

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20 and 24

[PP Docket No. 93–253, GN Docket No. 90–314, GN Docket No. 93–252, FCC 95–301]

Race and Gender Based Provisions for Auctioning C Block Broadband Personal Communications Services Licenses

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission adopts this *Sixth Report and Order* amending its competitive bidding rules to eliminate race- and gender-based provisions for the auctioning of C block broadband Personal Communications Services licenses. The Commission adopts the rule changes to prevent potential legal delays in conducting the C block auction, while minimizing disruptions to existing business relationships that were formed under the current rules.

EFFECTIVE DATE: July 21, 1995.

FOR FURTHER INFORMATION CONTACT:

Kathleen O'Brien Ham, (202) 418–0660 (Wireless Telecommunications Bureau), Peter Tenhula, (202) 418–1720 (Office of General Counsel), or Jackie Chorney, (202) 418–0600 (Wireless Telecommunications Bureau).

SUPPLEMENTARY INFORMATION: This is the Commission's *Sixth Report and Order* in PP Docket No. 93–253, GN Docket No. 90–314, GN Docket No. 93–252, adopted July 18, 1995 and released July 18, 1995. The full text of Commission decisions are available for inspection and copying during normal business hours in the FCC Docket Branch (Room 230), 1919 M. Street, N.W., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, N.W., Washington, DC 20037.

Summary of Sixth Report and Order

Introduction

1. In this *Sixth Report and Order*, we modify our competitive bidding rules for the "C block" of Personal Communications Services in the 2 GHz band (broadband PCS) to eliminate race- and gender-based provisions that we believe raise legal uncertainties in the aftermath of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995). We take this action to accomplish three goals: (1) promotion of rapid delivery of additional competition to the wireless

marketplace by C block licensees; (2) reduction of the risk of legal challenge; and (3) minimal disruption to the plans of as many applicants as possible who were in advanced stages of planning to participate in the C block auction when *Adarand* was announced. While taking action to ensure that the auction commences quickly, we also want the maximum number of existing business relationships formed under our prior rules and in anticipation of the C block auction—including those of women and minority applicants—to remain viable. We emphasize that our action today does not indicate that race- and gender-based provisions at issue here could not be sustained without further development of the record. Nor do we believe that such measures generally are inappropriate for future auctions of spectrum-based services. We are considering the means we should take to develop a supplemental record that will support use of such provisions in other spectrum auctions held post-*Adarand*.

Background

2. *Legislation and Commission Action.* In the Omnibus Budget Reconciliation Act of 1993, Congress authorized the competitive bidding of spectrum-based services and mandated that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively known as "designated entities") be ensured the opportunity to participate in the provision of such services. In the *Fifth Report and Order*, in PP Docket No. 93–253, we adopted competitive bidding rules designed to encourage designated entity participation in broadband PCS (59 Fed. Reg. 5532). Specifically, we established "entrepreneurs' blocks" (the C and F frequency blocks allocated for broadband PCS) for which eligibility is limited to individuals and entities under a certain financial size. We also adopted special provisions for businesses owned by members of minority groups or women and we analyzed their constitutionality utilizing the "intermediate scrutiny" standard of review articulated in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564–565 (1990). We made subsequent changes to the entrepreneurs' block rules and special provisions for designated entities in the *Fifth MO&O* (59 Fed. Reg. 53,364).

3. *Litigation and Auction Schedule.* On March 15, 1995, in response to a request filed by Telephone Electronic Corp. (TEC) alleging that our broadband PCS competitive bidding rules violated equal protection principles under the

Constitution, the U.S. Court of Appeals for the District of Columbia Circuit issued an *Order* stating that "those portions" of the Commission's *Order* "establishing minority and gender preferences, the C block auction employing those preferences, and the application process for that auction shall be stayed pending completion of judicial review." As a result, the C block auction, then scheduled to commence 75 days after the March 13, 1995 close of the A and B block auction, was postponed. The court's stay was subsequently lifted on May 1, 1995, pursuant to TEC's motion, after TEC decided to withdraw its appeal. The Commission established August 2, 1995 as the new auction date.

4. On June 12, 1995, three days before initial short form applications (FCC Form 175) for the August 2nd C block auction were due, the Supreme Court decided *Adarand*. The Supreme Court decided to overrule *Metro Broadcasting* "to the extent that *Metro Broadcasting* is inconsistent with" *Adarand*'s holding that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." As a result of the *Adarand* decision, the constitutionality of any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest. By Public Notice released June 13, 1995, the Commission postponed the C block auction again in order to give interested bidders and the Commission time to evaluate the impact of *Adarand*. We later established an August 29, 1995 date for the auction.

5. *Further Notice of Proposed Rule Making.* On June 23, 1995, we adopted a *Further Notice of Proposed Rule Making*, in which we identified four race- and gender-based measures in our C block auction rules and two similar provisions in our commercial mobile radio service (CMRS) and broadband PCS rules that were affected by the Court's ruling in *Adarand* (60 Fed. Reg. 34200–34201). In the *Further Notice*, we proposed to eliminate these race- and gender-based provisions and instead modify such measures to be race- and gender-neutral (60 Fed. Reg. 34202–34203). We, at the same time, stated that we remain committed to the mandates and objectives of the Budget Act.

6. In the *Further Notice*, we set forth our specific proposals and our rationale for these C block auction rule changes. While we stressed our commitment to the goal of ensuring broad participation in PCS by designated entities, particularly minority- and women-owned businesses, we indicated that *Adarand* required us to reevaluate our