arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) *Affiliation under joint venture arrangements.* (A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(B) The parties to a joint venture are considered to be affiliated with each other. Nothing in this subsection shall be construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint venture under attribution standards provided in this section.

(xi) *Exclusion from affiliation coverage.* For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 00–29094 Filed 11–14–00; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 24

[PP Docket No. 93–253; FCC 00–299]

Broadband Personal Communications Services (PCS) Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document denies various petitioners' requests to alter the Commission's C and F block competitive bidding rules. It does not change the rules except to reinstate provisions that had been inadvertently eliminated from the rules in a previous order. The Commission's determination with respect to these requests promotes the goals of the Communications Act.

DATES: Effective November 15, 2000.

FOR FURTHER INFORMATION CONTACT: Audrey Bashkin, Attorney, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of an *Order on Reconsideration* in the Amendment of the Commission's Rules Regarding Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap. The complete text of the *Order on Reconsideration* 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.*

I. Introduction

1. In this *Order on Reconsideration,* we first address three petitions for reconsideration of the Commission's Fifth Memorandum Opinion and Order in PP Docket No. 93–253 (''*Competitive Bidding Fifth Memorandum Opinion and Order*'') in which the Commission resolved petitions for reconsideration or clarification of its rules governing competitive bidding for ''entrepreneurs' block'' (C and F block) Personal Communications Services licenses in the 2 GHz band (''broadband PCS''), *See* 59 FR 63210 (December 7, 1994). We next address nine petitions for reconsideration of the Commission's Report and Order in WT Docket No. 96–59 and GN Docket No. 90–314 (''*DEF Report and Order*'') in which the Commission modified its competitive bidding and ownership rules for broadband PCS. *See* 61 FR 33859 (July 1, 1996). Finally, we reinstate provisions which, in the *Competitive Bidding Sixth Report and Order,* were inadvertently eliminated from one of the Commisson's competitive bidding rules. *See* 60 FR 37786 (July 21, 1995).

II. Background

2. Consistent with Congress' mandate to promote the participation of small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, ''designated entities'') in the provision of spectrum-based services, the Commission originally limited eligibility for C and F block PCS licenses to ''entrepreneurs'' and adopted special provisions for those blocks to assist small and women- and minority-owned businesses. The Commission considers entrepreneurs, with regard to the C and F blocks, to be those entities that can meet the auction and licensing eligibility requirements of § 24.709 of the Commission's rules. The principal requirement is set forth in § 24.709(a)(1), as follows:

> No application is acceptable for filing and no license shall be granted for frequency block C or frequency block F, unless the applicant, together with its affiliates and persons or entities that hold interests in the applicant and their affiliates, have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million at the time the applicant's short-form application (Form 175) is filed.

Under § 24.709, C and F block licensees are required to maintain their eligibility until at least five years from the date of the initial license grant. Licensees, however, are permitted to grow beyond the gross revenue and total assets caps through equity investment by non-attributable investors, debt financing, revenue from operations, business development, or expanded service.

3. The Commission has held four entrepreneurs' block PCS auctions to date, Auction No. 5, the first auction of C block spectrum, ended on May 6, 1996 and was followed quickly by Auction No. 10, another C block auction, which concluded on July 16, 1996. Auction No. 11, the first F block auction, ended on January 14, 1997, and also included D and E block spectrum. The fourth auction, Auction No. 22, made available additional C and F block, as well as E block, spectrum and concluded on April 15, 1999.

III. Reconsideration of the Competitive Bidding Fifth Memorandum Opinion and Order

A. Background

4. In the *Competitive Bidding Fifth Memorandum Opinion and Order,* the Commission, responding to petitions for reconsideration or clarification of the *Competitive Bidding Fifth Report and Order,* 59 FR 37566 (July 22, 1994), and the *Competitive Bidding Order on Reconsideration,* 59 FR 43062 (August 22, 1994), clarified and modified its rules in order to allow better participation in broadband PCS by entrepreneurs and designated entities.

B. Control Group Equity Exceptions

5. *Background.* To be eligible to participate in entrepreneurs' (C or F) block auctions, an applicant (together with its affiliates and persons or entities that hold interests in the applicant and their affiliates) must have had gross revenues of less than $125 million in each of the last two years and must have total assets of less than $500 million. We recently adopted as our general attribution rule a ''controlling interest'' standard and decided that this standard would govern attribution for purposes of determining entrepreneur and small business eligibility for future auctions of C and F block licenses. However, in each of the past four C and F block auctions, we applied an attribution rule that provided for two ''control group'' equity exceptions—the ''25 percent equity exception'' and the ''49.9 percent equity exception''—under which auction applicants could exclude from their gross revenue and asset totals the gross revenues and total assets of passive investors. Both exceptions required the applicant to form a ''control group'' within which ''qualifying investors'' owned at least 50.1 percent of the applicant's voting interests. Under the 25 percent equity exception, the applicant's control group was required to own at least 25 percent of the applicant's total equity; and, within the control group, qualifying investors were required to hold at least 15 percent of the applicant's total equity. Under the 49.9 percent equity exception, the applicant's control group was required to own at least 50.1 percent of the applicant's total equity; and, within the control group, qualifying investors were required to hold at least 30 percent of the applicant's total equity. If these and certain other requirements were met, the gross revenues and total assets of non-controlling investors were not attributed to the applicant.

6. For publicly-traded corporations with widely dispersed voting stock ownership, the Commission in the *Competitive Bidding Fifth Memorandum Opinion and Order* created an additional exception. Under the ''publicly-traded corporations exception,'' applicable to the four C and F block auctions conducted to date, no person could own more than 15 percent of the applicant's equity or be able to control the election of more than 15 percent of the applicant's board of directors. Moreover, no person, other than the applicant's management or members of its board of directors, in their capacities as such, could have *de facto* control of the applicant. If these and certain other requirements were met, the gross revenues and total assets of persons holding an interest in the applicant were not attributed to the applicant.

7. *Discussion.* One commenter objects that under the control group exceptions, small, widely held, publicly-traded companies ''cannot serve at the 'control group' level of the PCS applicant and are thereby effectively precluded from raising equity capital through the pursuit of joint ventures with non-controlling strategic investors.'' The commenter petitions the Commission either to allow publicly-traded companies to serve as control groups or to ''extend the public company exemption to the control group level.'' While there was nothing in the control group rules explicitly preventing a publicly-traded company from using one of the control group equity exceptions or even from serving as the control group of an applicant, as a practical matter, these options were unlikely to be available to corporations that were publicly-traded. Nevertheless, we believe that the Commission provided such corporations with ample opportunity to obtain financing and to form strategic relationships with other entities. Such corporations were able, under the publicly-traded corporations exception, to sell classes of stock to strategic investors in amounts up to 15 percent of the corporation's equity. They were also permitted to obtain unlimited amounts of debt financing from, or enter into management agreements with, other entities, provided that such arrangements did not constitute a transfer of *de jure* or *de facto* control of the applicant or licensee. Given our recent determination that the controlling interest standard would apply to all future C and F block auctions, we dismiss as moot the commenter's request as to such auctions. Moreover, we believe that to relax the entrepreneurs' block exceptions in the manner the commenter's requests for existing C and F block licensees would seriously undermine the effectiveness of the financial caps and, for this reason, deny the commenter's petition with regard to such licensees.

IV. Reconsideration of the DEF Report and Order

A. Background

8. In the *DEF Report and Order,* the Commission, responding to the Supreme Court's decision in *Adarand Constructors, Inc.* v. *Pena* (''*Adarand*''), modified its F block rules to make them race- and gender-neutral, as it previously had done for the C block.

B. Auction Timing

9. Two commenters ask that the Commission delay the start date of Auction No. 11. As stated, Auction No. 11, which began on August 26, 1996, concluded on January 14, 1997. Accordingly, the petitions of these commenters' are dismissed as moot.

C. Changes Resulting From Adarand

10. *Background.* In the *DEF Report and Order,* the Commission examined the F block auction rules in light of the Supreme Court's decision in *Adarand* that all racial classifications must be analyzed by a reviewing court under strict scrutiny. The Commission decided that it did not have sufficient evidence to support its F block race- and gender-based provisions and concluded that the F block rules should be race and gender neutral. Accordingly, the Commission modified the F block rules regarding control group equity structures, affiliation, installment payment plans, and bidding credits. The changes to the F block rules followed analogous modifications to the C block rules by the Commission in the *Competitive Bidding Sixth Report and Order,* which was upheld by the D.C. Circuit Court of Appeals in *Omnipoint* v. *FCC.* Two days after release of the *DEF Report and Order,* the Supreme Court clarified that under ''intermediate scrutiny,'' the standard of review for gender classifications, the government must demonstrate an ''exceedingly persuasive justification'' in order to defend gender-based government action, emphasizing that such action is constitutional only if it serves an important governmental objective and is substantially related to the achievement of that objective.

11. In the *Second Further Notice,* 63 FR 770 (January 7, 1998), we sought comment on whether there is a compelling governmental interest that

would justify the use of preferences for minority-owned businesses or an exceedingly persuasive justification to support gender-based preferences for women-owned businesses. In addition, we asked commenters to provide evidence in support of their positions and to indicate what measures, if any, could be narrowly tailored to withstand judicial review. We sought comment on what specifically tailored tools, such as bidding credits, might be appropriate or whether preferences should be given to minority-owned or women-owned businesses that also qualify as small businesses. In our recent *Part 1 Fifth Report and Order,* 65 FR 52323 (August 29, 2000), we noted that we did not receive any comments on these issues and concluded that because the record was sparse we did not believe that it was appropriate to adopt special provisions for minority- and women-owned businesses at that time.

12. *Discussion.* One commenter asks the Commission to reconsider its decision to eliminate race and gender preferences. It argues that the Commission is subject to fewer time pressures for the F block auction than it was for the initial C block auction and that the Commission has had the time to make, and should make, the factual showing necessary to justify reimplementing its race and gender F block provisions. This commenter's request is moot with regard to the two F block auctions already completed.

13. With regard to future F block auctions, we do not have a sufficient record to justify the reimplementation of race- and gender-based auction rules. As stated, we received no comments on these issues in response to the *Second Further Notice.* We note that our Office of Communications Business Opportunities has initiated several studies to examine ownership of telecommunications facilities by minority- and women-owned entities. Further, we have recently commenced several new studies to explore additional entry barriers and to seek further evidence of racial and gender discrimination against potential licensees. In addition, we will continue to track the rate of participation in our auctions by minority- and women-owned firms and evaluate this information with other data gathered to determine whether provisions to promote participation by minorities and women can satisfy judicial scrutiny. If a sufficient record can be adduced, we will consider race- and gender-based provisions for future auctions. We, therefore, deny the commenter's petition. We discuss other petitions addressing specific rule changes resulting directly or indirectly from the *Adarand* decision.

i. Control Group Equity Exception and Affiliation Exception

14. *Background. Control Group Equity Exception.* As explained earlier, the Commission's rules applicable to the four past C and F block auctions provided for two control group equity exceptions to the entrepreneurs' block financial caps. Under these exceptions, the gross revenues and total assets of certain persons or entities holding interests in an applicant were not considered for purposes of determining eligibility to participate in a C or F block auction. As originally adopted, the 49.9 percent equity exception was available only to women- and minority-owned businesses. In the *DEF Report and Order,* the Commission made the 49.9 percent equity exception available to all small businesses and entrepreneurs.

15. *Affiliation Exception.* In the *Competitive Bidding Sixth Report and Order,* the Commission modified an exception to the C and F block affiliation rules under which the gross revenues and assets of affiliates controlled by minority investors that were members of a C or F block applicant's control group were not attributed to the applicant. The exception as modified allowed every small business C block applicant to exclude the gross revenues and assets of any affiliates that did not exceed the entrepreneurs' block caps, provided that the gross revenues and total assets of all such affiliates of the small business applicant, when aggregated, did not exceed those caps. The modified exception was limited to C block applicants; language making the exception applicable to F block applicants was inadvertently eliminated. Subsequently, in the *DEF Report and Order,* instead of extending the exception to F block applicants, the Commission removed the exception entirely, expressing skepticism that the exception was still needed and acknowledging the argument that the exception might allow too many larger entities to qualify as small businesses. The Commission stated that it would consider waiver requests to allow participation in the first F block auction by parties that had participated in the first C block auction and had relied on the affiliation exception in structuring themselves.

16. *Discussion.* One commenter contends that elimination of the affiliation exception for the F block is unfair to F block bidders that participated in the original C block auction, because such bidders designed business plans that anticipated bidding in both blocks under the same bidding credit structure. We find this petition unpersuasive. As stated, the Commission offered Auction No. 11 applicants that had participated in the first C block auction the opportunity to request a waiver in order to be able to participate in Auction No. 11; however, the Commission received no such requests. Another commenter argues that the Commission should adopt the affiliation exception for the F block and eliminate the 49.9 percent equity exception or, alternatively, eliminate or retain both the affiliation and the 49.9 percent equity exceptions. As we noted, the Commission eliminated the affiliation exception for the C block as well as the F block; and we continue to believe that the exception may lead to abuses. Accordingly, we deny the requests of the two commenters' with regard to existing licensees. With regard to past auctions, we dismiss as moot the two commenters' petitions. Additionally, in light of our recent determination that the controlling interest standard will apply to all future C and F block auctions, we dismiss as moot the two commenters' petitions with regard to future auctions.

ii. C Block Licenses as Assets

17. *Background.* In the *DEF Report and Order,* the Commission decided not to treat C block licenses as assets for purposes of determining an applicant's eligibility for the then-upcoming F block auction, fearing that including such licenses might preclude C block winners from F block eligibility. The Commission stated that, because of the Commission's previous indications that the C and F blocks are linked, it would be unfair to disqualify C block winners from participation in the F block auction on the basis of their success in acquiring capital for the C block auction. Specifically, the Commission had earlier noted that the two blocks are contiguous and lend themselves to aggregation and that together they are subject to a cap on the number of licenses that may be won at auction. The Commission expressed concern that treating C block licenses as assets for purposes of eligibility for the initial F block auction could frustrate business plans and auction strategies made in reliance on the Commission's earlier statements. The Commission also noted that it was uncertain whether C block licenses that had already been won would be issued before the F block auction. Finally, the Commission decided that licenses other than C block licenses would be included in the total

asset calculations of applicants for the F block auction.

18. *Discussion.* Commenter asserts that it is inconsistent for the Commission not to require the inclusion of C block licenses in applicants' total asset valuations when the Commission requires A and B block broadband PCS licenses to be included in such valuations. Commenter argues further that Commission's decision will diminish opportunities for small businesses in the F block auction. The commenter also suggests that the issuance of C block licenses after Auction No. 11 to winners of F block licenses in Auction No. 11 could interfere with the ability of such license holders to maintain their eligibility as entrepreneurs. One commenter counters that another commenter has misconstrued the Commission's rules for maintaining entrepreneur eligibility and that, under the rules, entrepreneur eligibility is not lost simply because a license acquires additional licenses.

19. Because Auction No. 11 has already occurred, the commenter's petition is now moot as to that auction. We believe, however, that the Commission's decision was correct. In reaching this decision, the Commission determined that to prevent F block auction participation by C block winners on the basis of their earlier ability to raise capital within the limitations of our rules would be unfair. To further the Congressional objective that PCS licenses be disseminated among a wide variety of applicants, we encourage the success of C and F block licensees and recognize that such success is generally accompanied by asset growth. For this reason, we will not require applicants for participation in future auctions to treat either C or F block licenses as assets for purposes of determining applicants' C or F block entrepreneur eligibility. We will, however, continue to require that all other Commission licenses be included in the total asset calculations on the short-form applications for C and F block auctions. We also clarify that the acquisition by C or F block licenses of other Commission licenses, entrepreneurs' block or otherwise, will not of itself prevent licensees' continued eligibility to hold entrepreneurs' block licenses.

iii. Bidding Credits

20. *Background.* Under the originally adopted F block bidding credit rule, a small business was granted a 10 percent bidding credit; a business owned by members of minority groups or women was granted a 15 percent bidding credit; and a small business owned by members of minority groups or women was allowed to aggregate these bidding credits for a 25 percent bidding credit. In the *DEF Report and Order,* the Commission eliminated the race- and gender-based aspects of its bidding credit provisions and, instead, adopted a two-tiered approach. Under the modified rule, small businesses receive a 15 percent bidding credit and very small businesses receive a 25 percent bidding credit. In the *C Block Fourth Report and Order,* 63 FR 50791 (September 23, 1998), the Commission changed the C block bidding credit rule to adopt, for Auction No. 22 and subsequent C block auctions, the same two tiers that it had the F block.

21. *Discussion.* Commenter objects to the fact that the Commission did not adopt the same bidding credit for the F block that it had for the initial C block auction, a 25 percent bidding credit for all small businesses. Commenter argues that minority-owned bidders had an ''understanding that, at a minimum, the Commission would preserve for them the rules as they existed in the C block auction.'' The Commission considered and rejected similar arguments in the *DEF Report and Order*. The Commission disagreed that entities interested in bidding in Auction No. 11 had the same expectations as C block applicants in structuring their businesses or formulating strategies in reliance on the tiered bidding credits originally adopted. The Commission explained, moreover, that the timing of the F block modification allowed the Commission to take a different approach than it had for the C block. The Commission also indicated that a two-tiered approach would ensure that the smallest businesses receive the greatest benefit. Commenter has not provided any new rationale to justify our deviating from this reasoning here, and its petition is therefore denied. We note, as mentioned, that under current rules, bidding credits are the same for C and F block licenses.

iv. Installment Financing

22. *Background.* The originally adopted F block rules provided for five different installment payment plans. One of these plans was available only to entities owned by members of minority groups or women, while another plan was restricted to small businesses owned by members of minority groups or women. To satisfy the requirements of *Adarand*, the Commission, in the *DEF Report and Order,* eliminated these two plans. Of the three remaining plans, one was available only to small businesses. With the elimination of the two plans restricted to minority groups or women, the small business plan became the likely choice for minority- and women-owned small businesses. The Commission modified this plan in the *DEF Report and Order.* As modified, the plan offers small businesses or small business consortia a two-year interest-only period with an interest rate equal to the ten-year U.S. Treasury rate and principal amortized over the remaining eight years of the license term. This plan has the same interest rate as, but a shorter interest-only period than, the two eliminated plans and also the plan available to small businesses in the first two C block auctions. The Commission concluded that the availability of the small business plan would provide minority- and women-owned businesses an opportunity to participate in the provision of spectrum-based services. The Commission explained that the build-out requirement for F block licenses is less stringent than it is for C block licenses and that a two-year interest only period would provide F block licensees a substantial period in which to construct their systems, while also encouraging them to provide service to the public quickly. It explained further that restricting the interest-only period to two years would deter speculation and insincere bidding. Finally, the Commission discussed how the revised small business installment payment plan was still extremely attractive in comparison to other financing options likely to be available to small businesses.

23. In the *Part 1 Third Report and Order,* 63 FR 2315 (January 15, 1998), we suspended the installment payment program. Accordingly, we decided in the *C Block Fourth Report and Order* not to offer installment payments for Auction No. 22. Most recently, in the *Part 1 Fifth Report and Order,* we decided to adhere to our previous decision to suspend the installment payment program.

24. *Discussion.* We received petitions from several commenters opposing the alterations in the *DEF Report and Order* to the F block installment financing plans and, in particular, objecting to the reduction of the interest-only payment period under the small business plan. Given our current suspension of installment payment financing, these petitions are, as a practical matter, moot with regard to future F block auctions. Furthermore, we believe that, even with the two-year interest-only period, the plan available to small business winners in Auction No. 11 provided them with sufficient assistance to build out their systems and provide timely service. For this reason, we decline to alter the terms of existing, F block installment loans.

D. Upfront Payment and Down Payment

25. *Background.* Under the originally adopted rules, participants in an F block auction were required to submit an upfront payment of $0.015 per MHz per pop (or bidding unit) for the maximum number of licenses on which they intended to bid in any one round. Winning bidders were required to supplement their upfront payment with a down payment sufficient to bring their total deposits up to 10 percent of their winning bid(s). Based upon its experience in the first C block auction, the Commission changed the rules in the *DEF Report and Order* to require an upfront payment of $0.06 per MHz per pop and a down payment that, including the upfront payment amount, would total 20 percent of a participant's winning bid(s).

26. In the *Part 1 Third Report and Order,* we affirmed the Commission's decision in the *Competitive Bidding Second Report and Order,* 59 FR 22980 (May 4, 1994), that the upfront payment amount and terms should be determined on an auction-by-auction basis. We also concluded that a standard down payment of 20 percent is appropriate for all auctionable services; however, we reserved the right, in the event of unusual circumstances affecting a particular service, to adopt a different down payment amount by rule in that service. Accordingly, in the *C Block Fourth Report and Order,* we modified our part 24 rules for the C and F blocks to reflect that upront payments would be established on an auction-by-auction basis and that winning C and F block bidders would be subject to the 20 percent down payment requirement of part 1 of the Commission's rules.

27. *Discussion.* These commenters all protest the changes in the *DEF Report and Order* to the F block upfront and/or down payment rules. With regard to past auctions, these petitions are moot. With regard to future auctions, we continue to adhere to the wisdom of tailoring the specific amount and terms of the upfront payment to each specific auction. We also maintain our conviction, expressed in the *Part 1 Third Report and Order,* that a 20 percent down payment is an appropriate amount to provide the Commission with sufficient assurance that a winning bidder will be able to pay the full amount of its winning bid and that it possesses the financial strength to attract the capital necessary to deploy and operate its system. In addition, we continue to believe that a 20 percent down payment facilitates our discovery early in the licensing process that an applicant might be unable to finance its winning bid.

E. Administrative Procedure

i. Contract With America Advancement Act

28. *Background.* Shortly before release of the *DEF Report and Order,* Congress enacted the Contract with America Advancement Act of 1996 (CWAAA), which, *inter alia,* requires generally that a ''major rule'' cannot take effect until 60 days after the later of the rule's publication in the Federal Register or submission by the Federal agency of a required report to Congress. Under CWAAA, a major rule is one—

> that the Administrator of the Office of Information and Regulatory Affairs [OIRA] of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, [or] innovation * * *.

The Commission determined, and OIRA concurred, that the rule changes made in the *DEF Report and Order* were not major. Accordingly, the Commission made the rules effective 30 days after their July 1, 1996 Federal Register publication.

29. *Discussion.* Commenter contends that the Commission violated CWAAA by failing to determine that the rule changes resulting from the *DEF Report and Order* were major and delaying their effectiveness for at least 60 days after their Federal Register publication. By terms of the statutory language, OIRA's finding that the rule changes were not major is dispositive. Commenter's argument is therefore rejected.

ii. Regulatory Flexibility Act

30. Commenter also claims that the Commission failed to describe significant alternatives to the rules designed to minimize any significant economic impact on small entities as required by the Regulatory Flexibility Act (RFA). We disagree. The portion of the *DEF Report and Order*—the Final Regulatory Flexibility Analysis (FRFA)—addressing this RFA requirement refers to the substantive part of the Order, which discusses in great depth the impact of the rules on small businesses, alternatives considered, and why each alternative was rejected or adopted. Consolidation of the discussion of the impact on small businesses from the item into the FRFA would have been repetitive in this instance, where analyses of alternatives related to small businesses infuse the decision. Indeed, the commenter identifies no specific instances where the Commission omitted consideration of such alternatives. Accordingly, the commenter's petitions are denied.

V. Ordering Clauses

31. Authority for issuance of the *Order on Reconsideration* is contained in sections 4(i), 5(b), 5(c)(1), 309(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j). Accordingly, it is ordered that part 24 of the Commission's rules is amended as specified and becomes effective November 15, 2000.

List of Subjects in 47 CFR Part 24

Personal communications services.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 24 as follows:

PART 24—PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

2. Section 24.709 is amended by revising paragraphs (b)(5)(i)(D) and (b)(5)(ii) to read as follows:

§ 24.709 Eligibility for licenses for frequency Blocks C and F.

* * * * *

(b) * * *

(5) * * *

(i) * * *

(D) Following termination of the three-year period specified in paragraph (b)(5)(i) of this section, qualifying investors must continue to own at least 10 percent of the applicant's (or licensee's) total equity unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(5)(i)(A) of this section. The restrictions specified in paragraph (b)(5)(i)(C)(1) through (b)(5)(i)(C)(4) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose control group's sole member is a preexisting entity, the 25 percent minimum equity requirements set forth in paragraph (b)(5)(i) of this section shall apply, except that only 10

percent of the applicant's (or licensee's) total equity must be held in qualifying investors, and that the remaining 15 percent of the applicant's (or licensee's) total equity may be held by qualifying investors, or noncontrolling existing investors in such control group member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 15 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(5)(i) of this section.

* * * * *

[FR Doc. 00–29323 Filed 11–14–00; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF ENERGY

48 CFR Parts 927 and 970

RIN: 1991–AB55

Acquisition Regulations: Revision of Patent Regulations Relating to DOE Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Interim final rule and opportunity for public comment.

SUMMARY: The Department of Energy (DOE) is amending the Department of Energy Acquisition Regulation (DEAR) to improve the patent coverage relating to management and operating contracts. The clauses contained herein generally reflect the clauses used in such DOE contracts over the last five years. The changes made pursuant to this rule adapt patent related clauses to subcontracting under management and operating contracts, will result in clauses stated in ''plain language,'' and will provide a complete set of patent clauses for all varieties of management and operating contract.

DATES: This rule is effective December 15, 2000. Comments on the interim final rule should be submitted by January 16, 2001.

ADDRESSES: Comments (3 copies) should be addressed to: Robert M. Webb, U.S. Department of Energy, Office of Procurement and Assistance Management, 1000 Independence Avenue, SW., Washington, D.C. 20585.

FOR FURTHER INFORMATION CONTACT: Robert M. Webb at (202) 586–8264.

SUPPLEMENTARY INFORMATION:

I. Background.
II. Explanation of Changes in the Patent Rights Clauses.
III. Procedural Requirements.
A. Review Under Executive Order 12866.
B. Review Under Executive Order 12988.
C. Review Under the Regulatory Flexibility Act.
D. Review Under the Paperwork Reduction Act.
E. Review Under the National Environmental Policy Act.
F. Review Under Executive Order 13132.
G. Review Under the Unfunded Mandates Reform Act of 1995.
H. Review Under the Treasury and General Government Appropriations Act, 1999.
I. Congressional Review.

I. Background

The Department of Energy (DOE or Department) last revised its patent regulations covering management and operating contracts on March 2, 1995 at 60 FR 11824. That rule created two patent rights clauses, one for nonprofit contractors and a second for profit-making contractors. The former adapted the Bayh-Dole clause, granting title to inventions first conceived or reduced to practice under the contract to the contractor, for use in management and operating (M&O) contracts. The second clause retained title to those inventions in the United States. In the interim it has become apparent that the clauses could be designed to more effectively deal with the realities of performance under DOE management and operating contracts. There is a need to modify the specified clauses to reflect additional statutory requirements and the special treatment of exceptional circumstances in defense related activities. This interim final rule fulfills those needs.

This rulemaking establishes three clauses, one for nonprofit contractors, one for profit-making contractors where their contracts do not provide for technology transfer responsibilities, and a third for large profit-making contractors where their contracts do provide for technology transfer activities. The terms of the third clause reflect DOE's probable issuance of an advance waiver under which large profit-making management and operating contractors with a technology transfer mission will receive title to inventions. The individual class waiver that is likely to be granted may cause the actual terms of the patent clause used to vary from the model published here.

This interim final rule also adapts customary ancillary patent clauses to the special circumstances of DOE's management and operating contracts. The clause normally used to authorize and give consent to a contractor to use or manufacture an invention has been modified to allow a contractor to request and DOE to authorize copying copyrighted work. It also reflects that if a subcontractor is employed under a management and operating contract to perform research and development, the clause flowed down should use paragraph (a) as in the Federal Acquisition Regulation (FAR) Alternate 1, as opposed to the basic clause as is called for under paragraph (b) of the FAR clause.

The interim final rule limits the notice and assistance clause to subcontracts valued at $25,000 or more. The FAR clause limit for flowdown is the simplified acquisition threshold of $100,000.

The interim final rule establishes a flowdown for patent indemnity. In the area of royalties, the interim final rule provides for the contractor to provide to DOE information bearing on any royalty proposed to be paid after contract award. The relevant FAR provision does not foresee long term contracting with the variety of royalty activities that the Department is currently experiencing under its management and operating contracts.

This interim final rule also makes small changes to clauses for notice of right to request patent waiver and rights to proposal data, resulting from their being drafted in ''plain language.'' Additionally, a change has been made to DEAR Part 927 to assure that the facilities license contained in the three M&O patent clauses is used in appropriate contracts not subject to Part 970.

II. Explanation of Changes in the Patent Rights Clauses

A. Plain Language

All clauses in this interim final rule, except the nonprofit clause at 970.5204–101, were rewritten from former clauses to incorporate suggested language and sentence structure for clarifying and simplifying contract provisions. For example, the clause language is written in the present tense and exceptions are generally stated at the beginning of regulatory provisions. Italicized headings were added to all subparagraphs. At such time as the FAR is revised to reflect ''plain language,'' particularly with regard to the Bayh-Dole clause at FAR 52.227–11 (the core of the clause at 970.5204–101), which is overseen by the Department of Commerce, these regulations will be reviewed and revised as appropriate.

B. Organization of Clause Provisions

Modest changes were made to the organization of each of the patent rights clauses, so that like topics and provisions appear in a similar order in all of the clauses, as shown by the index. Also, if the same provision appeared in more than one clause, an