Three Individual Sources, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: March 31, 2003.

Thomas C. Voltaggio,

Acting Regional Administrator, Region III.

[FR Doc. 03–10659 Filed 5–1–03; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 99–266; FCC 03–51]

Practice and Procedure

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Commission seeks comment regarding ways to adjust its current tribal lands bidding credit program in order to encourage further deployment by carriers of wireless services on tribal lands. The Commission also seeks comment on possible adjustments to the program based on use of data from the 2000 Census that was not available when the program was initiated. Further, the Commission requests comment on a limited expansion of the credit program that would allow carriers who obtain bidding credits to serve qualifying tribal lands to obtain additional credit for extending their coverage to immediately adjacent non-tribal areas that also have low penetration rates.

DATES: Submit comments on or before June 2, 2003. Submit reply comments on or before June 16, 2003.

FOR FURTHER INFORMATION CONTACT: Roger Noel or Linda Chang, Wireless Telecommunications Bureau, at (202) 418–0620.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's *Second Further Notice of Proposed Rulemaking (2nd FNPRM)*, FCC 03–51, adopted March 7, 2003, and released March 14, 2003. The full text of the *2nd FNPRM* is available for public inspection during regular business hours at the FCC Reference Information Center, 445 12th St., SW., Room CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor: Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail at *qualexint@aol.com.*

Synopsis of Second Further Notice of Proposed Rulemaking

I. Background

1. In June 2000, the Commission adopted bidding credits for use by winning bidders who pledge to deploy facilities and provide service to federally recognized tribal areas that have a telephone service penetration rate at or below 70 percent. In setting out the bidding credit, the Commission noted that communities on tribal lands have had less access to telecommunications services than any other segment of the U.S. population. *See* Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99–266, *Report and Order,* 65 FR 47349 (August 2, 2000) (*R&O*), and *Further Notice of Proposed Rulemaking*, 65 FR 47366 (August 2, 2000) (*FNPRM*).

2. The *R&O* provided that, in order to obtain a bidding credit in a particular market, a winning bidder must indicate on its long-form application (FCC Form 601) that it intends to serve tribal lands in that market. Following the long-form application filing deadline, the applicant has 90 calendar days to amend its application to identify the tribal lands to be served, and provide certification from the tribal government(s) that: (1) It will allow the bidder to site facilities and provide service on its tribal land(s), in accordance with the Commission's rules; (2) it has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate against any carrier; and (3) its tribal land is a qualifying tribal land as defined in the Commission's rules, *i.e.,* an area that has a telephone penetration rate at or below 70 percent. In addition, at the conclusion of the 90-day period, the applicant must amend its long-form application to file a certification that it will comply with the bidding credit build-out requirement, and that it will consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land. Upon receipt by the Commission of the certifications, the bidding credit is awarded and the applicant makes payment of the final net adjusted bid amount. If the required certifications are not provided at the conclusion of the 90-day period, the bidding credit is not awarded and the applicant is required to pay the balance on the original gross bid amount in order to be awarded the licenses.

3. In order to ensure that applicants awarded bidding credits actually deploy facilities and provide service to tribal lands, the Commission imposed performance requirements as a condition of obtaining the bidding credit. The Commission required that a licensee construct and operate its system to cover 75 percent of the population of the qualifying tribal land within three years of the grant of the license. While this 75 percent benchmark is higher than the construction benchmarks applicable to auctioned wireless licenses generally, the Commission determined that it would ensure that only carriers that are committed to serving tribal lands will receive bidding credits, and that wireless telecommunications services will be deployed rapidly to underserved tribal areas. In the *R&O,* the Commission required that, at the conclusion of the three-year period, licensees file a notification of construction indicating that they have met the 75 percent construction requirement on the tribal lands for which the credit was awarded. If the licensee fails to comply with any condition, it is required to repay the bidding credit plus interest thirty days after the conclusion of the construction period. In the event the licensee fails to repay the amount, the license automatically cancels.

4. In limiting the scope of the bidding credit to federally recognized tribal areas with telephone penetration rates equal to or less than 70 percent, the Commission concluded that the credits would target the tribal communities with the greatest need for access to telecommunications service. Although the Commission acknowledged that there are some non-tribal areas with penetration rates lower than the national average, it was determined that almost all non-tribal areas have penetration rates greater than 70 percent and that non-tribal areas have penetration rates significantly greater than most tribal areas. Accordingly, the Commission found it appropriate to limit the program to tribal lands with a 70 percent or less penetration rate. The Commission did not, however, foreclose the possibility of changing the scope of the bidding credit program.

II. Discussion

5. In this *2nd FNPRM*, the Commission solicits comment on whether it is necessary to modify the Commission's existing tribal lands bidding credit program in order to further facilitate the use of the bidding credit. The tribal lands bidding credit program is still in its early stages and few carriers have taken advantage of the bidding credit thus far. The record, however, is unclear regarding the reasons behind the lack of response to the bidding credit. Because the record in this proceeding thus far is not sufficient to make reasoned decisions as to what steps, if any, the Commission should take to further encourage carriers to provide coverage to tribal lands, the Commission seeks additional comment regarding this issue.

A. Modifying the Construction Requirements of the Tribal Lands Bidding Credit

6. The Commission's rules currently impose more stringent construction requirements on carriers who seek the tribal lands bidding credit than those who do not. All carriers taking advantage of the bidding credit are required to serve 75 percent of the population of the qualifying tribal land for which the credit was awarded, and must do so within three years of license grant. The Commission initially set out the more stringent performance requirement because it believed that the accelerated buildout requirement ensures that: (1) Only entities making a serious commitment to serving tribal lands will receive bidding credits; and (2) telecommunications services will be rapidly deployed to unserved tribal areas.

7. It is possible, however, that one reason behind the lack of participation in the tribal lands bidding credit program is that carriers find that difficulties involved in meeting the enhanced construction requirements are not sufficiently mitigated by the existing bidding credit. For example, there may be conditions, such as technical obstacles, economic factors, or other difficulties, that may make it difficult for carriers to satisfy the stricter construction requirement. Circumstances may exist on remote tribal lands such as low population density, rough terrain, and other factors that can negatively affect the ability of carriers to provide the requisite coverage to facilities in those areas. Accordingly, the Commission seeks comment as to whether it should reconsider the buildout obligations imposed on carriers utilizing the tribal lands bidding credit. Given that the public has now had a period of time to evaluate the bidding credit program, the Commission seeks comment on whether the requirement that carriers cover 75 percent of the population within three years remains feasible, or whether it should moderate the buildout criteria. Specifically, the Commission requests comment on what factors or circumstances exist that warrant an across-the-board relaxation of the bidding credit construction requirements.

8. In the event that the Commission determines that the construction requirements should be eased, it seeks comment on how the requirements should be modified. For example, should the population of the qualifying tribal land covered by a carrier be lessened (*i.e.* reduced to a number below 75 percent)? Alternatively, should the time period in which to provide coverage to 75 percent of the tribal population be extended to a construction period longer than three years? Or is the appropriate remedy a combination of a reduced population coverage requirement and an expanded construction period? Should the Commission adopt a variation of the combination method, such as a tiered approach in which construction would occur in phases, *e.g.,* a certain percentage of the total tribal population must be covered in three years, and a greater percentage would be covered at the five-year mark. The Commission seeks comment regarding these alternatives, as well as any other options. The Commission notes that any across-the-board revision of the construction requirements must balance its desire to implement achievable construction requirements with the underlying purpose of the requirements, that is, to ensure that service is actually deployed on tribal lands.

9. The Commission is also aware that a comprehensive change of the construction requirements may not be the appropriate solution. It may be that satisfying the tribal lands buildout requirement may be more difficult in certain tribal areas in the country than in others. There may be difficulties or conditions specific to certain tribal lands, that may make it difficult for carriers to satisfy the stricter construction requirement, while other carriers deploying the same type of service may have no difficulties in meeting the construction requirements in other tribal areas. Similarly, the ability to comply with the tribal lands bidding credit may depend on the particular wireless service at issue. The Commission's rules governing general construction and operation obligations of licensees reflect several approaches that match a type of license (*i.e.* site-based versus geographic market) or service (*e.g.* PCS or lower band 700 MHz) with a specific buildout requirement. It may therefore be preferable to deal with these situations on a case-by-case or service-by-service basis rather than an across-the-board method. The Commission therefore seeks comment on whether it should resolve any buildout difficulties using an ad hoc or waiver approach.

B. Increasing the Bidding Credit Limit

10. The Commission established the tribal lands bidding credit in order to encourage participation in auctions by carriers who are in a position to provide service to tribal lands, and to help mitigate the economic risks associated with the deployment of such service. In recognition of the underlying economic difficulties in providing service to high cost areas, the Commission sought to fashion a bidding credit that bore a correlation to the infrastructure investment necessary to deploy facilities on tribal lands.

11. As noted, it is not clear why few applicants have thus far taken advantage of the tribal lands bidding credit. In addition to the required construction requirements, another possibility for the poor response may be that the existing bidding credit may not provide carriers sufficient incentive to deploy facilities on tribal lands. Although no applicant has yet requested a larger credit than the one called for under the Commission's tribal lands bidding credit methodology, it may be that the current bidding credit amounts are not adequate to allow carriers to recoup a significant portion of infrastructure costs. Accordingly, the Commission seeks comment on whether the existing tribal lands bidding credit remains effective in encouraging carriers to provide service in tribal areas. The Commission also requests comment on whether and how the bidding credit amount and methodology should be modified to provide a greater incentive for carriers to deploy facilities on tribal lands.

C. Adjustment of the Bidding Credit Based on 2000 Census Data

12. The Commission initiated this proceeding in recognition of the unusually low telephone service penetration rates on tribal lands as identified by the 1990 Census. *See* Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99–266, *Notice of Proposed Rulemaking,* 64 FR 49128 (Sept. 10, 1999) (*NPRM*). In the *NPRM*,

the Commission cited 1990 Census data indicating that, although the nationwide average penetration rate for those with incomes below $5,000 living in rural areas was 78.7 percent, the telephone penetration rates for individuals on tribal lands at the same income level averaged 46.6 percent. Further, the 1990 Census found that only 53 percent of those living on tribal lands had basic telephone service, as opposed to 94 percent for the country as a whole.

13. Recently, the Census Bureau has begun to issue data from the 2000 Census indicating that average telephone penetration rates on tribal lands have increased appreciably from the levels reported in 1990. The average telephone penetration rate for all tribal areas reported by the 2000 Census is 83.1 percent. U.S. Bureau of the Census, ''Occupancy, Equipment, and Utilization Characteristics of Occupied Housing Units: 2000,'' Table GCT–H8. However, despite the improvement that this census data indicates in access to basic telephone service experienced in some tribal areas, the data also reveals that telephone penetration rates on virtually all tribal lands remain well below the 97.6 percent penetration rate now found in the country as a whole. Indeed, certain tribal lands continue to have unusually low telephone penetration levels despite gains in subscribership numbers since the 1990 Census. For example, although the penetration rates of tribal areas such as the Navajo Reservation, Fort Apache Reservation, and Mississippi Choctaw Reservation and Trust Lands each increased by over 20 percent since the 1990 Census, these tribal lands continue to have very low penetration rates (39.9 percent, 57.2 percent, and 62.6 percent, respectively). The Commission therefore believes that it is appropriate to continue to develop and apply policies aimed at promoting further deployment of wireless services to tribal lands. In this regard, the Commission seeks comment on whether and to what extent it should use the updated information now available regarding tribal penetration rates to modify certain aspects of the bidding credit. First, should the credit formula be adjusted to require the use of 2000 Census figures instead of 1990 Census figures in calculating tribal penetration for purposes of determining eligibility for the credit? Second, to the extent that the 2000 census indicates that penetration rates in some tribal areas have risen above 70 percent but remain below the national average, should the Commission modify the bidding credit formula so that tribal areas with penetration rates greater than 70 percent but some percentage below the national average are eligible for the credit? If the Commission concludes that it is desirable to raise the level at which tribal areas are eligible for a credit, what should the benchmark be? Further, with respect to tribal lands that have been identified by the 2000 Census as continuing to have unusually low penetration rates, the Commission requests comment on whether it should make adjustments to the bidding credit to create additional and more targeted incentives for wireless carriers to provide services in such areas.

D. Extending the Tribal Lands Bidding Credit to Adjacent Non-Tribal Areas With Low Penetration Rates

14. The Commission also solicits comment on whether it should extend bidding credits to non-tribal areas with penetration rates that fall below the percentage threshold used to calculate eligibility for the tribal credit. Specifically, the Commission seeks comment on whether it should allow a limited expansion of the tribal lands bidding credit program that would allow carriers who obtain bidding credits in order to serve qualifying tribal lands to seek additional credit for extending their coverage to immediately adjacent non-tribal areas that have comparably low penetration rates.

15. In the *R&O*, the Commission limited the bidding credit program to qualifying tribal areas with penetration rates of 70 percent or less because the Commission determined that this limitation would target the tribal communities with the greatest need for access to telecommunications services. The Commission concluded that it would be appropriate to limit application of the bidding credit to tribal lands because the Commission believed that, even though there are non-tribal areas with penetration rates below the national average of 94 percent (as reported in the 1990 Census), almost all non-tribal areas have telephone penetration rates higher than 70 percent. In reviewing this proceeding, however, the Commission recognizes that there may be certain areas abutting tribal lands that also lack adequate access to telecommunications services. It is likely that some non-tribal areas share with their neighboring tribal communities the same barriers to access, such as geographic remoteness, sparse population clusters, and low income levels. Further, it is likely that areas adjacent to tribal communities also have significant Native American populations.

16. Extending the bidding credit to underserved non-tribal areas could serve dual purposes. First, extending the credit furthers the objectives of the Communications Act which directs the Commission to ensure the rapid and efficient deployment of wire and radio communications ''to all the people of the United States.'' *See* 47 U.S.C. 151. Further, allowing applicants to seek bidding credits for non-tribal areas immediately adjacent to tribal communities may make it more likely that entities will seek bidding credits to serve tribal lands. Accordingly, the Commission seeks comment on whether it should give those applicants who commit to serve a qualifying tribal area the ability to augment the bidding credit for also serving adjacent non-tribal areas.

17. In the event that the bidding credit is extended to non-tribal areas, the Commission seeks comment on how to define the geographic areas that would trigger eligibility for an additional credit amount. For example, is it suitable to use county-wide penetration rates to establish eligibility, or, given the large size of certain counties, would the use of county-wide figures fail to accurately gauge the penetration level of some specific areas? Alternatively, the Commission seeks comment on whether measuring telephone penetration based on smaller geographic areas would more accurately reflect underserved areas. For example, the Census Bureau tabulates data according to a variety of small geographic areas, such as census tracts or census blocks.

18. The Commission also requests comment on the appropriate certification process; *e.g.* is it sufficient that the applicant itself certify that the applicable non-tribal area has a telephone penetration rate that meets the percentage threshold to qualify for the credit? In particular, the Commission requests comment on the possible method(s) that would enable it to accurately target the non-tribal areas that share the same characteristics of tribal lands and are thus appropriate to target for support through bidding credits. Although it is likely that areas adjacent to tribal lands have significant tribal populations, and may possess characteristics (*e.g.* geographic remoteness, low subscribership) that similarly warrant support, the Commission recognizes that certain areas immediately adjacent to tribal lands include highly populated, urban areas. The Commission therefore requests comment on any widely applicable methodology that would enable the Commission to easily distinguish between urban/highly

populated areas with high telephone penetration rates and those that have characteristics warranting support. The Commission seeks comment on any other measures or conditions that should be adopted that will safeguard the integrity of the Commission's bidding credit program.

19. Further, the Commission tentatively concludes that, in the event it extends the bidding credit's applicability to adjoining non-tribal lands, it should use the existing formula to calculate the additional credit. In order to determine the total credit for a market, the applicable ''square kilometers'' of the relevant non-tribal area would be added to the qualifying tribal area within the license market. The Commission seeks comment on this approach, and on any alternative ways to calculate the credit.

20. In the *R&O*, the Commission concluded that it has the authority to establish the tribal lands bidding credit because the Act, *inter alia*, directs the Commission to: (1) Facilitate the rapid and efficient deployment of wire and radio communications ''to all the people of the United States;'' (2) foster ''the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas;'' and, (3) promote the ''efficient and intensive use of the electromagnetic spectrum.'' *See R&O,* citing 47 U.S.C. 151, 47 U.S.C. 309(j)(3)(A), and 47 U.S.C. 309(j)(3)(D). The Commission further concluded that section 706(A) of the Act authorizes bidding credits designed to remove or reduce economic barriers to infrastructure investment. The Commission tentatively concludes that these provisions also allow the Commission to extend the bidding credit to cover adjacent non-tribal areas. The Commission requests comment on this analysis.

III. Procedural Matters

A. *Ex Parte* Rules—Permit-But-Disclose Proceeding

21. This proceeding is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 CFR 1.1202, 1.1203, and 1.1206.

B. Initial Paperwork Reduction Act Analysis

22. The *2nd FNPRM* has been analyzed with respect to the Paperwork Reduction Act and found to impose no new or modified reporting and recordkeeping requirements or burdens on the public.

C. Initial Regulatory Flexibility Analysis

23. The Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for the *2nd FNPRM*, as required by the Regulatory Flexibility Act. The Commission requests written public comment on the analysis. Comments must be filed in accordance with the same filing deadlines as comments filed in response to the *2nd FNPRM*, and must have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *2nd FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). *See* 5 U.S.C. 603(a).

Need for, and Objectives of, the 2nd FNPRM

24. The tribal lands bidding credit program is still in its early stages and few carriers have taken advantage of the bidding credit thus far. The record, however, is unclear regarding the reasons behind the lack of response to the bidding credit. Because the record in this proceeding thus far is not sufficient to make reasoned decisions as to what steps, if any, should be taken to further encourage carriers to provide coverage to tribal lands, the Commission seeks additional comment regarding this issue.

25. *Modifying the construction requirements of the tribal lands bidding credit.* The Commission's rules currently impose more stringent construction requirements on carriers who seek the tribal lands bidding credit than those who do not. All carriers taking advantage of the bidding credit are required to serve 75 percent of the population of the qualifying tribal land for which the credit was awarded, and must do so within three years of license grant. One possible reason behind the lack of participation in the bidding credit program is that carriers find that difficulties involved in meeting the enhanced construction requirements are not sufficiently mitigated by the existing bidding credit. For example, there may be conditions, such as technical obstacles, economic factors, or other difficulties, that may make it difficult for carriers to satisfy the stricter construction requirement. Circumstances may exist on remote tribal lands such as low population density, rough terrain, and other factors that can negatively affect the ability of carriers to provide the requisite coverage to facilities in those areas. Accordingly, the Commission seeks comment as to whether it should reconsider the buildout obligations imposed on carriers utilizing the tribal lands bidding credit. The Commission seeks comment on whether the requirement that carriers cover 75 percent of the population within three years remains feasible, or whether it should moderate the buildout criteria. Specifically, the Commission requests comment on what factors or circumstances exist that warrant an across-the-board relaxation of the bidding credit construction requirements.

26. In the event that it is determined that the construction requirements should be eased, the Commission seeks comment on how the requirements should be modified. For example, should the population of the qualifying tribal land covered by a carrier be lessened (*i.e.* reduced to a number below 75 percent)? Alternatively, should the time period in which to provide coverage to 75 percent of the tribal population be extended to a construction period longer than three years? Or is the appropriate remedy a combination of a reduced population coverage requirement and an expanded construction period? Should the Commission adopt a variation of the combination method such as a tiered approach? In other words, construction would occur in phases, *e.g.*, a certain percentage of the total tribal population must be covered in three years, and a greater percentage would be covered at the five-year mark.

27. A comprehensive change of the construction requirements may not be the appropriate solution. It may be that satisfying the tribal lands buildout requirement may be more difficult in certain tribal areas in the country than in others. There may be difficulties or conditions specific to certain tribal lands, that may make it difficult for carriers to satisfy the stricter construction requirement, while other carriers deploying the same type of service may have no difficulties in meeting the construction requirements in other tribal areas. Similarly, the ability to comply with the tribal lands bidding credit may depend on the particular wireless service at issue. The Commission's rules governing general construction and operation obligations of licensees reflect several approaches that match a type of license (*i.e.* site-based versus geographic market) or service (*e.g.* PCS or lower band 700 MHz) with a specific buildout requirement. It may therefore be preferable to deal with these situations on a case-by-case or service-by-service basis rather than an across-the board

method. The Commission therefore seeks comment on whether buildout difficulties should be resolved using an ad hoc or waiver approach.

28. *Increasing the bidding credit limit.* In addition to the required construction requirements, another possibility for the poor response may be that the existing bidding credit may not provide carriers sufficient incentive to deploy facilities on tribal lands. Although no applicant has yet requested a larger credit than the one called for under the tribal lands bidding credit methodology, it may be that the current bidding credit amounts are not adequate to allow carriers to recoup a significant portion of infrastructure costs. Accordingly, the Commission seeks comment on whether the existing tribal lands bidding credit remains effective in encouraging carriers to provide service in tribal areas. The Commission also requests comment on whether and how the bidding credit amount and methodology should be modified to provide a greater incentive for carriers to deploy facilities on tribal lands.

29. *Adjustment of the Bidding Credit based on 2000 Census Data.* Recently issued data from the 2000 Census indicates that telephone penetration rates on tribal lands have increased appreciably from the levels reported in 1990. However, despite the improvement in access to basic telephone service experienced by many tribal areas, the census information reveals that telephone penetration rates on tribal lands remain well below the 97.6 percent penetration rate found in the country as a whole. Certain tribal lands continue to have unusually low telephone penetration levels despite gains in subscribership numbers since the 1990 Census. Accordingly, the Commission seeks comment on whether the improved tribal penetration rates require that certain aspects of the bidding credit be modified. For example, should the credit formula be adjusted using 2000 Census figures instead of 1990 Census figures? While some of the more populous tribal areas continue to have penetration rates below 70 percent, many tribal lands now have penetration rates above 70 percent. Accordingly, to the extent that tribal penetration rates have improved, but remain below the national average, should the bidding credit formula be modified so that tribal areas with penetration rates greater than 70 percent but below the national average are eligible for the credit? What should the benchmark be? Further, with respect to tribal lands that have been identified by the 2000 Census as continuing to have unusually low penetration rates, the Commission requests comment on whether the Commission should make adjustment to the bidding credit to provide additional incentives for such areas.

30. *Extending the Tribal Lands Bidding Credit to Adjacent Non-tribal Areas with Low Penetration Rates.* The Commission recognizes that there may be certain areas abutting tribal lands that also lack adequate access to telecommunications services. It is likely that some non-tribal areas share with their neighboring tribal communities the same barriers to access, such as geographic remoteness, sparse population clusters, and low income levels. Further, it is likely that areas adjacent to tribal communities also have significant Native American populations. Accordingly, in the *2nd FNPRM*, the Commission solicits comment on whether bidding credits should be extended to non-tribal areas with penetration rates of less than 70 percent. Specifically, the Commission seeks comment on whether it should allow a limited expansion of the tribal lands bidding credit program that would allow carriers who seek bidding credits in order to serve qualifying tribal lands to obtain additional credit for extending their coverage to immediately adjacent non-tribal areas that also have penetration rates of less than 70 percent.

Legal Basis

31. The Commission tentatively concludes that it has authority under sections 4(i), 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), 309(j) and 706, to adopt the proposals set forth in the *2nd FNPRM.*

Description and Estimate of the Number of Small Entities to which the rules will apply.

32. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. 5 U.S.C. 604(a)(3). The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' 5 U.S.C. 601(6). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in the Small Business Act, 15 U.S.C. 632). A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). 15 U.S.C. 632.

33. Cellular Licensees. The SBA has developed a small business size standard for small businesses in the category ''Cellular and Other Wireless Telecommunications.'' 13 CFR 121.201, North American Industry Classification System (NAICS) code 513322. Under that SBA category, a business is small if it has 1,500 or fewer employees. According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, the Commission notes that there are 1807 cellular licenses; however, a cellular licensee may own several licenses. According to the most recent *Trends in Telephone Service* data, 858 carriers reported that they were engaged in the provision of either cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio telephony services, which are placed together in that data. *See Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3—Number of Telecommunications Service Providers that are Small Businesses (May 2002). The Commission has estimated that 291 of these are small under the SBA small business size standard. Accordingly, based on this data, the Commission estimates that not more than 291 cellular service providers will be affected by these revised rules.

34. 220 MHz Radio Service—Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the definition under the SBA rules applicable to ''Cellular and Other Wireless Telecommunication'' companies. This category provides that a small business is a wireless company employing no more than 1,500 persons. According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000

or more employees. If this general ratio continues in 2002 in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

35. 220 MHz Radio Service '' Phase II Licensees. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order,* the Commission adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. *See* Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220–222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89–552, *Third Report and Order,* 62 FR 16004 (April 3, 1997). This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 683 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.

36. 700 MHz Guard Band Licenses. In the *700 MHz Guard Band Order,* the Commission adopted a small business size standard for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. *See* Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99–168, *Second Report and Order,* 65 FR 17594 (April 4, 2000). A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to 9 bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

37. Lower 700 MHz Band Licenses. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. *See* Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59), GN Docket No. 01–74, *Report and Order,* 67 FR 5491 (February 6, 2002). The Commission defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of 704 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings [EAGs]) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.

38. Private and Common Carrier Paging. In the *Paging Second Report and Order,* the Commission adopted a small size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96–18, *Second Report and Order,* 62 FR 11616 (March 12, 1997). A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 608 carriers reported that they were engaged in the provision of either paging or ''other mobile'' services. Of these, the Commission estimates that 589 are small, under the SBA-approved small business size standard. The Commission estimates that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

39. Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96–59, *Report and Order,* 61 FR 33859 (1996); *see* also 47 CFR 24.720(b). For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission

reauctioned 347 C, D, E, and F Block licenses; there were 48 small business winning bidders. Based on this information, the Commission concludes that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks plus the 48 winning bidders in the re-auction, for a total of 231 small entity PCS providers as defined by the SBA small business standards and the Commission's auction rules. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as ''small'' or ''very small'' businesses.

40. Narrowband PCS. The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. In March 2002, 106 MTA and BTA narrowband PCS licenses were granted to 4 licensees. Each of the licensees are small or very small businesses.

41. Specialized Mobile Radio (SMR). Pursuant to 47 CFR 90.814(b)(1), the Commission has established a small business size standard for purposes of auctioning 900 MHz SMR licenses, 800 MHz SMR licenses for the upper 200 channels, and 800 MHz SMR licenses for the lower 230 channels on the 800 MHz band as a firm that has had average annual gross revenues of $15 million or less in the three preceding calendar years. 47 CFR 90.814(b)(1). The SBA has approved this small business size standard for the 800 MHz and 900 MHz auctions. Sixty winning bidders for geographic area licenses in the 900 MHz SMR band qualified as small businesses under the $15 million size standard. The auction of the 525 800 MHz SMR geographic area licenses for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten (10) winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard.

42. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven (11) winning bidders for geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed ''small business'' status. Thus, 40 winning bidders for geographic licenses in the 800 MHz SMR band qualified as small business. In addition, there are numerous incumbent site-by-site SMR licensees on the 800 and 900 MHz band. The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to firms that had revenues of no more than $15 million in each of the three previous calendar years. This analysis applies to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by SBA.

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

43. The *2nd FNPRM* does not propose any specific reporting, recordkeeping or compliance requirements. However, the Commission seeks comment on what, if any, requirements it should impose if it adopts the proposals set forth in the *2nd FNPRM.*

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

44. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small Entities. 5 U.S.C. 603(c).

45. The *2nd FNPRM* seeks comment regarding ways to adjust the current tribal lands bidding credit program in order to encourage further deployment by carriers, as well as on additional uses of the bidding credit program to facilitate the provision of service to underserved non-tribal areas adjacent to tribal communities. The *2nd FNPRM* does not make specific implementation proposals, but seeks guidance from the public on how to further expand the Commission's bidding policies. The Commission tentatively concludes that these proposals should not have a significant economic impact on small carriers.

D. Comment Dates

46. The Commission invites comment on the issues and questions set forth in the *2nd FNPRM, Paperwork Reduction Analysis, and IRFA contained* herein. Pursuant to sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before June 2, 2003, and reply comments on or before June 16, 2003. 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 (1998).

47. 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 electronic comments by Internet e-mail. To receive 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. Or you may obtain a copy of the ASCII Electronic Transmittal From (FORM–ET) at *http://www.fcc.gov/e-file/email.html.*

48. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix,

Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location will be 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

49. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

If you are sending this type of document or using this delivery method . . .	It should be addressed for delivery to . . .
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary.	236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002 (8 a.m. to 7 p.m.).
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail and Priority Mail).	9300 East Hampton Drive, Capitol Heights, MD 20743 (8 a.m. to 5:30 p.m.).
United States Postal Service first-class mail, Express Mail, and Priority Mail	445 12th Street, SW., Washington, DC 20554.

50. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC 20554 (*see* alternative addresses above for delivery by hand or messenger) (telephone 202–863–2893; facsimile 202–863–2898) or via e-mail at *qualexint@aol.com.*

51. The full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.* Alternative formats (computer diskette, large print, audio cassette and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418–7426, TTY (202) 418–7365, or at *bmillin@fcc.gov.*

IV. Ordering Clauses

52. Pursuant to sections 1, 4(i), 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303(r), 309(j), and 706, the *Second Further Notice of Proposed Rulemaking* is adopted.

53. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Second Further Notice of Proposed Rulemaking,* including the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

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