

favorable bidding credits and installment payment plans contained in our rules (60 Fed. Reg. 34200). As a result, because we have evidence which supports a conclusion that many designated entities, including minority and women-owned businesses, would qualify as small businesses and, thus, benefit from such provisions, we believe that our action is fully consistent with the Budget Act. We further conclude that the proposals we adopt today are necessary under the circumstances and indeed will best serve the public interest.

12. With respect to alternative rule change proposals presented by the commenters, we conclude, as discussed more fully below, that because they draw distinctions based upon race, most of these proposals would engender the same danger of constitutional infirmity and would result in the same legal uncertainties that we seek to mitigate by these decisions. To the extent that the commenters have presented race- and gender-neutral rule changes, we conclude, as discussed herein, that the proposals set forth in the *Further Notice*, which are broadly supported by numerous commenters, constitute the more prudent and expedient course of action for proceeding with the auctioning of the C block licenses post-*Adarand*.

B. 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 "control group" structures, so that the gross revenues and total assets of persons or entities holding interests in such applicants will not be considered. These two equity structures are the *Control Group Minimum 25 Percent Equity Option* (which is available to all applicants) and the *Control Group Minimum 50.1 Percent Equity Option* (which is currently available only to minority or women applicants). In the *Further Notice*, we proposed to modify our rules to permit all C block applicants, including small businesses and entrepreneurs, to avail themselves of the *Control Group Minimum 50.1 Percent Equity Option*. 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 (59 Fed. Reg. 5532). 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. We tentatively

concluded that such a rule change would cause the least disruption and open up additional financing options for other applicants in the C block auction. The *Further Notice* sought comment on this proposed rule change and tentative conclusion (60 Fed. Reg. 34,200).

14. *Comments.* Most commenters agree that the *Control Group Minimum 50.1 Percent Equity Option* should be made available to all C block applicants. Several commenters express concerns about further delay of the auctioning and licensing of the C block and agree that this minimal rule change would not unduly disrupt existing business relationships. Other commenters support the proposed rule change on the basis that it would substantially reduce, if not eliminate, the possibility of legal challenges to the C block auction based on the *Adarand* decision. DCR Communications and Small Business PCS argue that elimination of minority- and gender-based provisions would provide meaningful opportunity for small businesses, as well as minority- and women-owned businesses, to participate in the C block auction.

15. Other commenters, however, oppose extending availability of the *Control Group Minimum 50.1 Percent Equity Option* to all entrepreneurs. K&M proposes that this equity structure only be available to "very small businesses," defined as businesses with revenues up to \$20 million. Omnipoint argues that because the *Control Group Minimum 50.1 Percent Equity Option* was created to address the problems experienced by women- and minority-owned companies in accessing capital, the Commission should either justify the measure under the strict scrutiny standard of review or eliminate it completely. Omnipoint expresses concern that extension of the *Control Group Minimum 50.1 Percent Equity Option* equity structure to all C block applicants would increase the number of "shams" financed by big companies. Similarly, Silverman and Century oppose allowing large companies, whether minority- or women-owned, as a general matter, to own more than 25 percent of a C block applicant's equity.

16. *Decision.* We have decided to amend our rules to permit all C block applicants to avail themselves of the *Control Group Minimum 50.1 Percent Equity Option*. This amendment enables minority- or women-owned applicants structured under our prior rule to retain the *Control Group Minimum 50.1 Percent Equity Option*, while extending this option to other applicants in the entrepreneurs' block as well. We recognize that we originally established the *Control Group Minimum 50.1*

Percent Equity Option as a race- and gender-based measure aimed at addressing the unique financing problems experienced by women- and minority-owned businesses. All C block applicants, as well as the public, will be better served if we proceed expeditiously in a manner which both reduces the likelihood of legal challenges and enhances the opportunities for a wide variety of applicants, including designated entities, to obtain licenses and rapidly deploy broadband PCS service. Thus, we conclude that use of this equity structure should now be dependent upon economic size, a factor not implicated by the Court's decision in *Adarand*. Moreover, retaining the *Control Group Minimum 50.1 Percent Equity Option* should help to preserve existing business relationships formed in reliance on our prior rules and encourage participation in the C block auction.

17. We disagree with Omnipoint's position on the *Control Group Minimum 50.1 Percent Equity Option* rule change. In the *Fifth R&O* and the *Fifth MO&O*, we indicated that the equity structure options provided under our rules are designed to provide qualified bidders with a reasonable amount of flexibility in attracting needed financing from other entities, while ensuring that such entities do not acquire controlling interests in the qualified bidders (59 Fed. Reg. 5532, 59 Fed. Reg. 53,364). With respect to the *Control Group Minimum 50.1 Percent Equity Option*, we previously explained that in order to guard against abuses, the control group of applicants choosing this option must own at least 50.1 percent of the applicant's equity, as well as retain control and hold at least 50.1 percent of the voting stock. We have previously concluded that this requirement reduces substantially the danger that a well-capitalized investor with substantial ownership stake will be able to assume *de facto* control of the applicant. In addition, we previously clarified our rules so that persons or entities that are affiliates of one another, or that have an "identity of interests," as well as their other investors pursuant to Sections 24.709(c) and 24.813 will be treated as though they are one person or entity and their ownership interests aggregated for purposes of determining compliance with our nonattributable equity limits. This clarification was aimed at discouraging large investors from circumventing our equity limitations for nonattributable investors. We believe that these measures will be effective in deterring the type of "sham" deals