

on this tentative conclusion, and in particular, request information on the time needed to develop a study to support race-based measures and the scope of such a supplemental record. We conclude that our proposal to eliminate the race- and gender-based measures from the C block auction rules is consistent with our duty to implement the Budget Act.³⁴ We also seek comment on whether there are other ways to modify the rules to comply with the strict scrutiny standard without significantly delaying the C block auction.³⁵

12. Finally, we note that nothing in the TEC stay order or the *Adarand* decision calls into question the concept of an entrepreneurs' block. The D.C. Circuit singled out "those portions" of the Commission's Orders "establishing minority and gender preferences," not our rules designed to promote participation by small businesses.³⁶ Similarly, in *Adarand* the Court held that a strict scrutiny standard of review applies to preferences based on race, not size.³⁷ Thus, attempts to ensure that small businesses have the opportunity to compete with larger businesses are still judged under the deferential rational basis standard. Indeed, the entrepreneurs' block concept is bolstered by *Adarand* insofar as that decision requires the consideration of race-neutral measures to promote equal opportunity.³⁸ Our record in the competitive bidding proceeding suggests that many minority and women bidders will qualify as small businesses under our rules,³⁹ and, hence, be

entitled to a small business bidding credit and favorable installment payment terms.⁴⁰ In any event, very few businesses owned by minorities and women are excluded from the entrepreneurs' block under our \$125 million gross revenue and \$500 million total asset caps.

Proposed Rule Changes

A. Control Group Equity Structures

13. *Background.* Our current rules permit broadband PCS applicants for licenses in the C block to utilize one of two equity structures so that the gross revenues and total assets of persons or entities holding non-attributable interests in such applicants will not be considered.⁴¹ Use of either of these equity structures, however, requires applicants to form a "control group."⁴² Under the first equity structure option, the *Control Group Minimum 25 Percent Equity Option* (which is available to all applicants), the control group must hold at least 25 percent of the applicant's total equity and members of the control group must have *de facto* control of the control group and of the applicant, and hold at least 50.1 percent of the voting stock and all general partnership interests within the control group.⁴³ Of that 25 percent equity, at least 15 percent must be held by "qualifying investors."⁴⁴ The remaining ten percent may be held by qualifying investors, certain institutional investors, non-controlling existing investors in any preexisting entity that is a member of the control group, or individuals that are members of the applicant's management team.⁴⁵ Outside of the control group, the remaining 75 percent of the applicant's equity may be held by other non-controlling investors; but, no investor in the applicant can hold more

than 25 percent of the equity and remain non-attributable.⁴⁶

14. Under the second equity structure option, the *Control Group Minimum 50.1 Percent Equity Option* (which is currently available only to minority or women applicants), the control group must own at least 50.1 percent of the applicant's total equity, with members of the control group holding 50.1 percent of the voting stock and all general partnership interests within the control group, and having *de facto* control of both the control group and the applicant.⁴⁷ Of that 50.1 percent equity, at least 30 percent must be held by qualifying investors who are minority or women.⁴⁸ The remaining 20.1 percent may be held by qualifying investors, certain institutional investors, non-controlling existing investors in any preexisting entity that is a member of the control group, or individuals that are members of the applicant's management team.⁴⁹ Outside of the control group, the remaining 49.9 percent of the applicant's equity may be held by a single non-controlling investor who is considered non-attributable.⁵⁰

15. *Discussion.* We propose to modify our rules to permit all C block applicants to avail themselves of the 50.1/49.9 percent equity structure. When we adopted the *Control Group Minimum 50.1 Percent Equity Option* in the *Fifth R&O*, we determined that making such a mechanism available to minority- or women-owned businesses would better enable them to attract adequate financing. We have previously noted that the primary impediment to participation by businesses owned by women and minorities in broadband PCS is a lack of access to capital.⁵¹ In light of the Supreme Court's holding in *Adarand*, however, we proposed to make the *Control Group Minimum 50.1 Percent Equity Option* available to small businesses⁵² and entrepreneurs rather than limiting it to minority- or women-owned businesses. We tentatively conclude that this proposed rule change would cause the least disruption to existing business relationships formed in anticipation of the C block auction that were premised on the use of this particular equity structure. Our

³⁴ See, e.g., *Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 89-553, 60 Fed. Reg. 21987 (1995) (900 MHz SMR Second R&O/Second FNPRM).

³⁵ See e.g., Letter from Thomas A. Hart, Jr. National Paging and Personal Communications Assoc., et. al. to William E. Kennard, General Counsel, FCC (June 22, 1995); Letter from David Honig, Executive Director, Minority Media and Telecommunications Council to William E. Kennard, General Counsel, FCC (June 21, 1995); Letter from James L. Winston, Executive Director and General Counsel, National Association of Black Owned Broadcasters, and Lois E. Wright, Vice President and Corporate Counsel Inner City Broadcasting Corp., to Reed E. Hundt, Chairman, FCC (June 15, 1995).

³⁶ *Telephone Electronics Corp. v. FCC*, No. 95-1015 (order granting stay).

³⁷ *Adarand*, 63 U.S.L.W. at 4526.

³⁸ See *Adarand*, *Id.* at 4533, quoting *Crosby*, 488 U.S. at 507 (under strict scrutiny, courts ask "whether there was any consideration of the use of race-neutral means to increase minority business participation.")

³⁹ See, e.g., 900 MHz SMR Second R&O/Second FNPRM, 60 Fed. Reg. 21987 (indicating that "U.S. Census Data shows that approximately 99% of all women-owned businesses and 99% of all minority-owned businesses generated net receipts of \$1 million or less", citing *Women-Owned Business*, WB 87-1, 1987 Economic Census, p. 144, Table 8;

Survey of Minority-Owned Business Enterprises, MB 87-4, 1987 Economic Census, pp. 81-82, Table 8).

⁴⁰ 47 CFR §§ 24.712 and 24.711.

⁴¹ See 47 CFR § 24.709(b)(5) and (b)(6).

⁴² Under the control group mechanism, the gross revenues and total assets of certain investors are not attributed provided the applicant has a control group consisting of one or more individuals or entities that are in *de jure* and *de facto* control of the applicant. The gross revenues and total assets of each member of the control group are counted toward the financial caps applicable to the entrepreneurs' block licenses. See 47 CFR § 24.720(k).

⁴³ 47 CFR § 24.709(b)(5)(i).

⁴⁴ Id. Under our rules, "qualifying investors" are defined as members of or holders of an interest in members of the applicant's or licensee's control group who gross revenues and total assets, when aggregated with those of all other attributable investors and affiliates, do not exceed the gross revenues and total assets restrictions specified in our rules with regard to eligibility for entrepreneurs' block licenses. 47 CFR § 24.720(m)(1).

⁴⁵ 47 CFR § 24.709(b)(5)(i)(C).

⁴⁶ 47 CFR § 24.709(b)(3).

⁴⁷ 47 CFR § 24.709(b)(6)(i).

⁴⁸ 47 CFR § 24.709(b)(6)(i)(A).

⁴⁹ 47 CFR § 24.709(b)(6)(i)(C).

⁵⁰ 47 CFR § 24.709(b)(4).

⁵¹ *Fifth R&O*, 59 Fed. Reg. 37566 (July 22, 1994), 9 FCC Rcd at 5537, ¶ 10.

⁵² Under our rules, a "small business" is defined as an entity that, together with its affiliates and persons or entities that hold interest in such entity and their affiliates, has average gross revenues that are not more than \$40 million for the preceding three years. 47 CFR § 24.720(b)(1).