FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 97–82; FCC 00–274]

Competitive Bidding Procedures

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document the Federal Communications Commission (Commission) seeks comments on a total assets test to determine small business status and propose exceptions to the attribution rule's requirement that certain stock interest be counted on a ''fully diluted'' basis.

DATES: Comments are due on or before October 30, 2000. Reply comments are due on or before November 27, 2000.

ADDRESSES: Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. *See* ''Filing Procedures.''

FOR FURTHER INFORMATION CONTACT: Leora Hochstein, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418–1022.

SUPPLEMENTARY INFORMATION: This is a summary of a Fourth Further Notice of Proposed Rule Making (*Fourth FNPRM*) adopted on July 27, 2000, and released on, August 14, 2000. The complete text of this *Fourth FNPRM*, including attachments, is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW, Washington, DC. It may also be purchased from the Commission's copy contractor, International Transcription Services, Inc. (ITS, Inc.), 1231 20th Street, NW, Washington, DC 20036, (202) 857–3800. It is also available on the Commission's web site at http://www.fcc.gov/wtb/auctions.

Synopsis of the Further Notice of Proposed Rule Making

A. Rules Governing Designated Entities

i. Total Assets Test

1. *Background.* In the first *Part 1 Notice of Proposed Rulemaking* 62 FR 13540 (March 21, 1997) in this proceeding, we proposed to define small businesses, for the purposes of auctions, ''purely in terms of gross revenues.'' In another proceeding, *Second Order on Reconsideration* 62 FR 48787 (September 17, 1997) we observed that ''[a]ssets, being potentially fluid and subject to inconsistent valuation * * * are generally much less ascertainable than gross revenues. * * *'' In the *Part 1 Third Report and Order*, 63 FR 2315 (January 15, 1998) we adopted our proposal to use gross revenues as our general standard for measuring a business' size. We indicated at that time that a gross revenues-based standard provides ''an accurate, equitable, and easily ascertainable measure of business size.'' Furthermore, we observed that while a total assets test had been used in the past to determine eligibility for participation in entrepreneur block auctions, it had not been employed for determining small business eligibility. We also relied on the Small Business Act, which controls how agencies may prescribe size standards for categorizing small businesses. This statute provides no assets test for categorizing business concerns that provide services.

2. *Discussion.* The Commission intends its small business provisions to be available only to bona fide small businesses. While we have concluded in the past to use gross revenues as the measure of business size, based on correspondence from the Small Business Administration, we take this opportunity to revisit the issue of whether to use a total assets test as well. We seek comment on whether the use of a total assets test, in conjunction with the gross revenues measure already employed, would enhance the Commission's determinations of small business status. For example, commenters may address whether a gross revenues standard alone allows participation of legitimate start-up companies that are supported only by assets held by affiliates. In the alternative, commenters should address whether our comprehensive affiliation rules counterbalance the effects of a gross revenues standard when applied to such enterprises. We ask that commenters cite to specific statistical and/or anecdotal evidence when addressing these issues. If supporting use of an assets test, commenters should address appropriate thresholds for small business determinations. For example, commenters may address whether the $500 million total assets test used in determining eligibility for entrepreneurs' block auctions provides a suitable benchmark. *See* Implementation of Section 309(j) of the Communications Act-Competitive Bidding, *Fifth Report and Order* 59 FR 37566 (July 7, 1994). A more complete record on this matter will assist the Commission in meeting its goals for small business participation in future spectrum auctions.

ii. Attribution of Gross Revenues or Total Assets of Investors and Affiliates

3. *Background.* In the *Second Notice*, 63 FR 770 (January 7, 1998) we sought further comment on whether to adopt a ''controlling interest'' standard as our general rule for attributing to an applicant the gross revenues of its investors and their affiliates in determining whether the applicant is eligible for small business preferences. In the *Fifth Report and Order*, we adopt the ''controlling interest'' standard as our general attribution rule for all future auctions. For purposes of calculating equity held in an applicant, the ''controlling interest'' definition provides for full dilution of certain stock interests, such as warrants, stock options, and convertible debentures. Accordingly, under the rule we adopt today, as well as under our existing rules, agreements of this type are generally treated as if the rights thereunder have been fully exercised. In our Competitive Bidding, Fifth Memorandum Opinion and Order (''*Fifth M O & O*''), 59 FR 63210 (December 7, 1994) we established two exceptions to the ''fully diluted'' requirement for the broadband PCS attribution rule. We decided that two types of ownership interests, ''rights of first refusal'' and ''put'' options, would not be considered on a fully diluted basis for purposes of calculating ownership levels.

4. *Discussion.* In this *Fourth FNPRM*, we seek comment on whether to incorporate into our part 1 general competitive bidding rules the two exceptions we adopted for our broadband PCS attribution rule. We also seek comment on a proposed third exception to our general requirement that we treat certain stock interests as ''fully exercised.''

5. Our attribution rules are designed to preserve control of the applicant by eligible entities while allowing investment in the applicant by entities that do not meet the size restrictions in our rules. We recognize that some forms of stock options and convertible debt instruments are common and often beneficial to the management of a company. Convertible debt instruments may also allow designated entities to obtain debt financing at a lower cost than would otherwise be available, thereby preserving working capital for such uses as the further construction of facilities. Because our rules generally require us to treat stock interests on a fully diluted basis, if an applicant grants its lender stock conversion rights in several promissory notes, the lender's equity could exceed the applicable limit

or threshold, thus requiring the applicant to include the lender's gross revenues in determining its eligibility as a designated entity.

6. Our proposed exception to the general attribution rule is a refinement to the ''fully diluted'' requirement that addresses stock conversion rights that are granted on a contingent basis. An applicant may grant conversion rights on a contingent basis, such rights vesting only in the event that the lender first assigns or transfers all interest in one or more other debt instruments to a qualified unaffiliated third party. Thus, the contingent right of conversion in one debt instrument could only be exercised upon divestiture of enough equity associated with the other debt instruments to allow the lender to remain below the applicable equity limit.

7. We tentatively conclude that furtherance of the policy underlying § 1.2110(c)(5)(v) of our designated entities rule does not require us to consider all existing stock conversion rights as having been fully exercised simultaneously in a case where exercise of the various conversion rights are mutually exclusive by their terms. We therefore propose an exception to the ''fully diluted'' requirement in § 1.2110(c)(5)(v) to permit conversion rights or stock options to be considered individually rather than collectively when they are mutually exclusive. Under this interpretation, for the purpose of calculating ownership interests, all stock interests would continue to be calculated on a fully diluted basis, but if a stock interest by its terms is mutually exclusive of one or more other stock interests, the various ownership interests would be treated as having been fully exercised only in the possible combinations in which they can be exercised by their holder.

8. We seek comment on whether we should amend the controlling interest standard in our part 1 general competitive bidding rules to include this exception to our requirement for calculating ownership interests on a fully diluted basis. Under the proposed rule, ownership interests that by their terms are capable of being exercised simultaneously or successively would continue to be treated collectively as if the rights thereunder have been fully exercised. Ownership interests that are mutually exclusive would be considered separately, but each mutually exclusive ownership interest would be considered in combination with all other ownership interests that are capable of being exercised with it simultaneously or successively. Thus, in calculating the equity held in an applicant, we propose to consider the various combinations of stock options or conversion rights that could possibly be exercised by an investor. For each combination, the ownership interests would be considered to have been fully exercised, and each combination would then be reviewed in the context of the specific equity limit or threshold applicable in a given case. We also propose that, for purposes of this rule, we consider one ownership interest to be mutually exclusive of another only if the agreement that conveys the first interest contains explicit language making it clear that the rights conveyed by that agreement cannot be exercised unless all ownership rights associated with the other agreement are either terminated or transferred or assigned to a qualified unaffiliated third party.

9. We further propose to codify in our part 1 general competitive bidding rules the policy under which we have previously adopted two exceptions to our broadband PCS attribution rule for the same reasons identified in the *Fifth M O & O.* Under these exceptions, we would not treat ''rights of first refusal'' and ''put'' options as having been exercised for purposes of calculating ownership levels. We seek comment on this proposal.

B. Procedural Matters And Ordering Clauses

i. Regulatory Flexibility Analysis

10. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the proposals and tentative conclusions set forth in the *Fourth FNPRM* in WT Docket No. 97–82. Written public comments are requested on the IRFA. Comments on the IRFA must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines for comments on the *Fourth FNPRM.* In accordance with the RFA, the Commission will send a copy of this *Fourth FNPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

ii. Paperwork Reduction Act Analysis

11. This *Fourth FNPRM* contains neither a new nor a modified information collection.

C. Filing Procedures

12. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before Ocotber 30, 2000, and reply comments on or before November 27, 2000. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (May 1, 1998).

13. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply.

14. Parties that choose to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, The Portals, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition, a courtesy copy should be delivered to Leora Hochstein, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, SW., Room #4A633, Washington, DC 20554.

15. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. Comments and reply comments will be available for public inspection and duplication during regular business hours in the FCC Reference Information Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. Copies also may be obtained from International Transcription Services, Inc., 445 12th Street, SW., Room CY–B400, Washington, DC 20554, (202) 314–3070.

D. Contacts for Further Information

16. For further information concerning the *Fourth FNPRM*, contact Leora Hochstein at (202) 418–1022 (Auctions and Industry Analysis

Division, Wireless Telecommunications Bureau).

E. Ordering Clauses

17. Authority for issuance of this *Fourth FNPRM* is contained in sections 4(i), 309(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 309(j).

18. It is further ordered that the Commission's Consumer Information Bureau, Reference Operations Division, shall send a copy of this *Fourth FNPRM* including the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

Initial Regulatory Flexibility Analysis

19. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the rules proposed in this *Fourth FNPRM* in WT Docket No. 97–82. Written public comments are requested on the IRFA. Comments on the IRFA must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines for comments on the *Fourth FNPRM.* The Commission will send a copy of the *Fourth FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

A. Need for, and Objectives of, This Fourth FNPRM

20. This *Fourth FNPRM* is being initiated to secure comment on additional issues relating to the general competitive bidding rules for all auctionable services. Specifically, the *Fourth FNPRM* seeks comment on whether the Commission should use a total assets test, in conjunction with the gross revenues measure already employed, in determining whether auction applicants qualify as small businesses. The Commission seeks to ensure that only bona fide small businesses are eligible for the small business provisions. It, therefore, solicits comment on whether the application of a total assets test would enhance its determinations of small business status. Further, in the *Order on Reconsideration*, *Fifth Report and Order*, (published elsewhere in this issue of the **Federal Register**), the Commission adopts as its general attribution rule a ''controlling interest'' standard, which provides for the full dilution of certain stock interests for purposes of calculating equity held in an applicant. In this *Fourth FNPRM*, the Commission proposes to codify in the part 1 competitive bidding rules the policy under which it previously adopted two exceptions to the ''fully diluted'' requirement of its broadband PCS attribution rule. Under these exceptions, two types of ownership interests, ''rights of first refusal'' and ''put'' options, would not be considered on a fully diluted basis for purposes of calculating ownership levels. The Commission also seeks comment on whether it should adopt a third exception to the ''fully diluted'' requirement of § 1.2110(b)(4)(v) of the Commission's rules. The Commission proposes that, in calculating the equity held in an applicant, the conversion rights or stock options be considered individually rather than collectively when they are mutually exclusive. The Commission believes that these proposals will enhance its assessments of small business eligibility.

B. Legal Basis

21. This action is taken pursuant to sections 4(i), 5(b), 5(c)(1), 303(r), and 309 (j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(b), 155(c)(1), 303(r), and 309(j).

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

22. The Commission is required to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The rules proposed in this *Fourth FNPRM* would apply to license applicants seeking small business status in all future auctions. In estimating the number of small entities that may participate in future auctions of wireless services, the Commission anticipates that the makeup of current wireless services licensees is representative of future auction participants. The Commission hereby incorporates into this IRFA section the Supplemental FRFA analysis and descriptions of potentially affected small entities.

D. Description of Reporting, Recordkeeping, and Other Compliance Requirements

23. The *Fourth FNPRM* proposes the adoption of a total assets test to be used in conjunction with the gross revenues measure already employed in determining whether auction applicants qualify as small businesses. The total assets test would require auction applicants seeking small business status to disclose their assets.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

24. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (iii) the use of performance, rather than design, standards; and (iv) an exemption from coverage of the rule or any part thereof for small entities.

25. The Commission has adopted specific provisions to promote small business participation in spectrum auctions. In order to ensure that only those entities truly meriting small business status qualify for special preferences, such as bidding credits, the Commission must have an accurate and easily applicable method of calculating business size. While it has concluded in the past to use gross revenues as the measure of business size, it now seeks comment on whether to use a total assets test as well. The Commission also seeks comment on whether it should adopt exceptions to the general requirement that certain stock interests are treated as fully diluted in calculating the equity held in an applicant. These proposals are intended to help the Commission realize its goal of widening the opportunities for small businesses in the spectrum auction program.

26. Federal Rules Which Overlap, Duplicate, Or Conflict With These Rules. None.

List of Subjects in 47 CFR Part 1

Communications common carriers, Reporting and recordkeeping requirements.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

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