

status would, if considered with other control group members, make the applicant ineligible for the C block or small business status. Accordingly, we clarify our definition of "qualifying investor" for purposes of Section 24.709(b) (5)(i)(C) and (6)(i)(C).

C. Affiliation Rules

24. *Background.* We adopted affiliation rules for purposes of 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. There are two exceptions to our broadband PCS affiliation rules. 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 exempt from the affiliation rules for purposes of determining eligibility to participate in bidding on C block licenses. These applicants additionally 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 applicant's eligibility determination. 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.

25. In the *Further Notice*, we proposed to eliminate the exception pertaining to minority investors (59 Fed. Reg. 34,204). In crafting this exception, we anticipated that it would permit minority investors that control other business entities 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. 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. In the *Further Notice*, we tentatively concluded that it would be imprudent to respond to *Adarand* by extending this 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 including small businesses and rural telephone companies (60 Fed. Reg. 34,200).

26. The *Further Notice* proposed to retain the affiliation exception for Indian tribes and Alaska Regional or Village Corporations (60 Fed. Reg. 34,204). We tentatively concluded that the "Indian Commerce Clause" of the United States Constitution provides an independent basis for this exception that is not implicated by the *Adarand* decision.

27. *Comments.* The commenters overwhelmingly support elimination of the exception to our affiliation rules that excludes the gross revenues and total assets of affiliates controlled by minority investors who are members of an applicant's control group. Some commenters agree that this rule change would reduce the likelihood of a further delay to the C block auction resulting from legal challenges premised on the *Adarand* decision. Other commenters argue that the Court's ruling in *Adarand* requires elimination of the affiliation rule exception applicable solely to investors who are members of minority groups. With respect to the effect of such rule change, Central Alabama & Mobile Tri-States argue that by virtue of the current rule, well-financed entities who might otherwise not qualify as an entrepreneur or as small businesses are allowed to participate in the C block which is ultimately to the detriment of those C block applicants who actually experience difficulties in accessing capital. DCR Communications contends that the proposed rule change would not deprive women and minority-owned businesses of investment from other minorities whose affiliates would exceed the financial size limitations imposed under our rules; rather, it would limit such investment to 25 percent before it becomes attributable.

28. BET, NABOB, and O.N.E. oppose elimination of the affiliation rule exception pertaining to investors who are members of minority groups. NABOB argues that such elimination will prevent many bidders from including experienced, successful minority entrepreneurs in their control groups, which, in turn, may cause them to lose financing dependent upon such alliances, and, thus, prevent them from participating in the C block auctions. Similarly, BET argues that this rule change would not only exclude several minority entrepreneurs, but, because the A and B blocks already have been licensed, such minorities would be precluded from any meaningful

participation in broadband PCS. BET further argues that elimination of the affiliation rule exception would be inconsistent with the congressional mandate given in the Budget Act and the record established by the Commission regarding those problems experienced by minority-owned businesses that the exception was specifically designed to address. Also, BET contends that *Adarand* does not require such a rule change.

29. Some commenters generally propose alternative modifications to the affiliation rule exception for minority investors. NABOB proposes that the exception be modified so that an entity controlled by a member of the control group of a small business applicant or licensee would not be considered an affiliate of the applicant if the entity would qualify as an entrepreneur. Spectrum Resources proposes that investors who have affiliates with gross revenues and total assets sufficiently large to disqualify a small business applicant would still be allowed to invest in the application if their investment was capped at a relatively low level, such as \$100,000. Spectrum Resources argues that this modification would increase the pool of investors for small businesses while ensuring that the applicant remains a small business.

30. BET suggests four alternative affiliation rule exceptions. Under BET's first alternative exception, it proposes that the exception be made available only when the revenues and assets of each of the affiliates of minorities in a control group separately qualify as entrepreneurs under our rules. If, however, any of the affiliates exceeded the financial limitations for the C block, then the minority-owned applicant would not be allowed to participate in the C block auction. BET argues that this proposal is analogous to the Commission's treatment of small business consortia in the C Block. Under BET's second proposal, the revenues and assets of affiliates of minority members of an applicant's control group would be excluded if the average revenues of the affiliates over the past two years are less than the C block financial limits. BET argues that without such modification, Native Americans are being singled out for special treatment in violation of the Equal Protection Clause. Under these proposals, BET suggests that aggregation of the gross revenues and total assets of these affiliates would not be required in determining whether the applicant qualifies as an entrepreneur or a small business. BET's other affiliation rule exception proposals consist of making the first two proposals described above