

proposed rule change enables minority- or women-owned businesses to retain their 50.1/49.9 percent equity structures while extending this control group option to other applicants in the entrepreneurs' block as well. We also expect that this proposed rule change would mitigate the likely legal challenges that could result if we moved forward with this rule in its current form. Consequently, the proposed rule change would facilitate the expeditious dissemination of the licenses. We seek comment on this proposed rule change and on our tentative conclusions.

16. We also recognize that, as a result of the proposed rule change, all C block applicants would be able to take advantage of the 50.1/49.9 percent equity structure, including small businesses and entrepreneurs. Nevertheless, we view this as the best approach to preserve many of the existing business relationships that have been formed, including those of women and minorities. We think this approach would be the least disruptive and would allow many minority or women applicants—both entrepreneurs and small businesses—to proceed. We seek comment on this analysis.

17. Although we propose to eliminate the race- and gender-based measures currently provided in our rules for the C block licenses, we, nonetheless, intend to continue to request bidder information on the short-form filings as to minority- or women-owned status. We tentatively conclude that such information will assist us in analyzing the applicant pool and the auction results to determine whether we have accomplished substantial participation by minorities and women through the broad provisions available to small businesses as directed by Congress. This information will assist us in preparing our report to Congress on the participation of designated entities in the auctions and in the provision of spectrum-based services.⁵³ In addition, such information will be relevant in developing a supplemental record should we find that special provisions solely for small businesses prove unsuccessful in encouraging dissemination of licenses to a wide variety of applicants, including businesses owned by members of minority groups and women. In this regard, we retain discretion to tailor our approach for future auctions. We seek comment on this monitoring proposal.

B. Affiliation Rules

18. *Background.* In the *Fifth R&O*, we adopted specific affiliation rules for

identifying all individuals and entities whose gross revenues and assets must be aggregated with those of the applicant in determining whether the applicant exceeds the financial caps for the entrepreneurs' blocks or for small business size status.⁵⁴ Our affiliation rules identify which individuals or entities will be found to control or be controlled by the applicant or an attributable investor in the applicant by specifying which ownership interests or other criteria will give rise to a finding of control and consequent affiliation. We have adopted two narrowly tailored exceptions to our affiliation rules in the broadband PCS context. Under one exception, applicants affiliated with Indian tribes and Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, are generally exempted from the affiliation rules for purposes of determining eligibility to participate in bidding on C block licenses and to qualify as a small business with a rebuttable presumption that revenues derived from gaming, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, will be included in the applicants' eligibility determination.⁵⁵ Under the second exception, the gross revenues and assets of affiliates controlled by minority investors who are members of the applicant's control group are not attributed to the applicant for purposes of determining compliance with the eligibility standards for entry into the entrepreneurs' block.⁵⁶

19. *Discussion.* We propose to eliminate the exception to our affiliation rules pertaining to minority investors. In crafting this exception, we anticipated that it would permit minority investors who control other concerns to be members of an applicant's control group and to bring their management skills and financial resources to bear in its operation without the assets and revenues of those other concerns being counted as part of the applicant's total assets and revenues.⁵⁷ We further anticipated that such an exception would permit minority applicants to pool their resources with other minority-owned businesses and draw on the expertise of those who have faced similar barriers to raising capital in the past.⁵⁸ Consequently, we tentatively conclude that it would be imprudent to

extend such exception to all entrepreneurs because to do so would frustrate the Commission's goals in establishing the entrepreneurs' block—namely, to ensure that broadband PCS will be disseminated among a wide variety of applicants and to exclude many large telecommunications companies from bidding on such blocks.⁵⁹

20. Although this proposed rule change may significantly affect certain existing business relationships formed in anticipation of the C block auction, we must balance our concern about minimizing the adverse impact on a limited number of existing business relationships with our desire to mitigate the legal challenges that are likely to result from the Court's *Adarand* decision in the absence of such rule change. In this context, we tentatively conclude that such rule change will affect a limited number of existing business relationships. By contrast, without such rule change, award of all entrepreneurs' block licenses could potentially be subject to substantial delay as a result of legal challenges to this race-based exception to the affiliation rules (regardless of the fact that such exception is limited in scope). We tentatively conclude that such outcome would be inconsistent with both the spirit and mandate of the Budget Act.⁶⁰ We also tentatively conclude that the proposed rule change not only complies with the Budget Act but also benefits the general public, since it would facilitate rapid deployment of broadband PCS in a manner most likely to avoid judicial delay. We seek comment on this proposed rule change and these tentative conclusions. We also do not propose to eliminate the affiliation exception for Indian tribes and Alaska Regional or Village Corporations. We tentatively conclude that the "Indian Commerce Clause" of the United States Constitution provides an independent basis for this exception that is not questioned by the *Adarand* decision.⁶¹

⁵⁹ See *Fifth R&O*, 59 Fed. Reg. 37566 (July 22, 1994), 9 FCC Rcd at 5538, ¶ 12.

⁶⁰ The Budget Act instructs the Commission to provide for the "rapid deployment of new technologies * * * without administrative or judicial delays." 47 U.S.C. 309(j)(3)(A).

⁶¹ *Order on Reconsideration*, 59 Fed. Reg. 43062 (Aug. 22, 1994), FCC 94-217, (released Aug. 15, 1994); *Fifth MO&O*, 59 Fed. Reg. 63210 (Dec. 7, 1994), 9 FCC Rcd at 5548-4449, ¶¶ 42-43. See also *Oklahoma Tax Commission v. Chickasaw Nation*, 63 U.S.L.W. 4594, 4596 (Supreme Court upheld applicability of a categorical immunity from certain State taxation to Indian tribes and their members and not to "non-Indians.")

⁵⁴ *Fifth R&O*, Fed. Reg. 37566 (July 22, 1994), 9 FCC Rcd at 5620, 5625.

⁵⁵ 47 CFR § 24.720(l)(1)(i).

⁵⁶ 47 CFR § 24.720(l)(1)(ii).

⁵⁷ *Fifth MO&O*, 59 Fed. Reg. 63210 (Dec. 7, 1994), 10 FCC Rcd at 425-426, ¶ 41.

⁵⁸ *Id.*

⁵³ See 47 U.S.C. § 309(j)(12)(D).