[15]

240. Commenters offered limited support for additional eligibility restrictions based upon the possibility of adopting further restrictions related to class type and/or financial and operational agreements.[16] Most commenters, including Council Tree, the original proponent of the rule changes, urged the Commission to refrain from adopting additional eligibility restrictions based on the relationships of a designated entity applicant or licensee with a particular class of entities.[17] Most commenters also responded negatively to the potential use of an in-region component in any further material relationship restrictions.[18] The record compiled in 2006 therefore indicated little support for the adoption of any additional restrictions such as those contemplated in the *DE Second FNPRM*, and

[10] *Id.* at 4782 ¶ 87.

[11] Comments were filed by Blooston Rural; Cook Inlet: Council Tree; CTIA; Leap Wireless International, Inc.; National Association of Broadcasters; NTCA; Office of Advocacy of the U.S. Small Business Administration; Paging Systems, Inc.; and Wirefree Partners.

[12] Reply Comments were filed by: Aloha Partners, L.P., Cingular Wireless LLC, Council Tree Communications, Inc., Royal Street Communications, LLC, and Verizon Wireless.

[13] *See*, *e.g.*, September 20 Comments of CTIA at 8-10 ("CTIA Comments"); September 20 Comments of Cook Inlet at 4-5 ("Cook Inlet Comments"); October 20 Reply Comments of Council Tree at 5; October 20 Reply Comments of Verizon Wireless at 2-5 ("Verizon Wireless Reply Comments").

[14] *DE Second FNPRM*, 21 FCC Rcd at 4779-80, ¶ 78.

[15] *Id*. at 4782 ¶ 87. (This proposal was made in a Letter from Messrs. Steve C. Hillard and George T. Laub, Council Tree Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 02-353, 04-356, RM-10956 at 10 (June 13, 2005)).

[16] *See*, *e.g.*, February 24 Comments of Leap Wireless International, Inc. ("Leap Wireless") at 14-16. Leap Wireless includes its February 24, 2006 Comments as an attachment to its September 20, 2006 Comments (respectively, the "September Leap Wireless Comments" and the "February Leap Wireless Comments"). *See also* Blooston Petition at 3. *But see* September 20 Comments of Wirefree Partners at 12-13 ("Wirefree Partners Comments"); CTIA Comments at 8-10; September 20 Comments of the National Association of Broadcastersat 2-4 ("National Association of Broadcasters Comments") (the last three commenters all opposing class-based restrictions).

[17] September 20 Comments of Council Tree Communications, Inc. at 4-5 ("Council Tree Comments"); National Association of Broadcasters Comments at 2-5; Cook Inlet Comments at 2-4; Wirefree Partners Comments at 12-13; CTIA Comments at 8-10; National Association of Broadcasters Comments at 2-4; *See*, *e.g.*, Verizon Wireless Reply Comments at 2-4.

[18] Blooston Rural Comments at 6-7; *see also* CTIA Comments at 8-10; Cook Inlet Comments at 4-5 (arguing that, in the absence of a spectrum cap, an incumbent carrier may be more likely to abuse a relationship with a designated entity to obtain spectrum where its own spectrum resources are scarce, rather than in a market where it is already present); *but see* February Leap Wireless Comments at 14-16 (arguing that such benefits should not be awarded to companies that have a "material relationship" with a "large, in-region incumbent wireless provider).

provides no basis upon which to adopt rules.

241. Similarly, no commenter, including Council Tree, the original proponent of a personal net worth test, supported the adoption of such a restriction.[19] Several commenters in 2006 argued strongly that a personal net worth test would be unnecessary and ineffective.[20] We therefore conclude that the widespread opposition to such a restriction reinforces the Commission's previous conclusions on this matter. The Commission has previously observed that personal net worth limits can be difficult to apply and to enforce.[21] Accordingly, we decline to adopt any personal net worth test for determining small business eligibility.

242. In light of the many policy and rule modifications we adopt above regarding designated entity eligibility, as well as the general lack of support by commenters, we close the record complied in response to the 2006 *DE Second FNPRM*, and we terminate the inquiry.

VII. PROCEDURAL MATTERS

243. *Final Regulatory Flexibility Act Analysis*. Pursuant to the Regulatory Flexibility Act of 1980, as amended,[1] the Commission's Final Regulatory Flexibility Analysis (FRFA) relating to this *Report and Order* is attached as Appendix B.

244. *Final Paperwork Reduction Act of 1995 Analysis*. This document contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. It will be submitted to the Office of Management and Budget ("OMB") for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

245. We have assessed the effects of the policies adopted in this *Report and Order* with regard to information collection burdens on small business concerns, and find that these policies will benefit many companies with fewer than 25 employees by providing them with additional flexibility to obtain designated entity preferences under the Commission's Part 1 competitive bidding rules. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA attached to this *Report and Order* as Appendix B.

246. *Congressional Review Act*. The Commission will send a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[2]

247. *Delegation to Correct Rules*. We delegate authority to the Wireless Telecommunications Bureau, as appropriate, to make corrections to the rules set forth in Appendix A as necessary to conform them to the text of this *Report and Order*. We note that any entity that disagrees with a rule correction made on delegated authority will have the opportunity to file an Application for Review by the full Commission.[3]

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[19] *See, e.g.*, Wirefree Partners Comments at 17-18, Blooston Rural Comments at 9-10.

[20] Blooston Rural Comments at 9-10; *see also* October 20 Reply Comments of Aloha Partners, L.P. at 3-4 ("Aloha Partners Reply Comments"); Wirefree Partners Comments at 17-18; RSC Street Reply Comments at 7-8; Verizon Wireless Reply Comments at 4-5.

[21] *DE Second FNPRM*, 21 FCC Rcd at 4783 ¶ 90.

[1] *See* 5 U.S.C. § 604.

[2] *See* 5 U.S.C. § 801(a)(1)(A).

[3] *See* 47 U.S.C. § 155(c)(1).

VIII. ORDERING CLAUSES

248. IT IS ORDERED that, pursuant to sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), and 309(j), this *Report and Order* IS ADOPTED.

249. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), and 309(j), the petitions for reconsideration of the *Order on Reconsideration of the First Report and Order* in WT Docket No. 05-211, filed by Blooston, Mordkofsky, Dickens, Duffy & Pendergast, LLP, and by the National Telecommunications Cooperative Association are DENIED.

250. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), and 309(j), the petition for partial reconsideration and/or clarification of the *Second Report and Order and Second Further Notice of Proposed Rule Making* in WT Docket No. 05-211 filed by Blooston, Mordkofsky, Dickens, Duffy & Pendergast, LLP, is, to the extent described herein, DENIED and otherwise is DISMISSED AS MOOT.

251. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), and 309(j), the petition for reconsideration and clarification of the *Second Report and Order and Second Further Notice of Proposed Rule Making* in WT Docket No. 05-211 filed by Cook Inlet Region, Inc., is, to the extent described herein, DENIED, and otherwise is DISMISSED AS MOOT.

252. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), and 309(j), consideration of the *Second Further Notice of Proposed Rule Making* in WT Docket No. 05-211 is TERMINATED.

253. IT IS FURTHER ORDERED that the Commission's rules ARE HEREBY AMENDED as set forth in Appendix A.

254. IT IS FURTHER ORDERED that the rules adopted herein WILL BECOME EFFECTIVE 60 days after the date of publication in the Federal Register, except for those rules and requirements which contain new or modified information collection requirements that require approval by the OMB under the PRA and WILL BECOME EFFECTIVE after the Commission publishes a notice in the Federal Register announcing such approval and the relevant effective date.

255. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

256. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Report and Order* in WT Docket Nos. 14-170 and 05-211, GN Docket No. 12-268, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Parts 1 and 27 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 et seq.; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), 309, 1403, 1404, 1451, and 1452.

2. Section 1.2105 is amended by adding new paragraphs (a)(2)(x), (a)(3), (a)(4)(i)-(iv), and (b)(1)(ii); redesignating paragraph (a)(2)(x) as paragraph (a)(2)(xi); redesignating paragraph (a)(2)(xi) as paragraph (a)(2)(xii) and revising it; redesignating paragraph (a)(2)(xii) as paragraph (a)(2)(xiii); redesignating paragraph (b) as paragraph (b)(1) and revising it; redesignating paragraph (c)(5) as paragraph (c)(3); redesignating paragraph (c)(6) as paragraph (c)(4) and revising it; redesignating paragraph (c)(7) as paragraphs (c)(5)(i) and (ii) and revising resdesignated paragraph (c)(5(i); redesignating paragraph (c)(8) as paragraph (c)(6); revising paragraphs (a), (a)(1)(ii), (a)(2), (a)(2)(iii), (a)(2)(iv), (a)(2)(v), (a)(2)(vi), (a)(2)(viii), (a)(2)(ix), and (c)(1); removing existing paragraphs (c)(2) and adding a new paragraph (c)(2) in its place; removing paragraphs (c)(3) and (c)(4); and relocating the note to paragraph (a) to the end of paragraph (a) without change.

§ 1.2105 Bidding application and certification procedures; prohibition of certain communications.

* * * * *

(a) Submission of Short-Form Application (FCC Form 175). In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate upfront payment set forth by Public Notice. All short-form applications must be filed electronically.

(1)

* * *

(ii) In the case of application filing dates which occur automatically by operation of law, on a date specified by public notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.

(2) The short-form application must contain the following information, and all information, statements,

certifications and declarations submitted in the application shall be made under penalty of perjury:

* * *

(iii) The identity of the person(s) authorized to make or withdraw a bid. No person may serve as an authorized bidder for more than one auction applicant;

(iv) If the applicant applies as a designated entity, a certification that the applicant is qualified as a designated entity under §1.2110.

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to section 308(b) of the Communications Act of 1934, as amended;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of section 310 of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of section 310 is pending;

* * *

(viii) Certification that the applicant has provided in its application a brief description of, and identified each party to, any partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any agreements that address or communicate directly or indirectly bids (including specific prices), bidding strategies (including the specific licenses on which to bid or not to bid), or the post-auction market structure, to which the applicant, or any party that controls as defined in section 1.2105(a)(4) or is controlled by the applicant, is a party.

(ix) Certification that the applicant (or any party that controls as defined in section 1.2105(a)(4) or is controlled by the applicant) has not entered and will not enter into any partnerships, joint ventures, consortia or other agreements, arrangements, or understandings of any kind relating to the licenses being auctioned that address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid) or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure with: any other applicant (or any party that controls or is controlled by another applicant); with a nationwide provider that is not an applicant (or any party that controls or is controlled by such a nationwide provider); or, if the applicant is a nationwide provider, with any non-nationwide

provider that is not an applicant (or with any party that controls or is controlled by such a non-nationwide provider), other than:

(a) Agreements, arrangements, or understandings of any kind that are solely operational as defined under section 1.2105(a)(4);

(b) Agreements, arrangements, or understandings of any kind to form consortia or joint ventures as defined under section 1.2105(a)(4);

(c) Agreements, arrangements or understandings of any kind with respect to the transfer or assignment of licenses, provided that such agreements, arrangements or understandings do not both relate to the licenses at auction and address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid), or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure.

(x) Certification that if applicant has an interest disclosed pursuant to section 1.2112(a)(1)-(6) with respect to more than one short-form application for an auction, it will implement internal controls that preclude any individual acting on behalf of the applicant as defined in section 1.2105(c)(5) from possessing information about the bids or bidding strategies (including post-auction market structure), of more than one party submitting a short-form application or communicating such information with respect to a party submitting a short-form application to anyone possessing such information regarding another party submitting a short-form application.

(xi) Certification that the applicant is not in default on any Commission licenses and that it is not delinquent on any non-tax debt owed to any Federal agency.

(xii) A certification indicating whether the applicant has ever been in default on any Commission license or has ever been delinquent on any non-tax debt owed to any Federal agency. For purposes of this certification, an applicant may exclude from consideration as a former default any default on a Commission license or delinquency on non-tax debt to any Federal agency that has been resolved and meets any of the following criteria:

(A) the notice of the final payment deadline or delinquency was received more than seven years before the short-form application deadline;

(B) the default or delinquency amounted to less than $100,000;

(C) the default or delinquency was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency; or

(D) the default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding.

* * *

(3) Limit on filing applications. In any auction, no individual or entity may file more than one short-form application or have a controlling interest in more than one short-form application. In the case of a consortium, each member of the consortium shall be considered to have a controlling interest in the consortium. In the event that applications for an auction are filed by applications with overlapping controlling interests, pursuant to paragraph (b)(1)(ii), both applications will be deemed incomplete and only one such applicant may be deemed qualified to bid. This limit shall not apply to any qualifying rural wireless partnership and individual members of such partnerships. A qualifying rural wireless partnership for purposes of this exception is one that was established as a result of the cellular B block settlement process established by the Commission in CC Docket No. 85-388, no nationwide provider is a managing partner or a managing member of the management committee; and partnership interests have not materially changed as of the effective date of the Report and Order in WT Docket No. 14-170, FCC 15-80. A partnership member for purposes of this exception is a partner or successor-in-interest to a partner in a qualifying partnership, does not have day-to-day management responsibilities in the partnership and holds 25% or less ownership interest, and provides a certification in its short-form application that it will implement internal controls to insulate itself from the bidding process of the cellular partnership and any other members of the partnership, except that it may, prior to the deadline for resubmission of short-form applications, express to the partnership the maximum it is willing to spend as a partner.

(4) Definitions—For purposes of the certifications required under paragraph (a)(2)

(i) The term controlling interest includes individuals or entities with positive or negative de jure or de facto control of the applicant. De jure control includes holding 50 percent or more of the voting stock of a corporation or holding a general partnership interest in a partnership. Ownership interests that are held

indirectly by any party through one or more intervening corporations may 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 meets or exceeds 50 percent or represents actual control, it may be treated as if it were a 100 percent interest. De facto control is determined on a case-by-case basis. Examples of de facto control include constituting or appointing 50 percent or more of the board of directors or management committee; having authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; or playing an integral role in management decisions. In the case of a consortium, each member of the consortium shall be considered to have a controlling interest in the consortium.

(ii) The term consortium means an entity formed to apply as a single applicant to bid at auction pursuant to an agreement by two or more separate and distinct legal entities that individually are eligible to claim the same designated entity benefits under section 1.2110, provided that no member of the consortium may be a nationwide provider;

(iii) The term joint venture means a legally cognizable entity formed to apply as a single applicant to bid at auction pursuant to an agreement by two or more separate and distinct legal entities, provided that no member of the joint venture may be a nationwide provider;

(iv) The term solely operational agreement means any agreement, arrangement, or understanding of any kind that addresses operational aspects of providing a mobile service, including but not limited to agreements for roaming, device acquisition, and spectrum leasing and other spectrum use arrangements, so long as the agreement does not both relate to the licenses at auction and address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid) or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure.

NOTE TO PARAGRAPH (a): The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) Modification and Dismissal of Short-Form Application (FCC Form 175). (1) (i) Any short-form application (FCC Form 175) that does not contain all of the certifications required pursuant to this section

is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be deemed incomplete, the applicant will not be found qualified to bid, and the upfront payment, if paid, will be returned.

(ii) If (A) an individual or entity submits multiple applications in a single auction; or (B) entities commonly controlled by the same individual or same set of individuals submit applications for any set of licenses in the same or overlapping geographic areas in a single auction; then only one of such applications may be deemed complete, and the other such application(s) will be deemed incomplete, such applicants will not be found qualified to bid, and the associated upfront payment(s), if paid, will be returned.

* * *

(c) Prohibition of certain communications. (1) After the short-form application filing deadline, all applicants are prohibited from cooperating or collaborating with respect to, communicating with or disclosing, to each other or any nationwide provider that is not an applicant, or, if the applicant is a nationwide provider, any non-nationwide provider that is not an applicant, in any manner the substance of their own, or each other's, or any other applicants' bids or bidding strategies (including post-auction market structure), or discussing or negotiating settlement agreements, until after the down payment deadline, unless such communications are within the scope of an agreement described in section 1.2105(a)(2)(ix)(a)-(c) that is disclosed pursuant to section 1.2105(a)(2)(viii).

* * *

(2) [Removed]

* * *

(2) Any party submitting a short-form application that has an interest disclosed pursuant to section 1.2112(a)(1)-(6) with respect to more than one short-form application for an auction must implement internal controls that preclude any individual acting on behalf of the applicant as defined for purposes of this paragraph from possessing information about the bids or bidding strategies of more than one party submitting a short-form or communicating such information with respect to a party submitting a short-form application to anyone possessing such information regarding another party submitting a short-form

application. Implementation of such internal controls will not outweigh specific evidence that a prohibited communication has occurred, nor will it preclude the initiation of an investigation when warranted.

* * *

(3) [Removed]

* * *

(3) An applicant must modify its short-form application to reflect any changes in ownership or in membership of a consortium or a joint venture or agreements or understandings related to the licenses being auctioned.

(4) [Removed]

* * *

(4) A party that makes or receives a communication prohibited under paragraphs (c)(1) or (6) of this section shall report such communication in writing immediately, and in any case no later than five business days after the communication occurs. A party's obligation to make such a report continues until the report has been made. Such reports shall be filed as directed in public notices detailing procedures for the bidding that was the subject of the reported communication. If no public notice provides direction, the party making the report shall do so in writing to the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, by the most expeditious means available, including electronic transmission such as email.

(5) For purposes of this paragraph:

(i) The term applicant shall include all controlling interests in the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity. In the case of a consortium, each member of the consortium shall be considered to have a controlling interest in the consortium; and

* * * * *

3. Section 1.2106 is amended by revising paragraph (a) to read as follows:

§ 1.2106 Submission of upfront payments.

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. Any auction applicant that, pursuant to § 1.2105(a)(2)(xi), certifies that it is a former defaulter must submit an upfront payment equal to 50 percent more than the amount that otherwise would be required. No interest will be paid on upfront payments.

* * * * *

4. Section 1.2110 is amended by removing paragraph (b)(3)(iv); redesignating existing paragraph (b)(3) as paragraph (b)(4) and revising it; redesignating existing paragraph (f)(2) as paragraph (f)(2)(i) and revising it; redsignating existing paragraphs (f)(2)(i), (f)(2)(ii), and (f)(2)(iii) as paragraphs (f)(2)(i)(A), (f)(2)(i)(B), and (f)(2)(i)(C) and revising them; adding new paragraphs (b)(3), (c)(2)(ii)(J), (f)(2)(ii), and (f)(4); and revising paragraphs (a), (b)(1)(i) and (ii), (c)(6), (j), and (n) to read as follows:

§ 1.2110 Designated entities.

(a) Designated entities are small businesses (including small businesses owned by members of minority groups and/or women), rural telephone companies, and eligible rural service providers.

(b) Eligibility for small business and entrepreneur provisions—(1) Size attribution. (i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous three years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

(ii) If applicable, pursuant to §24.709 of this chapter, the total assets of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the

applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as an entrepreneur. An applicant seeking status as an entrepreneur must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous two years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

* * *

(b) * * *

(3) Standard for evaluating eligibility for small business benefits. To be eligible for small business benefits: (1) an applicant must meet the applicable small business size standard in §1.2110(b)(1)-(2) above, and (2) must retain de jure and de facto control over the spectrum associated with the license(s) for which it seeks small business benefits. An applicant or licensee may lose eligibility for size-based benefits for one or more licenses without losing general eligibility for size-based benefits so long as it retains de jure and de facto control of its overall business.

* * *

(b) * * *

(3) * * *

(iv) [Removed]

(b) * * *

(4) Exceptions—(i) Consortium. Where an applicant to participate in bidding for Commission licenses or permits is a consortium of entities eligible for size-based bidding credits and/or closed bidding based on gross revenues and/or total assets, the gross revenues and/or total assets of each consortium member shall not be aggregated. Where an applicant to participate in bidding for Commission licenses or permits is a consortium of entities eligible for rural service provider bidding credits pursuant to §1.2110(f)(4), the subscribers of each consortium member shall not be aggregated. Each consortium member must constitute a separate and distinct legal entity to qualify for this exception. Consortia that are winning bidders using this exception must comply with the requirements of §1.2107(g) of this chapter as a condition of license grant.

* * *

(c) * * *

(2) * * *

(ii) * * *

(J) In addition to the provisions of sections 1.2110(b)(1)(i) and 1.2110(f)(4)(C), for purposes of determining an applicant's or licensee's eligibility for bidding credits for designated entity benefits, the gross revenues (or, in the case of a rural service provider under section 1.2110(f)(4), the subscribers) of any disclosable interest holder of an applicant or licensee are also attributable to the applicant or licensee, on a license-by-license basis, if the disclosable interest holder uses, or has an agreement to use, more than 25 percent of the spectrum capacity of a license awarded with bidding credits. For purposes of this provision, a disclosable interest holder in a designated entity applicant or licensee is defined as any individual or entity holding a ten percent or greater interest of any kind in the designated entity, including but not limited to, a ten percent or greater interest in any class of stock, warrants, options or debt securities in the applicant or licensee. This rule, however, shall not cause a disclosable interest holder, which is not otherwise a controlling interest, affiliate, or an affiliate of a controlling interest of a rural service provider to have the disclosable interest holder's subscribers become attributable to the rural service provider applicant or licensee when the disclosable interest holder has a spectrum use agreement to use more than 25 percent of the spectrum capacity of a license awarded with a rural service provider bidding credit, so long as (1) the disclosable interest holder is independently eligible for a rural service provider bidding credit, and (2) the disclosable interest holder's spectrum use and any spectrum use agreements are otherwise permissible under the Commission's rules.

(c) * * *

(6) Consortium. A consortium of small businesses, very small businesses, entrepreneurs, or rural service providers is a conglomerate organization composed of two or more entities, each of which individually satisfies the definition of a small business, very small business, entrepreneur, or rural service provider as those terms are defined in this section and in applicable service-specific rules. Each individual member must constitute a separate and distinct legal entity to qualify.

* * * * *

(f) * * *

(2) Small business bidding credits.

(i) Size of bidding credits. A winning bidder that qualifies as a small business, and has not claimed a rural service provider bidding credit pursuant to paragraph (f)(4), may use the following bidding credits corresponding to its respective average gross revenues for the preceding 3 years:

(A) Businesses with average gross revenues for the preceding years, 3 years not exceeding $4 million are eligible for bidding credits of 35 percent;

(B) Businesses with average gross revenues for the preceding years, 3 years not exceeding $20 million are eligible for bidding credits of 25 percent; and

(C) Businesses with average gross revenues for the preceding years, 3 years not exceeding $55 million are eligible for bidding credits of 15 percent.

(ii) Cap on winning bid discount. A maximum total discount that a winning bidder that is eligible for a small business bidding credit may receive will be established on an auction-by-auction basis. The limit on the discount that a winning bidder that is eligible for a small business bidding credit may receive in any particular auction will be no less than $25 million. The Commission may adopt a market-based cap on an auction-by-auction basis that would establish an overall limit on the discount that a small business may receive for certain license areas.

(f) * * *

(4) Rural service provider bidding credit—(i) Eligibility. A winning bidder that qualifies as a rural service provider and has not claimed a small business bidding credit pursuant to paragraph (f)(1) will be eligible to receive a 15 percent bidding credit. For the purposes of this paragraph, a rural service provider means a service provider that—

(A) is in the business of providing commercial communications services and together with its controlling interests, affiliates, and the affiliates of its controlling interests as those terms are defined in paragraph (c)(2) and (c)(5) of this section, has fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers as of the date of the short form filing deadline; and

(B) serves predominantly rural areas, defined as counties with a population density of 100 or fewer persons per square mile.

(C) Size attribution. (1) The combined wireless, wireline, broadband, and cable subscribers of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for the rural service provider bidding credit.

(2) Exception. For rural partnerships providing service as of July 16, 2015, we will determine eligibility for the 15 percent rural service provider bidding credit by evaluating whether the individual members of the rural partnership individually have fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers, and for those types of rural partnerships, the subscribers will not be aggregated.

(ii) Cap on winning bid discount. A maximum total discount that a winning bidder that is eligible for a rural service provider bidding credit may receive will be established on an auction-by-auction basis. The limit on the discount that a winning bidder that is eligible for a rural service provider bidding credit may receive in any particular auction will be no less than $10 million. The Commission may adopt a market-based cap on an auction-by-auction basis that would establish an overall limit on the discount that a rural service provider may receive for certain license areas.

* * * * *

(j) 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, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, spectrum use agreements, and all other agreements including oral agreements, establishing as applicable, de facto or de jure control of the entity. Designated entities also must provide the date(s) on which they entered into of the agreements listed. In addition, designated entities must file with their long-form applications a copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of

the license, maintain at their facilities or with their designated agents the lists, summaries, dates and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to §1.2114.

* * * * *

(n) Annual reports. (1) Each designated entity licensee must file with the Commission an annual report no later than September 30 of each year for each license it holds that was acquired using designated entity benefits and that, as of August 31 of the year in which the report is due (the "cut-off date"), remains subject to designated entity unjust enrichment requirements (a "designated entity license"). The annual report must provide the information described in paragraph (n)(2) of this section for the year ending on the cut-off date (the "reporting year"). If, during the reporting year, a designated entity has assigned or transferred a designated entity license to another designated entity, the designated entity that holds the designated entity license on September 30 of the year in which the application for the transaction is filed is responsible for filing the annual report.

(2) The annual report shall include, at a minimum, a list and summaries of all agreements and arrangements (including proposed agreements and arrangements) that relate to eligibility for designated entity benefits. In addition to a summary of each agreement or arrangement, this list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement.

(3) A designated entity need not list and summarize on its annual report the agreements and arrangements otherwise required to be included under paragraphs (n)(1) and (n)(2) of this section if it has already filed that information with the Commission, and the information on file remains current. In such a situation, the designated entity must instead include in its annual report both the ULS file number of the report or application containing the current information and the date on which that information was filed.

* * * * *

5. Section 1.2111 is amended by removing paragraphs (a) and (b); redesignating paragraphs (c), (d), and (e) as paragraphs (a), (b), and (c); and revising redesignated paragraphs (a)(2), (a)(3), and (b)(1) to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

(a) [Removed]

(b) [Removed]

(c) Unjust enrichment payment: installment financing.

(1) * * *

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

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

* * * * *

(b) Unjust enrichment payment: bidding credits. (1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the

license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the licensee would qualify after restructuring), plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer or of a reportable eligibility event (see §1.2114).

* * * * *

(c) Unjust enrichment: partitioning and disaggregation

* * * * *

6. Section 1.2112 is amended by adding new paragraphs (b)(1)(v), (b)(1)(vi), and (b)(2)(viii); and revising paragraphs (b), (b)(1)(iii), (b)(1)(iv), (b)(2)(iii), (b)(2)(v), (b)(2)(vi), and (b)(2)(vii) to read as follows:

§ 1.2112 Ownership disclosure requirements for applications.

(a) *** * ***

* * * * *

(b) Designated entity status. In addition to the information required under paragraph (a) of this section, each applicant claiming eligibility for small business provisions or a rural service provider bidding credit shall disclose the following:

(1) * * *

(i) * * *

(ii) List any FCC-regulated entity or applicant for an FCC license, in which any controlling interest of the applicant owns a 10 percent or greater interest or a total of 10 percent or more of any class of stock, warrants, options or debt securities. This list must include a description of each such entity's principal business and a description of each such entity's relationship to the applicant;

(iii) List all parties with which the applicant has entered into agreements or arrangements for the use of

any of the spectrum capacity of any of the applicant's spectrum;

(iv) List separately and in the aggregate the gross revenues, computed in accordance with §1.2110, for each of the following: The applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium;

(v) If applying as a consortium of designated entities, provide the information in paragraphs (b)(i)-(iv) separately for each member of the consortium;

(vi) If claiming eligibility for a rural service provider bidding credit, provide all information to demonstrate that the applicant meets the criteria for such credit as set forth in 1.2110(f)(4).

* * * * *

(b) * * *

(2) * * *

(i) * * *

(ii) * * *

(iii) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility under the applicable designated entity provisions, including the establishment of de facto or de jure control. Such agreements and instruments include articles of incorporation and by-laws, partnership agreements, shareholder agreements, voting or other trust agreements, management agreements, franchise agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and any other relevant agreements (including letters of intent), oral or written;

(iv) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees;

(v) List separately and in the aggregate the gross revenues, computed in accordance with §1.2110, for each of the following: the applicant, its affiliates, its controlling interests, and affiliates of its controlling interests; and if a consortium of designated entities, the members comprising the consortium;

(vi) List and summarize, if seeking the exemption for rural telephone cooperatives pursuant to §1.2110,

all documentation to establish eligibility pursuant to the factors listed under §1.2110(b)(3)(iii)(A);

(vii) List and summarize any agreements in which the applicant has entered into arrangements for the use of any of the spectrum capacity of the license that is the subject of the application; and

(viii) If claiming eligibility for a rural service provider bidding credit, provide all information to demonstrate that the applicant meets the criteria for such credit as set forth in 1.2110(f)(4).

* * * * *

7. Section 1.2114 is amended by revising paragraph (a)(1) to read as follows:

§1.2114 Reporting of eligibility event.

* * * * *

(a) * * *

(1) Any spectrum lease (as defined in §1.9003) or any other type of spectrum use agreement with one entity or on a cumulative basis that might cause a licensee to lose eligibility for installment payments, a set-aside license, or a bidding credit (or for a particular level of bidding credit) under §1.2110 and applicable service-specific rules.

* * * * *

8. Section 1.9020 is amended by revising paragraphs (d)(4) and (e) to read as follows:

§ 1.9020 Spectrum manager leasing arrangements.

*** * * * ***

(d) * * *

(4) Designated entity/entrepreneur rules. A licensee that holds a license pursuant to small business, rural service provider, and/or entrepreneur provisions (*see* §1.2110 and §24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* §1.2111 and §24.714 of this chapter) and/or transfer restrictions (*see* §24.839 of this chapter) may enter into a spectrum manager leasing arrangement with a spectrum lessee, regardless of whether the spectrum lessee meets the Commission's designated entity eligibility requirements (*see* §1.2110 of this chapter) or its entrepreneur eligibility requirements to hold certain C and F block licenses in the broadband personal communications services (*see* §1.2110 and §24.709 of this chapter), so long as the spectrum manager leasing arrangement does not result in the

spectrum lessee's becoming a "controlling interest" or "affiliate" (*see* §1.2110 of this chapter) of the licensee such that the licensee would lose its eligibility as a designated entity or entrepreneur.

* * * * *

(e) Notifications regarding spectrum manager leasing arrangements. A licensee that seeks to enter into a spectrum manager leasing arrangement must notify the Commission of the arrangement in advance of the spectrum lessee's commencement of operations under the lease. Unless the license covering the spectrum to be leased is held pursuant to the Commission's designated entity rules and continues to be subject to unjust enrichment requirements and/or transfer restrictions (*see* §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter), the spectrum manager lease notification will be processed pursuant to either the general notification procedures or the immediate processing procedures, as set forth herein. The licensee must submit the notification to the Commission by electronic filing using the Universal Licensing System (ULS) and FCC Form 608, except that a licensee falling within the provisions of § 1.913(d) may file the notification either electronically or manually. If the license covering the spectrum to be leased is held pursuant to the Commission's designated entity rules, the spectrum manager lease will require Commission acceptance of the spectrum manager lease notification prior to the commencement of operations under the lease.

* * * * *

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

9. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302a, 303, 307, 309, 332, 336, 337, 1403, 1404, 1451, and 1452, unless otherwise noted.

10. Section 27.1002 is amended by revising paragraphs (a)(1) and (2) to read as follows:

§27.1002 Designated entities in the 1915-1920 MHz and 1995-2000 MHz bands.

* * * * *

(a)(1) A small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, 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 affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $15 million for the preceding three years.

11. Section 27.1104 is amended by revising paragraphs (a)(1) and (2) to read as follows:

§27.1104 Designated Entities in the 2000-2020 MHz and 2180-2200 MHz bands.

* * * * *

(a) Small business. (1) A small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, 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 affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $15 million for the preceding three years.

* * * * *

12. Section 27.1106 is amended by revising paragraphs (a)(1) and (2) to read as follows:

§27.1106 Designated Entities in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands.

* * * * *

(a) Small business. (1) A small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $40 million for the preceding three (3) years.

(2) A very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $15 million for the preceding three (3) years.

* * * * *

13. Section 27.1301 is amended by removing the introductory text; adding new paragraph (b); redesignating existing paragraph (b) as paragraph (c) and revising it; and revising paragraphs (a)(1) and (2) to read as follows:

§ 27.1301 Designated entities in the 600 MHz band.

* * * * *

(a) Small business. (1) A small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $55 million for the preceding three (3) years.

(2) A very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $20 million for the preceding three (3) years.

(b) Eligible rural service provider. For purposes of this section, an eligible rural service provider is an entity that meets the criteria specified in § 1.2110(f)(4) of this chapter.

(c) Bidding credits. (1) A winning bidder that qualifies as a small business as defined in this section or a consortium of small businesses may use the bidding credit specified in §1.2110(f)(2)(i)(C) of this chapter. A winning bidder that qualifies as a very small business as defined in this section or a consortium of very small businesses may use the bidding credit specified in §1.2110(f)(2)(i)(B) of this chapter.

(2) An entity that qualifies as eligible rural service provider or a consortium of rural service providers may use the bidding credit specified in § 1.2110(f)(4) of this chapter.

* * * * *

APPENDIX B

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] the Commission has prepared this Final Regulatory Flexibility Analysis ("FRFA") of the possible significant economic impact on small entities by the policies and rules adopted in this *Report and Order* (*Report and Order*). The Commission will send a copy of this *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA"). In addition, the *Report and Order* and the FRFA (or summaries thereof) will be published in the Federal Register.

2. As required by the RFA, an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rule Making* ("*Notice*" or "*NPRM*") and a Supplemental Initial Regulatory Flexibility Analysis ("Supplemental IRFA) was incorporated in the *Public Notice* ("*Part 1 Public Notice*" or "*Public Notice*"). The Commission sought written public comment on the proposals in the *NPRM*[2] and *Part 1 Public Notice*,[3] including comment on the IRFA and Supplemental IRFA. We received one written *ex parte* letter addressing the IRFA or Supplemental IRFA. The Office of Advocacy, U.S. Small Business Administration (SBA Office of Advocacy) supports the Commission's repeal of the attributable material relationship ("AMR") rule and the Commission's decision allowing small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, "designated entities" or "DEs")[4] more flexibility in their ability to lease spectrum.[5] The SBA Office of Advocacy argues against "arbitrary caps" on DEs, saying that such caps would limit a small business's ability to grow.[6] It also warns against expanding the DE program to include some large

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

[2] *See* Updating Part 1 Competitive Bidding Rules, *Notice of Proposed Rulemaking*, Appendix B, 29 FCC Rcd 12426, 12488-12501 (2014) (*Part 1 NPRM*).

[3] *See* Request for Further Comment on Issues Related to Competitive Bidding Proceeding; Updating Part 1 Competitive Bidding Rules, *Public Notice*, 30 FCC Rcd 4153, 4168-4176 (2015) (*Part 1 PN*).

[4] In 1995, the Supreme Court decided *Adarand Constructors*, holding that any federal program in which the "government treats any person unequally because of his or her race" must satisfy the "strict scrutiny" constitutional standard of review. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227–30 (1995) (*Adarand Constructors*). The Court subsequently held in *VMI* that a state program that makes distinctions on the basis of gender must be supported by an "exceedingly persuasive justification" in order to withstand constitutional scrutiny. *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (*VMI*). In response to the Court's holding, the Commission decided that it would use race- and gender-neutral provisions until it had developed a record that would provide the evidentiary support necessary to withstand this standard of review, and maintain provisions for small businesses. Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19975-77 ¶¶ 1-3 (1996). The Commission has noted that many minority- and women-owned businesses qualify for the provisions that the Commission has adopted for small businesses. Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15318-19 ¶¶ 45-48 (2000), citing *Adarand Constructors*, 515 U.S. at 227.

[5] Letter from Jamie Belcore Saloom, Assistant Chief Counsel, SBA Office of Advocacy, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170 at 2 (filed June 8, 2015) (SBA Office of Advocacy June 8, 2015 *Ex Parte* Letter); *see also* § II.A.1 (AMR Rule).

[6] *See* SBA Office of Advocacy June 8, 2015 *Ex Parte* Letter at 2; *see also* § II.B.3 (Small Business and Rural Service Provider Bidding Credit Caps).

businesses, explaining that large businesses do not need another advantage over small entities.[7] Because we amend the rules in this Order, we have included this FRFA which conforms to the RFA.[8]

A. Need for, and Objectives of, the Order

3. Given the prolific changes witnessed in the wireless industry over the last decade , this adopts revisions to certain of the Part 1 competitive bidding rules in advance of an auction that holds historic potential for interested applicants to acquire licenses for below 1-GHz spectrum in the Broadcast Television Spectrum Incentive Auction ("Incentive Auction"). The *Report and Order* therefore reforms some of the Commission's general Part 1 rules governing competitive bidding for spectrum licenses to reflect changes in the marketplace, including the challenges faced by new entrants. The *Report and Order*'s new rules also advance the statutory directive to ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services while preventing unjust enrichment, and fulfill the commitment made in the *Incentive Auction R&O*.[9] Together these revisions will assure that the Commission's Part 1 rules continue to promote the Commission's fundamental statutory objectives.

4. Specifically, the *Report and Order* adopts revisions that:

- Modify our eligibility requirements for small business benefits, and update the standardized schedule of small business sizes, including the gross revenues thresholds used to determine eligibility;
- Establish a new bidding credit for eligible rural service providers;
- Implement a cap on the overall amount of bidding credits available for eligible entities in any one auction; Strengthen and target attribution rules to prevent the unjust enrichment of ineligible entities;
- Modify our DE reporting requirements;
- Revise the former defaulter rule, consistent with the waiver the Commission granted in Auction 97;
- Adopt rules prohibiting joint bidding arrangements with limited exceptions, and make related updates to our rule on prohibited communications; and
- Adopt rules prohibiting the same individual or entity as well as entities that have controlling interests in common from becoming qualified to bid on the basis of more than one short-form application in a specific auction, with a limited exception for certain rural wireless partnerships and individual members of such partnerships.

5. The *Report and Order* also resolves long standing petitions for reconsideration and adopts necessary clean up revisions to the Commission's Part 1 competitive bidding rules.[10]

6. With respect to small businesses, the *Report and Order*'s revisions to the Commission's rules reflect that small businesses need greater opportunities to gain access to capital so that they may have an opportunity to participate in the provision of spectrum-based services in today's communications marketplace. In the past decade, the rapid adoption of smartphones and tablet computers and the

[7] *See* SBA Office of Advocacy June 8, 2015 *Ex Parte* Letter at 2-3; *see also* § II.B.2 (Rural Service Provider Bidding Credit).

[8] *See* 5 U.S.C. § 604.

[9] *See, e.g.*, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, *Report and Order*, 29 FCC Rcd 6567, 6762 ¶ 474 (2014) (*Incentive Auction R&O*).

[10] *See* Petition for Partial Reconsideration and/or Clarification, Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP ("Blooston"), WT Docket No. 05-211, filed June 2, 2006; Petition for Reconsideration and Clarification, Cook Inlet Region, Inc., filed June 5, 2006; Reply to Opposition to Petitions for Reconsideration, Blooston, filed July 24, 2006; Petition for Reconsideration, National Telecommunications Cooperative Association, filed Mar. 9, 2006; Petition for Clarification and/or Reconsideration, Blooston, filed Mar. 9, 2006.

widespread use of mobile applications, combined with the increasing deployment of high-speed 3G and now 4G technologies, have driven significantly more intensive use of mobile networks.[11] This progression from the provision of mobile voice services to the provision of mobile broadband services has increased the need for access to spectrum.[12] In addition, in the past decade, the number of small and regional mobile wireless service providers has significantly decreased, yet regional and local service providers continue to offer consumers additional choices in the areas they serve.[13] The Commission anticipates that by revising its rules to allow small businesses to take advantage of the same opportunities to utilize their spectrum capacity and gain access to capital as those afforded to larger licensees, the Commission can better achieve its statutory directives.[14] Nonetheless, the Commission remains mindful of its obligation to prevent unjust enrichment of ineligible entities.[15]

B. Legal Basis

7. The action is authorized under sections 1, 4(i), 303(r), 309(j), and 316 of the Communications Act of 1934, as amended, 47 U.S.C. sections 151, 154(i), 303(r), 309(j), and 316.

C. Summary of Significant Issues Raised by Public Comments in Response to the IFRA or Supplemental IFRA

8. No commenters directly responded to the IRFA or Supplemental IRFA. The SBA Office of Advocacy raised concerns regarding the analysis contained within the earlier IRFAs.[16] Having reviewed both the initial IRFA and the supplemental IRFAs we conclude that the analyses satisfy the requirements of 5 U.S.C. § 603, as further specified in 5 U.S.C. § 607. The IRFAs sufficiently describe the impact of the rules the Commission proposed. We provide further detail in this FRFA below on the impact of the rules we adopt in this order, the steps we have taken to minimize the significant economic impact on small entities consisted with the stated objectives of the Communications Act, and an analysis of why these rules were adopted in and other significant alternatives were considered and rejected. Additionally, a number of commenters raised concerns about the impact on small businesses of various auction-related issues. We have nonetheless addressed these concerns in the FRFA.

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

9. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.[17] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."[18] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[19] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of

[11] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6146 ¶ 23.

[12] *Id.*

[13] *Id.* at 6144 ¶ 18, 6206 ¶ 179.

[14] Once effective, these revised rules will allow all licensees that have acquired licenses with or without DE benefits this increased flexibility.

[15] 47 U.S.C. § 309(j)(4)(E).

[16] SBA Office of Advocacy June 8, 2015 *Ex Parte* Letter at 3.

[17] 5 U.S.C. § 603(b)(3).

[18] 5 U.S.C. § 601(6).

[19] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

operation; and (3) satisfies any additional criteria established by the SBA.[20]

10. Small Businesses, Small Organizations, and Small Governmental Jurisdictions. The *Report and Order*'s revisions may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.[21] First, nationwide, there are a total of approximately 28.2 million small businesses, according to the SBA.[22] In addition, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[23] Nationwide, as of 2007, there were approximately 1,621,315 small organizations.[24] Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[25] Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.[26] We estimate that, of this total, as many as 88,506 entities may qualify as "small governmental jurisdictions."[27] Thus, we estimate that most governmental jurisdictions are small.

11. Licenses Assigned by Auction. The changes and additions to the Commission's rules in the *Report and Order* are of general applicability to all auctionable services. Accordingly, this FRFA provides a general analysis of the impact of the proposals on small businesses rather than a service-by-service analysis. The number of entities that may apply to participate in future Commission spectrum auctions is unknown. Moreover, the number of small businesses that have participated in prior spectrum auctions has varied. As a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of changes in control, or assignments or transfers, unjust enrichment issues are implicated.

12. Wireless Telecommunications Carriers (except satellite). The Census Bureau defines this category to include "establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services."[28] The SBA has developed a small business size standard for Wireless Telecommunications Carriers (except satellite).[29] Under the SBA's standard, a

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[20] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[21] *See* 5 U.S.C. § 601(3)-(6).

[22] *See* SBA, Office of Advocacy, Frequently Asked Questions, https://www.sba.gov/sites/default/files/advocacy/FAQ_March_2014_0.pdf (last visited Jul. 9, 2015).

[23] 5 U.S.C. § 601(4).

[24] INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

[25] 5 U.S.C. § 601(5).

[26] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427: Number of Local Governments by Types–States: 2007, *available at* http://www.census.gov/prod/2011pubs/11statab/stlocgov.pdf.

[27] The 2007 U.S. Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 small governmental organizations in 2007. If we assume that county, municipal, township and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,125. If we make the same assumption about special districts, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 special districts. Therefore, of the 89,476 small governmental organizations documented in 2007, as many as 88,506 may be considered small under the applicable standard. This data may overestimate the number of such organizations that has a population of 50,000 or less. *Id.* at Tables 427, 426 (data cited therein are from 2007).

business is small if it has 1,500 or fewer employees.[30] For this category, Census data for 2007 show that there were 1,383 firms that operated for the entire year.[31] Of this total, 1,368 firms (approximately 99 percent) had employment of 999 or fewer employees and only 15 (approximately 1 percent) had employment of 1,000 employees or more.[32] Similarly, according to Commission data, 413 carriers reported that they were engaged in the provisions of wireless telephony, including cellular service, PCS, and Specialized Mobile Radio ("SMR") Telephony services.[33] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[34] Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by the NPRM's proposed actions.[35]

13. Broadband Radio Service and Educational Broadband Service. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service ("MDS") and Multichannel Multipoint Distribution Service ("MMDS") systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") (previously referred to as the Instructional Television Fixed Service ("ITFS")).[36] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[37] The BRS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas ("BTAs"). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, based on our review of licensing records, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent BRS licensees do not meet the small business size standard).[38] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the

[28] U.S. Census Bureau, Industry Statistics Portal, 2012 NAICS: 517210 – Wireless telecommunications carriers (except satellite), Definition & Comparability, http://www.census.gov/econ/isp/sampler.php?naicscode=517210&naicslevel=6# (last visited Aug. 11, 2014).

[29] 13 C.F.R. § 121.201, NAICS code 517210.

[30] *Id*.

[31] U.S. Census Bureau, 2007 Economic Census, Table No. EC0751SSSZ5, Information: Subject Series – Estab and Firm Size: Employment Size of Firms for the United States: 2007 (NAICS Code 517210), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table (last visited Aug. 19, 2014).

[32] *Id*.

[33] *See Trends in Telephone Service* at Table 5.3.

[34] *See Trends in Telephone Service* at Table 5.3.

[35] *See id*.

[36] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding, MM Docket No. 94-131, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995).

[37] 47 C.F.R. § 21.961(b)(1) (1996).

[38] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1,500 or fewer employees.

sale of 78 licenses in the BRS areas.[39] The Commission established three small business size standards that were used in Auction 86: (i) an entity with attributed average annual gross revenues that exceeded $15 million and do not exceed $40 million for the preceding three years was considered a small business; (ii) an entity with attributed average annual gross revenues that exceeded $3 million and did not exceed $15 million for the preceding three years was considered a very small business; and (iii) an entity with attributed average annual gross revenues that did not exceed $3 million for the preceding three years was considered an entrepreneur.[40] Auction 86 concluded in 2009 with the sale of 61 licenses.[41] Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses. We note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service.

14. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based educational broadcasting services. Since 2007, Wired Telecommunications Carriers have been defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[42] Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.[43] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[44] Census data for 2007 shows that there were 3,188 firms that operated for the duration of that year.[45] Of those, 3,144 had fewer than 1,000 employees, and 44 firms had more than 1,000 employees. Thus under this category and the associated small business size standard, the majority of such firms can be considered small. In addition to Census data, the Commission's Universal Licensing System indicates that as of July 2014, there are 2,006 active EBS licenses. The Commission estimates that of these 2,006 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.[46]

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[39] Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86, AU Docket No. 09-56, *Public Notice*, 24 FCC Rcd 8277 (2009).

[40] *Id.* at 8296.

[41] Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period, *Public Notice*, 24 FCC Rcd 13572 (2009).

[42] U.S. Census Bureau, 2012 NAICS Definitions: 517110 Wired Telecommunications Carriers, http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012 (last visited Aug. 19, 2014).

[43] *Id.*

[44] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[45] U.S. Census Bureau, 2007 Economic Census, Table No. EC0751SSSZ5, Information: Subject Series - Estab and Firm Size: Employment Size of Firms for the United States: 2007 (NAICS code 517110), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5 (last visited Aug. 11, 2014).

[46] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. § 601(4)-(6).

15. Television Broadcasting. This economic census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."[47] The SBA has created the following small business size standard for Television Broadcasting firms: those having $38.5 million or less in annual receipts.[48] The Commission has estimated the number of licensed commercial television stations to be 1,387.[49] In addition, according to Commission staff review of the BIA/Kelsey, LLC's *Media Access Pro Television Database* on July 30, 2014, about 1,276 of an estimated 1,387 commercial television stations (or approximately 92 percent) had revenues of $38.5 million or less. We therefore estimate that the majority of commercial television broadcasters are small entities.

16. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included.[50] Our estimate, therefore, likely overstates the number of small entities that might be affected by the *Report and Order's* rules because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

17. In addition, the Commission has estimated the number of licensed noncommercial educational television stations to be 395.[51] These stations are non-profit, and therefore considered to be small entities.[52]

18. There are also 2,460 LPTV stations, including Class A stations, and 3,838 TV translator stations.[53] Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

19. Radio Broadcasting. The SBA defines a radio broadcast station as a small business if such station has no more than $38.5 million in annual receipts.[54] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[55] According to review of the BIA/Kelsey, LLC's *Media Access Pro Radio Database* as of July 30, 2014, about 11,332 (or about 99.9 percent) of 11,343 commercial radio stations have revenues of $38.5 million or less and thus qualify as small entities under the SBA definition. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. This estimate, therefore, likely overstates the number of small entities that might be affected, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

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[47] U.S. Census Bureau, 2012 NAICS Definitions: 515120 Television Broadcasting, http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2012 (last visited Aug. 19, 2014).

[48] 13 C.F.R. § 121.201, NAICS code 515120 (updated for inflation in 2014).

[49] *See* FCC News Release, Broadcast Station Totals as of June 30, 2014 (rel. July 9, 2014), available at http://www.fcc.gov/document/broadcast-station-totals-june-30-2014 (*June 2014 Broadcast Station Totals*).

[50] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[51] *See June 2014 Broadcast Station Totals*.

[52] *See generally* 5 U.S.C. § 601(4), (6).

[53] *See June 2014 Broadcast Station Totals*.

[54] 13 C.F.R § 121.201, NAICS code 515112 (updated for inflation in 2014).

[55] U.S. Census Bureau, 2012 NAICS Definitions: 515112 Radio Stations, http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515112&search=2012 (last visited Aug. 19, 2014).

20. Cable and Other Subscription Programming. This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (e.g., limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.[56] Since 2007, the prior but now discontinued service involving distribution of programming via cable television was placed within the broad economic census category of Wired Telecommunications Carriers [57] The SBA has developed a small business size standard for this category, which consists of all such firms with gross annual receipts of 38.5 million dollars or less. [58] Census data for 2007, when data about Wired Telecommunications Carriers were used for Cable and Other Program Distribution, show that there were 3,188 Wired Telecommunications Carrier firms that operated for the entire year. Of this total, 3,144 had fewer than 1,000 employees.[59] Thus under this size standard, the majority of firms offering cable and other subscription programming can be considered small.

21. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

22. The updated reporting, recordkeeping, and other compliance requirements resulting from the *Report and Order* will apply to all entities in the same manner. The Commission believes that these rules assist the Commission meeting its statutory goals by providing DEs more flexibility in finding the capital needed for acquisition and provisions of spectrum-based services while ensuring that designated entity benefits go to *bona fide* small businesses and eligible rural service providers. The Commission does not believe that the costs and/or administrative burdens associated with the rules will unduly burden small entities. The *Report and Order* makes a number of rule changes that will affect reporting, recordkeeping, and other compliance requirements. Each of these changes is described below.

23. Eligibility for Bidding Credits. The *Report and Order* makes changes to the Commission's process for evaluating small business eligibility for bidding credits. In particular, the *Report and Order* repeals the AMR rule and replaces it with a more flexible approach under which the Commission would evaluate small business eligibility on a license-by-license basis, using a two-pronged test. The first prong would evaluate whether an applicant meets the applicable small business size

[56] 13 C.F.R. 515210

[57] In 2014, "Cable and Other Subscription Programming", NAICS Code 515210, replaced a prior category, now obsolete, which was called "Cable and Other Program Distribution". Cable and Other Program Distribution, prior to 2014 ,was placed under NAICs Code 517110, Wired Telecommunications Carriers, for which the size standard determined that all such Carriers having 1,500 or fewer employees were small.. No useable U.S. Census data for Cable and Other Subscription is currently available because this NAICs-code based industry classification did not come into existence until December 2014. Until such data become available, we will continue in this proceeding, as with Cable and other Program Distribution Programming, the practice of using U.S. Census data based on Wired Telecommunications Carriers

[58] *See* 13 C.F.R.121.201, NAICS Code 517110

[59] http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US-51SSSZ5&prodType=Table.

standard and is therefore eligible for benefits. To evaluate small business eligibility, the *Report and Order* applies the Commission's existing controlling interest standard and affiliation rules to determine whether an entity should be attributable based on whether that entity has *de jure* or *de facto* control of, or is affiliated with, the applicant's overall business venture. Once the first prong has been met, the Commission would evaluate eligibility under the second prong. Under the second prong, the *Report and Order* determines an entity's eligibility to retain small business benefits on a license-by-license basis, based on whether it has maintained *de jure* and *de facto* control of the license. Under this license-by-license approach, an entity will not necessarily lose its eligibility for all current and future small business benefits solely because of a decision associated with any particular license. Instead, while a small business might incur unjust enrichment obligations if it relinquishes *de jure* or *de facto* control of any particular license for which it claimed benefits, so long as the revenues of its attributable interest holders (i.e., the DE's affiliates, its controlling interests, and the affiliates of its controlling interests) continue to qualify under the relevant small business size standard, it could still retain its eligibility to retain current and future benefits on existing and future licenses. The *Report and Order* determines, on the basis of the express language of section 309(j), that there is no statutory requirement for DEs to directly provide primarily facilities-based service to the public with each license.

24. The *Report and Order* also modifies the Commission's secondary market rules to comport with the Commission's proposed approach to assessing small business eligibility. Specifically, the *Report and Order* amends the language in section 1.9020(d)(4) to remove the conflicting reference to the control standard of section 1.2110 in order to make clear that small business lessors are fully subject to the same *de facto* control standard for spectrum manager leasing that applies to all other licensees.[60] This modification should clarify that section 1.9010 alone defines whether a licensee, including a small business, retains *de facto* control of the spectrum that it leases to a spectrum lessee in the context of spectrum manager leasing.

25. Attribution Rules. The *Report and Order* adopts an additional attribution requirement under which, during the five-year unjust enrichment period, the gross revenues (or the subscribers in the case of a rural service provider) of a disclosable interest holder in a DE applicant or licensee will become attributable, on a license-by-license basis, for any license in which the disclosable interest holder uses, in any manner, more than 25 percent of the spectrum capacity of a DE's license awarded with bidding credits. Under this rule, a disclosable interest holder is defined as any party holding a ten percent or greater interest of any kind in the DE, including but not limited to, a ten percent or greater interest in any class of stock, warrants, options or debt securities in the applicant or licensee. However, for DEs that acquire licenses with the new rural service provider bidding credit, this new attribution rule will not apply to any disclosable interest holder that would independently qualify for a rural service provider bidding credit.

26. The *Report and Order* declines to make any adjustments to the Commission's unjust enrichment rules and applies these rules to the new rural service provider bidding credit.

27. Bidding Credits. The *Report and Order* refines the primary way that the Commission facilitates participation by small businesses at auction through its bidding credit program. Bidding credits operate as a percentage discount on the winning bid amounts of a qualifying small business. By making the acquisition of spectrum licenses more affordable for new and existing small businesses, bidding credits facilitate their access to needed capital. The Commission establishes eligibility for bidding credits for each auctionable service, adopting one or more definitions of the small businesses that will be eligible. The Commission's small business definitions have been based on an applicant's average annual gross revenues over a three-year period. The *Report and Order* retains the existing three-tiered schedule for determining eligibility for bidding credits but utilizes the GDP price index to increase the general schedule of size standards in its Part 1 rules, measured by gross revenues, for purposes of determining an entity's eligibility for a bidding preference. Specifically, the *Report and Order* revises the standardized schedule in section 1.2110(f) as follows:

[60] *See* 47 C.F.R. § 1.9010; *see also* 47 C.F.R. § 1.9020(d)(4).

- Businesses with average annual gross revenues for the preceding three years not exceeding $4 million would be eligible for a 35 percent bidding credit;
- Businesses with average annual gross revenues for the preceding three years not exceeding $20 million would be eligible for a 25 percent bidding credit; and
- Businesses with average annual gross revenues for the preceding three years not exceeding $55 million would be eligible for a 15 percent bidding credit.

28. The rules adopted in the *Report and Order* will apply to the 600 MHz band spectrum licenses to be offered in the Incentive Auction and all Commission auctions in which the short-form deadline falls on or after the release date of the *Report and Order*. In the Incentive Auction proceeding, the Commission adopted a 15 percent bidding credit for small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding $40 million) and a 25 percent bidding credit for very small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding $15 million). Accordingly, the *Report and Order* adopts for the 600 MHz band increases in the gross revenues thresholds associated with the 25 percent and 15 percent bidding credits that are consistent with the increased gross revenues thresholds in the *Report and Order* for the standardized schedule in our Part 1 competitive bidding rules.

29. The *Report and Order* adopts a 15 percent bidding credit for qualifying service providers that provide commercial communications services to a customer base of fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers and serve primarily rural areas. To determine whether a provider has fewer than 250,000 combined subscribers, we will attribute the subscribers of all the provider's affiliates. The Commission will apply its existing definition of rural, a county with a population density of 100 persons or fewer per square mile.[61] To qualify for a rural service provider bidding credit, an applicant must certify in its short-form application that it serves predominantly rural areas. An applicant will be permitted to claim a rural service provider bidding credit or a small business bidding credit, but not both.

30. The *Report and Order* adopts a limit or cap on the total amount of that a small business or rural service provider can receive in any particular auction, to be determined on an auction-by-auction basis. Specifically, the *Report and Order* establishes a cap floor for any particular auction at $25 million for each eligible small business, and $10 million for each eligible rural service provider. Additionally, the *Report and Order* sets the caps for the upcoming incentive auction at $150 million for a small business and $10 million for a rural service provider. For markets with a population of 500,000 or less, a DE bidder may not receive more than $10 million in bidding credits. To the extent a small business does not claim the full $10 million in bidding credits in the smaller markets, it may apply the remaining balance to its winning bids on larger licenses, up to the aggregate $150 million cap for small businesses.

31. DE Reporting Requirements. The *Report and Order* modifies the DE annual reporting requirement in section 1.2110(n) of the Commission's rules to require that all annual reports be filed no later than September 30 of each calendar year, reflecting the status of each license subject to unjust enrichment requirements held by a particular licensee as of August 31 of that same calendar year. Any licensee required to file a report between the release date of the *Report and Order* and the effective date of the amended rule may defer filing its annual report until September 30, 2016. The new rule only applies to licenses acquired with DE benefits and still held subject to unjust enrichment obligations. If a

[61] Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, *Report and Order*, 19 FCC Rcd 19078, 19087-88 (2004) ("We recognize, however, that the application of a single, comprehensive definition for 'rural area' may not be appropriate for all purposes. . . . Rather than establish the 100 persons per square mile or less designation as a uniform definition to be applied in all cases, we instead believe that it is more appropriate to treat this definition as a presumption that will apply for current or future Commission wireless radio service rules, policies and analyses for which the term 'rural area' has not been expressly defined. By doing so, we maintain continuity with respect to existing definitions of 'rural' that have been tailored to apply to specific policies, while also providing a practical guideline").

license is transferred from a DE to a DE, the licensee who holds the license on September 30 of that year is responsible for filing the annual report. The annual report does not need to list agreements and arrangements that otherwise are included in the report if the information has already been filed with the Commission and the information is current. Instead the filer must provide both the ULS file number of the report containing such information and the date that the report was filed. These new DE reporting requirements will be applied to the new rural service provider bidding credit.

32. Former Defaulter Rule. The *Report and Order* adopts changes to the Commission's former defaulter rule to balance concerns that narrow the scope of the defaults and delinquencies that will be considered in determining whether or not an auction participant is a former defaulter. Specifically, the *Report and Order* excludes any cured default on any Commission license or delinquency on any non-tax debt owed to any Federal agency for which any of the following criteria are met: (1) the notice of the final payment deadline or delinquency was received more than seven years before the relevant short-form application deadline; (2) the default or delinquency amounted to less than $100,000; (3) the default or delinquency was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding.[62] This rule will be applied on a prospective basis, including for the Incentive Auction.

33. Joint Bidding. The *Report and Order* prohibits joint bidding arrangements between nationwide providers and between nationwide and non-nationwide providers. The *Report and Order* also prohibits joint bidding arrangements between non-nationwide providers but allows the use of joint ventures and consortia. The *Report and Order* defines "joint bidding arrangements" as arrangements that involve a shared strategy for bidding in auction. This definition does not include agreements that are solely operational in nature, like agreements for roaming and leasing, which continue to be permitted. We are permitting non-nationwide providers to form consortia and joint ventures. However, we specify that: (1) DEs can participate in only one consortium in an auction, which shall be the exclusive bidding vehicle for its members in that auction, and (2) non-nationwide providers may participate in an auction through only one joint venture, which also shall be the exclusive bidding vehicle for its members in that auction. The *Report and Order* also adopts a rule prohibiting individuals from serving as an authorized bidder for more than one auction applicant. The *Report and Order* adopts a rule requiring all applicants to certify that they are not, and will not be, privy to, or involved in, in any way the bids or bidding strategy of more than one auction applicant. An applicant is also allowed to certify that it has established internal controls

[62] Depending on the origin of any federal non-tax debt giving rise to a default or delinquency, notice to a debtor may include notice of a final payment deadline or notice of delinquency and may be express or implied. Consistent with guidance previously provided with respect to applicability of the former defaulter rules, *see, e.g.*, Letter to Cheryl A. Tritt, Esq., from Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, 19 FCC Rcd 22907 (2004), for purposes of the certifications required on a short-form auction application, a debt will not be deemed to be in default or delinquent until after the expiration of a final payment deadline. Thus, to the extent that the rules providing for payment of a specific federal debt permit payment after an original payment deadline accompanied by late fee(s), such debts would not be in default or delinquent for purposes of applying the former defaulter rules until after the late payment deadline. In addition, we provide the following clarification with regard to defaults on Commission licenses. Any winning bidder that fails timely to pay its post-auction down payment or the balance of its bid payment or is disqualified for any reason after the close of an auction will be in default and subject to a default payment. *See* 47 C.F.R § 1.2109(c). *See also, e.g.*, Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled For November 13, 2014; Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 97, AU Docket No. 14-78, *Public Notice*, 29 FCC Rcd 8386, 8450 ¶ 239 (2014). Commission staff provide individual notice of the amount of such a default payment as well as procedures and information required by the Debt Collection Improvement Act of 1996, including the payment due date and any charges, interest, and/or penalties that accrue in the event of delinquency. *See, e.g.*, 31 U.S.C. §§ 3716, 3717; *see also* 47 C.F.R. §§ 1.1911, 1.1912, 1.1940. *See also* Auction of Lower and Upper Paging Bands Licenses Closes; Winning Bidders Announced for Auction 95, *Public Notice*, 28 FCC Rcd 11848 (2013). For purposes of the certifications required on a short-form auction application, such notice provided by Commission staff assessing a default payment arising out of a default on a winning bid, constitutes notice of the final payment deadline with respect to a default on a Commission license.

to preclude any person serving as an agent or employee for an applicant from having information about the bids or bidding strategies of more than one applicant or communicating such information to either applicant. The *Report and Order* modifies the Commission's prohibited communications rule to prohibit an applicant from communicating bids or bidding information with any other applicant or any nationwide provider but provides limited exceptions for any arrangements that is solely operational in nature and is disclosed on an applicant's short-form application.

34. Commonly Controlled Entities. The *Report and Order* codifies an established competitive bidding procedure that prohibits the same individual or entity from filing more than one short-form application to participate in an auction. The *Report and Order* also adopts a new rule that would prevent entities that are controlled by a single individual or set of individuals from qualifying to bid on licenses in the same or overlapping geographic areas in a specific auction on more than one short-form application. The *Report and Order* adopts a limited exception to this general prohibition for existing rural partnerships. Under this exception, a qualifying wireless partnership and their individual rural telephone company members will be permitted to participate separately in an auction.[63] The *Report and Order* defines "controlling interest" as individuals or entities with positive or negative *de jure* or *de facto* control of the licensee.

35. Miscellaneous Part 1 Revisions. In addition to changes that would implement the foregoing proposals, the *Report and Order* amends two of the Commission's Part 1, Subpart Q, rules, sections 1.2111 and 1.2112.

- *Section 1.2111* – The *Report and Order* eliminates two provisions of this rule: (1) section 1.2111(a), under which applicants for assignments or transfers during the first three years of a license term must provide the Commission with detailed contract and marketing information, and (2) section 1.2111(b), a never-used unjust enrichment payment requirement for broadband PCS C and F block set-aside licenses.
- *Section 1.2112* – The *Report and Order* clarifies the auction application requirements for reporting an entity's percentage ownership in the applicant and in FCC-regulated entities. The *Report and Order* further changes the rule to specify application requirements for bidding consortia. The *Report and Order* also corrects two errors in the rule caused by the inadvertent substitution of an incorrect paragraph in the Code of Federal Regulations publication of the rule for the correct one published in the Federal Register summary of the *DE Second Report and Order*.[64] The first error was the addition of a requirement that DE short-form applicants list and summarize all their agreements that support their DE eligibility, a requirement that the Commission intended to apply only to long-form applicants. The *Report and Order* deletes the requirement with respect to the short-form. The second error was the deletion of a requirement that DE short-form applicants list the parties with which they have lease or resale arrangements for any of the DE applicants' spectrum. The *Report and Order* reinstates this requirement.

F. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

36. The RFA requires an agency to describe any significant alternatives that it has considered

[63] A qualifying rural wireless partnership is one that was established as a result of the cellular B block settlement process established by the Commission in CC Docket No. 85-388, no nationwide provider holds a ten percent or greater interest in the partnership or is a managing partner; and partnership interests have not materially changed as of the effective date of the Report and Order. A rural telephone company would qualify if it is a partner or successor-in-interest to a partner in a qualifying partnership, does not have day-to-day management responsibilities in the partnership and holds 25 percent or less ownership interest; and certify that it will insulate itself from the bidding process of the cellular partnership and any other members of the partnership (other than expressing prior to the deadline for resubmission of short-form applications the maximum it is willing to spend as a partner).

[64] *Compare* 71 Fed. Reg. 26245, 26253 (May 4, 2006) (publishing summary of *DE Second Report and Order*, 21 FCC Rcd 4753), *with* 47 C.F.R. § 1.2112 (Oct. 1, 2006).

in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;[65] (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[66]

37. The *Report and Order* repeals the AMR rule and replaces it with a two-pronged analysis. This approach to evaluating attribution and establishing small business eligibility should provide small businesses with greater opportunities to participate in the provision of spectrum-based services. Moreover, insofar as the *Report and Order* should allow small businesses greater flexibility to engage in business ventures that include increased forms of leasing and other spectrum use arrangements, the Commission anticipates that the combined intent of the updated rules should increase the potential sources of revenue for the small business and decrease the likelihood that it would be subject to undue influence by any particular user of a single license. The *Report and Order's* two-pronged approach to establishing small business eligibility would also ensure that a licensee retains control of all licenses for which it seeks bidding credits, while providing greater flexibility for any acquired without such benefits. Further, the elimination of the AMR rule and clarification of how spectrum manager leasing rules apply to DEs should allow small businesses greater certainty to participate in secondary markets transactions.

38. The Commission's determination that section 309(j) does not require a DE to directly provide primarily facilities-based service to the public removes one barrier facing small businesses in providing spectrum-based services. The *Report and Order* retains the focus of the facilities-based requirement, specifically to prevent unjust enrichment, by strengthening other aspects of its rules, like its attribution and unjust enrichment provisions. A facilities-based requirement would operate as an impediment, while the Commission's adjustments are narrowly tailored to better strike the balance between the Commission's statutory goals. In eliminating this requirement, DEs now have more flexibility in how they may utilize their licenses won with bidding credits.

39. The *Report and Order's* new attribution rule is an additional safeguard to ensure that benefits are award only to eligible, *bona fide* entities. The Commission declines a number of alternative proposals focusing on restricting financing or agreements with large or regional carriers due to concerns that these proposals would impede a DE's ability to raise capital and gain operational experience. We also decline proposals for an exception to the Commission's attribution rules for rural service provides who hold a minority interest in a cellular general partnership and to relax attribution rule in regards to immediate family members and of officers and directors. The Commission declines proposals to modify or eliminate its tribal exclusion to the attribution rule. The attribution rule is carefully tailored to ensure that DE benefits are not awarded to ineligible entities, while not being overly broad. The declined proposals would have affected the balance of the attribution rule, and in doing so, weaken the Commission's safeguards against the flow of DE benefits to ineligible entities.

40. The *Report and Order's* retains the Commission's three-tiered structure of small business bidding credits while increasing the gross revenues thresholds that define the three tiers of small businesses in the Part 1 schedule by which the Commission provides the corresponding available bidding credits would encourage small business participation in spectrum license auctions. The gross revenues thresholds, based on the GDP index, are intended to more accurately reflect what constitutes a "small business" in today's marketplace, taking into consideration the relative size of the large, national providers. This update to the thresholds will provide an economic benefit to small entities by making it easier to acquire spectrum licenses. The *Report and Order* declines other bidding credit percentages proposed by commenters and the use of a MHz per pop methodology for setting thresholds at levels that

[65] We note that all references to small entities in this FRFA apply also to minority-and women-owned small businesses.

[66] 5 U.S.C. § 603(c)(1)-(c)(4).

would be over inclusive. It also declines proposals favoring a single bidding credit in lieu of the current three-tier system, and the creation of a new entrant bidding credit. The three-tiered system gives the Commission flexibility to adjust the bidding credits available to reflect the spectrum being offered at auction. Furthermore, the current percentages will enable those who qualify to compete in a Commission auction while not giving an unfair advantage against auction participants who do not qualify for a bidding credit.

41. The *Report and Order's* new rural service provider bidding credit is designed to better enable rural service providers to compete for spectrum at auction and increase the availability of mobile voice and broadband services in rural areas. The new rural service provider bidding credit is 15 percent. The Commission rejected proposals for a 25 percent rural service provider bidding credit. The Commission believes that a bidding credit of 15 percent is the proper amount. While this new bidding credit will promote the provision of service in rural areas, many of the service providers that are eligible for the rural service provider bidding credit have well over $55 million in annual revenues and thus have far greater access to capital than most small businesses. The 15 percent bidding credit strikes the right balance between our existing DE system where rural providers are often unable to win a license covering their service areas limiting an unnecessary advantage received by an existing rural provider in certain markets. The Commission also declines the proposal to allow a winning bidder to deduct from its auction purchase price the pro rata value of any area partitioned to a rural telephone company, where the area includes all or a portion of the rural telephone company's service area. This proposal was declined because it would be overly burdensome and benefit those choosing not to serve rural areas. The Commission also declines proposals to make the small business and rural service provider bidding credits cumulative because cumulative bidding credits would provide an unnecessary advantage in certain markets.

42. The *Report and Order* adopts bidding caps for the small business and rural service provider bidding credits. These caps will be determined for all future spectrum auctions on an auction-by-auction basis. The *Report and Order* sets the cap floor for any particular auction at $25 million for the small business bidding credit and $10 million for the rural service provider bidding credit. The *Report and Order* also set the bidding credit caps for the upcoming incentive auction at $150 million for the small business bidding credit and $10 million for the rural service provider bidding credit. Additionally, the *Report and Order* limits the amount of bidding credits a bidder in the upcoming Incentive Auction may obtain to $10 million in markets with a population of 500,000 or less. If the full $10 million is not claimed, a bidder may apply its remaining balance to winning bids on larger licenses, up to $150 million. We declined proposals advocating for no caps and for set caps of varying amounts. The caps will assist DEs by providing some level of assurance of bidding activity. Additionally, the caps will protect the integrity of the Commission's auction process by discouraging those who may try to game the DE system. While caps limit the amount of assistance a DE may receive, the Commission has the flexibility to calibrate the caps to the spectrum being offered in a particular auction. Based on past auction data, the *Report and Order* adopts caps for the upcoming incentive auction. In the most recent auctions of CMRS spectrum, the $150 million cap would have allowed the vast majority of the bidding credits awarded to DEs.[67] The 500,000 population threshold provides an easily administrable delineation between larger urban and smaller rural markets and the average population density for markets with a population of 500,000 or less roughly corresponds with our approach in defining rural areas.[68] Additionally, a $10 million cap on the rural service provider bidding credit is the appropriate amount to stimulate rural service while not giving the larger companies who don't qualify for a small business bidding credit an unnecessary advantage.[69]

43. The *Report and Order* declines to adopt bidding preferences or credits based on criteria

[67] If the $150 million cap was in place for Auctions 66 and 73, 100 percent of DEs would have received the full amount of the bidding credits they were awarded. In Auction 97, 89 percent of DEs would receive the full amount of awarded bidding credits.

[68] The average population density for the small PEAs in the upcoming incentive auction is 76 pops/mile, while our rural definition is 100 pops/mile.

other than business size, except for the new rural service provider bidding credit. The repeal of the AMR rule, expanded eligibility for the DE program, and new rural service provider bidding credit are more than sufficient to address the challenges new entrants, minority- and women-owned companies, individuals who have overcome significant disadvantages, and service providers in areas that are unserved or underserved, areas of persistent poverty, and in tribal lands face today. The *Report and Order* also declines proposals in the MMTC white paper, except for the proposal to repeal the AMR rule which was adopted. These additional proposed bidding credits or preferences, along with the other alternatives proposed to promote small business participation in the wireless sector, would add unnecessary complexity, which in turn could negatively affect the Commission's auction process.

44. The *Report and Order's* modification of the Commission's DE reporting requirements reduces a significant regulatory burden placed on a DE by eliminating the requirement on DEs to provide information multiple times. In updating the deadline of the report reduces the administrative and related burdens on DEs. The DE reporting requirements provide a safeguard helping to prevent unjust enrichment. Additionally, the modifications adopted in the *Report and Order* reduce administrative difficulties the Commission has in managing the information. The *Report and Order* declines to eliminate the DE reporting rule altogether because other decisions, like the elimination of the AMR rule, have reduced the safeguards preventing unjust enrichment.

45. The *Report and Order's* joint bidding rules are intended to preserve and promote robust competition in the mobile wireless marketplace and facilitate competition among bidders at auction, including small entities. These rules provide potential bidders with greater clarity regarding the types of joint bidding arrangements that would be permissible. In addition, the *Report and Order's* rule to allow consortia and joint ventures among non-nationwide providers would maintain flexibility for small businesses to enter into such arrangements

46. Finally, the additional changes to the Part 1 rules will apply to all entities in the same manner as the Commission will apply these changes uniformly to all entities that choose to participate in spectrum license auctions. The Commission believes that applying the same rules equally to all entities in these contexts promotes fairness. The Commission does not believe that the limited costs and/or administrative burdens associated with the rule revisions will unduly burden small entities. In fact, many of the proposed rule revisions clarify the Commission's competitive bidding rules, including short-form application requirements, as well as a reduction of reporting requirements.

G. Federal Rules Which Duplicate, Overlap, or Conflict With the Proposed Rules

47. None.

H. Report to Small Business Administration

48. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA.

[69] According to their filings from 2011-2013, there are thirteen large ILECs that are not eligible for a Small Business Bidding Credit. Only three of these are rural telecommunications providers and would be eligible for a Rural Service Providers Bidding Credit.

APPENDIX C

Short Names of Commenters Cited in This *Report and Order*

A. Update Part 1 Competitive Bidding Rules – WT Docket No. 14-170

Name of Filer	Short name
Americans for Tax Reform, Center for Individual Freedom, National Taxpayers Union, and Taxpayers Protection Alliance	Taxpayer Advocates
Atelum LLC	Atelum
AT&T, Inc. or AT&T Services, Inc.	AT&T
AT&T and Rural-26 DE Coalition (Joint Proposal)	AT&T/Rural Carriers
Auction Reform Coalition	ARC
The Blooston Rural Carriers	Blooston Rural
Cellular South, Inc. d/b/a C Spire	C Spire
Chugach Alaska Corporation	Chugach
Cerberus Communications Limited Partnership	Cerberus
Citizens Against Government Waste (Thomas A. Schatz)	CAGW
Competitive Carriers Association	CCA
Columbia Capital, LLC	Columbia Capital
Coquille Indian Tribe	Coquille
Council Tree Investors, Inc.	Council Tree
CTIA−The Wireless Association®	CTIA
DE Opportunity Coalition	DE Coalition
Doyon and Chugach Alaska Corp.	DCA
Grand Traverse Band of Ottawa and Chippewa Indians	Grand Traverse
Jamestown S'Klallam Tribe	Jamestown Tribe
King Street Wireless, LP	KSW
Leech Lake	Leech Lake
M/C Partners	M/C Partners
MediaFreedom.org	MediaFreedom
Multicultural Media, Telecom and Internet Council	MMTC
National Congress of American Indians	NCAI
Native Public Media	Native Public
Nez Perce Tribe	Nez Perce
NTCA-The Rural Broadband Association	NTCA
NTCH, Inc.	NTCH
Omaha Tribe of Nebraska and Iowa	Omaha Tribe
Public Knowledge	PK
Rainbow Telecommunications Association, Inc., SRT Communications, and Nemont Telephone Cooperative, Inc.	Rural Telcos
Rural Wireless Association, Inc.	RWA
Rural Wireless Association, Inc. and NTCA-The Rural Broadband Association	RWA/NTCA
Rural Wireless Association, Inc., NTCA-The Rural Broadband Association, and Blooston Rural Carriers	RWA/NTCA/Blooston Rural
Rural-26 DE Coalition	Rural-26 Coalition

Rural Carrier Coalition	Rural Coalition
Rural Wireless Association and NTCA (joint filing)	RWA/NTCA
Shoalwater Bay Indian Tribe	Shoalwater
Spectrum Financial Partners, LLC (Stephen Wilkus)	Spectrum Financial
Sprint Corporation	Sprint
U.S. Small Business Administration, Office of Advocacy	SBA Office of Advocacy
SRT Communications, Panhandle Telephone Cooperative, Inc., Copper Valley Telephone Cooperative, Nemont Telephone Cooperative, Inc., Pine Belt Telephone Company, Inc., and Central Texas Telephone Cooperative	Rural Carriers
T-Mobile USA, Inc.	T-Mobile
Tohono O'odham Utility Authority	Tohono
Tulalip Tribes of Washington	Tulalip Tribes
National Tribal Telecommunications Association	NTTA
Navajo Tribal Utility Authority	NTUA
Tristar License Group	Tristar
Twenty-Nine Palms Band of Mission Indians	Twenty-Nine Palms
U.S. Cellular Corporation	USCC
Wireless Internet Service Providers Association	WISPA

B. WT Docket 05-211

Name of Filer	Short Name
Aloha Partners, L.P.	Aloha Partners
Blooston, Mordkofsky, Dickens, Duffy & Pendergast, LLP	Blooston Rural
Cingular Wireless LLC	Cingular
Cook Inlet Region, Inc.	Cook Inlet
Council Tree Communications, Inc., Minority Media Telecommunications Council, and Bethel Native Corporation	Joint Petitioners
Council Tree Communications, Inc.	Council Tree
CTIA – The Wireless Association®	CTIA
Leap Wireless International, Inc.	Leap Wireless
National Association of Broadcasters	NAB
National Telecommunications Cooperative Association	NTCA
National Telecommunications and Information Administration	NTIA
Paging Systems, Inc.	Paging Systems
Royal Street Communications, LLC	RSC
U.S. Small Business Administration, Office of Advocacy	U.S. SBA
Verizon Wireless	Verizon
Wirefree Partners III, LLC	Wirefree Partners

APPENDIX D

List of Parties that Commented on the *Part 1 NPRM* and *Part 1 PN*

AT&T
AT&T Services Inc.
AT&T, FTC Mgmt Group and others
Atelum LLC
Auction Reform Coalition
Blooston Rural Carriers
Cellular South, Inc. (d/b/a C Spire)
Cerberus Communications Limited Partnership
Chugach Alaska Corporation
Communications Workers of America and NAACP
Competitive Carriers Association
Confederated Tribes and Bands of the Yakama Nation
Coquille Indian Tribe
Council Tree Investors, Inc.
CTIA-The Wireless Association
DE Opportunity Coalition
DISH Network
Doyon, Limited and Chugach Alaska Corporation
E Ashton Johnston
Governor of Pueblo of Acoma
Grand Traverse Band of Ottawa and Chippewa Indians
Jamestown S'Klallam Tribe
Jamie Belcore Saloom
Joyce Dillard
Kim Keenan
King Street Wireless, L.P.
Leech Lake Telecommunications
M/C Partners
MediaFreedom
MMTC
Mobile Future
National Congress of American Indians
National Tribal Telecommunications Association
National Urban League
Native Public Media
Navajo Tribal Utility Authority ("NTUA")
Nez Perce Tribe
NTCA, RWA and Blooston Rural Carriers
NTCA-The Rural Broadband Association
NTCH, Inc.
Omaha Tribe of Nebraska and Iowa
Panhandle Telephone and Pine Belt Telephone
Public Knowledge
Rainbow Telecommunications, SRT Communications and Nemont Telephone
Representative Frank Pallone, Jr.
Rural Carrier Coalition
Rural Carriers
Rural Telcos
Rural Wireless Association, Inc.

Rural Wireless Association, Inc., NTCA-The Rural Broadband Association, Blooston
Rural-26 DE Coalition
Senator Claire McCaskill
Shoalwater Bay Indian Tribe
Sprint Corporation
Spectrum Financial Partners (Stephen Wilkus)
Taxpayers Protection Alliance
The Wireless Internet Service Providers Association
Thomas A. Schatz
T-Mobile USA, Inc.
Tohono O'odham Utility Authority
Tristar License Group, LLC
Tulalip Tribes of Washington
Twenty-Nine Palms Band of Mission Indians
United States Cellular Corporation
Various Rural Telcos
Verizon
Vermont Telephone Company, Inc.

STATEMENT OF
CHAIRMAN TOM WHEELER

Re: *Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, *Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver*, RM-11395, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211.

Congress instructed the FCC to reduce the barriers faced by small businesses, including women- and minority-owned businesses and rural service providers seeking meaningful participation in the provision of spectrum-based services. Today's Order revamps our outdated spectrum auction bidding policies to help these entities better compete for a position in today's wireless marketplace. At the same time, our reforms will enhance the integrity of the FCC's auctions and ensure large corporations can't game the system.

The Commission has had such so-called "Designated Entity" rules in place since the 1990s. However, the Commission has not looked at updating the rules since 2006. The amazing changes in the wireless marketplace since then required a review of our policies, and that review made plain the rules needed to be reformed. In 2006, for instance, the top four national CMRS providers served 82 percent of the market; today the top four national carriers serve 98 percent of mobile devices. When the rules were first put in place in the mid-1990s it was possible for individual entrepreneurs to start their own company and compete in the market.

Today, however, the hegemony of the wireless marketplace makes it virtually impossible for an independent entrepreneur to take on such concentration. Considering the rapid changes in the marketplace, the importance of consumer choice, and the significant challenges new entrants face in starting from scratch to build a new wireless service provider, now is the time to update our auction policies and provide smaller businesses— including carriers serving rural areas – a better on-ramp into the wireless industry.

Today's item provides greater flexibility so that qualified small businesses can find opportunity in the wireless industry. This includes, for example, eliminating the requirement that the winning bidder must build a unique network; under the new rules the winner may choose to build or lease their capacity. The rules also create a new rural provider bidding credit that will incentivize participation in future auctions by rural service providers in the communities they serve. We also increase the revenue threshold to qualify as a small business to account for inflation.

In addition to expanding opportunities for small businesses, the modernized rules will increase transparency and efficiency to prevent potential gaming or abuse, as well as protect the integrity of the Commission's auction process. In particular, we establish the first-ever cap on the total value of bidding credits, minimizing an incentive for major corporations to try to take advantage of the program by finding a small business to act on their behalf. The new rules also take several steps to make sure that small businesses receiving bidding credits are exercising independent decision-making authority. For example, we clarify the types of agreements – including management and operating agreements – that independently or together create the impression that a Designated Entity is not "calling the shots" in order to prevent ineligible entities from obtaining bidding credits. We also limit the amount of spectrum that a Designated Entity may lease to its non-controlling investors during the five-year unjust enrichment period.

The rules also make it clear that joint bidding agreements that involve a shared strategy for bidding at auction between Designated Entities and large nationwide companies will not be tolerated. Because this restriction is based on encouraging competition both in the market and in the auction, non-nationwide providers would still be able to participate in certain joint bidding ventures with other non-nationwide providers.

Few areas of our economy hold more promise for driving innovation and economic growth than the wireless sector. We cannot overlook the opportunity this growth presents for American small businesses. Today's reforms will increase competitive access to spectrum and thus create economic opportunity for small and rural businesses.

Thank you to the Wireless Bureau, the Office of General Counsel and the Auctions Division staff for their work on this item.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, *Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver*, RM-11395, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211.

Congress recognized more than 20 years ago that advanced telecommunications services and wireless technologies had the potential to create tremendous opportunities in our Nation. Though smartphones, tablets, millions of mobile broadband apps and the Internet of everything may not have been part of their predictions back then, lawmakers knew that in order for all communities to benefit from technological innovation, the FCC's obligation to allocate spectrum in the public interest should be guided by key enduring principles. Most relevant are the ones which affirm that all consumers should have access to affordable service, entrepreneurs and small businesses should have a reasonable opportunity to own and provide communications services, and that vigorous competition can promote both of those policy goals.

So when Congress amended the Communications Act in the 1990s giving the Commission the authority to conduct spectrum auctions, it specifically mandated that we design them to "promot[e] economic opportunity and competition," "ensur[e] that new and innovative technologies are readily accessible to the American people," "avoid[] excessive concentration of licenses[,]…disseminat[e] licenses among a wide variety of applicants, including small businesses," and deter unjust enrichment.

In implementing these mandates, the Commission has attempted to promote small business participation in the wireless industry, primarily by awarding auction bidding credits through its Designated Entity (DE) program.

And these efforts have led to some inspiring successes. Take Leap Wireless. It defined an entirely new strategy in the wireless industry through a simple, affordable and worry-free service. Priced competitively with traditional home phone service, Cricket let customers make and receive virtually unlimited phone calls in their local service area. It achieved strong penetration and brand awareness in its first two markets of Chattanooga and Nashville, and the company quickly set in motion plans to launch service in eight more markets by the end of 2000. By the close of 2001 they offered service in 35 markets.

In late 2000, Leap actively sought to acquire additional wireless operating licenses across the country. They participated in the FCC's re-auction of "Entrepreneur's Block" PCS operating licenses – a program that was also designed to help small business compete for spectrum, just like the DE program. Leap's then-CEO and Chairman credited this "Entrepreneur's Block" with allowing them to expand aggressively. Leap went on to sell their Cricket service to AT&T in 2014, but not before becoming a staple in the prepaid wireless market, serving more than four and a half million customers nationally.

The Leap story is one of a small, innovative company identifying an underserved market, developing an inventive business model, growing into a significant market player, and – in the process – providing competition and innovation in a dynamic marketplace. This is exactly the kind of story the Designated Entity Program is designed to make possible. The challenge for this Commission, however, has been to find the proper balance between allowing small businesses to acquire spectrum through DE credits on the one hand, and preventing parties from circumventing the purpose of those rules and being

unjustly enriched on the other. However, between 2004 and 2006, our policy changes actually shifted this balance and it impacted small business participation tremendously… and not for the better.

A number of parties told us that the current rules are actually having an adverse effect on small businesses, right at a time when these entities are facing increased challenges to compete effectively in the commercial wireless industry and serve their target markets. That is why, since 2010, I have been calling on the Commission to consider creative and legally sustainable approaches to promote greater participation by small businesses in the communications industry.[70]

I applaud Chairman Wheeler today for presenting us with an Order which contains comprehensive reforms to the Commission's competitive bidding rules that will enable small businesses to compete more effectively. At the top of the list are the elimination of the Attributable Material Relationship rule and the policy that DEs must use the licenses they win with DE credits to provide facilities-based retail service. As I mentioned at the start of this proceeding, there is absolutely nothing in the statute or the legislative history that requires us to adopt those policies.

But what we do have is the authority to change policies when it is evident that consolidation in the wireless industry, and other circumstances, warrant giving small businesses greater ability to raise capital and effectively compete.

I am also pleased that we are adopting a rural bidding credit for non-DEs with 250,000 or fewer subscribers. In last year's Notice I was particularly pleased that we sought comment on bidding credits to winning bidders that deploy facilities to persistent poverty counties. According to the United States Department of Agriculture, a county is persistently poor if 20 percent or more of its population has been living in poverty over the last 30 years or more. Currently, there are approximately 353 such counties in this country. Although the record did not provide sufficient comment on how we should design a credit to promote deployment in these counties, as the Order explains, the rural bidding credit covers 90 percent of these counties. The wireless industry often talks about how deployment of their networks creates jobs and spurs economic growth. So I hope this credit will create incentives to deploy more networks in these communities.

While I fully support most of the rule changes in the Order, our decision, for the first time, to impose a cap on the amount of bidding credits that a DE may claim at auction does still concern me. I recognize that the intent of this cap is to deter some of the alleged activity that people have criticized in the AWS-3 auction. But I am confident that the other rule changes we adopt today are sufficient to remedy those concerns.

Most notably, we are prohibiting DEs from entering into bidding arrangements with other entities. We are also informing parties that some agreements that restrict the ability of DEs to make certain operational decisions could lead us to find that the DE does not control its license. The timing for the first cap in the history of the DE program also causes me concern because AWS-3 resulted in a record setting $41.3 billion, and since spectrum below 1 GHz is more valuable, it is reasonable to surmise that the total provisionally winning bids for the incentive auction could be higher. That means DEs will need access to more capital to win licenses.

That said, the rules we adopt today will give more flexibility to small businesses to enter into

[70] Statement of FCC Commissioner Mignon L. Clyburn, Statement on Public Notice Seeking Comment on Proposal to create an "Overcoming Disadvantage" category for its current Designated Entity rules (December 3, 2010); Section 257 Triennial Report to Congress Identifying and Eliminating Market Entry Barriers for Entrepreneurs and other Small Businesses, *Report*, 26 FCC Rcd 2909, 2969-70 (2011) (Separate Statement of FCC Commissioner Mignon L. Clyburn); Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, *Notice of Proposed Rulemaking*, 27 FCC Rcd 12357, 12368 (2012) (Separate Statement of FCC Commissioner Mignon L. Clyburn).

business models that should allow them to acquire licenses and thrive in the commercial wireless industry.

Therefore, I am voting to approve.

I wish to thank Roger Sherman, Jean Kiddoo, Sue McNeil and the team in the Wireless Telecommunications Bureau, and my lead advisor Louis Peraertz, along with David Strickland, for their terrific work throughout this proceeding.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

Re: *Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, *Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver*, RM-11395, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211.

It has been nearly a decade since the Commission last updated its competitive bidding rules—and what a difference a decade makes. At the time, flip phones were state-of-the-art. Movie rentals involved a trip to the neighborhood Blockbuster and viewing them was limited to the television screen. No one imagined the range of daily activities we now conduct on our wireless devices. The economic force of the Internet of Things was no more than a dream from the far-off future.

But that future is now. So it is the right time to revisit our decade-old rules governing competitive bidding in wireless auctions. We do that here by modernizing our policies in a way that is consistent with our statutory obligations under Section 309. Our reforms provide designated entities with the flexibility they need to thrive in a wireless marketplace that has changed. They also ensure that only the entities Congress intended to assist will receive the benefits of designated entity status. In addition, for the first time ever, we ensure that rural service providers have a special opportunity to qualify for bidding credits when they provide service to rural communities.

These reforms are smart, balanced, and fair. But to increase the opportunity these policies can provide, we need to increase the spectrum pipeline. We have, of course, a big auction on the horizon that involves choice airwaves in the 600 MHz band. But we need to think beyond this one auction now. We need to find ways to speed the process of repurposing more spectrum for mobile broadband use, and to do so we need to provide federal users with incentives to be efficient with their airwaves—so they see gain and not just loss in reallocation. After all, with more spectrum in the pipeline, we will have more airwaves to auction, and more opportunities for designated entities in the wireless sector.

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, *Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver*, RM-11395, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211.

It's no secret that the FCC's Designated Entity (DE) program has been plagued by abuse. You don't need to look any further than our most recent spectrum auction to see that large corporations routinely try to game the system and gain access to discounted spectrum.[71] The ones that bear the cost of this abuse? Legitimate small businesses across the country—businesses that are actually building networks and serving their communities, like Glenwood Telephone in Nebraska and Rainbow Telecommunications in my home state of Kansas. American taxpayers also take a hit since we all pay the price when corporate giants snag discounts Congress never intended them to have.

So the last thing one would expect when the Designated Entity program has once again been rocked by corporate gamesmanship is for the FCC to reopen loopholes it closed on a bipartisan basis years ago—loopholes that led to wide-ranging abuses in past auctions. Yet here we are. We were promised FCC action to close loopholes exploited by slick lawyers.[72] Instead, we have the FCC's blessing of new loopholes through which even a minimally competent attorney could drive a truck.

In particular, this *Order* paves the way for DEs to obtain a 35%, taxpayer-funded discount on auctioned spectrum and then turn around and lease 100% of that spectrum to AT&T, Verizon, Sprint, or T-Mobile.

Will it further the public interest to allow a "small business" with no plan beyond regulatory arbitrage to purchase discounted spectrum and then flip it to our nation's largest wireless carriers? Let's see.

Will that large wireless carrier face increased competition when it leases the spectrum? No. Will it face competitive pressure on its pricing? No. Will consumers, including those in rural areas, have a new competitive alternative to choose from? No. Will eliminating the safeguard "reserve the DE program for companies that actually intend to use their spectrum to serve customers," as former Commissioner Michael Copps put it when he and his fellow Commissioners established these rules?[73]

[71] *See, e.g.*, Statement of Commissioner Ajit Pai on Abuse of the Designated Entity Program, Press Release, http://go.usa.gov/3fcXj (Feb. 2, 2015); Senator Kelly Ayotte and Commissioner Ajit Pai, Ending Welfare for Telecom Giants, *The Wall Street Journal* (Feb. 4, 2015), *available at* http://on.wsj.com/18OXcyl; Statement of Commissioner Ajit Pai on How Abuse of the FCC's Small Business Program Hurts Small Businesses, Press Release, http://go.usa.gov/3fcXH (Mar. 16, 2015); Testimony of FCC Commissioner Ajit Pai Before the Subcommittee on Communications and Technology of the U.S. House of Representatives Committee on Energy and Commerce, http://go.usa.gov/3fcXh (Mar. 19, 2015); Statement of Commissioner Ajit Pai Before the Senate Appropriations Subcommittee on Financial Services and General Government, http://go.usa.gov/3fc54 (May 12, 2015); Statement of FCC Commissioner Ajit Pai on Proposal to Create More Loopholes for Abuse of Designated Entity Program, Press Release, http://go.usa.gov/3fc5k (June 25, 2015); *Request for Further Comment on Issues Related to Competitive Bidding Proceeding*, WT Docket No. 14-170 *et al*., Public Notice, 30 FCC Rcd. 4153, 4179-80, http://go.usa.gov/3G359 (2015) (Statement of Commissioner Ajit Pai).

[72] Testimony of FCC Chairman Tom Wheeler Before the U.S. Senate Committee on Commerce, Science, and Transportation, http://cs.pn/1GmANBh (Mar. 18, 2005).

[73] *See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753, 4808 (2006) (Statement of Commissioner Michael J. Copps)

Quite the opposite.

But I don't want to be accused of focusing solely on what today's decision won't do. So let me shift gears and discuss what voting in favor of 100% leasing will do. Will it increase concentration in the wireless market? Yes. Will it mean that large companies can access discounted spectrum (rather than purchasing it at full price)? Yes. Will it make the politically well-connected owners of shell DEs very wealthy? Yes. And will it create new incentives for companies to continue to try to game the system? Absolutely.

For these reasons, I respectfully dissent.

I.

The Commission's decision to eliminate the facilities-based requirement is yet another example of the agency rejecting a long-standing, bipartisan consensus. As I mentioned, Commissioner Copps and his colleagues put many of these protections in place. Commissioner Copps spoke eloquently against abuse of the Designated Entity program. He noted that Congress created the program to promote competition by small businesses *against* larger, established providers—competition that would spur the deployment of new services to the public, including in rural and underserved areas.[74] Commissioner Copps saw the tendency of companies with "deep pockets [to] help themselves to discounts they were never meant to enjoy" and to "twist the rules in order to gain unwarranted entry into these programs."[75] He observed that the abuse "means that spectrum goes to those most willing and able to manipulate the rules of the game, rather than to the entities Congress actually intended to benefit."[76]

So Commissioner Copps proposed ways to end it. In his words, the FCC "strengthen[ed] our unjust enrichment rules . .. [and took] away the incentive for speculators to try to masquerade as legitimate DEs." It "discourage[d] sham buyers from participating." And, "most importantly," the FCC "reserve[d] the DE program for companies that actually intend to use their spectrum to serve customers."[77]

How did our predecessors do this? They barred DEs from leasing 100% of their discounted spectrum to large corporations. They did so to help give legitimate small businesses a "fighting chance to compete with industry giants," as Commissioner Copps put it.[78] But today, the Commission decides on a party-line vote to jettison the very safeguard that Commissioner Copps pioneered.

This will invite more abuse. Just look at the record. Public interest advocates explained that allowing 100% leasing "would do little to discourage a DE from acquiring spectrum at a taxpayer-funded

(*CSEA/Part I Second Report and Order*).

[74] *Id.* at 4808 (Statement of Commissioner Michael J. Copps) ("In this age when telecommunications companies seem only to grow larger and larger, it is important to have programs that encourage competition from smaller entrepreneurs. This is exactly what the Designated Entity (DE) program is all about and it is why we must do everything we can to make this program perform as intended.").

[75] *Id.* (Statement of Commissioner Michael J. Copps).

[76] *Id*. (Statement of Commissioner Michael J. Copps). Commissioner Adelstein took a similar position. He believed that the Commission should close "loophole[s]" in the DE program, not open them up. *Id.* at 4810 (Statement of Commissioner Jonathan Adelstein Approving in Part, Dissenting in Part). He expressed serious concern about "large wireless carriers gain[ing] indirect access to bidding credits." *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Further Notice of Proposed Rulemaking, 21 FCC Rcd 1753, 1772 (2006) (Statement of Commissioner Jonathan Adelstein).

[77] *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4808 (Statement of Commissioner Michael J. Copps).

[78] *Id.* (Statement of Commissioner Michael J. Copps).

discount and flipping it to someone else at full market value."[79] They explained that "it would likely create huge incentives for DEs to engage in this type of behavior, increasing the chances that future auctions would proceed in much the same way as the AWS-3 auction played out. That would be terrible for taxpayers, who would be underwriting corporate welfare, and for consumers, who would not see valuable spectrum put to its most productive uses."[80] T-Mobile said that allowing 100% leasing "effectively would gut the purpose of the designated entity program"[81] and "increas[e] the likelihood that designated entity benefits unfairly flow to ineligible entities or to speculators that acquire or warehouse spectrum at the expense of actual service providers that need it."[82] Still others remarked that allowing these leasing arrangements "will act like catnip to spectrum opportunists who are less interested in serving underserved areas than with getting rich quick at the public's expense."[83] Dozens of smaller and rural providers echoed these same concerns and urged the Commission not to eliminate the facilities-based requirement.[84] Yet down the drain it goes.

The *Order*'s defense is the Commission's "predictive judgment that DEs will not be able to build viable, competitive wireless businesses" unless they are allowed to lease all of their spectrum to large, nationwide carriers.[85] Putting aside the question of who the DE is actually competing against when it leases all of its spectrum to an incumbent provider, I will concede that it's hard to argue with predictive judgments. Except when they run contrary to actual facts. DEs like Vtel in Vermont, Buggs Island Telephone in Virginia, Chariton Valley in Missouri, and Sandhill Communications in South Carolina, as well as many other facilities-based providers across the country, can certainly be forgiven if they don't agree with the FCC that their businesses are "not . . . viable."

Nor do the *Order*'s statements about consolidation in the wireless industry counsel in favor of eliminating the facilities-based requirement. Ditching the rule only *increases* market concentration since, as I noted, spectrum will be flipped from smaller providers to the largest wireless carriers in the country.

II.

Prohibiting DEs from leasing 100% of their spectrum is not just sound policy. It also happens to be the law. Section 309(j) of the Communications Act authorizes the Commission to use bidding credits to give DEs "the opportunity to participate in the provision of spectrum-based services."[86] And Congress passed this provision "to deter speculation and participation in the licensing process by those who have no intention of offering service to the public."[87]

It's no surprise, then, that the Commission has consistently read the Communications Act to

[79] Comments of Americans for Tax Reform, Center for Individual Freedom, National Taxpayers Union, and Taxpayers Protection Alliance at 9–10, http://go.usa.gov/3G3dj.

[80] *Id.*

[81] T-Mobile Comments at 3, http://go.usa.gov/3G3d5.

[82] T-Mobile Comments at 13, http://go.usa.gov/3G3dV.

[83] MediaFreedom.org Comments at 2, http://go.usa.gov/3G3dH.

[84] *See, e.g.*, Cellular South d/b/a C Spire Reply at 2, http://go.usa.gov/3G3dh (urging the Commission to "promote acquisition of spectrum for development of facilities-based wireless service by new providers or by small, existing providers seeking to expand their current service capacity or footprint"); Blooston Rural Carriers Comments at 5, http://go.usa.gov/3G3v4 ("[A]bandoning the AMR rule at this time would be a serious misstep."); Rural Wireless Association Comments at 15, http://go.usa.gov/3G3vk (stating that rural carriers did not fare well in Auction 97 and explaining that "RWA is concerned that eliminating the AMR Rule as proposed could yield similar (or worse) results in the Incentive Auction").

[85] *Order* at para. 24.

[86] 47 U.S.C. § 309(j)(4)(D).

[87] H.R. Rep. No. 103-111, at 257–58 (1993).

require that the DE program benefit facilities-based operators, not passive speculators. When the FCC first confronted the question in 1994, it interpreted the statute to require DEs to actually "provide telecommunications services"[88] and adopted unjust enrichment rules to "deter speculation and participation in the licensing process by those who do not intend to offer service to the public."[89]

When the FCC returned to the issue in 2004, it found that "Congress specifically intended that, in order to prevent unjust enrichment, the licensee receiving designated entity benefits actually provide facilities-based services as authorized by its license"[90] and stated that "the licensee cannot make spectrum leasing its primary business and must . . . continue to provide facilities-based network services under its licenses."[91]

And when the FCC rejoined the issue in 2006, it stated that Congress' statutory directive means that "every recipient of our designated entity benefits [must be] an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public."[92] Later that year, it made clear that "Section 309(j)(4)(D) directs the Commission to issue regulations to 'ensure' that designated entities 'are given the opportunity to participate in the provision of spectrum-based services.'"[93] The Commission added that "the word 'participate' in this directive contemplates significant involvement in the provision of services to the public, *not merely passive ownership of a license to spectrum used by others to provide service*."[94]

Notably, the consensus that the Communications Act limits DE benefits to facilities-based providers was bipartisan and unanimous. A Democratic Congress passed section 309(j)(4)(D), and a Democratic President signed it into law. Democratic Chairman Reed Hundt led his fellow commissioners in first interpreting that section to require that DEs be facilities-based providers, and Republican Chairmen Michael Powell and Kevin Martin followed suit. Indeed, Democratic Commissioner Copps took an even stricter view, arguing that there was "no legal justification" for permitting DEs (or any other provider) to lease *any* of their spectrum without specific Commission approval of each such lease.[95]

Until today. The decades-long, bipartisan consensus on the law is turned aside in one short paragraph by the *Order* on the theory that all of those prior Commissioners—Democrat and Republican alike—simply placed undue weight on certain legislative history.[96] But even a cursory reading of our

[88] *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93–253, Second Report and Order, 9 FCC Rcd 2348, 2394, para. 258 (1994) (*Competitive Bidding Second Report and Order*).

[89] *Id.* at 2394, para. 259.

[90] *Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503, 17544, para. 82 (2004) (*Secondary Markets Second Report and Order*).

[91] *Id.* at 17541, para. 76.

[92] *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4760, para. 15.

[93] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Order on Reconsideration, 21 FCC Rcd 6703, 6705, n.8 (2006) (*CSEA/Part I Order on Reconsideration*).

[94] *Id*. (emphasis added).

[95] *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17649 (Dissenting Statement of Commissioner Michael J. Copps).

[96] *See Order* at para. 25. The *Order* argues that Congress never intended that designated entities be limited to providing primarily facilities-based service because Congress referenced the facilities-based requirement in the portion of section 309(j)'s legislative history that describes the FCC's obligation to guard against unjust enrichment, rather than the portion that describes the FCC's authority to use bidding credits. *See Order* at n.88. But this misses

precedents makes clear that the Commission's bipartisan reading of the Communications Act was grounded in the plain language of the statute, not on tea leaves from the *Congressional Record*.[97]

The *Order* does not—and cannot—reconcile Congress' directive that DEs participate in the provision of spectrum-based services with the FCC's decision to allow DEs to offer *no* spectrum-based services themselves and instead simply profit from wholesale leasing. As it is unlawful, I cannot support it.

III.

To be sure, the *Order* does take some stabs at reform. Yes, we should prohibit a company from bidding through multiple auction participants. Yes, we should prevent an individual from serving as an authorized bidder for more than one applicant. And yes, we should require an applicant to certify that it is not involved in any way in the bidding strategy of more than one bidder. But we shouldn't pat ourselves on the back for prohibiting collusive conduct already subject to the criminal provisions of antitrust law. These fruits don't hang much lower.

For me, this proceeding has never been about ending certain types of abuse while opening up avenues for new types of abuse to flourish. Commissioner Copps put it best: "[O]ur job is to deny wealthy companies or individuals *any* opportunity to misuse the DE discount to outbid small carriers—the very carriers the DE program is meant to protect."[98] The *Order* fails that test. So what would real reform look like?

First, real reform would mean putting meaningful limits on the discounts that any company can obtain. But the *Order*'s $150 million cap is not a serious measure. Remember, to get DE bidding credits, a "very small business" can have no more than $20 million in annual revenues. Yet the FCC foresees that very small business bidding up to *$600 million* in order to receive the maximum bidding credit. A "small business" spending that massive a multiple of its revenues at a single auction is not really a small business, any more than a family earning $20,000 per year but spending $600,000 in one go is financially responsible. Indeed, members of Congress have weighed in on this point, stating that "real small businesses who are building mobile broadband to serve their communities do not have deep pockets, and placing too high a cap on bidding credits is only likely to encourage speculators and others more interested in profiting from this government program rather than deploying new broadband infrastructure and creating real competition."[99]

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the point. Among other things, Congress put section 309(j)'s unjust enrichment provision in place to require the FCC to guard against misuse of bidding credits, which, as explained above, is precisely what occurs when a company obtains spectrum at a 35% taxpayer-funded discount and then immediately leases 100% to one of the country's largest wireless providers. *See, e.g.*, H.R. Rep. No. 103-111, at 257 (1993) (stating that "to the extent" the Commission uses its authority to achieve goals that benefit small businesses, the unjust enrichment provision ensures that DEs are "not . . . permitted to frustrate that goal").

[97] *See, e.g.*, *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394, paras. 258–59 (reading section 309(j) as requiring the FCC to ensure that DE benefits flow only to entities that actually "provide telecommunication services"); *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17544, para. 82 (rejecting any reading of Section 309(j) that says DEs "need not be limited to constructing and operating a facilities-based network"); *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4760, para. 15 (discussing section 309(j) and "Congress's directives" to ensure that every DE "uses its licenses to directly provide facilities-based telecommunications service"); *CSEA/Part I Order on Reconsideration*, 21 FCC Rcd at 6705, n.8 (interpreting the word "participate" in section 309(j)(4)(D)).

[98] *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4808 (Statement of Commissioner Michael J. Copps) (emphasis added).

[99] Letter from Hon. Marsha Blackburn and Hon. Robert E. Latta to Hon. Tom Wheeler, Chairman, FCC (June 26, 2015).

Our experience shows that the *Order*'s cap is a reform in name only. Just look at the last three major spectrum auctions. Putting aside the cases where petitions to deny are pending, a $150 million cap would not have affected a single qualified DE. Even a $50 million cap, which I was willing to support in the interest of reaching a compromise, would have impacted less than 2% of DEs (and the $10 million cap I initially proposed would have only affected 3.52%). And remember, these figures include data from the auction of below-1 GHz spectrum and licenses that covered much larger areas than the upcoming incentive auction. So any argument that imposing meaningful caps would end the Designated Entity program rather than mend it doesn't line up with reality.

The *Order* tries to defend its approach by noting that a lower, $10 million cap will apply to some markets in the incentive auction. But the $150 million cap covers nearly 80% of the U.S. population. And in those areas where the lower cap does apply, the playing field is tilted. A shell DE—which can and probably will have a major corporate backer—will get a percentage discount significantly larger than even the smallest facilities-based provider qualifying only for the rural service credit. Moreover, that DE can bid without needing to raise and spend the capital necessary to actually deploy and maintain a network that serves consumers. Finally, I don't take much comfort in the *Order*'s suggestion that a future FCC might decide to impose a $25 million cap in a future auction; predictive difficulties aside,[100] recent experience suggests that politics, not practicalities, will inform that determination.

Second, real reform would mean putting a bright-line rule in place that prohibits large companies from setting up multiple DEs and using them to get multiple bites at the $150 million discount.[101] After all, what's the use of a cap if any large company can avoid it by setting up more than one shell DE? So I proposed that we allow a company to invest the maximum amount permitted by our rules in one DE, but that we prohibit it from holding more than a 40% stake in a second DE, regardless of whether it claims a controlling or non-controlling interest in the DEs. I thought this would be a straightforward way of promoting access to capital while ensuring that large companies don't circumvent our cap by reserving majority interests in multiple DEs. But the *Order* fails to do that.

Third, real reform would mean strengthening our unjust enrichment rules to ensure that a shell DE can't just flip its spectrum to one of our nation's largest wireless carriers. The Competitive Carrier Association, T-Mobile, and others all called on the FCC to extend our existing requirements.[102] In my view, we should lengthen the unjust enrichment period to ten years. But the *Order* doesn't do that either. It allows DEs to sell their licenses in as little as three years without having to repay the full amount of the taxpayer-funded discount. This is particularly strange since the Commission eliminates the facilities-based requirement—which means that DEs will no longer need to spend capital constructing or maintaining a network (and hence the need for a quick exit strategy becomes less not more compelling).

Fourth, real reform would mean preventing deep pockets from standing up shell companies simply to siphon the taxpayer-funded discount.[103] I offered a straightforward way of doing this: I proposed to attribute a large company's revenues to a DE if it owns a majority of the business. But the

[100] *See* Yoda, *Star Wars Episode V: The Empire Strikes Back* (Lucasfilm 1980) ("Difficult to see. Always in motion is the future.").

[101] *See, e.g.*, Spectrum Financial Partners, LLC Reply at 3, http://go.usa.gov/3G3H9 (stating that "[c]ross ownership of multiple bidding entities is clearly . . . tantamount to collusion" and that "rules for future auctions ought to limit joint ownership to much less than controlling interest, certainly less than 50%").

[102] *See, e.g.*, Competitive Carrier Association Comments at 11, http://go.usa.gov/3G3sF ("Extending the unjust enrichment period beyond five years would increase the deterrent against DE discounts being used by ineligible entities to acquire spectrum licenses at below-market rates."); T-Mobile Comments at 17, http://go.usa.gov/3G3H3 ("[T]he Commission should consider an unjust enrichment obligation that requires full repayment, plus interest, until the end of a standard 10-year lease term.").

[103] *See, e.g.*, Cellular South d/b/a C Spire Reply at 2–3, http://go.usa.gov/3G3dh.

Order rejects this safeguard from corporate capture, instead allowing a large company to own up to 99% of a designated entity.

Fifth, real reform would mean prohibiting any big company that owns a DE from leasing the designated entity's discounted spectrum. These types of lease-back arrangements present opportunities ripe for abuse. But the *Order* does not adopt this reform. Instead, it leaves the door open to a large carrier that owns 99% of a DE—and is itself too large to qualify for any small business discount—to use up to 25% of its DE's discounted spectrum. And that's just during the unjust enrichment period. After that, the large carrier can use every last megahertz of the DE's spectrum.

Sixth, real reform would mean treating the revenues of Alaska Native Corporations the same as revenues from any other qualifying DE.[104] But the *Order* instead opts for preferential treatment and will give ANCs millions in discounts even if they are otherwise too large to qualify as small businesses.

Seventh, real reform would mean preventing individuals who make more than $55 million a year from holding a controlling interest in a qualifying DE. This is a common sense way to prevent hedge-fund millionaires from getting taxpayer-funded discounts. But the *Order* rolls out the red carpet.

In sum, the *Order* rejects fact-based, common-sense, and widely supported reforms that would restore public confidence in our Designated Entity program. These reforms would have met the test of "deny[ing] wealthy companies or individuals *any* opportunity to misuse the DE discount to outbid small carriers."[105] But they'll have to wait for another day.

* * *

Finally, a note about process. I was under no illusion that today's *Order* would adopt every one of my suggestions. But I thought there was enough common ground that we could still reach a compromise. After all, we were able to work together on the April Public Notice and tee up a wide range of proposals.[106]

In that spirit, I gave my colleagues all of my requests weeks ago, within days of receiving the draft. And I rolled up my sleeves, ready to get to work finding a consensus. I understood early on that retaining the attributable material relationship rule would be a red line for some. Preserving this safeguard was important to me, but I was willing to compromise and support its elimination if the Commission adopted other safeguards that would prevent unjust enrichment and faithfully implement the Communications Act's requirements.

Unfortunately, it was not until three days ago that the Chairman's Office responded to my proposal. Despite repeated assurances that the draft *Order* was only an opening offer and that there was room to negotiate, the reality turned out to be far different.[107] It was the take-it-or-leave-it proposition that has been too common around here. On this issue, the American people are tired of taking it. So I will leave it. And I will respectfully dissent.

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[104] *See, e.g.*, Letter from Sen. Claire McCaskill to Hon. Tom Wheeler, Chairman, FCC (Feb. 26, 2015), http://go.usa.gov/3G3HT.

[105] *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4808 (Statement of Commissioner Michael J. Copps) (emphasis added).

[106] *See Request for Further Comment on Issues Related to Competitive Bidding Proceeding, Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170 *et al.*, Public Notice, 30 FCC Rcd 4153 (2015), http://go.usa.gov/3fuGe; *see also id.* at 4179-80 (Statement of Commissioner Ajit Pai).

[107] Let me just give one example. When I was initially briefed on the item, I was told that the cap on bidding credits would be $125 million. But when the item was circulated, the cap had somehow magically grown to $150 million. Then, after I proposed a lower number of $10 million, I was told that the cap could be lowered back to $125 million in exchange for me abandoning most of my other proposals. *Cf.* Kramer, "The Raincoats," *Seinfeld*, Season 5, Episode 18 (Apr. 28, 1994), *available at* http://www.tubechop.com/watch/6435438.

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, *Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver*, RM-11395, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211.

While I have concerns about a number of provisions in the item before us, this proceeding effectively comes down to one fundamental question: Should designated entities (DE) receiving taxpayer money to subsidize the purchase of a valuable public resource have to provide any actual service to the American people? It is my firm belief that the statute, not to mention common sense, requires that small businesses benefitting from spectrum subsidies construct facilities in order to offer wireless services to consumers. To align today's item with the language of the statute, Commissioner Pai and I both requested edits that would require designated entities to build facilities in return for taxpayer funding. However, these edits were rejected as the majority does not share this philosophy; therefore, I must dissent.

Opponents' reasoning for dismissing a facilities-based requirement is incoherent at best. Some argue that the statute does not contain a directive that DEs provide facilities-based services. Admittedly the word "facilities-based" does not appear in the statute, but the goals of "competition," "innovative technologies," and "spectrum-based services" cannot be achieved if DEs act as mere "pass-throughs," leasing or flipping their spectrum to existing wireless providers.[108] This makes a mockery of Congress's directive to disseminate licenses to a wide variety of licensees.[109] It is also unfathomable that, in seeking "economic opportunity" for small businesses,[110] Congress intended to allow valuable spectrum to be bought on the cheap so that the financial backers of DEs could get rich while large wireless providers – ineligible for the credit – access spectrum at a reduced cost.

The item text suggests that our rules need to be more permissive so that DEs can obtain investment and gain "operational experience" from existing providers.[111] But allowing 100 percent leasing of DE licenses does not prevent a DE from acquiring the spectrum, leasing it for profit and then selling it for even more windfall profits. And simply cashing a check does not equate to obtaining operational experience. It just means that the U.S. taxpayers are being ripped off for the benefit of a select few, soon-to-be millionaires.

Being told that a facilities-based requirement was a non-starter, I sought other edits to prevent abuses of the DE program. For instance, I proposed that we limit the amount of spectrum that could be leased to any one nationwide provider and entertained other possible restrictions on spectrum use arrangements. This wouldn't completely eliminate the issue but would have forced those seeking to lease DE subsidized spectrum to find multiple partners when attempting to do so. And it would be accompanied by more stringent unjust enrichment rules.

The current rules set the unjust enrichment period at five years. However, in today's age of clearing and sharing spectrum, most initial construction requirements fall outside of this five-year timeframe. This loophole allows DEs to acquire spectrum and warehouse it until the unjust enrichment period expires. How can we justify rules that encourage the warehousing of spectrum and so blatantly

[108] 47 U.S.C. §§ 309(j)(3)(B), 309(j)(4)(D).

[109] *Id*. § 309(j)(3)(B) (stating that there is also an objective to avoid the "excessive concentration of licenses.").

[110] *Id*. §§ 309(j)(3)(B), 309(j)(4)(C)(ii).

[111] *E.g., supra* ¶¶ 4, 42.

violate the objective that the Commission promote the "efficient and intensive use of . . . spectrum"?[112]

To rectify this loophole, I requested that, at a minimum, the unjust enrichment period extend to one year past the construction requirement, or, in the case of the upcoming incentive auction, seven years. In addition, if the initial construction benchmark was extended, the unjust enrichment period would be similarly extended to one year after the initial construction requirement. Additionally, a 100 percent reimbursement of the bidding credit would be due if DEs transferred control of their licenses before constructing their own facilities to a FCC licensee that has either invested in the DE or has a spectrum use arrangement with the DE.

Although these reasonable suggestions serve as safeguards to ensure that only *bona fide* small businesses obtain DE benefits,[113] they were rejected because some believe that prolonged unjust enrichment periods scare off venture capitalists. No one is saying that investors cannot divest their ownership interests, but it is highly possible that such transactions would result in unjust enrichment. I understand that investors want an exit strategy and a return on their investment in a set timeframe. But why shouldn't the American people expect a similar return on their investment or, at the very least, a reimbursement of their generous loan?

The Act also states that there should be "performance requirements . . . to ensure prompt delivery of services to rural areas, to prevent stockpiling or warehousing of spectrum . . . , and to promote investment in and rapid deployment of new technologies and services."[114] I hope the Chairman will initiate a review of the Commission's wireless buildout requirements to ensure that our rules and policies continue to promote the expeditious deployment of wireless networks by small and large businesses alike.

Additionally, although I am in favor of a cap, $150 million for a small business is too high, and there must be stronger provisions to ensure that wireless providers cannot invest in multiple DEs, allowing them to aggregate and evade the bidding credit cap. I also cannot support maintaining the revenue exemption for Alaska Native Corporations, a rule change that is also championed by Senator Claire McCaskill.

Although I recognize that today's item takes steps to correct some flaws in the DE program, I cannot support an item that does not require facilities-based DEs and does not prevent the abuses we have seen in the past.

[112] 47 U.S.C. § 309(j)(3)(D).

[113] *Id*. §§ 309(j)(3)(C), 309(j)(4)(E) (stating that the Commission's auction design should include safeguards to avoid unjust enrichment and that the Commission's rules should include "antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.").

[114] *Id*. § 309(j)(4)(B).