

direct readers to the coverage in the FMR. The FMR coverage was written in plain language to provide agencies with updated regulatory material that is easy to read and understand.

DATES: This final rule becomes effective March 14, 2002.

FOR FURTHER INFORMATION CONTACT: Stanley C. Langfeld, Director, Real Property Policy Division, 202-501-1737.

SUPPLEMENTARY INFORMATION:

A. Background

In furtherance of its leadership role in real property asset management, the Office of Governmentwide Policy, Office of Real Property, conducted a comprehensive review of the policies contained in Federal Property Management Regulations (FPMR) Part 101-3 (41 CFR part 101-3), entitled "Annual Real Property Inventories." This review was based on a collaborative effort with Federal real property holding agencies that utilize the Worldwide Inventory of Federal Real Property.

Representatives from the Department of the Interior, the Department of Energy, and the Army Corps of Engineers participated with GSA in conducting the initial steps of the comprehensive review of the policies in FPMR part 101-3 (41 CFR part 101-3). The review focused on improvements to make the real property inventory program more useful and to enable Federal agencies to more effectively manage their real property inventories. In addition, we have rewritten these regulations in plain language format. These regulations are being transferred from the FPMR to the FMR to enable the Government to better focus on implementing statutory requirements, Executive Orders, and governmentwide policies rather than on detailed operating procedures.

An interim rule was published in the **Federal Register** on November 2, 2001 (66 FR 55593). No comments were received in response to the interim rule.

B. Executive Order 12866

GSA has determined that this final rule is not a significant regulatory action for the purposes of Executive Order 12866 of September 30, 1993.

C. Regulatory Flexibility Act

This final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612 because it applies solely to matters

concerning agency management and personnel.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this final rule does not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*

E. Small Business Regulatory Enforcement Fairness Act

This final rule is exempt from Congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Parts 101-3 and 102-84

Federal buildings and facilities, Government property management.

Interim Rule Adopted as Final Without Change

For the reasons set forth in the preamble and under the authority of 40 U.S.C. 486(c), the interim rule revising 41 CFR part 101-3 and adding 41 CFR part 102-84 which was published in the **Federal Register** at 66 FR 55593 on November 2, 2001, is adopted as a final rule without change.

Dated: February 28, 2002.

Stephen A. Perry,

Administrator of General Services.

[FR Doc. 02-5775 Filed 3-13-02; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 22

[WT Docket No. 01-32; FCC 02-09]

Implementation of Competitive Bidding Rules to License Certain Rural Service Areas

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission ("the Commission"), pursuant to the Balanced Budget Act of 1997, takes action to grant initial licenses for certain areas of the country for cellular service by allowing all eligible parties to apply for initial licenses, licensing markets based on rural service areas (RSAs) under part 22 of its rules, and using its part 1 competitive bidding rules to auction these licenses.

DATES: Effective April 15, 2002.

FOR FURTHER INFORMATION CONTACT: Katherine M. Harris at (202) 418-0609 (Wireless Telecommunications Bureau).

SUPPLEMENTARY INFORMATION: This is a summary of the Report and Order ("R&O") in WT Docket No. 01-32, FCC 02-9, adopted January 16, 2002 and released January 28, 2002. The complete text is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW, Washington, DC and also may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW, Room CY-B402, Washington, DC 20554. The document is also available via the Internet at <http://www.fcc.gov/Bureaus/Wireless/Orders/2001/fcc02-9.pdf>.

Paperwork Reduction Act

1. The R&O contains no proposed information collection.

Synopsis of the Report and Order

2. In the *Notice of Proposed Rule Making* in this proceeding (NPRM), 66 FR 14104 (March 9, 2001), the Commission proposed rules for awarding licenses for four cellular Rural Service Areas (RSAs) that remain unlicensed because the initial lottery winner was disqualified or has otherwise withdrawn its application.

3. There are currently four cellular RSA markets that remain unlicensed because the initial lottery winner was disqualified. These markets are: 332A—Polk, AR; 582A—Barnes, ND; 672A—Chambers, TX; and 727A—Ceiba, PR. Three additional markets (370A—Monroe, FL; 492A—Goodhue, MN; and 615A—Bradford, PA) were the subject of recent Congressional action in which the Commission was directed to reinstate the original lottery winner in each of the three markets to tentative selectee status and proceed with processing the selectee's application for authority to operate. *See* District of Columbia Appropriations Act of FY 2001, Public Law 106-553, Title X, 1007, 114 Stat. 2762, Launching Our Communities' Access to Local Television Act of 2000 (2000) (D.C. Appropriations Act of FY 2001); *Public Notice*, Wireless Telecommunications Bureau Grants Rural Cellular Licenses, 16 FCC Rcd 5601 (2001) (not published in the **Federal Register**), recon. denied, *In the Matter of Applications of Great Western Cellular Partners, L.L.C., Monroe Telephone Services, L.L.C., and Futurewave Partners, L.L.C., Memorandum Opinion and Order*, DA 01-2443 (CWD rel. Oct. 19, 2001) (application for review pending). Under

the Balanced Budget Act of 1997 (1997 Budget Act), the Commission is now required, with certain exceptions not applicable here, to resolve mutually exclusive applications for initial licenses by competitive bidding. See Balanced Budget Act of 1997, Public Law 105–33, 3002(a), 111 Stat. 251, 258–60 (1997); 1997 Budget Act, Section 3002(a)(1)(A), *codified* at 47 U.S.C. 309(j)(1), (2); 1997 Budget Act, Section 3002(a)(2)(B), *codified* at 47 U.S.C. 309(i)(5). Based on the record compiled in this proceeding the Commission has decided to implement the proposals put forth in the *NPRM*, namely, to: (1) Allow all eligible parties to apply for these initial licenses; (2) license these markets on an RSA basis under our part 22 rules; and (3) use our part 1 competitive bidding rules to auction these licenses.

Background

4. The Commission has been awarding cellular licenses since 1982. Under the original cellular licensing rules, one of the two cellular channel blocks in each market (the B block) was awarded to a local wireline carrier, while the other block (the A block) was awarded competitively to a carrier other than a local wireline incumbent. After awarding the first thirty Metropolitan Statistical Area (MSA) licenses pursuant to comparative hearing rules, the Commission adopted rules in a 1984 *Report and Order*, 49 FR 23628 (June 7, 1984), and a 1986 *First Report and Order*, 51 FR 26895 (July 28, 1986), to award the remaining cellular MSA and RSA licenses through lotteries. On January 31, 2001, the Commission adopted a *Notice of Proposed Rulemaking*, 66 FR 14101 (March 9, 2001), acknowledging that in four RSA markets no initial licensee had been granted.

5. In the Omnibus Budget Reconciliation Act of 1993 (1993 Budget Act), Congress added Section 309(j) to the Communications Act, authorizing the Commission to resolve mutually exclusive applications for use of the electromagnetic spectrum by auction. Omnibus Budget Reconciliation Act of 1993, Public Law 103–66, Title VI, 6002(a), 107 Stat. 312, 387–92 (1993). In addition, Section 6002(e) of the 1993 Budget Act provided that: “[t]he Federal Communications Commission shall not issue any license or permit [by lottery] after the date of enactment of this Act unless . . . one or more applications for such license were accepted for filing by the Commission before July 26, 1993.” This provision left to the Commission’s discretion whether to use auctions or lotteries for applications filed before July 26, 1993. Beginning in 1994, the

Commission, in a *Memorandum Opinion and Order*, 59 FR 37163 (July 21, 1994), exercised its discretion and used lotteries, rather than auctions, to resolve already-pending mutually exclusive applications for cellular unserved areas filed prior to July 26, 1993.

6. On August 5, 1997, the 1997 Budget Act was signed into law, modifying the Commission’s auction authority by amending Section 309(j) of the Communications Act to require that all mutually exclusive applications for initial licenses or construction permits be auctioned, with certain exceptions not applicable here. 1997 Budget Act, Public Law 105–33, 3002(a), 111 Stat. 251, 258–60 (1997) (amending 47 U.S.C. 309(j)). The 1997 Budget Act expressly repealed Section 6002(e) of the 1993 Budget Act, *id.* at 3002(a)(4), and terminated the Commission’s authority to award licenses through random selection, even in the case of applications filed prior to July 26, 1993, except for licenses for noncommercial educational and public broadcast stations, *id.* at 3002(a)(2)(B). The Commission had found in the *Competitive Bidding Second Report and Order* that mutually exclusive applications for initial licenses to provide cellular service were auctionable under the auction authority provided by the 1993 Budget Act. Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Second Report and Order*, 59 FR 22980 (May 4, 1994), (*Competitive Bidding Second Report and Order*). Because the 1997 Budget Act terminated the Commission’s remaining lottery authority, the Bureau dismissed all pending RSA lottery applications. See In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 14 FCC Rcd 4619 (WTB 1999) (not published in the **Federal Register**) (dismissing applications in RSAs 332A (Polk, AR), 370A (Monroe, FL), 492A (Goodhue, MN), 582A (Barnes, ND), 615A (Bradford, PA), and 727A (Ceiba, PR)); In the Matter of Certain Cellular Rural Service Area Applications in Market Nos. 599A and 672A, *Order*, DA 99–814 (CWD rel. Apr. 29, 1999) (dismissing applications in RSAs 599A (Nowata, OK) and 672A (Chambers, TX)); In the Matter of Certain Rural Service Area Applications in Market Nos. 599A and 672A, *Order on Reconsideration*, DA 99–1426 (CWD rel. July 21, 1999) (reinstating applications of tentative selectees in those markets—Zephyr Tele-Link in RSA 599A and Alee in RSA 672A); In the Matter of Zephyr Tele-Link Application for a

Construction Permit to Establish a Cellular System Operating on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service To Serve the Oklahoma 4-Nowata Rural Service Area, Market No. 599A, *Order* 15 RCC Rcd 4247 (CWD 2000) (granting application of Zephyr Tele-Link); In the Matter of Application of Alee Cellular Communications for Authorization to Construct Nonwireline Cellular System in Texas RSA 21 Market 672, *Memorandum Opinion and Order*, 15 FCC Rcd 2831(2000) (not published in the **Federal Register**) (recon. pending) (dismissing application of Alee) (*Alee Cellular*). Several of the applicants sought reconsideration of the Bureau’s dismissal of the RSA applicants, and the Bureau declined to reconsider its actions. In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 16 FCC Rcd 4619 (WTB 2001) (not published in the **Federal Register**) (affirming dismissals) (*March 2, 2001 Order*). Ranger Cellular and Miller Communications, Inc. have sought further reconsideration of the Bureau’s dismissal of the applications, and High Tower Communications, Inc. has sought Commission review of the Bureau’s action. Consolidated Petition for Reconsideration of Ranger Cellular and Miller Communications, Inc. (filed Mar. 30, 2001); Application for Review of High Tower Communications, Inc. (filed Apr. 2, 2001).

7. In the first dismissal order cited above, the Bureau also dismissed as moot CCPR’s Petition requesting that we award licenses for the remaining RSA markets through competitive bidding. CCPR’s Petition specifically requested that market 727A—Ceibo, Puerto Rico, be awarded through competitive bidding rather than through a second lottery. However, the CCPR Petition raised certain issues concerning the broader applicability of the use of competitive bidding for all markets where an initial lottery was held and the winner was disqualified. The Commission therefore treated the CCPR Petition as a petition for rulemaking and requested comment on awarding cellular licenses through competitive bidding for all remaining unlicensed RSAs. Although the Commission dismissed CCPR’s Petition as moot because we are required by the 1997 Budget Act to award licenses through competitive bidding, we have considered, and are incorporating into the record of this proceeding, all comments and reply comments submitted in response to the CCPR Petition.

8. The four markets for which no initial license has been granted are:

332A—Polk, AR; 582A—Barnes, ND; 727A—Ceiba, PR; and 672A—Chambers, TX. These four markets are the subject of this *Report and Order*.

A. Need for and Objectives of the Report and Order

9. Congress enacted the Balanced Budget Act of 1997, which requires the Commission to resolve mutually exclusive applications for initial licenses through competitive bidding instead of random selection, with certain exceptions not applicable here. Accordingly, the Commission initiated this rulemaking in order to adopt rules for the granting of initial cellular RSA authorizations by means of competitive bidding. The Commission's objective in this rulemaking proceeding is to establish, for cellular RSA markets for which a tentative selectee has been disqualified, the applicable competitive bidding and licensing rules. Such rules are necessary in order to determine the classes of eligible entities as well as determine what policies, if any, should be adopted to promote participation by small business entities, consistent with the Commission's statutory obligation under Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. 309.

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

10. No comments were submitted specifically in response to the IRFA. Some of the comments responding to the proposals contained in the *NPRM*, however, discussed issues that could affect small businesses. Two of the three commenters that addressed eligibility for the four cellular RSA licenses at issue generally supported permitting all eligible entities to apply for the licenses. *See Report and Order* at ¶¶ 8–21. The third commenter opposed such open eligibility (which would encompass small businesses), instead arguing that only entities that had filed lottery applications for these licenses in 1988 and 1989 and had appealed the dismissal of their lottery applications should be permitted to apply for these licenses (which would mean only three entities would be potentially eligible). *See Report and Order* at ¶¶ 8–21.

11. One commenter supported the proposals contained in the *NPRM* to provide bidding credits to small businesses to encourage them to bid on and win the cellular RSA licenses. *See Report and Order* at ¶¶ 27–33. Another commenter opposed adoption of such bidding credits on the basis that such credits would unfairly and uneconomically skew the auction in

favor of smaller entities. *See Report and Order* at ¶¶ 27–33.

12. Regarding eligibility for the four cellular RSA licenses, the Commission determined in the *Report and Order*, that any entity otherwise qualified under the rules would be permitted to apply for any of the four RSA licenses. *See Report and Order* at ¶¶ 8–21. As explained in greater detail in the *Report and Order* and in Section E *infra*, the Commission concluded that permitting broad-based eligibility would best further the public interest as well as facilitate participation by small businesses.

13. Regarding the adoption of bidding credits for certain categories of small businesses, the Commission concluded that including such bidding credits as part of the cellular RSA application and bidding process would help to promote opportunities for small businesses. *See Report and Order* at ¶¶ 27–33. As explained in greater detail in the *Report and Order* and Section E *infra*, implementation of bidding credits facilitates the ability of small businesses to compete against larger entities and promotes economic opportunities for those small businesses.

C. Description and Estimate of the Number of Small Entities To Which the Rules Will Apply

14. 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 proposed rules, if adopted. *See* 5 U.S.C. 603(b)(3). The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” *Id.* 601(6). The term “small business” has the same meaning as the term “small business concern” under section 3 of the Small Business Act. *Id.* 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.” 5 U.S.C. 601(3). 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 SBA at 15 U.S.C. 632.

15. A small organization is generally “any not-for-profit enterprise which is

independently owned and operated and is not dominant in its field.” 5 U.S.C. 601(4). Nationwide, as of 1992, there were approximately 275,801 small organizations. 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration). “Small governmental jurisdiction” generally means “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.” 5 U.S.C. 601(5). As of 1992, there were approximately 85,006 such jurisdictions in the United States. 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce. This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, the Commission estimate that 81,600 (91 percent) are small entities. According to SBA reporting data, there were 4.44 million small business firms nationwide in 1992.

16. According to recent telecommunications industry revenue data, 808 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Services (PCS), which are placed together in that data. Trends in Telephone Service, Table 19.3 (March 2000). This data does not indicate how many of these 808 carriers fall within each of the revenue tiers defined by the Commission for the purpose of receiving bidding credits as some form of small business or entrepreneur. *See Report and Order* at ¶¶ 29–33. As described in the *Report and Order* and Section E *infra*, the Commission defined an “entrepreneur” as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years and provided a 15 percent bidding credit; a “small business” as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years and provided a 25 percent bidding credit; and a “very small business” as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years and provided a 35 percent bidding credit.

17. The Commission is required to estimate in this FRFA the number of small entities to which any new rules would apply, provide a description of such entities, and assess the impact of the rule on such entities. The rules adopted in the *Report and Order* will

apply to all entities that seek to obtain the subject licenses, including small entities. The number of entities that may apply to participate in these future auctions is unknown. Moreover, these entities might already be providers of cellular service or PCS or other wireless services, or they may have no current involvement in the wireless industry. To the extent that existing cellular or PCS operators would apply for the subject authorizations, the applicable NAICS code is 513322. Existing paging carriers, which might also be interested in these authorizations, fall under NAICS code 513321. Resellers of paging and cellular services are identified by NAICS code 51333.

18. The number of small businesses that have participated in prior auctions has varied. Small businesses, as defined under the Commission's rules in the context of various auctions for authorizations in specific services, have accounted for 1,667 out of a total of 2,096 qualified bidders in all prior auctions, not including broadcast auctions. As provided in Section 1.2110(c)(1) of the Commission's rules, and in conformity with the Small Business Act and the regulations of the Small Business Administration, the Commission establishes small business definitions for purposes of its auctions on a service-specific basis. See 47 CFR 1.2110(c)(1); 15 U.S.C. 632(c)(2)(c); 13 CFR 121.902(b). Statistics for broadcast license auctions are not available, and would be less relevant to the licenses at issue here. Given these statistics, the Commission expects a large percentage of participants in our auctions program generally to be small businesses in the future, although this may not be the case in this individual auction.

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

19. The Commission imposes no new reporting, recordkeeping, or other compliance requirements in the *Report and Order*. The only projected reporting and recordkeeping requirements that will apply in any auctions for the four cellular RSA authorizations are those that are already established by Commission regulations. Nothing in this rulemaking changes those regulations. The Commission will accept new license applications and use our general Part 1 competitive bidding rules to conduct the auction. These rules require all applicants to electronically submit FCC Form 175 in order to participate in the auction and, at the conclusion of the auction, all high bidders to electronically submit FCC Form 601 to apply for a license. See 47 CFR

1.2105(a), 1.2107(a). The purposes of these forms are to ensure that applicants are eligible to participate in the auction and that high bidders are eligible to hold the cellular RSA licenses at issue. The Office of Management and Budget has already approved both of these forms. FCC Form 175, OMB Control No. 3060-0600 (effective until Apr. 30, 2004); FCC Form 601, OMB Control No. 3060-0798 (effective until Mar. 31, 2002). In addition, under our Part 1 rules, any entity wishing to receive a bidding credit for serving qualifying tribal lands must comply with 47 CFR 1.2110(f)(3), an obligation also approved by the Office of Management and Budget. See 47 CFR 1.2110(f)(3).

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

20. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (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. 5 U.S.C. 603(c)(1)-(4).

21. In the *Report and Order*, the Commission adopts rules to permit us to grant initial licenses in four cellular RSAs. In adopting these rules, the Commission considered the potential significant economic impact of the rules on small entities. Specifically, the Commission considered the impact of its eligibility definition on the ability of small businesses even to apply for the licenses at issue in this proceeding and to participate in the associated auctions. The Commission also considered the effect of the proposed bidding credits for three categories of small businesses on the ability of small businesses to compete successfully in the auctions and to build out a system should such businesses be awarded any of the licenses. As described in the *Report and Order* and Section E *infra*, the Commission defined an "entrepreneur" as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years and provided a 15 percent bidding credit; a "small business" as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years and provided a 25 percent bidding

credit; and a "very small business" as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years and provided a 35 percent bidding credit.

22. Also, in proposing to apply the Commission's existing Part 1 competitive bidding rules to any auctions for these licenses, the Commission took into account their effect on small businesses.

23. The rules adopted by the *Report and Order* will affect all small entities that seek to acquire any of the four cellular RSA licenses discussed herein. The Commission believes that permitting all eligible entities to apply for the four licenses—instead of restricting eligibility to three applicants that filed lottery applications in 1988 and 1989—will promote opportunities for participation by small businesses. A greater number of small businesses will have the chance to seek the authorizations at issue.

24. The Commission has sought to promote small business ownership by defining three tiers of small businesses for the purposes of providing bidding credits to small entities: an "entrepreneur" is an entity with average annual gross revenues not exceeding \$40 million for the preceding three years; a "small business" is an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and a "very small business" is an entity with average annual gross revenues not exceeding \$3 million for the preceding three years. The Small Business Administration approved these proposed small business definitions on January 30, 2001. See Letter from Fred P. Hochberg, Acting Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Jan. 30, 2001 (*SBA Letter*). See also Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Gary M. Jackson, Assistant Administrator, Small Business Administration, dated Sept. 21, 2001. The bidding credits are 15 percent for entrepreneurs, 25 percent for small businesses, and 35 percent for very small businesses. The Commission specifically rejected arguments in opposition to the use of bidding credits for small businesses. As explained in the *Report and Order*, adoption of bidding credits for small businesses provides them with an opportunity to compete successfully against larger, well-financed bidders. *Report and Order*

at ¶ 32. The Commission believes the bidding credits it has adopted will benefit a range of small businesses.

25. The Commission will apply its Part 1 competitive bidding rules equally to all applicants for the licenses, including small businesses. Our Part 1 competitive bidding rules have been designed to ensure that small businesses are not placed at a disadvantage and have a full and fair opportunity to compete in fair auction proceedings. While these rules require small businesses to submit application forms in order to participate in the auctions for the subject licenses, the Commission believes that equitably applying the same rules to all entities helps to promote fairness in the process and to ensure that the auction is effective. Fair and effective auction proceedings benefit small businesses as well as all other participants.

I. Discussion

A. Eligibility for Licenses

26. *Background.* In the *NPRM*, the Commission proposed to allow all eligible entities to participate in an auction for the four cellular RSA licenses at issue in this proceeding. The Commission noted that the competitive bidding program seeks to award each license to the applicant that values it most highly and that is, therefore, most likely to offer valued service to the public. The Commission explained that excluding potential applicants that were not previously lottery applicants would be inconsistent with that goal. The Commission also recognized that, because nearly twelve years have passed since the closing of the original RSA filing window, a number of commenters that have expressed interest in participating in RSA auctions would not have had the opportunity to file applications, while some applicants that did file lottery applications may no longer exist. Finally, the Commission reasoned that, to the extent former lottery applicants continue to have an interest in applying for these markets, open eligibility allows them to do so.

27. In each of the four unlicensed RSAs, the Commission has granted interim operating authority to one or more cellular operators to provide cellular service on the Channel A block pending the ultimate permanent licensing of these RSAs. The Commission also specifically proposed to permit cellular operators that have been granted interim operating authority (IOA) in the four unlicensed RSAs to participate in the RSA auction. The Commission noted that although IOAs confer no interest or expectation of

receiving a cellular license, IOA holders might have a substantial interest in bidding for permanent authorizations in markets where they may have been providing interim cellular service.

28. *Discussion.* After careful consideration, the Commission concludes that it is in the public interest to allow all entities, including current IOA holders and former lottery applicants, to participate in the RSA auction. In recent years, the Commission has generally favored open eligibility because the Commission believes that maximizing the pool of auction applicants helps to ensure that licenses are awarded to entities that value them most highly and are, therefore, most likely to offer prompt service to the public. See, e.g., *Competitive Bidding Second Report and Order*, 59 FR 22980 (May 4, 1994); Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, 37.0–38.6 GHz and 38.6–40.0 GHz, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18617–20, ¶¶ 30–35 (1997) (not published in the **Federal Register**); Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, *Report and Order*, 15 FCC Rcd 22709, 22736–37, ¶¶ 54–56 (2000) (*BBA Report and Order*) (not published in the **Federal Register**). But see, e.g., *BBA Report and Order*, 15 FCC Rcd at 22737, ¶ 56 (not published in the **Federal Register**) (the Commission has authority to restrict eligibility in particular cases if such restrictions are consistent with our spectrum management responsibilities under Section 309(j)). The Commission has found that this approach to auction participation best fulfills the public interest objectives set forth in Section 309(j)(3) of the Communications Act. 47 U.S.C. 309(j)(3)(A)–(D). Further, the Commission does not believe that there are any compelling reasons to exclude potential participants in the upcoming RSA auction.

29. A number of commenters support open eligibility, particularly current IOA holders and entities that did not previously file lottery applications. With respect to eligibility, two of the four commenters that responded to the *Notice* support open eligibility. In addition, several commenters that responded to the CCPR Petition favored open eligibility. Cingular argues that

permitting open eligibility will ensure that licenses are awarded to applicants that value them the most highly. Cingular specifically insists that the Commission allow IOA holders in the subject markets to apply for licenses. ALLTEL also supports the Commission's proposal to permit open eligibility. BANM asserts that open eligibility will expedite cellular service to the RSA markets. WWC urges the Commission to give all interested applicants an opportunity to provide cellular service in the RSAs. Century contends that the number of potential service providers has increased in the years since the closing of the original RSA filing window and that broadening auction participation would permit the best qualified and most highly motivated entities to compete.

30. Several commenters oppose open eligibility. Some of these commenters, such as Ranger and Miller, seek to restrict eligibility to former lottery applicants who continue to contest dismissal of their applications. One commenter responding to the *Notice* contends that the auction should be restricted to former lottery applicants. Commenters in response to the *CCPR Petition* also argue that the Commission should limit the auction to former lottery applicants. Other commenters argue that IOA holders should be barred from participating in the cellular RSA auction. These commenters generally contend that it is the Commission's policy, when it grants a party's application for IOA service, to dismiss that party's pending application for permanent authority for the subject market. AALA claims that an IOA holder would have an advantage over other applicants in an auction because it would have a "unique ability" to calculate the value of the license. In contrast, BANM and CCPR argue that the Commission's policy for excluding IOAs was implemented to avoid unfair advantage in the comparative hearing process and thus is not relevant when licenses are assigned by competitive bidding.

31. Several commenters cite to *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). See, e.g., AALA Comments at 14 (to allow one applicant to operate in a market under temporary authority poses a severe threat to the principles set forth in *Ashbacker*). We note that short-form applications to participate in competitive bidding are governed by Section 309(j), and not the procedural requirements of Sections 309(a), 309(b), or 309(e), or the *Ashbacker* doctrine, which requires a comparative hearing when competing applicants file conflicting license or construction

permit applications for the same authorization. See *Elleron Oil Co. and WVI Partners, Inc. Petition for Reconsideration of Dismissal of Short-Form Applications for Interactive Video and Data Service Auction*, Order, 13 FCC Rcd 17246, 17251–52, ¶ 9 (WTB 1998) (not published in the **Federal Register**). Section 309(j) does not require the Commission to use a notice and cut-off procedure or establish “cut-off dates” to invite mutually exclusive applications for a particular license. See *id.* at 17250, ¶ 8.

32. In determining eligibility for auction participation, the Commission is required by Section 309(j)(3) to promote certain public interest objectives. Those objectives include rapid deployment of new technologies and services to the public, promotion of economic opportunity and competition, recovery for the public of a portion of the value of the spectrum, and efficient and intensive use of the spectrum. 47 U.S.C. 309(j)(3)(A)–(D). The Commission believes that a policy of unrestricted eligibility in the RSA auction will best fulfill our public interest goals. Here, open eligibility has a higher probability of promoting the rapid delivery of services to the public than limited eligibility. This is because open eligibility increases the likelihood that all entities who have an interest in putting the license to use will participate in the auction. Among these, the bidder who is willing to pay the most will be highly motivated to rapidly put the license to a use that the public finds valuable because only such a use will make its investment worthwhile. Importantly, no commenter has presented evidence in this case that there are entities with market power whose participation might allow them to limit or reduce competition by their entry. In such a situation, permitting as many qualified bidders as possible allows competition and economic opportunity to flourish by reducing one barrier to market entry, potentially resulting in a more competitive applicant pool. In the absence of evidence of market failure, the market, and not regulation, should determine participation in competitive bidding here, and the Commission should allow the maximum number and types of bidders to participate in the auctions.

33. An important factor in our decision to permit open eligibility is that the licenses at issue in this proceeding will cover rural areas. Under Section 309(j)(4)(B), the Commission is required to encourage the rapid deployment of services specifically to rural areas. 47 U.S.C. 309(j)(4)(B). BANM also highlights the need for the

provision of service in rural markets, stating that, “[w]hile many urban markets have enjoyed cellular service for as long as thirteen years, these rural service areas have remained without a permanent nonwireline cellular licensee.” The Commission believes that open eligibility will encourage participation in the RSA auction by entities that are most likely to be interested in, and capable of, serving rural areas.

34. Our decision to permit open eligibility in the RSA auction includes the participation of current IOA holders in the four unlicensed RSAs. The Commission’s policy to dismiss applications for permanent status filed by IOA holders originated in the context of comparative hearings, based on the concern that the decision to grant a license in a comparative hearing would be biased in favor of an IOA holder because it had incurred substantial expenses in its temporary operations. See *In re Applications of La Star Cellular Telephone Co. and New Orleans CGSA, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 3777 (1989) (not published in the **Federal Register**), *aff’d*, 899 F.2d 1233 (D.C. Cir. 1990). See *Community Broadcasting Co. v. FCC*, 274 F.2d 753 (D.C. Cir. 1960) (an interim operator’s expenditure of sizeable funds on its temporary operation would inevitably influence the Commission’s final decision, no matter how much the Commission tried to eliminate this factor). The Commission declines to extend that policy to the competitive bidding process. IOA holders will not have an advantage over other bidders as they once had over other applicants in comparative hearings because, in an auction, licenses are assigned to the highest bidder, regardless of prior operating status. See Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Memorandum Opinion and Order, 14 FCC Rcd 8724, 8737–39, ¶¶ 23–26 (1999) (not published in the **Federal Register**) (the Commission rejected arguments that holders of interim authority have a comparative advantage in an auction process). As the Commission stated in the *NPRM*, although IOAs confer no entitlement to, or expectation of, receiving a cellular license, IOA holders may have a substantial interest in bidding for permanent authorizations in markets where they have been providing interim cellular service. Given our previously adopted policies and the record in this

proceeding, the Commission concludes that current IOA holders should not be excluded from participating in the auction of licenses for the unlicensed RSAs on an equal basis with other applicants.

35. Joint commenters Ranger and Miller raise a variety of statutory and equitable arguments against open eligibility, none of which the Commission find persuasive. First, Ranger and Miller argue that Section 309(l) of the Communications Act of 1934, as amended, restricts eligibility for cellular radio licenses to lottery applicants that filed their applications prior to July 1997 and whose applications allegedly are “unresolved.” Section 309(l) provides in pertinent part that, with respect to competing applications for initial licenses for “commercial radio and television stations” that were filed with the Commission before July 1, 1997, the Commission shall treat the persons filing such applications as the only persons eligible to be qualified bidders. Public Law 105–33, 3002(a)(3), 111 Stat. 251, 260 (1997) (codified at 47 U.S.C. 309(l)). Ranger and Miller contend that the Commission’s rules define cellular radio as a “commercial mobile radio service” and that, therefore, the reference to “commercial radio” in Section 309(l) includes cellular radio. Cingular disagrees with Ranger and Miller, asserting that the Commission should not view “commercial radio” and “television stations” as distinct, unrelated terms. Cingular maintains that the term “commercial” was intended to exclude *noncommercial educational radio and television* applications from the scope of Section 309(l) and from competitive bidding under Section 309(j)(2)(C).

36. The Commission agrees with Cingular’s interpretation of the statutory language, which is plain on its face. The statute does not use “commercial radio” and “television stations” as distinct terms. Rather, the reference in the statute to “commercial radio and television stations” clearly refers to broadcast facilities. Where Congress has referred to wireless services like cellular in other provisions of the Communications Act of 1934, as amended, it has clearly used the term “commercial mobile services.” See, e.g., 47 U.S.C. 253(e), 274(i)(2)(B), 332(c)(1), 332(d)(1). As the Supreme Court has explained, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*,

464 U.S. 16, 23 (1983) (internal quotation marks omitted), citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). The legislative history also confirms that Section 309(l) applies only to commercial broadcast radio and television applications. The Conference Report specifically states that “[n]ew section 309(l) of the Communications Act requires the Commission to use competitive bidding to resolve any mutually exclusive applications for *radio or television broadcast licenses* that were filed with the Commission prior to July 1, 1997.” H.R. Conf. Rep. No. 217, 105th Cong., 1st Sess. at 573 (1997) (*Conference Report*) (emphasis added). The Commission has applied Section 309(l) only to pending comparative broadcast licensing cases. See Implementation of Section 309(j) of the Communications Act “Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 63 FR 48615 (Sept. 30, 1998) (*Broadcast First Report and Order*); recon. denied, 14 FCC Rcd 8724 (1999) (not published in the **Federal Register**); modified, 14 FCC Rcd 12541 (1999) (not published in the **Federal Register**); See In the Matter of Amendment of Section 73.202(B), FM Table of Allotments, FM Broadcast Stations, *Memorandum Opinion and Order*, 16 FCC Rcd 2272 (2001) (not published in the **Federal Register**).

37. Contrary to the claim of Ranger and Miller, *Bachow Communications, Inc. v. FCC* does not support the notion that Section 309(l) applies to cellular RSA applications as well as broadcast license applications. *Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001) (*Bachow*). *Bachow*’s central holding instead is that license applications for 39 GHz service filed under a comparative hearing licensing scheme could be dismissed when the Commission shifted to an auction licensing scheme. *Bachow*, 237 F.3d at 686–688 (recognizing the “Commission’s authority to change license assignment allocation (*sic*) procedures midstream” even though it disrupts expectations and alters the competitive balance among applicants). Ranger and Miller also cite the D.C. Circuit’s opinion in *McElroy* to support their argument that the Commission cannot make the RSA licenses available to new applicants. *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996) (*McElroy*). *McElroy* holds that when the Commission decides to process timely-filed applications, it generally may not also process competing applications filed out of

time. *McElroy*, 86 F.3d at 253–259. Because we will permit open eligibility for the subject licenses, and all applications to participate in the auction will be newly filed, the *McElroy* decision is inapposite.

38. Ranger and Miller also offer up a litany of equitable arguments that they contend support artificially limiting eligibility. They argue that the Commission should limit the RSA applicant pool because the number of unresolved lottery applicants is small, the applications have been pending for thirteen years, the service rules for RSA licenses have not changed, and the lottery applicants did not have notice when they filed their applications that competitive bidding, rather than lotteries, might be used to assigned licenses. In addition, Ranger and Miller oppose open eligibility on the grounds that the Commission did not refund their lottery application filing fees, and that open eligibility will lead to delay and litigation.

39. Ranger and Miller fail to show how the public interest would be served by limiting the RSA auction to only three former lottery applicants. In fact, it is well-established that, regardless of when an application is filed, an applicant has no vested right to a continuation of the licensing procedures in effect at the time its application was filed. See, e.g., *Bachow*, 237 F.3d at 687–688; Revision of Part 22 and Part 90 of the Commission’s Rules To Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 64 FR 33762 (June 24, 1999); *Broadcast First Report and Order*, 13 FCC Rcd at 15937, ¶ 44 (not published in the **Federal Register**); Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5–29.5 GHz Frequency Band, *Third Order on Reconsideration*, 13 FCC Rcd 4856, 4941, ¶ 195 (1998) (not published in the **Federal Register**), citing *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240–41 (D.C. Cir. 1997). Moreover, there is no logical nexus between the length of time the applications were pending and the rationale for restricting eligibility to bid in the RSA auction. Similarly, the claim that the lottery applicants did not have any notice of possible rule changes at the time they filed their applications provides no reasonable rationale for the proposed narrowing of eligibility. The Commission’s action declining to refund application filing fees neither gives the applications continued “life” nor justifies restrictions on eligibility. Finally, the Commission necessarily is guided by the public interest objectives

set forth in Section 309(j)(3)(A)–(D) in setting application eligibility and not by concerns over the prospects of litigation and appeals. 47 U.S.C. 309(j)(3)(A)–(D).

40. Ranger and Miller Comments at 9, 12–13. Ranger and Miller argue that the Commission should restrict eligibility because Miller helped the Commission determine that a cellular RSA licensee was unqualified to hold a RSA license. Ranger and Miller Comments at 10–12. We disagree. Any action by Miller that may have led the Commission to such a determination is irrelevant to our decision whether we should, as a general rule, adopt open eligibility with respect to the four cellular RSA markets. We are obligated to promote the public interest, not individual applicants.

41. Ranger and Miller totally disregard the equities of other parties potentially interested in seeking the subject authorizations, as well as equitable considerations relevant to the public interest. As the Commission found above, adopting open eligibility—the antithesis of the licensing plan promoted by Ranger and Miller—for these licenses has a greater probability than limited eligibility of resulting in the rapid deployment of new technologies and services to the public, the possibility of competition and economic opportunity, and the efficient and intensive use of the spectrum. Such a result would promote the public interest, and therefore, open eligibility is warranted. In addition, it is important to recognize that there may be parties interested in providing cellular service in these markets, and qualified to do so, that did not even exist at the time the lottery applications were filed.

42. Finally, Ranger and Miller argue that an open eligibility policy in this context must necessarily be based on the potential for increased revenue to the Treasury. Section 309(j)(7)(B) does not preclude the Commission from adopting eligibility rules based on other considerations, even though such rules may also result in increased federal revenues. The purpose of open eligibility is not to maximize the amount of revenues raised in an auction but to ensure that licenses are awarded to those that value them most highly and that, therefore, will be most likely to provide rapid and efficient service to the public. Indeed, by asserting that auction revenues will be greater if they are forced to compete with a larger number of bidders, Ranger and Miller may be suggesting that they value the RSA licenses less highly than their potential competitors. Our determination to permit open eligibility in the RSA auction is based on our statutory obligations to promote

competition and rapid deployment of services to rural areas, not to enhance the Federal Treasury.

B. Market Areas To Be Auctioned

43. *Background.* In the *NPRM*, the Commission sought comment on whether the markets for which licenses are to be awarded through competitive bidding should be based on RSAs, or whether alternative licensing models should be considered. The Commission received two comments that supported licensing the markets on an RSA basis, and no party expressed opposition to that proposal.

44. *Discussion.* The Commission concludes that the remaining unlicensed cellular RSA markets should be licensed on an RSA basis under our Part 22 rules. As the Commission observed in the *NPRM*, the initial lotteries for the unlicensed markets were for RSAs as defined in 47 CFR 22.909 of our rules. To employ another market model for these RSAs would be potentially disruptive to adjacent cellular operations, as well as possibly impede the cost-effective buildout of facilities to serve the residents of these areas as well as transient users. The Commission also will, pursuant to 47 CFR 22.947, subject licenses awarded for these markets to the same construction and operational rules as licenses granted to prior RSA lottery winners, including the exclusive right of the auction winner to expand its system within that market for a period of five years. After the expiration of the five-year expansion period, any areas within the RSA that remained unserved would be available for licensing pursuant to 47 CFR 22.949 of our rules which governs unserved areas Phase I and Phase II filing procedures.

C. Competitive Bidding Procedures

1. Incorporation by Reference of Part 1 Standardized Auction Rules

45. *Background.* In the *Part 1 Third Report and Order*, the Commission streamlined its auction procedures by adopting general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules applicable to all auctionable services. Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 62 FR 13540 (March 21, 1997) (modified by Erratum, DA 98-419 (rel. March 2, 1998)) (*Part 1 Third Report and Order*). The Commission clarified and amended these general competitive

bidding procedures. Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 65 FR 52323 (Aug. 29, 2000) (modified by Erratum, DA 00-2475, 65 FR 52401 (rel. Aug. 29, 2000)) (*Part 1 Order on Reconsideration*) (recons. pending). More recently, the Commission adopted modifications to Section 1.2105(c) of the Commission's rules, the competitive bidding "anti-collusion rule." Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Seventh Report and Order*, 66 FR 54447 (Oct. 29, 2001). *See also* 47 CFR 1.2101 *et seq.* In the *NPRM*, the Commission proposed to conduct the auction of cellular RSA licenses in conformity with the general competitive bidding rules, including any amendments adopted in the *Part 1 Order on Reconsideration, Fifth Report and Order, and Fourth FNPRM*, 65 FR 52323 (August 29, 2000) proceeding. Specifically, the Commission proposed to employ the Part 1 rules governing competitive bidding design, designated entities, application and payment procedures, reporting requirements, collusion issues, and unjust enrichment. The Commission further stated that winning bidders would be eligible to obtain a bidding credit for serving qualifying tribal lands. *See* 47 CFR 1.2110(f)(3). A tribal land bidding credit is in addition to, and separate from, any other bidding credit for which a winning bidder may qualify. Unlike other bidding credits that are requested prior to the auction, a winning bidder applies for the tribal land bidding credit after winning the auction when it files its long-form application. In this regard, we note that only one RSA subject to these proposals—RSA 582A-Barnes, ND—contains any federally recognized tribal lands. Finally, the *NPRM* contemplated that auction-related procedural matters such as the appropriate competitive bidding design for the RSA auction, as well as minimum opening bids and reserve prices, would be determined by the Bureau pursuant to its delegated authority prior to the start of the cellular RSA auction. *See* 47 CFR 0.131(c), 0.331, and 0.332; *see also* Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, 62 FR 13540 (March 21, 1997).

46. *Discussion.* The Commission adopts the proposal to conduct the

auction for initial licenses in the four cellular RSAs in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules. The Commission believes that this decision to conduct the RSA auction in conformity with the standardized Part 1 rules will increase the efficiency of the competitive bidding process and provide specific guidance to auction participants.

47. Although the Commission received few comments on this issue, none of the commenters opposed the application of the general competitive bidding rules. One commenter, Cingular, favors application of the general competitive bidding rules to the RSA auction. In its comments, Cingular also requests that the bidding design ultimately selected not include combinatorial bidding. (Combinatorial bidding design allows for bids on combinations or packages of licenses.) arguing that it is inappropriate where no "synergies" exist among the markets in question. As indicated in the *NPRM*, the Bureau will seek comment by Public Notice on auction-related procedural issues, including the appropriate competitive bidding design, prior to the start of the cellular RSA auction. This approach will provide the Bureau with an opportunity to weigh the benefits and disadvantages of combinatorial bidding design, among other auction-specific issues.

2. Small Business Definitions and Bidding Credits

48. *Background.* In the *NPRM*, the Commission proposed to adopt special provisions for small businesses that participate in the auction for cellular RSA licenses. The Commission noted that the markets at issue could attract a wide range of entities and the adoption of bidding credits will help us meet our Congressional mandate to promote competition and to disseminate licenses among a wide variety of applicants. Accordingly, the Commission proposed to define an entrepreneur as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, a small business as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million, and a very small business as an entity with average annual gross revenues for the preceding three years not exceeding \$3 million. The entrepreneur and small business definitions are consistent with the small business definitions we established for the broadband Personal Communications Services C and F blocks. We also proposed the definition of very small business for the RSA

auction because smaller businesses may be interested in acquiring licenses to provide service in these markets. The Small Business Administration approved these proposed small business definitions on January 30, 2001. *See SBA Letter*. The Commission further proposed, as provided in Section 1.2110(f)(2) of our rules, to offer entrepreneurs a bidding credit of 15 percent, small businesses a bidding credit of 25 percent, and very small businesses a bidding credit of 35 percent.

49. The Commission sought comment on whether the characteristics and capital requirements of cellular service call for a different approach. The Commission also asked commenters, to the extent that they propose additional provisions to ensure participation by businesses owned by minorities and women, to address how such provisions should be crafted to meet the relevant standards of judicial review.

50. *Discussion*. As the Commission tentatively concluded in the *NPRM*, it will adopt the following small business definitions and bidding credits: (1) An "entrepreneur" with average annual gross revenues for the preceding three years not exceeding \$40 million will be eligible for a 15 percent bidding credit; (2) a "small business" with average annual gross revenues for the preceding three years not exceeding \$15 million will be eligible for a 25 percent bidding credit; and (3) a "very small business" with average annual gross revenues for the preceding three years not exceeding \$3 million will be eligible for a 35 percent bidding credit.

51. The Commission is not persuaded that large carriers are necessarily better suited to provide cellular RSA service. In any case, the Commission does not prescreen applicants' relative qualifications. Further, the Commission believes that competition between large and small entities will benefit subscribers in the rural markets. Also, the Commission is not persuaded that the adoption of bidding credits will, in any way, impede service to these areas. To the extent that, as ALLTEL suggests, cellular service is a national "mature" service dominated by large carriers, our decision to adopt bidding credits should help eliminate barriers to entry for small businesses, consistent with our statutory mandate. *See* 47 U.S.C. 309(j)(3)(B).

52. Finally, ALLTEL contends that the auction will be skewed toward smaller entities that receive an overly generous bidding credit, which will distort market valuation. While the Commission agrees that bidding credits provide small businesses with an advantage, Congress, in Section 309(j),

specifically directed the Commission to promote economic opportunities for small businesses. The Commission further notes that bidding credits alone do not guarantee success; rather, they provide small businesses with an opportunity to successfully compete against larger, well-financed bidders. *See* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Second Report and Order and Further Notice of Proposed Rulemaking*, 62 FR 11616 (March 12, 1997). Because bidding credits are the best tool the Commission has to promote these opportunities, the Commission concludes that it is appropriate to adopt the special provisions for small businesses.

53. The Commission does adopt special preferences for entities owned by minorities or women. As the Commission did not receive any comments on this issue, the Commission does not have an adequate record to support such special provisions under the current standards of judicial review. *See Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for Congressionally mandated race-conscious measures); *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate standard of review to a state program based on gender classification). The Commission believes the bidding credits adopted here for small businesses will further our objective of disseminating licenses among a wide variety of applicants. Furthermore, minority and women-owned entities that qualify as small businesses may take advantage of the special provisions.

D. Disposition of Alee's Argument Concerning Texas 21

54. In its comments, Alee has requested that RSA 672A (Texas 21—Chambers) not be included in any upcoming auction pending the outcome of its petition for reconsideration of an order denying its application in that market. For the reasons stated below, the Commission denies Alee's request and includes the Texas 21 RSA authorization among the markets to be subject to auction rules.

55. Alee requests that, if the Commission includes the Texas 21 authorization in the contemplated auction, the Commission gives notice to any potential bidder that any license won in that market would be subject to Alee's claim. If Alee ultimately prevails in the hearing process, the license will

be awarded accordingly. If Alee does not prevail, then the Commission will have the necessary licensing rules and policies in place for the Texas 21 authorization without having to conduct another rulemaking proceeding. The Commission will ensure that interested parties are fully informed to the extent that Alee's claim remains unresolved.

E. IOA Operations

56. *Background*. Under the terms of each of the existing IOAs, the IOA operator must cease operations immediately upon initiation of service by the new licensee, provided that the new licensee gives at least 30 days written notice of its intent to provide service. The IOA condition specifically provides that "[t]he interim operator must fully cooperate with the permanent licensee in effectuating a smooth transition to the provision of service in the market by the permanent licensee without disruption of service to the public. The interim operator must cease operations in the market on the date of initiation of permanent service or within 30 days of written notice by the permanent permittee to the interim operator of the day and time that it intends to initiate service, whichever date occurs later." In order to prevent unnecessary interruption of service to existing cellular customers, the Commission proposed in the *NPRM* that, in the event that any of the current IOA holders do not obtain the RSA license for their markets, they should be allowed to continue providing service on a temporary basis subject to these conditions, *i.e.*, until the auction winner provides the required notice and is prepared to commence service. Minimizing such interruptions while the auction winner establishes its service will also help to retain 911 access in the IOA service area. Circular requests that the Commission clarify its rules to provide that interim operators may continue to operate until the auction winner is prepared to commence service in that particular part of the market where the IOA holder is operating in order to avoid disruption in service to the public.

57. *Discussion*. Because of the nature of these markets and carrier buildout practices, the Commission anticipates the auction winner will not initially provide coverage throughout the entire market. As a result, the auction winner may or may not initiate service in the area where the public currently is receiving service from the IOA holder. The Commission will require the IOA holder to "pull back" its service area boundaries (SAB) to eliminate any overlap with the auction winner's own

SAB, and to terminate service in the RSA upon notice from the auction winner that the latter is extending coverage into the area served under the IOA. The Commission feels that this will best serve the public interest by preventing localized disruptions in service during the transition period.

II. Final Regulatory Flexibility Analysis

A. Procedural Matters

1. Final Regulatory Flexibility Analysis

58. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making* in this docket. 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, Public Law 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The comments received are discussed above. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA. See 5 U.S.C. 604.

59. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 603, the Final Regulatory Flexibility Analysis (FRFA) is set forth above. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

60. *Report to Congress*: The Commission will include a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. See 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**. See 5 U.S.C. 604(b).

B. Ordering Clauses

61. Pursuant to 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 309(j), Part 22, 47 CFR is Amended as specified in the rule changes and the auctions for Markets 322A—Polk, AR, 592A—Barnes, ND, 727A—Ceiba, PR, and 672A—Chambers, TX be conducted under Part 1, Subpart Q of the

Commission's rules, 47 CFR 1.2101 *et seq.*, and that all eligible parties be permitted to participate in the bidding.

62. The rules and policies adopted in this Report and Order shall become effective April 15, 2002.

63. The Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 22

Rural areas.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

For the reasons discussed in the preamble, part 22 of title 47 of the Code of Federal Regulations is amended as follows:

PART 22—PUBLIC MOBILE SERVICES

1. The authority citation for part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 222, 303, 309, and 332.

2. Section 22.228 is added to Subpart B to read as follows:

§ 22.228 Cellular rural service area licenses subject to competitive bidding.

Mutually exclusive initial applications for Cellular Rural Service Area licenses are subject to competitive bidding. The general competitive bidding procedures set forth in Part 1, Subpart Q of this chapter will apply unless otherwise provided in this part.

3. Section 22.229 is added to Subpart B to read as follows:

§ 22.229 Designated entities.

(a) *Eligibility for small business provisions.* (1) A very small business is an entity that, together with its controlling interests and affiliates, has average annual gross revenues not exceeding \$3 million for the preceding three years.

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

(3) An entrepreneur is an entity that, together with its controlling interests and affiliates, has average annual gross revenues not exceeding \$40 million for the preceding three years.

(4) A consortium of very small businesses is a conglomerate organization formed as a joint venture

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

(5) For purposes of determining whether an entity meets any of the definitions set forth in paragraphs (a)(1), (a)(2), (a)(3), or (a)(4) of this section, the gross revenues of the entity, its controlling interests and affiliates shall be considered in the manner set forth in § 1.2110(b) and (c) of this chapter.

(b) *Bidding credits.* A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in this section may use the bidding credit specified in § 1.2110(f)(2)(i) of this chapter. A winning bidder that qualifies as a small business or a consortium of small businesses as defined in this section may use the bidding credit specified in § 1.2110(f)(2)(ii) of this chapter. A winning bidder that qualifies as an entrepreneur or a consortium of entrepreneurs as defined in this section may use the bidding credit specified in § 1.2110(f)(2)(iii) of this chapter.

4. Section 22.969 is added to Subpart H to read as follows:

§ 22.969 Cellular RSA licenses subject to competitive bidding.

Mutually exclusive applications for initial authorization for the following Cellular Rural Service Areas filed after the effective date of this rule are subject to competitive bidding procedures as prescribed by Sections 22.228 and 22.229: 332A—Polk, AR; 582A—Barnes, ND; 672A—Chambers, TX; and 727A—Ceiba, PR.

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