

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

In the Matter of
Extending Wireless Telecommunications
Services to Tribal Lands
WT Docket No. 99-266

SECOND REPORT AND ORDER
AND
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairman Powell, Commissioners Copps and Adelstein issuing separate
statements.

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TABLE OF CONTENTS

Table with 2 columns: Section Title and Paragraph Number. Includes sections I through V with sub-sections A, B, C, D.

A. <i>Ex Parte</i> Rules – Permit-But-Disclose Proceeding.....	36
B. Final Regulatory Flexibility Analysis.....	37
C. Paperwork Reduction Act Analysis .....	38
D. Initial Regulatory Flexibility Analysis .....	39
E. Initial Paperwork Reduction Act Analysis .....	40
F. Comment Dates .....	41
VI. ORDERING CLAUSES.....	47
Appendix A: Rules.	
Appendix B: Final Regulatory Flexibility Analysis.	
Appendix C: Initial Regulatory Flexibility Analysis.	

## I. INTRODUCTION

1. In this *Second Report and Order*, we clarify rules previously adopted in the *Report and Order and Further Notice of Proposed Rulemaking* in WT Docket 99-266<sup>1</sup> to provide incentives for wireless telecommunications carriers to serve individuals living on tribal lands.<sup>2</sup> In that *Report and Order*, the Commission adopted rules to grant bidding credits to winning bidders who deploy facilities and provide service to federally-recognized tribal areas that have a telephone service penetration rate below 70 percent.<sup>3</sup> In the present item, we extend, on our own motion, the time period during which winning bidders can negotiate with the relevant tribes to obtain the certification needed to obtain the credit. We also clarify various administrative matters involved in implementing the credit.

2. This *Second Report and Order* also addresses issues raised in the *Further Notice of Proposed Rulemaking (Further Notice)*. In the *Further Notice*, the Commission requested comment on whether the bidding credits program should be expanded beyond its current scope. Because the program is still in its early stages, and based on the limited comment we received in the proceeding, we conclude that the existing record does not justify enlarging the scope of the bidding credit as set out in the *Further Notice*.

3. However, while we do not expand the scope of the tribal lands bidding credit in this order, we continue to seek ways in which we can encourage greater participation in the existing tribal lands bidding credit program. We also believe that consideration should be given to extending the program to underserved tribal communities that are situated on non-tribal lands adjacent to tribal lands. Accordingly,

<sup>1</sup> In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 11794 (2000) (*Report and Order*).

<sup>2</sup> Section 1.2110(f)(3)(i) of the Commission's rules provides that a qualifying tribal land is any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments that has a wireline telephone subscription rate to or less than seventy (70) percent based on the most recently available U.S. Census Data. 47 C.F.R. § 1.2110(f)(3)(i). We note that since the adoption of section 1.2110(f)(3)(i), the Bureau of Indian Affairs (BIA) revised its definition of "reservation" in such a way as to no longer explicitly include "former reservations in Oklahoma" or "Indian allotments." See 25 C.F.R. § 20.100. Although we based our designation of "qualifying tribal land" on BIA's previous definition of the term "reservation," we are retaining the definition as set out in section 1.2110(f)(3)(i). We amend section 1.2110(f)(3)(i) to delete the reference to former rule section 25 C.F.R. § 20.1(v).

<sup>3</sup> The "telephone penetration rate," or telephone subscribership rate, represents the actual percentage of households that subscribe to telephone service. See *Telephone Subscribership in the United States* (rel. February 2003), available at <[http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/subs0702.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/subs0702.pdf)>.

in the *Second Further Notice of Proposed Rulemaking (Second Further Notice)*, we seek comment regarding ways to adjust our current program in order to encourage further deployment by carriers of wireless services on tribal lands. We also seek comment on possible adjustments to the program based on use of data from the 2000 Census that was not available when the program was initiated. Finally, we seek comment on a limited expansion of the credit program that would allow carriers who obtain bidding credits to serve qualifying tribal lands to obtain additional credit for extending their coverage to immediately adjacent non-tribal areas that also have low penetration rates.

## II. BACKGROUND

4. In the *Report and Order*, the Commission established bidding credits for use by winning bidders who pledge to deploy facilities and provide service to federally recognized tribal areas that have a telephone service penetration rate at or below 70 percent. In setting out the bidding credit, the Commission noted that communities on tribal lands have had less access to telecommunications services than any other segment of the U.S. population.<sup>4</sup>

5. The *Report and Order* provided that, in order to obtain a bidding credit in a particular market, a winning bidder must indicate on its long-form application (FCC Form 601) that it intends to serve tribal lands in that market.<sup>5</sup> Following the long-form application filing deadline, the applicant has 90 calendar days to amend its application to identify the tribal lands to be served, and provide certification from the tribal government(s) that: (1) it will allow the bidder to site facilities and provide service on its tribal land(s), in accordance with our rules; (2) it has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate against any carrier; and (3) its tribal land is a qualifying tribal land as defined in our rules, *i.e.*, an area that has a telephone penetration rate at or below 70 percent.<sup>6</sup> In addition, at the conclusion of the 90-day period, the applicant must amend its long-form application to file a certification that it will comply with the bidding credit build-out requirement, and that it will consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land. Upon receipt by the Commission of the certifications, the bidding credit is awarded and the applicant makes payment of the final net adjusted bid amount.<sup>7</sup> If the required certifications are not provided at the conclusion of the 90-day period, the bidding credit is not awarded and the applicant is required to pay the balance on the original gross bid amount in order to be awarded the licenses.

6. In order to ensure that applicants awarded bidding credits actually deploy facilities and provide service to tribal lands, the Commission imposed performance requirements as a condition of obtaining the bidding credit. The Commission required that a licensee construct and operate its system to cover 75 percent of the population of the qualifying tribal land within three years of the grant of the license.<sup>8</sup> While this 75 percent benchmark is higher than the construction benchmarks applicable to auctioned wireless licenses generally, the Commission determined that it would ensure that only carriers that are committed to serving tribal lands will receive bidding credits, and that wireless telecommunications services will be deployed rapidly to underserved tribal areas.<sup>9</sup> In the *Report and Order*, the Commission required that, at the conclusion of the three-year period, licensees file a notification of construction

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<sup>4</sup> *Report and Order*, 15 FCC Rcd at 11798, para. 8.

<sup>5</sup> *Id.* at 11805, para. 31.

<sup>6</sup> *See id.*

<sup>7</sup> *Id.* at 11806, para. 33.

<sup>8</sup> *Id.* at 11806, para. 35.

<sup>9</sup> *Id.*

indicating that they have met the 75 percent construction requirement on the tribal lands for which the credit was awarded.<sup>10</sup> If the licensee fails to comply with any condition, it is required to repay the bidding credit plus interest thirty days after the conclusion of the construction period.<sup>11</sup> In the event the licensee fails to repay the amount, the license automatically cancels.<sup>12</sup>

7. In limiting the scope of the bidding credit to federally recognized tribal areas with telephone penetration rates equal to or less than 70 percent, the Commission concluded that the credits would target the tribal communities with the greatest need for access to telecommunications service.<sup>13</sup> Although the Commission acknowledged that there are some non-tribal areas with penetration rates lower than the national average, it was determined that almost all non-tribal areas have penetration rates greater than 70 percent and that non-tribal areas have penetration rates significantly greater than most tribal areas.<sup>14</sup> Accordingly, the Commission found it appropriate to limit the program to tribal lands with a 70 percent or less penetration rate. The Commission did not, however, foreclose the possibility of extending the credit both to non-tribal areas and to areas with higher penetration rates.

8. In the *Further Notice*, the Commission solicited comment on ways the bidding credit could be extended to encourage further deployment of wireless telecommunications services. The Commission specifically sought comment on whether it should award bidding credits to carriers who commit to serve non-tribal areas with a 70 percent or less penetration rate, or tribal and/or non-tribal areas with penetration levels above 70 percent but significantly below the national average. Further, comment was requested regarding whether the Commission should expand the program to give transferable bidding credits to be used in future auctions to existing licensees in already-established wireless services who deploy and provide service to unserved tribal communities. The Commission also asked whether it should make credits available to licensees that enter into partitioning agreements with tribal authorities that allow the tribal government to provide service, either directly or through negotiation with a third-party carrier.

9. We received limited comment in response to the *Further Notice*. Four entities filed comments in this proceeding, while other entities filed reply comments.<sup>15</sup> In general, the commenters agreed that we should institute new measures to encourage further deployment of wireless services onto tribal lands.

### III. DISCUSSION

#### A. Modification and Clarification of Bidding Credit Procedures.

10. *Certification Procedure*. When the Commission adopted the tribal lands bidding credit in the *Report and Order*, it established the method by which a bidding credit would be calculated, as well as the application process involved in obtaining a bidding credit. Since the inception of the tribal lands bidding

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<sup>10</sup> *Id.* at 11807, para. 37.

<sup>11</sup> *Id.* The interest is set according to the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted. 47 C.F.R. §1.2110(f)(3)(vii).

<sup>12</sup> *Report and Order*, 15 FCC Rcd at 11807, para. 37.

<sup>13</sup> *Id.* at 11802, para. 22.

<sup>14</sup> *Id.*

<sup>15</sup> See Comments of National Telephone Cooperative Association (NTCA), Titan Wireless, Inc, Verizon Wireless, and Western Wireless Corporation. See also Reply Comments of Cheyenne River Sioux Tribe Telephone Authority, and Salt River Pima-Maricopa Indian Community and Saddleback Communications. Another entity, Alaska Native Wireless, L.L.C., filed an *ex parte* in this matter.

credit, there have been 10 auctions,<sup>16</sup> with 375 winning bidders purchasing 10,479 licenses.<sup>17</sup> However, only 27 winning bidders to date have initially indicated on their long-form applications that they would be seeking the tribal lands bidding credit, and of those applicants, only five submitted the required 90-day certifications.<sup>18</sup> Upon review of this proceeding, we find that the small number of applications seeking the credit is due, at least in part, to the administrative process established by the Commission. Specifically, we find that the 90-day deadline for obtaining the certifications from the applicable tribal government(s) makes it extremely difficult to qualify for the credit. The 90-day deadline and certifications were established: (1) to ensure prompt issuance of licenses to winning bidders; (2) to provide a time frame for making contact with tribal governments and obtaining requisite certifications; and (3) to ensure that the wireless carrier intends to provide service to the tribal land. Because ninety days may not be a sufficient amount of time for licensees and tribal authorities to complete the certification process,<sup>19</sup> we extend the tribal lands certification period to 180 days. Accordingly, a winning bidder claiming a tribal lands bidding credit will now have 180 days to amend its long-form application to identify the tribal lands to be served, and provide the required certification from the tribal government. Further, the winning bidder will have 180 days to file a certification that it will comply with the tribal lands build-out requirements, and consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land. If the winning bidder fails to submit the required certifications within the 180-day period, the bidding credit will not be awarded, and the winning bidder will be required to pay the balance on the original gross bid amount in order to obtain the license.

11. *Full or partial assignments of licenses involving tribal lands bidding credits.* An issue that was inadvertently omitted in the *Report and Order* is the impact of license assignments on licenses with tribal lands bidding credit construction/repayment obligations. We therefore clarify that if the license is assigned to another entity, the construction/repayment obligations associated with the credit are transferred as well. Because all obligations of the license automatically transfer to the assignee, we will not require the assignee to seek re-certification where the original licensee received certifications from the

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<sup>16</sup> See “C and F Block Broadband PCS Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 2339 (WTB 2001) (C and F Block Broadband PCS Auction); “700 MHz Guard Band Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 4590 (WTB 2001) (700 MHz Guard Band Auction); “800 MHz SMR Service Lower 80 Channels Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 1736 (WTB 2000) (800 MHz SMR Service Lower 80 Channels Auction); “VHF Public Coast and Location and Monitoring Service Spectrum Auction Closes: Winning Bidders Announced,” *Public Notice*, DA 01-1443 (rel. June 15, 2001) (Combined Public Coast and LMS Auction); “Narrowband PCS Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 18663 (WTB 2001); “Lower and Upper Paging Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 21821 (WTB 2001); “Multiple Address Systems Spectrum Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 21011 (WTB 2001); “Multi-Radio Service Auction Closes: Winning Bidders Announced,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002); “Lower 700 MHz Band Auction Closes: Winning Bidders Announced,” *Public Notice*, 17 FCC Rcd 17272 (WTB 2002); “Cellular Rural Service Areas Auction Closes: Winning Bidders Announced,” *Public Notice*, 17 FCC Rcd 10582 (WTB 2002).

<sup>17</sup> Not all of these licenses have tribal lands. For more information, visit the FCC Auctions web site at <http://www.fcc.gov/wtb/auctions/>, select the link for “Info on Tribal Land Bidding Credit,” and refer to the files under “List of Tribal Lands and Market Cross References.”

<sup>18</sup> Two of the applicants did not submit timely certifications. There are currently seven pending requests for extensions of the 90-day certification period.

<sup>19</sup> For example, it takes time for licensees to determine the appropriate individuals within a tribal government to approach and the appropriate procedures to follow in order to obtain the certifications from tribal authorities. Further, depending upon the particular tribal entity, there may be lengthy processes involved in evaluating the proposed service and determining whether to adopt the certification (e.g. such considerations could include determining whether the proposed service fits within the tribal government’s technology plan).

appropriate tribal authorities. It is important to note that an assignee contracting with a licensee to transfer a license for which a tribal lands bidding credit was received bears the risk that the tribal government may not allow the assignee to deploy facilities on its land. We expect that parties interested in obtaining wireless licenses will exercise due diligence in identifying whether or not a tribal lands bidding credit construction obligation is associated with the license, and, therefore, take into account the heightened construction obligation, the dependence of the credit on obtaining the consent of the tribal government, and the potential for a repayment penalty in case the construction requirement is not met within the original three-year time frame. It is up to the assignee to verify that the tribe will consent to allowing the assignee access to its lands.

12. Also, we clarify that in partial license transfers involving geographic partitioning,<sup>20</sup> the tribal land must be wholly contained within either the assignor's or assignee's proposed license area after the partition. We will not permit, for example, a tribal area for which a credit was awarded to be "split" between partitioned areas because this would be inconsistent with the original purpose of issuing the credit, *i.e.*, to ensure that at least 75 percent of the tribal land is served. Where a partition occurs, the construction/repayment obligation will attach to the license for the partitioned area that encompasses the tribal land for which the credit was awarded. However, in partial license transfers involving spectrum disaggregation<sup>21</sup> (but not partitioning), the construction/repayment obligation will be presumed to remain with the original licensee whose stated intention was to serve the tribal land unless the parties to the transaction inform us otherwise. As is the case with partitioning, spectrum covering the tribal land must be disaggregated in its entirety (*i.e.* a disaggregation involving only a portion of a tribal area subject to a bidding credit will not be permitted).

13. *Notification of Construction.* In the *Report and Order*, the Commission did not clearly set out the notification of construction procedures applicable to licensees that are granted tribal lands bidding credits. Pursuant to the goals of section 309(j)(4)(B) of the Act,<sup>22</sup> the Commission has set out performance requirements for the various services, with alternative construction obligations for those licensees using tribal land bidding credits. As noted, the Commission imposed more stringent construction requirements for those licensees that choose to utilize the tribal lands bidding credit in order to ensure that only those most committed to building out their facilities will receive bidding credits and that service is deployed as quickly as possible. In order to verify compliance with the tribal lands construction requirement, any licensee employing a bidding credit must file a notification of construction (FCC Form 601, Schedule K) electronically at the conclusion of the three-year construction period along with an attachment stating affirmatively that it is providing coverage to 75 percent of the population of the tribal area for which the credit was awarded. In its notification of construction, the licensee must provide the total population of the tribal area covered by its license as well as the number of persons it is serving in the tribal area. If the licensee fails to make an adequate showing that it has met the 75 percent benchmark, it will be required to repay the bidding credit, plus interest, thirty days after the conclusion of the construction period.<sup>23</sup> Failure to repay this amount will result in automatic termination of the license.<sup>24</sup>

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<sup>20</sup> Partitioning is the assignment of geographic portions of a license along geopolitical or other boundaries.

<sup>21</sup> Disaggregation is the assignment of discrete portions or blocks of spectrum licensed to a geographic market licensee or qualifying entity.

<sup>22</sup> Section 309(j)(4)(B) of the Act directs the Commission to "include performance requirements ... to ensure prompt delivery of rural services to rural areas...and to promote investment in and the rapid deployment of new technologies and services. 47 U.S.C. § 309(j)(4)(B).

<sup>23</sup> 47 C.F.R. § 1.2110(f)(3)(vii).

<sup>24</sup> 47 C.F.R § 1.946(c).

14. *Penalty for failure to construct and failure to timely repay bidding credit.* We also take this opportunity to correct an omission in the rules implemented in connection with the *Report and Order*, in which the Commission stated that a licensee's failure to comply with build-out requirements, and subsequent failure to repay the bidding credit, plus interest, thirty days after the conclusion of the construction period, would result in automatic termination of the licensee's license, *i.e.*, termination without any further notification being sent to the licensee, opportunity for a hearing, or other Commission action.<sup>25</sup> This penalty will now be expressly codified in Part 1 of our rules.

**B. Use of Bidding Credits in Non-Tribal Areas or Areas with Telephone Penetration Rates of More than 70 Percent.**

15. In the *Further Notice*, the Commission sought comment on whether it should apply the bidding credit to non-tribal areas on the same terms and conditions as for tribal areas, or alternatively, whether it should extend the bidding credit to areas (tribal and non-tribal) with penetration levels greater than 70 percent, but below the national average of 94 percent.<sup>26</sup> As noted, very few commenters submitted responses to the *Further Notice*. Those who filed comments generally support extending bidding credits to entities seeking to provide service to non-tribal areas with telephone penetration rates below the national average.<sup>27</sup>

16. We conclude that it is premature to expand the program to non-tribal areas or to areas with penetration rates of greater than 70 percent at this time. Because this program is still in its early stages and few entities have taken advantage of the bidding credit thus far, we cannot yet determine whether it would be constructive to expand the use of the bidding credit to non-tribal areas generally. Moreover, we are concerned about the paucity of comment regarding this issue. It is necessary to have a more substantial record as to whether the use of bidding credits is appropriate to encourage deployment of services into non-tribal areas, particularly from those most familiar with dealing with rural and high-cost service issues.<sup>28</sup> Similarly, we believe the record is insufficient at this time to support expanding the use

<sup>25</sup> *Report and Order*, 15 FCC Rcd at 11807, para. 37.

<sup>26</sup> *Id.* at 11809, para. 66.

<sup>27</sup> *See, e.g.*, NTCA Comments at 2-3; Titan Wireless Comments at 4-5; UTStarcom Comments at 2; Verizon Comments at 2.

<sup>28</sup> Because non-tribal areas generally have higher telephone penetration rates than do tribal areas, there is less indication of a need for the availability of bidding credits in addition to other existing support mechanisms to encourage deployment of telecommunications services in non-tribal areas. We note that both tribal and non-tribal communities are eligible for telecommunications funding in the form of federal universal service support, including the high cost program (which provides support to eligible telecommunications service providers that serve residents of high cost regions), and the low-income program, comprised of the Lifeline and LinkUp programs (which provide discounts on telephone installation and monthly telephone service to qualifying consumers). We also note that there has recently been interest in Congress in facilitating the deployment of telecommunications infrastructure in rural and underserved areas. Bills introduced regarding this issue included the Rural Wireless Telecommunications Consumer Enhancement Act of 2002, which was introduced in March 2002 as a means of fostering the deployment of wireless telecommunications services to consumers in rural areas. H.R. 4012, 107th Cong. (2002). Another bill, the Rural America Technology Enhancement Act of 2001, sought to amend Section 254(e) of the Communications Act to provide federal universal service support for the deployment of broadband service to eligible rural communities. Such support could be used for the deployment of wireless technologies. H.R. 2847, 107th Cong. (2001). A further bill introduced in the House of Representatives, the Rural Telecommunications Enhancement Act, sought to authorize the Secretary of Agriculture to make loans and grants to eligible entities to finance the improvement, expansion, construction, acquisition, and operation of facilities to furnish or improve broadband transmission service in rural areas. H.R.2669, 107th Cong. (2001). Additionally, the Community Telecommunications Planning Act was introduced to authorize a total of \$60 million for Fiscal Year 2002, and such sums as necessary in following years, for the creation of grants for community telecommunications infrastructure

of the bidding credit to areas having telephone penetration rates of greater than 70 percent. However, in an effort to develop a more complete and up-to-date record on possible adjustment of the penetration rate threshold, we seek comment below in our *Second Further Notice* on information from the 2000 Census regarding increases in tribal penetration rates that has recently been released by the Census Bureau.<sup>29</sup>

### C. Applying Bidding Credits to Existing Licenses.

17. The Commission noted in the *Report and Order* that the current tribal lands bidding credit can be applied only in the auction in which it is obtained.<sup>30</sup> Accordingly, the bidding credit is not available to carriers with existing licenses that were acquired in prior auctions or through transfer or assignment. The Commission therefore asked in the *Further Notice* whether a more flexible form of credit should be made available to existing licensees who have constructed facilities, using currently-licensed spectrum to provide service to qualifying tribal lands.<sup>31</sup> Under this approach, carriers who use their existing spectrum to provide service to such areas could receive bidding credits that could be used in future auctions.<sup>32</sup> Further, the Commission sought comment on whether such a credit should be transferable to third parties for use in future auctions.<sup>33</sup> The Commission also sought comment on our legal authority under Section 309(j) of the Communications Act to adopt the flexible bidding credit.

18. Although we continue to believe that the tribal lands bidding credit is a valuable means to encourage greater deployment of telecommunications services into underserved tribal areas, we conclude that in light of our still-limited experience with the bidding credit program, we should not extend the program to already-licensed carriers or make the credit transferable at this juncture. We believe that before taking such a step, additional time is needed to determine the effectiveness of the program as currently structured in meeting its intended goals. We also find that the limited comment we have received in this proceeding does not provide sufficient support or guidance for such an expansion of the program.<sup>34</sup> Accordingly, we decline to extend the program to already-licensed carriers or make the credit transferable at this time.

### D. Transferable Bidding Credits for Licensees that Partition Tribal Areas

19. In the *Further Notice*, the Commission solicited comment on whether bidding credits should be made available to carriers that enter into partitioning agreements with tribal governments to facilitate deployment of service to tribal lands.<sup>35</sup> The Commission proposed that a credit would be awarded to a

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planning. Priority for funding would be given to eligible entities that propose to use their awards in rural and underserved areas. S. 1056, 107th Cong. (2001). Although these items have not as yet been re-introduced in the 108th Congress, another bill, the Rural America Digital Accessibility Act, was introduced in January 2003. This bill would authorize grants or guaranteed loans to facilitate the deployment of broadband telecommunications networks (including wireless services) to underserved rural areas. H.R. 138, 108th Cong. (2003).

<sup>29</sup> See section IV.C. *infra*.

<sup>30</sup> *Report and Order*, 15 FCC Rcd at 11817, para. 68.

<sup>31</sup> *Id.* at 11817, para. 69.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 11817, para. 70.

<sup>34</sup> See e.g. National Telephone Cooperative Association Comments at 4; Western Wireless Comments at 2-3; Cheyenne River Sioux Tribe Authority Reply Comments at 1-2; Salt River Pima-Maricopa Indian Community and Saddleback Communications Joint Reply Comments at 2.

<sup>35</sup> *Report and Order*, 15 FCC Rcd at 11818, para. 72.



geographic area licensee that partitioned portions of its license area covering tribal lands to the appropriate tribal government.<sup>36</sup> Again, we received limited comment regarding this issue, and therefore we conclude that the record does not at this time support expanding the bidding credit program as proposed.

#### IV. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

20. In this *Second Further Notice*, we solicit comment on whether it is necessary to modify our existing tribal lands bidding credit program in order to further facilitate the use of the bidding credit. As noted *supra*, the tribal lands bidding credit program is still in its early stages and few carriers have taken advantage of the bidding credit thus far. The record, however, is unclear regarding the reasons behind the lack of response to the bidding credit. Because the record in this proceeding thus far is not sufficient to make reasoned decisions as to what steps, if any, we should take to further encourage carriers to provide coverage to tribal lands, we seek additional comment regarding this issue.

##### A. Modifying the construction requirements of the tribal lands bidding credit.

21. As noted, our rules currently impose more stringent construction requirements on carriers who seek the tribal lands bidding credit than those who do not. All carriers taking advantage of the bidding credit are required to serve 75 percent of the population of the qualifying tribal land for which the credit was awarded, and must do so within three years of license grant.<sup>37</sup> The Commission initially set out the more stringent performance requirement because it believed that the accelerated buildout requirement ensures that: (1) only entities making a serious commitment to serving tribal lands will receive bidding credits; and (2) telecommunications services will be rapidly deployed to unserved tribal areas.<sup>38</sup>

22. It is possible, however, that one reason behind the lack of participation in our bidding credit program is that carriers find that difficulties involved in meeting the enhanced construction requirements are not sufficiently mitigated by the existing bidding credit. For example, there may be conditions, such as technical obstacles, economic factors, or other difficulties, that may make it difficult for carriers to satisfy the stricter construction requirement. Circumstances may exist on remote tribal lands such as low population density, rough terrain, and other factors that can negatively affect the ability of carriers to provide the requisite coverage to facilities in those areas. Accordingly, we seek comment as to whether we should reconsider the buildout obligations imposed on carriers utilizing the tribal lands bidding credit. Given that the public has now had a period of time to evaluate the bidding credit program, we seek comment on whether the requirement that carriers cover 75 percent of the population within three years remains feasible, or whether we should moderate the buildout criteria. Specifically, we request comment on what factors or circumstances exist that warrant an across-the-board relaxation of the bidding credit construction requirements.

23. In the event that we determine that the construction requirements should be eased, we seek comment on how the requirements should be modified. For example, should the population of the qualifying tribal land covered by a carrier be lessened (*i.e.* reduced to a number below 75 percent)? Alternatively, should the time period in which to provide coverage to 75 percent of the tribal population be extended to a construction period longer than three years? Or is the appropriate remedy a combination of a reduced population coverage requirement and an expanded construction period? Should we adopt a variation of the combination method, such as a tiered approach in which construction would occur in phases,

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<sup>36</sup> *Id.*

<sup>37</sup> 47 C.F.R. § 1.2110(f)(3)(vi).

<sup>38</sup> *See Report and Order*, 15 FCC Rcd at 11807-11807, para. 35.

*e.g.*, a certain percentage of the total tribal population must be covered in three years, and a greater percentage would be covered at the five-year mark. We seek comment regarding these alternatives, as well as any other options. We note that any across-the-board revision of the construction requirements must balance our desire to implement achievable construction requirements with the underlying purpose of the requirements, that is, to ensure that service is actually deployed on tribal lands.<sup>39</sup>

24. We are also aware that a comprehensive change of the construction requirements may not be the appropriate solution. It may be that satisfying the tribal lands buildout requirement may be more difficult in certain tribal areas in the country than in others. There may be difficulties or conditions specific to certain tribal lands, that may make it difficult for carriers to satisfy the stricter construction requirement, while other carriers deploying the same type of service may have no difficulties in meeting the construction requirements in other tribal areas. Similarly, the ability to comply with the tribal lands bidding credit may depend on the particular wireless service at issue. Our rules governing general construction and operation obligations of licensees reflect several approaches that match a type of license (*i.e.* site-based versus geographic market) or service (*e.g.* PCS or lower band 700 MHz) with a specific buildout requirement.<sup>40</sup> It may therefore be preferable to deal with these situations on a case-by-case or service-by-service basis rather than an across-the-board method. We therefore seek comment on whether we should resolve any buildout difficulties using an ad hoc or waiver approach.

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<sup>39</sup> We are currently exploring whether our current regulatory framework is effective in facilitating the delivery of spectrum-based services to rural areas, and how to modify our policies to promote further deployment of such services to rural areas. See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, WT Docket No. 02-381, *Notice of Inquiry*, 17 FCC Rcd 24135 (2002) (*Rural Areas NOI*). In that proceeding, we sought comment on how construction benchmarks may be utilized to facilitate the delivery of wireless services to rural populations. *Id.* at 25566, para. 21. Because we believe that many of the issues raised in the *Rural Areas NOI* are equally applicable to tribal lands, we encourage interested parties to supplement the record in that proceeding regarding how performance requirements and construction benchmarks can be utilized to improve wireless service to tribal lands.

<sup>40</sup> As a general matter, we continue to seek methods, including the targeting of service and licensing rules, that will encourage deployment of services to tribal lands. Accordingly, we encourage interested parties to participate in rulemaking proceedings regarding services for which we are in the process of adopting service and licensing rules. For example, we are currently evaluating spectrum that may be suitable for the provision of new services, including Advanced Wireless Services (AWS). The questions asked in that proceeding include how best to use the reallocated Mobile-Satellite Service (MSS) spectrum as well as other bands previously proposed for AWS use, and on whether we should provide additional flexibility for the Unlicensed Personal Communications Service (UPCS) band spectrum. See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258; *The Establishment of Policies and Service Rules for the Mobile-Satellite Service in the 2 GHz Band*, IB Docket No. 99-81; *Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690 MHz Frequency Bands for the Mobile-Satellite Service*, RM-9911; *Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service*, RM-9498; *Petition for Rule Making of UTStarcom, Inc., Concerning the Unlicensed Personal Communications Service*, RM-10024, *Third Report and Order, Third Notice Of Proposed Rulemaking and Second Memorandum Opinion and Order*, FCC 03-16 (rel. February 10, 2002). We also began an examination of ways to promote the commercial development and growth of the "millimeter wave" spectrum in the 71-76 GHz, 81-86 GHz and 92-95 GHz bands ("70/80/90 GHz"). See *Allocations and Service Rules for the 71-76 GHz, 81-86 GHz and 92-95 GHz Bands*, WT Docket No. 02-146, *Notice of Proposed Rulemaking*, 17 FCC Rcd 12182 (2002). We encourage interested parties to submit comments in such proceedings, specifying the licensing procedures and rules that will best facilitate the deployment of such services to tribal lands.

**B. Increasing the bidding credit limit.**

25. The Commission established the tribal lands bidding credit in order to encourage participation in auctions by carriers who are in a position to provide service to tribal lands, and to help mitigate the economic risks associated with the deployment of such service. In recognition of the underlying economic difficulties in providing service to high cost areas, the Commission sought to fashion a bidding credit that bore a correlation to the infrastructure investment necessary to deploy facilities on tribal lands.<sup>41</sup>

26. As noted, it is not clear why few applicants have thus far taken advantage of the tribal lands bidding credit. In addition to the required construction requirements, another possibility for the poor response may be that the existing bidding credit may not provide carriers sufficient incentive to deploy facilities on tribal lands. Although no applicant has yet requested a larger credit than the one called for under our tribal lands bidding credit methodology,<sup>42</sup> it may be that the current bidding credit amounts are not adequate to allow carriers to recoup a significant portion of infrastructure costs. Accordingly, we seek comment on whether the existing tribal lands bidding credit remains effective in encouraging carriers to provide service in tribal areas. We also request comment on whether and how the bidding credit amount and methodology should be modified to provide a greater incentive for carriers to deploy facilities on tribal lands.

**C. Adjustment of the Bidding Credit based on 2000 Census Data.**

27. The Commission initiated this proceeding in recognition of the unusually low telephone service penetration rates on tribal lands as identified by the 1990 Census.<sup>43</sup> In the *Notice of Proposed Rule Making*, the Commission cited 1990 Census data indicating that, although the nationwide average penetration rate for those with incomes below \$5,000 living in rural areas was 78.7 percent, the telephone penetration rates for individuals on tribal lands at the same income level averaged 46.6 percent.<sup>44</sup> Further, the 1990 Census found that only 53 percent of those living on tribal lands had basic telephone service, as opposed to 94 percent for the country as a whole.<sup>45</sup>

28. Recently, the Census Bureau has begun to issue data from the 2000 Census indicating that average telephone penetration rates on tribal lands have increased appreciably from the levels reported in

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<sup>41</sup> The Commission also concluded that it was appropriate to consider the coverage area of a transmitter as well as the size of the tribal area in determining the amount of the credit. Under the existing bidding credit formula, a winning bidder may receive a \$300,000 credit for up to the first 200 square miles (518 square kilometers) of qualifying tribal land within its license area. In instances where qualifying tribal lands within a license area exceed 200 square miles (518 kilometers), a winning bidder may receive an additional \$1500 per square mile (2.59 square kilometer), or \$300,000 for each additional 200 square miles (518 square kilometers). All credits are subject to a maximum limit based on the gross bid amount for the license for which the credit is sought. Where the gross bid amount is \$1 million or less, the cap is 50 percent of the gross bid. Where the gross bid amount is greater than \$1 million and equal to or less than \$2 million, the cap is \$500,000. Finally, where the gross bid amount exceeds \$2 million, the cap is 25 percent of the gross bid. 47 C.F.R. § 1.2110(f)(3)(iii)-(iv).

<sup>42</sup> In the *Report and Order*, we set out a waiver process by which applicants can request additional bidding credits if they can show that their infrastructure costs exceed the available credit set out by the formula. These waiver requests, however, remain subject to applicants' applicable percentage caps. *Report and Order*, 15 FCC Rcd at 11805, para. 31.

<sup>43</sup> See *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Notice of Proposed Rulemaking*, 14 FCC Rcd 13679, 13682, para. 5.

<sup>44</sup> *Id.*

<sup>45</sup> U.S. Bureau of the Census, "Housing of American Indians on Reservations: Equipment and Fuels," SB/95-11, April 1995.

1990.<sup>46</sup> However, despite the improvement that this census data indicates in access to basic telephone service experienced in some tribal areas, the data also reveals that telephone penetration rates on virtually all tribal lands remain well below the 97.6 percent penetration rate found in the country as a whole.<sup>47</sup> Indeed, certain tribal lands continue to have unusually low telephone penetration levels despite gains in subscribership numbers since the 1990 Census.<sup>48</sup> We therefore believe that it is appropriate to continue to develop and apply policies aimed at promoting further deployment of wireless services to tribal lands. In this regard, we seek comment on whether and to what extent we should use the updated information now available regarding tribal penetration rates to modify certain aspects of the bidding credit. First, should we adjust the credit formula to require the use of 2000 Census figures instead of 1990 Census figures in calculating tribal penetration for purposes of determining eligibility for the credit? Second, to the extent that the 2000 census indicates that penetration rates in some tribal areas have risen above 70 percent but remain below the national average, should we modify the bidding credit formula so that tribal areas with penetration rates greater than 70 percent but some percentage below the national average are eligible for the credit? If we conclude that it is desirable to raise the level at which tribal areas are eligible for a credit, what should the benchmark be? Further, with respect to tribal lands that have been identified by the 2000 Census as continuing to have unusually low penetration rates, we request comment on whether we should make adjustments to the bidding credit to create additional and more targeted incentives for wireless carriers to provide services in such areas.

#### **D. Extending the Tribal Lands Bidding Credit to Adjacent Non-tribal Areas with Low Penetration Rates.**

29. We also solicit comment on whether we should extend bidding credits to non-tribal areas with penetration rates that fall below the percentage threshold used to calculate eligibility for the tribal credit. Specifically, we seek comment on whether we should allow a limited expansion of the tribal lands bidding credit program that would allow carriers who obtain bidding credits in order to serve qualifying tribal lands to seek additional credit for extending their coverage to immediately adjacent non-tribal areas that have comparably low penetration rates.

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<sup>46</sup> The average telephone penetration rate for all tribal areas reported by the 2000 Census is 83.1 percent. U.S. Bureau of the Census, "Occupancy, Equipment, and Utilization Characteristics of Occupied Housing Units: 2000," Table GCT-H8. A 1999 study commissioned by the U.S. Department of Commerce's Economic Development Administration found that the average penetration rate for basic telephone service on reservation and trust lands in rural areas was 39 percent. U.S. Department of Commerce, Economic Development Administration, and New Mexico State University, "Assessment of Technology Infrastructure in Native Communities," June 1999 (*Assessment of Technology Infrastructure in Native Communities*). This report, which was based on survey responses of tribal governments rather than Census data, noted that because 20 percent of those residing on tribal lands live on the Navajo Reservation, the low penetration rate reported in the study was significantly affected by the 22 percent penetration rate found on the Navajo Reservation at the time of the study. The study indicated that excluding the Navajo Reservation from the calculation, resulted in a reported penetration rate for the remaining tribal lands in rural areas of 71 percent. *Assessment of Technology Infrastructure in Native Communities*, p. 16-17. Although the Commission has determined penetration levels according to Census data in administering the tribal lands bidding credit, we are not opposed to considering other methods of determining the actual telephone penetration rate on tribal lands. Accordingly, we welcome comments proposing the use of other sources of data that accurately reflect penetration rates.

<sup>47</sup> U.S. Bureau of the Census, "Profile of Selected Housing Characteristics: 2000," Table: DP-4.

<sup>48</sup> For example, although the penetration rates of tribal areas such as the Navajo Reservation, Fort Apache Reservation, and Mississippi Choctaw Reservation and Trust Lands each increased by over 20 percent since the 1990 Census, these tribal lands continue to have very low penetration rates (39.9 percent, 57.2 percent, and 62.6 percent, respectively).

30. In the *Report and Order*, the Commission limited the bidding credit program to qualifying tribal areas with penetration rates of 70 percent or less because we determined that this limitation would target the tribal communities with the greatest need for access to telecommunications services.<sup>49</sup> The Commission concluded that it would be appropriate to limit application of the bidding credit to tribal lands because the Commission believed that, even though there are non-tribal areas with penetration rates below the national average of 94 percent (as reported in the 1990 Census), almost all non-tribal areas have telephone penetration rates higher than 70 percent.<sup>50</sup> In reviewing this proceeding, however, we recognize that there may be certain areas abutting tribal lands that also lack adequate access to telecommunications services. It is likely that some non-tribal areas share with their neighboring tribal communities the same barriers to access, such as geographic remoteness, sparse population clusters, and low income levels. Further, it is likely that areas adjacent to tribal communities also have significant Native American populations.

31. Extending the bidding credit to underserved non-tribal areas could serve dual purposes. First, extending the credit furthers the objectives of the Communications Act which directs us to ensure the rapid and efficient deployment of wire and radio communications “to all the people of the United States.”<sup>51</sup> Further, allowing applicants to seek bidding credits for non-tribal areas immediately adjacent to tribal communities may make it more likely that entities will seek bidding credits to serve tribal lands. Accordingly, we seek comment on whether we should give those applicants who commit to serve a qualifying tribal area the ability to augment the bidding credit for also serving adjacent non-tribal areas.

32. In the event that we extend the bidding credit to non-tribal areas, we seek comment on how to define the geographic areas that would trigger eligibility for an additional credit amount. For example, is it suitable to use county-wide penetration rates to establish eligibility, or, given the large size of certain counties, would the use of county-wide figures fail to accurately gauge the penetration level of some specific areas? Alternatively, we seek comment on whether measuring telephone penetration based on smaller geographic areas would more accurately reflect underserved areas. For example, the Census Bureau tabulates data according to a variety of small geographic areas, such as census tracts or census blocks.<sup>52</sup>

33. We also request comment on the appropriate certification process; *e.g.* is it sufficient that the applicant itself certify that the applicable non-tribal area has a telephone penetration rate that meets the percentage threshold to qualify for the credit. In particular, we request comment on the possible method(s) that would enable us to accurately target the non-tribal areas that share the same characteristics of tribal lands and are thus appropriate to target for support through bidding credits. Although it is likely that areas adjacent to tribal lands have significant tribal populations, and may possess characteristics (*i.e.* geographic remoteness, low subscribership) that similarly warrant support, we recognize that certain areas immediately adjacent to tribal lands include highly populated, urban areas.<sup>53</sup> We therefore request

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<sup>49</sup> See *Report and Order*, 15 FCC Rcd at 11802, para. 22.

<sup>50</sup> *Id.*

<sup>51</sup> 47 U.S.C. § 151.

<sup>52</sup> Census tracts are small, relatively permanent statistical subdivisions of a county; they are designed to be relatively homogeneous units with respect to population characteristics, economic status, and living conditions. Census blocks are among the smallest geographical entities for which the Census Bureau tabulates data.

<sup>53</sup> For example, the Commission previously included “near reservations” as areas which would receive enhanced Lifeline and Link-Up support. However, the Commission subsequently stayed the application of enhanced Lifeline and Link-Up support to such areas because it concluded that the near reservation definition used by BIA at the time included certain wide geographic areas that encompass highly populated and urban areas. See Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas,

comment on any widely applicable methodology that would enable us to easily distinguish between urban/highly populated areas with high telephone penetration rates and those that have characteristics warranting support. We seek comment on any other measures or conditions that should be adopted that will safeguard the integrity of our bidding credit program..

34. Further, we tentatively conclude that, in the event we extend the bidding credit's applicability to adjoining non-tribal lands, we should use the existing formula to calculate the additional credit. In order to determine the total credit for a market, the applicable "square kilometers" of the relevant non-tribal area would be added to the qualifying tribal area within the license market. We seek comment on this approach, and on any alternative ways to calculate the credit.

35. In the *Report and Order*, the Commission concluded that it has the authority to establish the tribal lands bidding credit because the Act, *inter alia*, directs the Commission to: (1) facilitate the rapid and efficient deployment of wire and radio communications "to all the people of the United States;" (2) foster "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas;" and, (3) promote the "efficient and intensive use of the electromagnetic spectrum."<sup>54</sup> The Commission further concluded that section 706(A) of the Act authorizes bidding credits designed to remove or reduce economic barriers to infrastructure investment.<sup>55</sup> We tentatively conclude that these provisions also allow us to extend the bidding credit to cover adjacent non-tribal areas. We request comment on this analysis.

## V. PROCEDURAL MATTERS

### A. *Ex Parte* Rules – Permit-But-Disclose Proceeding

36. This proceeding is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206.

### B. Final Regulatory Flexibility Act Analysis.

37. The Final Regulatory Flexibility Analysis for this *Second Report and Order*, as required by Section 604 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, is set forth in Appendix B.

### C. Paperwork Reduction Act Analysis.

38. The actions taken in the *Second Report and Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104-13, and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of

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Including Tribal and Insular Areas, CC Docket No. 96-45, *Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 17112 (2000). Accordingly, extending bidding credits based on near reservations could be overinclusive in terms of furthering the goal of increasing telephone deployment and subscribership to the most underserved areas.

<sup>54</sup> *See Report and Order*, 15 FCC Rcd at 11801, para. 18, citing 47 U.S.C. § 151, 47 U.S.C. § 309(j)(3)(A), and 47 U.S.C. § 309(j)(3)(D).

<sup>55</sup> *Id.* at 11802, para. 20. *See* 47 U.S.C. 157 (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans... by utilizing... regulating methods that remove barriers to infrastructure investment.")

Management and Budget (OMB) as prescribed by the PRA, and will go into effect upon announcement in the Federal Register of OMB approval.

#### **D. Initial Regulatory Flexibility Analysis.**

39. The Commission has prepared an Initial Regulatory Flexibility Analysis for the *Second Further Notice*, as required by the Regulatory Flexibility Act. *See* Appendix C. We request written public comment on the analysis. Comments must be filed in accordance with the same filing deadlines as comments filed in response to the *Second Further Notice*, and must have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>56</sup> In addition, the *Second Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.

#### **E. Initial Paperwork Reduction Act Analysis.**

40. The *Second Further Notice* has been analyzed with respect to the PRA and found to impose no new or modified reporting and recordkeeping requirements or burdens on the public.

#### **F. Comment Dates.**

41. We invite comment on the issues and questions set forth in the *Second Further Notice*, Paperwork Reduction Analysis, and Initial Regulatory Flexibility Analysis contained herein. Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>57</sup> interested parties may file comments on or before 30 days after this *Second Further Notice* is published in the Federal Register, and reply comments on or before 45 days after this *Second Further Notice* is published in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

42. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit electronic comments by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Or you may obtain a copy of the ASCII Electronic Transmittal Form (FORM-ET) at [www.fcc.gov/e-file/email.html](http://www.fcc.gov/e-file/email.html).

43. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington,

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<sup>56</sup> *See* 5 U.S.C. § 603(a).

<sup>57</sup> 47 C.F.R. §§ 1.415, 1.419.

DC 20002. The filing hours at this location will be 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

44. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

<b>If you are sending this type of document or using this delivery method...</b>	<b>It should be addressed for delivery to...</b>
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary	236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002 (8:00 to 7:00 p.m.)
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail and Priority Mail)	9300 East Hampton Drive, Capitol Heights, MD 20743 (8:00 a.m. to 5:30 p.m.)
United States Postal Service first-class mail, Express Mail, and Priority Mail	445 12 <sup>th</sup> Street, SW Washington, DC 20554

45. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW, CY-B402, Washington, DC 20554 (see alternative addresses above for delivery by hand or messenger) (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at [qualexint@aol.com](mailto:qualexint@aol.com).

46. The full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12<sup>th</sup> Street, SW, Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12<sup>th</sup> Street, SW, Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com). Alternative formats (computer diskette, large print, audio cassette and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426, TTY (202) 418-7365, or at [bmillin@fcc.gov](mailto:bmillin@fcc.gov).



**VI. ORDERING CLAUSES.**

47. Accordingly, 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), the REPORT AND ORDER is hereby ADOPTED.

48. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4(i), 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 309(j), and 706, that the SECOND FURTHER NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

49. IT IS FURTHER ORDERED that, pursuant to the authority of Sections 4(i), 7, 303(c), 303(f), 303(g), 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r), and 332, the rule changes specified in Appendix A ARE ADOPTED.

50. IT IS FURTHER ORDERED that the rule changes set forth in Appendix A WILL BECOME EFFECTIVE 60 days after publication in the *Federal Register*.

51. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Report and Order and Second Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis, and the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## RULES

Subpart Q of Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 1.2110(f)(3) is amended to read as follows:

§ 1.2110 Designated Entities.

\* \* \* \* \*

(f) \* \* \*

\* \* \* \* \*

(3) \* \* \*

(i) Qualifying tribal land means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments, that has a wireline telephone subscription rate equal to or less than seventy (70) percent based on the most recently available U.S. Census Data.

(ii) *Certification.*

(A) Within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and attach a certification from the tribal government stating the following:

(1) The tribal government authorizes the winning bidder to site facilities and provide service on its tribal land;

(2) The tribal area to be served by the winning bidder constitutes qualifying tribal land; and

(3) The tribal government has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate among wireless carriers seeking to provide service on the qualifying tribal land.

(B) In addition, within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and file a certification that it will comply with the construction requirements set forth in § 1.2110(e)(vi) and consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land.

(C) If the winning bidder fails to submit the required certifications within the 180-day period, the bidding credit will not be awarded, and the winning bidder must pay the balance on the original gross bid amount.

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(vi) *Post-construction certification.* Within fifteen (15) days of the third anniversary of the initial grant of its license, a recipient of a bidding credit under this section shall file a certification that the recipient has constructed and is operating a system capable of serving seventy-five (75) percent of the population of the qualifying tribal land for which the credit was awarded. The recipient must provide the total population of the tribal area covered by its license as well as the number of persons that it is serving in the tribal area.

(vii) *Performance penalties.* If a recipient of a bidding credit under this section fails to provide the post-construction certification required by §1.2110(f)(3)(vi), then it shall repay the bidding credit amount in its entirety, plus interest. The interest will be based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted. Such payment shall be made within thirty (30) days of the third anniversary of the initial grant of its license. Failure to repay the bidding credit amount and interest within the required time period will result in automatic termination of the license without specific Commission action.

(viii) *Partitioning and disaggregation.* Parties seeking approval for partitioning or disaggregation of tribal areas obtained pursuant to the tribal lands bidding credit shall request an authorization for partial assignment of a license pursuant to §1.948 of this chapter.

(A) *Partitioning.* A licensee of a market obtained using a tribal lands bidding credit may partition the tribal lands within its market. The partitioned area must include all tribal areas within the market subject to the tribal lands bidding credit. The partitionee must certify that it will satisfy the construction requirements set forth in §1.2110(f)(3)(vi).

(B) *Disaggregation.* Spectrum covering tribal lands may be disaggregated in any amount. The disaggregated spectrum must include all tribal areas within the market subject to the tribal lands bidding credit. The original licensee must certify that it will satisfy the construction requirements set forth in §1.2110(f)(3)(vi), unless the parties to the transaction inform the Commission otherwise.

\* \* \* \* \*

## APPENDIX B

## FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>58</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 99-266, released June 20, 2000 (*Report and Order/Further Notice*).<sup>59</sup> The Commission sought written public comment on the proposals in the *Further Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>60</sup>

**A. Need for, and Objectives of, the Second Report and Order.**

In the *Second Report and Order*, we clarify rules previously adopted in the *Report and Order and Further Notice of Proposed Rulemaking* in WT Docket 99-266 to provide incentives for wireless telecommunications carriers to serve individuals living on tribal lands.<sup>61</sup> In that *Report and Order*, we authorized the grant of bidding credits to winning bidders who deploy facilities and provide service to federally-recognized tribal areas that have a telephone service penetration rate below 70 percent.<sup>62</sup> In the present item, we clarify, on our own motion, administrative matters involved in implementing the bidding credit, such as the process by which carriers obtain certifications permitting them to deploy facilities on tribal lands. This *Second Report and Order* also addresses issues raised in the *Further Notice*. In the *Further Notice*, we requested comment on whether we should expand the use of bidding credits. Specifically, we sought comment as to whether to: 1) apply bidding credits to entities who undertake to serve non-tribal areas and/or tribal areas with telephone penetration levels above 70 percent, but significantly below the national penetration average; 2) award bidding credits for use in future auctions to existing geographic area licensees who deploy facilities in unserved tribal communities; and, 3) grant bidding credits to licensees who enter into partitioning agreements with tribal governments that enable tribal entities to provide service, either directly or by way of a third-party carrier. It is our goal to ensure that all Americans have access to telecommunications service.

While we continue to believe that the tribal lands bidding credit is a useful device in improving telephone penetration rates on tribal lands, we conclude that the specific measures proposed in our *Further Notice* to encourage greater deployment should not be adopted at this time. Given the nascent state of the tribal lands bidding credit program, as well as the lack of a comprehensive record supporting the proposed extensions of the bidding credit, we believe that it is premature to expand the use of bidding credits as proposed.

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<sup>58</sup> 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), Title II, Pub. L. No. 104-121, 110 Stat. 857 (1996).

<sup>59</sup> In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 11794, 11833 (2000).

<sup>60</sup> See 5 U.S.C. § 604.

<sup>61</sup> Section 1.2110(f)(3)(i) of the Commission's rules provides that a qualifying tribal land "means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments," (see 25 C.F.R. § 20.1(v)), that has a wireline telephone subscription rate to or less than seventy (70) percent based on the most recently available U.S. Census Data." 47 C.F.R. § 1.2110(f)(3)(i).

<sup>62</sup> The "telephone penetration rate," or telephone subscribership rate, represents the actual percentage of households that subscribe to telephone service. See *Telephone Subscribership in the United States* (rel. November 2001), available at <[http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/recent.html](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/recent.html)>.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA.**

No comments were filed that specifically addressed the rules and policies proposed in the IRFA.

**C. Description and Estimate of the Number of Small Entities to which the Rules Will Apply.**

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.<sup>63</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>64</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>65</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>66</sup>

Cellular Licensees. The SBA has developed a small business size standard for small businesses in the category “Cellular and Other Wireless Telecommunications.”<sup>67</sup> Under that SBA category, a business is small if it has 1,500 or fewer employees.<sup>68</sup> According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.<sup>69</sup> Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA’s definition. In addition, we note that there are 1807 cellular licenses; however, a cellular licensee may own several licenses. According to the most recent *Trends in Telephone Service* data, 858 carriers reported that they were engaged in the provision of either cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio telephony services, which are placed together in that data.<sup>70</sup> We have estimated that 291 of these are small under the SBA small business size standard.<sup>71</sup> Accordingly, based on this data, we estimate that not more than 291 cellular service providers will be affected by these revised rules.

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<sup>63</sup> 5 U.S.C. § 604(a)(3).

<sup>64</sup> 5 U.S.C. § 601(6).

<sup>65</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 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.”

<sup>66</sup> 15 U.S.C. § 632.

<sup>67</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513322.

<sup>68</sup> *Id.*

<sup>69</sup> U.S. Department of Commerce, U.S. Census Bureau, 1997 Economic Census, Information - Subject Series, Establishment and Firm Size, Table 5 – Employment Size of Firms Subject to Federal Income Tax at 64, NAICS code 513322 (October 2000).

<sup>70</sup> See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 - Number of Telecommunications Service Providers that are Small Businesses (May 2002).

<sup>71</sup> *Id.* Data found in *Trends in Telephone Service* is based on information filed by service providers on FCC Form 499-A worksheets, in combination with employment information obtained from ARMIS and Securities and Exchange Commission filings as well as industry employment estimates published by the Bureau of Labor Statistics.

220 MHz Radio Service – Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to “Cellular and Other Wireless Telecommunication” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.<sup>72</sup> According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.<sup>73</sup> If this general ratio continues in 2002 in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's small business standard.

220 MHz Radio Service – Phase II Licensees. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>74</sup> This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>75</sup> A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.<sup>76</sup> The SBA has approved these small size standards.<sup>77</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>78</sup> In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 683 were sold.<sup>79</sup> Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.<sup>80</sup>

700 MHz Guard Band Licenses. In the *700 MHz Guard Band Order*, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>81</sup> A small business is

<sup>72</sup> 13 C.F.R. § 121.201, NAICS code 513322.

<sup>73</sup> U.S. Department of Commerce, U.S. Census Bureau, 1997 Economic Census, Information - Subject Series, Establishment and Firm Size, Table 5 – Employment Size of Firms Subject to Federal Income Tax at 64, NAICS code 513322 (October 2000).

<sup>74</sup> Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, *Third Report and Order*, 12 FCC Rcd 10943, 11068-70, paras. 291-295 (1997) (*220 MHz Third Report and Order*).

<sup>75</sup> *Id.* at para. 291.

<sup>76</sup> *Id.*

<sup>77</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

<sup>78</sup> See generally “220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

<sup>79</sup> “FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,” *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

<sup>80</sup> “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

<sup>81</sup> See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Second Report and Order*, 15 FCC Rcd 5299 (2000).

an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>82</sup> Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>83</sup> An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.<sup>84</sup> Of the 104 licenses auctioned, 96 licenses were sold to 9 bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.<sup>85</sup>

Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.<sup>86</sup> We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 704 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings [EAGs]) commenced on August 27, 2002, and closed on September 18, 2002.<sup>87</sup> Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.

Private and Common Carrier Paging. In the *Paging Second Report and Order*, we adopted a small size standard for “small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>88</sup> A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>89</sup> The SBA has approved this definition.<sup>90</sup> An auction of Metropolitan Economic

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<sup>82</sup> *Id.* at para. 133.

<sup>83</sup> *Id.*

<sup>84</sup> See generally “220 MHz Service Auction Closes: Winning Bidders In the Auction of 908 Phase II 220 MHz Service Licenses,” *Public Notice*, DA 98-2143 (rel. October 23, 1998).

<sup>85</sup> “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC 4590 (WTB 2001).

<sup>86</sup> See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Report and Order*, 17 FCC Rcd 1022 (2002).

<sup>87</sup> See “Lower 700 MHz Band Auction Closes, 17 FCC Rcd 17272 (2002).

<sup>88</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order*, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second Report and Order*); see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, paras. 98-107 (1999).

<sup>89</sup> *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

<sup>90</sup> See Letter to Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000.<sup>91</sup> Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 608 carriers reported that they were engaged in the provision of either paging or “other mobile” services.<sup>92</sup> Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>93</sup> For Block F, an additional small business size standard for “very small business” was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>94</sup> These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.<sup>95</sup> No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 “small” and “very small” business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.<sup>96</sup> On March 23, 1999, the Commission reaucted 347 C, D, E, and F Block licenses; there were 48 small business winning bidders. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks plus the 48 winning bidders in the re-auction, for a total of 231 small entity PCS providers as defined by the SBA small business standards and the Commission's auction rules. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses.

Narrowband PCS. The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. In March 2002, 106 MTA and BTA narrowband PCS licenses were granted to 4 licensees.<sup>97</sup> Each of the licensees are small or very small businesses.

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<sup>91</sup> See generally “220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

<sup>92</sup> See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 - Number of Telecommunications Service Providers that are Small Businesses (May 2002).

<sup>93</sup> See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824, paras. 57-60 (1996); see also 47 C.F.R. § 24.720(b).

<sup>94</sup> See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, para. 60 (1996).

<sup>95</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Small Business Administration, dated December 2, 1998.

<sup>96</sup> FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. January 14, 1997).

<sup>97</sup> See “Wireless Telecommunications Bureau Announces It is Prepared to Grant 109 Narrowband PCS Auction Licenses Upon Full And Timely Payment,” *Public Notice*, 17 FCC Rcd 1559 (WTB 2002).



Specialized Mobile Radio (SMR). Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has established a small business size standard for purposes of auctioning 900 MHz SMR licenses, 800 MHz SMR licenses for the upper 200 channels, and 800 MHz SMR licenses for the lower 230 channels on the 800 MHz band as a firm that has had average annual gross revenues of \$15 million or less in the three preceding calendar years.<sup>98</sup> The SBA has approved this small business size standard for the 800 MHz and 900 MHz auctions.<sup>99</sup> Sixty winning bidders for geographic area licenses in the 900 MHz SMR band qualified as small businesses under the \$15 million size standard. The auction of the 525 800 MHz SMR geographic area licenses for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten (10) winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.

The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven (11) winning bidders for geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed “small business” status. Thus, 40 winning bidders for geographic licenses in the 800 MHz SMR band qualified as small business. In addition, there are numerous incumbent site-by-site SMR licensees on the 800 and 900 MHz band. The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to firms that had revenues of no more than \$15 million in each of the three previous calendar years.<sup>100</sup> This analysis applies to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by SBA.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.**

The *Second Report and Order* modifies the certification process that wireless carriers must follow in order to obtain a tribal lands bidding credit. The Commission extends the time period during which winning bidders can negotiate to obtain the certification needed to obtain the credit, however, the Commission declines to expand the credit beyond its current scope.

#### **E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.**

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its 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; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance,

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<sup>98</sup> 47 C.F.R. § 90.814(b)(1).

<sup>99</sup> See Letter to Tom Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

<sup>100</sup> 47 C.F.R. § 90.814(b)(1).

rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small Entities.<sup>101</sup>

A certification period of 90 days was previously identified in the final regulatory flexibility analysis in the *Report and Order*.<sup>102</sup> In the *Second Report and Order*, we extend the time period in which an applicant must obtain a certification from tribal governments regarding the siting of facilities and deployment of service on tribal lands. The *Second Report and Order* extends the certification period from 90 days to 180 days in order to allow applicants more time to conduct necessary research and negotiate with tribal governments.<sup>103</sup> The change we are adopting in the certification process is minor, and will not have additional significant economic impact on tribal governments or carriers seeking to serve tribal lands. The extension of the certification period from 90 to 180 days benefits all carriers, particularly small entities.

Further, the *Second Report and Order* clarifies partitioning and disaggregation rules specific to licensees electing to use the tribal lands bidding credit.<sup>104</sup> In clarifying these rules, we considered whether or not to apply our existing partitioning and disaggregation rules to situations in which a tribal lands bidding credit is utilized. While the partitioning and disaggregation rules are slightly more restrictive in situations in which tribal lands bidding credits are involved, we believe these rules further our original goal of promoting service to tribal lands by helping to ensure that those using bidding credits fulfill their construction obligations.

Report to Congress: The Commission will send a copy of the *Second Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the *Congressional Review Act*.<sup>105</sup> In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Second Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>106</sup>

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<sup>101</sup> 5 U.S.C. § 603 (c).

<sup>102</sup> See *Report and Order*, Appendix C.

<sup>103</sup> *Id.* para. 9.

<sup>104</sup> *Id.* at paras. 10-11.

<sup>105</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>106</sup> See 5 U.S.C. § 604(b).

## APPENDIX C

## INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),<sup>107</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this *Second Further Notice of Proposed Rulemaking (Second Further Notice)*. Written public comments are requested regarding this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second Further Notice*. The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>108</sup> In addition, the *Second Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>109</sup>

**A. Need for, and Objectives of, the *Second Further Notice*.**

The tribal lands bidding credit program is still in its early stages and few carriers have taken advantage of the bidding credit thus far. The record, however, is unclear regarding the reasons behind the lack of response to the bidding credit. Because the record in this proceeding thus far is not sufficient to make reasoned decisions as to what steps, if any, should be taken to further encourage carriers to provide coverage to tribal lands, the Commission seeks additional comment regarding this issue.

Modifying the construction requirements of the tribal lands bidding credit. The Commission's rules currently impose more stringent construction requirements on carriers who seek the tribal lands bidding credit than those who do not. All carriers taking advantage of the bidding credit are required to serve 75 percent of the population of the qualifying tribal land for which the credit was awarded, and must do so within three years of license grant.<sup>110</sup> One possible reason behind the lack of participation in the bidding credit program is that carriers find that difficulties involved in meeting the enhanced construction requirements are not sufficiently mitigated by the existing bidding credit. For example, there may be conditions, such as technical obstacles, economic factors, or other difficulties, that may make it difficult for carriers to satisfy the stricter construction requirement. Circumstances may exist on remote tribal lands such as low population density, rough terrain, and other factors that can negatively affect the ability of carriers to provide the requisite coverage to facilities in those areas. Accordingly, the Commission seeks comment as to whether it should reconsider the buildout obligations imposed on carriers utilizing the tribal lands bidding credit. Given that the public has now had a period of time to evaluate the bidding credit program, the Commission seeks comment on whether the requirement that carriers cover 75 percent of the population within three years remains feasible, or whether it should moderate the buildout criteria. Specifically, the Commission requests comment on what factors or circumstances exist that warrant an across-the-board relaxation of the bidding credit construction requirements.

In the event that it is determined that the construction requirements should be eased, the Commission seeks comment on how the requirements should be modified. For example, should the population of the qualifying tribal land covered by a carrier be lessened (*i.e.* reduced to a number below 75 percent)?

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<sup>107</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>108</sup> See 5 U.S.C. § 603(a).

<sup>109</sup> See *id.*

<sup>110</sup> 47 C.F.R. § 1.2110(f)(3)(vi).

Alternatively, should the time period in which to provide coverage to 75 percent of the tribal population be extended to a construction period longer than three years? Or is the appropriate remedy a combination of a reduced population coverage requirement and an expanded construction period? Should the Commission adopt a variation of the combination method such as a tiered approach? In other words, construction would occur in phases, *e.g.*, a certain percentage of the total tribal population must be covered in three years, and a greater percentage would be covered at the five-year mark.

A comprehensive change of the construction requirements may not be the appropriate solution. It may be that satisfying the tribal lands buildout requirement may be more difficult in certain tribal areas in the country than in others. There may be difficulties or conditions specific to certain tribal lands, that may make it difficult for carriers to satisfy the stricter construction requirement, while other carriers deploying the same type of service may have no difficulties in meeting the construction requirements in other tribal areas. Similarly, the ability to comply with the tribal lands bidding credit may depend on the particular wireless service at issue. The Commission's rules governing general construction and operation obligations of licensees reflect several approaches that match a type of license (*i.e.* site-based versus geographic market) or service (*e.g.* PCS or lower band 700 MHz) with a specific buildout requirement. It may therefore be preferable to deal with these situations on a case-by-case or service-by-service basis rather than an across-the board method. The Commission therefore seeks comment on whether buildout difficulties should be resolved using an ad hoc or waiver approach.

Increasing the bidding credit limit. In addition to the required construction requirements, another possibility for the poor response may be that the existing bidding credit may not provide carriers sufficient incentive to deploy facilities on tribal lands. Although no applicant has yet requested a larger credit than the one called for under the tribal lands bidding credit methodology, it may be that the current bidding credit amounts are not adequate to allow carriers to recoup a significant portion of infrastructure costs. Accordingly, the Commission seeks comment on whether the existing tribal lands bidding credit remains effective in encouraging carriers to provide service in tribal areas. The Commission also requests comment on whether and how the bidding credit amount and methodology should be modified to provide a greater incentive for carriers to deploy facilities on tribal lands.

Adjustment of the Bidding Credit based on 2000 Census Data. Recently issued data from the 2000 Census indicates that telephone penetration rates on tribal lands have increased appreciably from the levels reported in 1990. However, despite the improvement in access to basic telephone service experienced by many tribal areas, the census information reveals that telephone penetration rates on tribal lands remain well below the 97.6 percent penetration rate found in the country as a whole. Certain tribal lands continue to have unusually low telephone penetration levels despite gains in subscribership numbers since the 1990 Census. Accordingly, the Commission seeks comment on whether the improved tribal penetration rates require that certain aspects of the bidding credit be modified. For example, should the credit formula be adjusted using 2000 Census figures instead of 1990 Census figures? While some of the more populous tribal areas continue to have penetration rates below 70 percent, many tribal lands now have penetration rates above 70 percent. Accordingly, to the extent that tribal penetration rates have improved, but remain below the national average, should the bidding credit formula be modified so that tribal areas with penetration rates greater than 70 percent but below the national average are eligible for the credit? What should the benchmark be? Further, with respect to tribal lands that have been identified by the 2000 Census as continuing to have unusually low penetration rates, the Commission requests comment on whether we should make adjustment to the bidding credit to provide additional incentives for such areas.

Extending the Tribal Lands Bidding Credit to Adjacent Non-tribal Areas with Low Penetration Rates. The Commission recognizes that there may be certain areas abutting tribal lands that also lack adequate access to telecommunications services. It is likely that some non-tribal areas share with their neighboring

tribal communities the same barriers to access, such as geographic remoteness, sparse population clusters, and low income levels. Further, it is likely that areas adjacent to tribal communities also have significant Native American populations. Accordingly, in the *Second Further Notice*, the Commission solicits comment on whether bidding credits should be extended to non-tribal areas with penetration rates of less than 70 percent. Specifically, the Commission seeks comment on whether it should allow a limited expansion of the tribal lands bidding credit program that would allow carriers who seek bidding credits in order to serve qualifying tribal lands to obtain additional credit for extending their coverage to immediately adjacent non-tribal areas that also have penetration rates of less than 70 percent.

### **B. Legal Basis.**

We tentatively conclude that we have authority under Sections 4(i), 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j) and 706, to adopt the proposals set forth in the *Second Further Notice*.

### **C. Description and Estimate of the Number of Small Entities to which the Rules Will Apply.**

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.<sup>111</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>112</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>113</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>114</sup>

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<sup>111</sup> 5 U.S.C. § 604(a)(3).

<sup>112</sup> 5 U.S.C. § 601(6).

<sup>113</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 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.”

<sup>114</sup> 15 U.S.C. § 632.

<sup>115</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513322.

<sup>116</sup> *Id.*

<sup>117</sup> U.S. Department of Commerce, U.S. Census Bureau, 1997 Economic Census, Information - Subject Series, Establishment and Firm Size, Table 5 – Employment Size of Firms Subject to Federal Income Tax at 64, NAICS code 513322 (October 2000).

Specialized Mobile Radio telephony services, which are placed together in that data.<sup>118</sup> We have estimated that 291 of these are small under the SBA small business size standard.<sup>119</sup> Accordingly, based on this data, we estimate that not more than 291 cellular service providers will be affected by these revised rules.

220 MHz Radio Service – Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to “Cellular and Other Wireless Telecommunication” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.<sup>120</sup> According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.<sup>121</sup> If this general ratio continues in 2002 in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's small business standard.

220 MHz Radio Service – Phase II Licensees. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>122</sup> This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>123</sup> A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.<sup>124</sup> The SBA has approved these small size standards.<sup>125</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>126</sup> In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and

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<sup>118</sup> See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 - Number of Telecommunications Service Providers that are Small Businesses (May 2002).

<sup>119</sup> *Id.* Data found in *Trends in Telephone Service* is based on information filed by service providers on FCC Form 499-A worksheets, in combination with employment information obtained from ARMIS and Securities and Exchange Commission filings as well as industry employment estimates published by the Bureau of Labor Statistics.

<sup>120</sup> 13 C.F.R. § 121.201, NAICS code 513322.

<sup>121</sup> U.S. Department of Commerce, U.S. Census Bureau, 1997 Economic Census, Information - Subject Series, Establishment and Firm Size, Table 5 – Employment Size of Firms Subject to Federal Income Tax at 64, NAICS code 513322 (October 2000).

<sup>122</sup> Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, *Third Report and Order*, 12 FCC Rcd 10943, 11068-70, paras. 291-295 (1997) (*220 MHz Third Report and Order*).

<sup>123</sup> *Id.* at para. 291.

<sup>124</sup> *Id.*

<sup>125</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

<sup>126</sup> See generally "220 MHz Service Auction Closes," *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 683 were sold.<sup>127</sup> Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.<sup>128</sup>

700 MHz Guard Band Licenses. In the *700 MHz Guard Band Order*, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>129</sup> A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>130</sup> Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>131</sup> An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.<sup>132</sup> Of the 104 licenses auctioned, 96 licenses were sold to 9 bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.<sup>133</sup>

Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.<sup>134</sup> We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 704 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings [EAGs]) commenced on August 27, 2002, and closed on September 18, 2002.<sup>135</sup> Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.

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<sup>127</sup> “FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,” *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

<sup>128</sup> “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

<sup>129</sup> See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 99-168, *Second Report and Order*, 15 FCC Rcd 5299 (2000).

<sup>130</sup> *Id.* at para. 133.

<sup>131</sup> *Id.*

<sup>132</sup> See generally “220 MHz Service Auction Closes: Winning Bidders In the Auction of 908 Phase II 220 MHz Service Licenses,” *Public Notice*, DA 98-2143 (rel. October 23, 1998).

<sup>133</sup> “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC 4590 (WTB 2001).

<sup>134</sup> See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Report and Order*, 17 FCC Rcd 1022 (2002).

<sup>135</sup> See “Lower 700 MHz Band Auction Closes,” 17 FCC Rcd 17272 (2002).

Private and Common Carrier Paging. In the *Paging Second Report and Order*, we adopted a small size standard for “small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>136</sup> A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>137</sup> The SBA has approved this definition.<sup>138</sup> An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000.<sup>139</sup> Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 608 carriers reported that they were engaged in the provision of either paging or “other mobile” services.<sup>140</sup> Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>141</sup> For Block F, an additional small business size standard for “very small business” was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>142</sup> These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.<sup>143</sup> No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 “small” and “very small” business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.<sup>144</sup> On March 23, 1999, the Commission reaucted 347 C, D, E, and F Block licenses; there were 48 small business winning bidders. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks plus the 48 winning

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<sup>136</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order*, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second Report and Order*); see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, paras. 98-107 (1999).

<sup>137</sup> *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

<sup>138</sup> See Letter to Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

<sup>139</sup> See generally “220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

<sup>140</sup> See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 - Number of Telecommunications Service Providers that are Small Businesses (May 2002).

<sup>141</sup> See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824, paras. 57-60 (1996); see also 47 C.F.R. § 24.720(b).

<sup>142</sup> See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, para. 60 (1996).

<sup>143</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Small Business Administration, dated December 2, 1998.

<sup>144</sup> FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. January 14, 1997).



bidders in the re-auction, for a total of 231 small entity PCS providers as defined by the SBA small business standards and the Commission's auction rules. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses.

Narrowband PCS. The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. In March 2002, 106 MTA and BTA narrowband PCS licenses were granted to 4 licensees.<sup>145</sup> Each of the licensees are small or very small businesses.

Specialized Mobile Radio (SMR). Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has established a small business size standard for purposes of auctioning 900 MHz SMR licenses, 800 MHz SMR licenses for the upper 200 channels, and 800 MHz SMR licenses for the lower 230 channels on the 800 MHz band as a firm that has had average annual gross revenues of \$15 million or less in the three preceding calendar years.<sup>146</sup> The SBA has approved this small business size standard for the 800 MHz and 900 MHz auctions.<sup>147</sup> Sixty winning bidders for geographic area licenses in the 900 MHz SMR band qualified as small businesses under the \$15 million size standard. The auction of the 525 800 MHz SMR geographic area licenses for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten (10) winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.

The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven (11) winning bidders for geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed “small business” status. Thus, 40 winning bidders for geographic licenses in the 800 MHz SMR band qualified as small business. In addition, there are numerous incumbent site-by-site SMR licensees on the 800 and 900 MHz band. The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to firms that had revenues of no more than \$15 million in each of the three previous calendar years.<sup>148</sup> This analysis applies to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by SBA.

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<sup>145</sup> See “Wireless Telecommunications Bureau Announces It is Prepared to Grant 109 Narrowband PCS Auction Licenses Upon Full And Timely Payment,” *Public Notice*, 17 FCC Rcd 1559 (WTB 2002).

<sup>146</sup> 47 C.F.R. § 90.814(b)(1).

<sup>147</sup> See Letter to Tom Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

<sup>148</sup> 47 C.F.R. § 90.814(b)(1).

**D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.**

The *Second Further Notice* does not propose any specific reporting, recordkeeping or compliance requirements. However, we seek comment on what, if any, requirements we should impose if we adopt the proposals set forth in the *Second Further Notice*.

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.**

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its 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; (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.<sup>149</sup>

The *Second Further Notice* seeks comment regarding ways to adjust the current tribal lands bidding credit program in order to encourage further deployment by carriers, as well as on additional uses of the bidding credit program to facilitate the provision of service to underserved non-tribal areas adjacent to tribal communities.<sup>150</sup> The *Second Further Notice* does not make specific implementation proposals, but seeks guidance from the public on how to further expand our bidding policies. The Commission tentatively concludes that these proposals should not have a significant economic impact on small carriers.

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<sup>149</sup> 5 U.S.C. § 603 (c).

<sup>150</sup> See *Second Further Notice*, paras. 19-23.

**STATEMENT OF CHAIRMAN MICHAEL K. POWELL**

Re: *Extending Wireless Telecommunications Services to Tribal Lands; WT Docket No. 99-266*

Our government-to-government relationship with tribal authorities make us partners in the quest to bring access to all modern communications to Indian Country. We share a common goal: to increase the availability of telecommunications services on tribal lands. While penetration rates have increased in the last decade, the chasm between penetration rates on tribal lands and the national average must be closed. Current penetration rates – which are below 50% of the population in some tribal areas – are unacceptable. Spectrum-based services provide an ideal opportunity to close this gap.

The order we adopt today takes common sense steps to increase the availability of wireless services on underserved tribal lands. By refining the bidding credit program adopted previously – including by extending the certification period to allow ample time for tribal consultation – we make the program more “user-friendly,” increasing the probability that the credits will be used and service will be delivered. We also seek comment on ways to make the bidding credit program more attractive and to create incentives for wireless deployment in areas adjacent to tribal lands, which often suffer from the same low penetration rates as tribal lands themselves. We must work together to utilize our resources in new and creative ways to tackle these challenges. To that end, I note the productive government-to-government meetings and discussions we held recently with tribal leaders and representatives from the National Congress of American Indians and our stepped up outreach and consultation with tribes on issues of significant importance, such as historic preservation. I am committed to continuing this positive direction and building the solid relationship that will yield the results we all seek.

I applaud the leadership and imagination of Commissioners Copps and Adelstein in developing some of the proposals in the further notice. I look forward to working with them and my other colleagues to ensure that all Americans enjoy technology-neutral access to modern telecommunications services and can participate fully in the digital economy.

**SEPARATE STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

**Re: *In the Matter of Extending Wireless Telecommunications Services  
To Tribal Lands; WT Docket No. 99-266***

According to the census a mere 54 percent of Americans living on tribal lands had basic telephone service in the 1990's. The Department of Commerce paints an even bleaker picture, stating that the average penetration rate for basic telephone service on reservations and trust lands in rural areas was 39 percent. Nationwide, in contrast, 94 percent of Americans have phone service.<sup>151</sup>

These numbers should shock us. They should be a clear call to action. It is unjust and unacceptable for one group of Americans' access to telecommunications to be radically inferior to the population as a whole. It also violates the clear policy and language of the Communications Act. The first sentence of the Act states that the purpose of the legislation is:

“[T]o make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire radio communication service with adequate facilities at reasonable prices.”<sup>152</sup>

The Act also says that our competitive bidding system must seek to promote:

“[T]he development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas”, and “to promote economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”<sup>153</sup>

The unacceptable disparity in access to telecommunications services between Americans living on tribal lands and those who do not means that the FCC is not currently meeting these mandates. We have a legal and a moral responsibility to improve the situation.

This item makes some progress. It keeps alive the possibility of our making significant changes to improve access. For example, we consider whether we need to increase the size of the tribal lands bidding credit, whether we should change the build-out requirements to account for the unique challenges encountered in Indian Country, and whether we should expand the bidding credit to underserved areas adjacent to tribal areas. While we decide not to expand the credit to non-tribal areas where penetration levels are below the national average, we only do so because the current bidding credit program is new and untested. The Commission does not find any substantive problem with this expansion, and leaves open the possibility of expanding the program to other areas in the future.

Time will tell whether this Commission will fulfill its responsibilities in Indian Country. How we conduct this proceeding and whether we can find creative ways to increase telephone penetration is the next test. I am also looking for action in the near future on making sure our universal service policies are

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<sup>151</sup> *In the Matter of Extending Wireless Telecommunications Services to Tribal Lands; WT Docket No. 99-266.*

<sup>152</sup> 47 U.S.C. § 151.

<sup>153</sup> 47 U.S.C. §309.

effective for those in Indian Country, including those who live in near-reservation lands. But the responsibility is not the Commission's alone. Communities who want FCC policy changes to help spur development must participate in our process. Companies must look to tribal areas for business opportunities and help us determine how we can make investment more attractive. A decision made without you is often a decision made against you. So let's pull together and make progress.

**SEPARATE STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

***Re: In the Matter of Extending Wireless Telecommunications Services to Tribal Lands; WT Docket No. 99-266***

My family's presence on the Great Plains has endured for four generations. I grew up in South Dakota, which also is home to more than 62,000 American Indians. I feel duty-bound by my heritage to ensure that the benefits of the most advanced telecommunications reach all Americans, particularly those who live on tribal lands.

I fully endorse the previous Commission's decision to provide incentives for wireless telecommunications carriers to serve individuals living on tribal lands. I also support today's decision to extend the time period during which winning bidders can negotiate with tribes to obtain the certification required for obtaining a bidding credit.

I believe, however, that we need to explore additional modifications to the tribal lands bidding credit system in order to ensure that the credit is utilized to its fullest possible extent. We must do more as an agency to support the deployment of wireless services in tribal areas, particularly those that are underserved by traditional wireline services. This proceeding represents one of our best opportunities to truly make a difference to the types of communications services available on tribal lands.

The order indicates that since the inception of the tribal lands bidding credit, there have been 10 auctions, with 375 winning bidders purchasing 10,479 licenses. While 27 winning bidders to date have initially indicated that they would be seeking the tribal lands credit, of those applicants, only five have submitted the required certification.

I strongly support the Second Further Notice of Proposed Rulemaking, which includes questions regarding the construction period associated with the bidding credit and the size of the discount offered by the tribal land bidding credit program. Given that the program has met with such limited success, it may be that the incentives just are not enough.

Finally, I strongly encourage interested tribes and wireless carriers to participate in this proceeding and the several other proceedings referenced in the item that are looking at service area sizes and performance requirements. The Commission wants to hear from you, so that we can learn how best to facilitate and improve wireless service on tribal lands.