

and minorities face.²² The first such provision enables businesses owned by women or minorities to hold 50.1 percent of an applicant's equity while another investor holds 49.9 percent of the equity.²³ Second, under an exception to our affiliation rules, the gross revenues and total assets of firms controlled by minority investors in the applicant are not included for purposes of determining eligibility for the C block.²⁴ Third, small businesses and companies owned by minorities or women receive the most favorable installment payment options available to entrepreneurs' block applicants.²⁵ Finally, businesses owned by minorities or women and small businesses owned by minorities or women receive larger bidding credits under our rules.²⁶ The *Adarand* holding also potentially affects our commercial mobile radio service (CMRS) spectrum aggregation limit and cellular PCS cross-ownership rules under which ownership interests held by businesses owned by minorities and women, as well as small businesses and rural telephone companies, are subject to a higher attribution threshold.²⁷ In addition, under our cellular PCS Cross-ownership rule, entities that invest in broadband PCS licensees that are minority- or women-owned can benefit from a higher attribution threshold.

Overview

7. While we stress our continued commitment to the goal of ensuring broad participation in PCS by minority- and women-owned business, *Adarand* requires that we reevaluate our method for accomplishing this compelling objective. *Adarand*, which was issued just three days before applications were due for participation in the C block, imposes a strict scrutiny standard, the highest, most searching level of judicial review, for evaluating the provisions to encourage minority participation in PCS. That standard requires us to show a "compelling governmental interest" for taking race into account.²⁸ Under *Adarand* the agency must show that it considered "race-neutral alternatives" and that the program is "narrowly tailored" to meet the compelling governmental interest established by the record and findings.²⁹

8. While we believe that our current record for the C block auction is strong, we tentatively conclude that additional evidence would be required to meet the strict scrutiny standard. The time required for further fact-finding would necessitate a delay in holding the C block auction. We tentatively conclude that such a delay would put the C block winners at a greater competitive disadvantage vis-a-vis existing wireless carriers such as cellular and enhanced SMR carriers, who have a substantial head start in the market.³⁰ Additionally, we believe there is a high likelihood that before the auction, legal challenges would be filed to question whether we have met the strict scrutiny standard. Given the D.C. Circuit's willingness to stay the auctions under an "intermediate scrutiny standard,"³¹ there is a high likelihood that the court might impose another stay under the strict scrutiny standard of review. A stay would prevent the auction from going forward during litigation and cause lengthy delays in licensing and time to market for the eventual winners. Even if the auction were not stayed beforehand, there is a high likelihood that minority applicants and possibly female applicants who elected the bidding credits and other provisions available to members of those groups, would be subject to petitions to deny their licenses, legal challenges and possible injunctions on the issuance of their licenses. This would again greatly delay their entry into the market, and diminish their ability to compete.

9. Based on the letters we have received from potential bidders, many of whom have made extensive preparations to bid in the C block auction, we conclude that at this time, minority and women bidders, as well as other bidders, will have a better chance of becoming successful PCS providers if we eliminate the race- and gender-based provisions from the C block and adopt provisions based on economic size only. The likely delays in market entry from doing otherwise would thwart Congress's directive to disseminate PCS license quickly so competitive service to the public can begin forthwith. Because of the urgent situation posed by the need to auction these licenses in a speedy fashion so the businesses can get

to market, we reluctantly conclude that we must drop the race- and gender-based provisions and adopt standards based solely on economic size.

10. We propose to eliminate the race- and gender-based provisions in our rules in a manner that is the least disruptive to bidders preparing to bid in the C block auction. We recognize that many of the C block applicants, including minority- and women-owned businesses, as well as small businesses, have already attracted capital and formed business relationships in anticipation of the C block auction. We further understand that these relationships are more likely to survive if the auction is not significantly delayed, and our rule changes are minimally disruptive to existing business plans. We have received numerous informal comments expressing this point of view.³² We believe, therefore, it is the best interests of furthering competition and ownership diversity in the marketplace, that we eliminate as much legal uncertainty as possible and proceed rapidly to auction the C block licenses.

11. We want to emphasize that our tentative conclusion to eliminate race- and gender-based measures from the C block auction rules does not indicate that we have concluded that race- or gender-based measures are inappropriate for any of the other spectrum auctions we will hold in the future. Moreover, we do not concede that our C block auction rules themselves are unconstitutional in the wake of *Adarand*. We simply believe that our program must now be evaluated under a stricter constitutional standard than it was before. With regard to the C block auction, we tentatively conclude that the advantages of moving forward quickly outweigh the benefits that would be derived by developing an extensive supplemental record for these rules that will pass a strict scrutiny standard of review.³³ We seek comment

²² See *Fifth R&O*, 59 Fed. Reg. 37566 (July 22, 1994), 9 FCC Rcd at 5537-5538, 5580, ¶¶10-13, 113.

²³ 47 CFR § 24.709(b)(6).

²⁴ 47 CFR § 24.720(1)(11)(ii).

²⁵ 47 CFR § 24.711.

²⁶ 47 CFR § 24.712.

²⁷ 47 CFR §§ 20.6 and 24.204.

²⁸ *Adarand*, 63 U.S.L.W. at 4530.

²⁹ *Id*

³⁰ Cellular operators, for example, have been in the wireless market for over a decade, and after a very slow rise through the 1980's and into the 1990's sales have risen very quickly and cellular operators are currently enrolling about 28,000 new customers per day. See United States Department of Commerce, National Telecommunications and Information Administration, May 30, 1995 at 2.

³¹ *Telephone Electronics Corp v. FCC* 95-1015 (order granting stay).

³² See, e.g., Letter from Eliot J. Greenwald and Howard C. Griboff, attorneys with Fisher, Wayland, Cooper, Leader & Zaragoza L.L.P., representing Central Alabama Partnership L.P. 132 and Mobile Tri-States L.P. 130, to William F. Caton, Acting Secretary, FCC (June 16, 1995); Letter from Michael Walker, Executive Director, National Paging and Personal Communications Association, to Reed Hundt, Chairman, FCC (June 16, 1995); Letter from Sandra Goeken Martis, Wireless Works, Inc., to Cathy Sandoval, Office of Communications Business Opportunities, FCC (June 16, 1995); Letter from Jonathan Chambers, Director, Public Policy, Sprint Telecommunications Venture, to Reed E. Hundt, Chairman, FCC (June 19, 1995); Letter from Roy M. Huhndorf, President, Cook Inlet Region, Inc. to Reed E. Hundt, Chairman, FCC (June 14, 1995).

³³ With respect to other auctions, however, we may develop a supplemental record as part of our evaluation to meet the strict scrutiny standard of *Adarand*.