§ 540.9 [Amended]

5. In section 540.9, paragraph (j) is removed, and paragraph (k) is redesignated as paragraph (j).

Appendix A to Subpart A—[Amended]

6. The following sentence is added at the end of Paragraph 12 of Appendix A to subpart A—Example of Escrow Agreement for Use Under 46 CFR 540.5(b):

The Operator and/or Ticket Issuer are not entitled to, nor have any interest in, any funds payable from this account to the extent such funds represent unearned passenger revenue, as that term is defined in subpart A of part 540 of title 46, Code of Federal Regulations.

* * * * *

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 96–16210 Filed 6–25–96; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[General Docket No 96–113; FCC 96–216]

Identifying and Eliminating Market Entry Barriers for Small Businesses

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; notice of inquiry.

SUMMARY: The attached Notice of Inquiry (NOI) commences a proceeding to examine barriers to small business entry into the telecommunications marketplace. Section 101 of the Telecommunications Act of 1996 (1996 Telecommunications Act) adds new Section 257 to the Communications Act, which requires the Commission, within 15 months after enactment, to complete a proceeding to identify and eliminate market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services. Through this NOI, the Commission initiates an omnibus Section 257 proceeding and will undertake specific initiatives that further the objective of reducing market entry barriers for small businesses. The record developed in connection with these intiatives also will, assist us in achieving our mandate under Section 309(j) of the Communications Act of 1934 to disseminate licenses for auctionable spectrum-based services to small businesses, rural telephone companies, and businesses owned by women and minorities, as well as in fulfilling our general obligation to serve the public interest.

DATES: Comments must be submitted on or before July 24, 1996 and reply comments are due on or before August 23, 1996.

ADDRESSES: Comments and reply comments may be mailed to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Linda L. Haller, Office of General Counsel, at (202) 418–1720 or S. Jenell Trigg, Office of Communications Business Opportunities, at (202) 418–0990.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Inquiry* which was adopted on May 10, 1996, and released on May 21, 1996. The complete text of this NOI is available for inspection and copying during normal business hours in the FCC Reference Center (room 239), 1919 M Street, N.W., Washington, D.C., on-line at the Office of Communications Business Opportunities' web site via the FCC's Internet Home Page at www.fcc.gov., and may also be purchased from the Commission's copy contractor, International Transcription Service (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

I. Introduction

1. Section 101 of the Telecommunications Act of 1996 (1996 Telecommunications Act),[1] adds new Section 257 to the Communications Act of 1934.[2] Section 257 requires the Commission, within 15 months after enactment, to complete a proceeding ''for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act * * * market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.'' [3] In implementing Section 257, the Commission must ''promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.'' [4] Every three years following the completion of the market entry barriers proceeding, the Commission must report to Congress on regulations that have been issued to eliminate barriers and any statutory barriers that the Commission recommends be eliminated.[5]

2. This *Notice of Inquiry* (NOI) commences the Commission's omnibus Section 257 proceeding. We also will undertake specific initiatives that further the objective of Section 257 to reduce market entry barriers for small businesses. The record developed in connection with these initiatives also will assist us in achieving our mandate under Section 309(j) of the Act [6] to disseminate licenses for auctionable spectrum-based services to small businesses, rural telephone companies, and businesses owned by women and minorities, as well as in fulfilling our general obligation to serve the public interest.[7]

3. We also inquire whether small businesses owned by minorities or women face unique entry barriers. We explore this area because the legislative history of Section 257 suggests that Congress was concerned about the underrepresentation of minority or women-owned small businesses in the telecommunications market and sought to increase competition by diversifying ownership.[8] In addition, Section 309(j) specifically requires that we further opportunities for businesses owned by women and minorities in the provision of spectrum-based services, because a portion of small telecommunications businesses under Section 257 are owned by women and minorities, and because

[1] Telecommunications Act of 1996, Public Law No. 104–104, 110 Stat. 56 (1996).

[2] 47 U.S.C. 151 *et seq.*

[3] 47 U.S.C. 257(a).

[4] 47 U.S.C. 257(b).

[5] 47 U.S.C. 257(c).

[6] 47 U.S.C. 309(j).

[7] *See, e.g.,* 47 U.S.C. § 214 (Commission must certify that public convenience or necessity requires construction or extension of lines); 47 CFR § 303 (Commission must regulate radio as public interest, convenience or necessity requires); 47 U.S.C. 307(a) (Commission must grant radio licenses that serve the public convenience, interest, or necessity).

[8] The Congressional Record provides:

[W]hile we should all look forward to the opportunities presented by new, emerging technologies, we cannot disregard the lessons of the past and the hurdles we still face in making certain that everyone in America benefits equally from our country's maiden voyage into cyberspace. I refer to the well-documented fact that minority and women-owned small businesses continue to be extremely under represented in the telecommunications field. * * * Underlying this amendment [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. telecommunications marketplace.

142 Cong. Rec. H1141 at H1176–77 (daily ed. Feb. 1, 1996) (statement of Rep. Collins).

evidence suggests that these entities encounter unique market barriers.

II. Background

4. The primary purpose of this inquiry is to fulfill our mandate under Section 257 to identify and eliminate market barriers for small businesses in the provision and ownership of telecommunications and information services, and in the provision of parts or services to providers of telecommunications services and information services. We interpret ''market entry barriers'' to include obstacles that deter entrepreneurs from forming small businesses, barriers that impede entry into the telecommunications market by existing small businesses, and obstacles that small telecommunications businesses face in providing service or expanding within the telecommunications industry, e.g., those that inhibit a paging company from expanding into a new geographic area or new service such as cellular.

5. The legislative history of Section 257 essentially parallels the language of the enacted provision. The Conference Report states: ''The conference agreement adopts the House provisions with minor modifications as a new Section 257 of the Communications Act.'' [9] There was no provision in the Senate bill and the House amendment stated: ''Section 250 [now Section 257] requires the Commission to adopt rules that identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications and information services. The Commission must review these rules and report to Congress every three years on how it might prescribe or eliminate rules to promote the purposes of this section.'' [10]

6. Small businesses play a significant role in the U.S. economy. According to the U.S. Small Business Administration (SBA), in 1992 (the last year for which information is available), small businesses constituted the vast majority of all employers, employed 53% of the private work force, and provided 50% of all receipts. Research also has shown that small firms innovate at a per person rate twice that of large firms, spend more money on research and development (R&D), and more efficiently convert R&D efforts to new products than large firms.[11] Furthermore, small businesses are able to serve narrower niche markets that may not be easily or profitably served by large corporations, especially as large telecommunications expand globally. Despite the role of small businesses in the economy, and the growth of the telecommunications market,[12] small businesses currently constitute only a small portion of telecommunications companies.[13]

III. Identifying Market Barriers

A. General Market Barriers

7. In this section, we first request commenters to provide profile data about small telecommunications businesses, including financing sources and terms, services provided, markets served, geographic areas of operation, and employee workforce. This information will assist us in identifying market barriers and designing appropriate measures to eliminate barriers. Commenters may submit individualized or aggregated data. We request commenters to provide the following information in as much detail as possible regarding particular services, including but not limited to PCS, cellular, paging, SMR, satellite, radio, television, wired cable, wireless cable, local exchange, long-distance, access, on-line, messaging, and international services, and resale of any such service, as well as information regarding businesses that provide parts or services to providers of telecommunications services and information services:

(1) Ownership structure, including identity of owner(s) by gender and racial group,[14] as well as percentage of minority or female control;

(2) Communications service(s) provided;

(3) Geographic region(s) served;

(4) Primary markets (e.g., businesses, residences, government);

(5) Number of employees, job categories (i.e., officials and managers, professionals, technicians, clerical), and employee composition in job categories by race and gender.

(6) Capital requirements for entry or expansion;

(7) Funding sources and methods of raising capital;

(8) Revenue, income and profit levels.

8. To help fulfill our responsibilities under Sections 257 and 309(j), we request comment on the following questions regarding market barriers.

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[9] 142 Cong. Rec. H1078–03, H1113–14, *Joint Explanatory Statement of the Committee of Conference* at 23.

[10] 142 Cong. Rec. H1078–03 at H1113. In debates preceding passage of the 1996 Telecommunications Act, two members of Congress expressed the view that Section 257 would cover conduct including that precluded by new Section 222(e), 47 U.S.C. § 222(e), which prohibits local telephone service providers from charging discriminatory or unreasonable rates, or setting discriminatory or unreasonable terms or conditions, in selling subscriber lists to independent directory publishers. 142 Cong. Rec. H1145–06 at H1160 (daily ed. Feb. 1, 1996) (statement of Rep. Barton); 142 Cong. Rec. E184–03 (daily ed. Feb. 6, 1996) (extension of remarks by Rep. Paxon).

[11] ''Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen Docket 90–314,'' *reprinted at* 8 FCC Rcd 7820, 7828 (1993) (*SBAC PCS Report*) (citing *Joint Petition for Further Rulemaking of Advanced Mobilecomm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc.*, in Gen Docket 90–314, Exhibit # 3, at 12–13).

[12] For example, according to Edge Media, worldwide revenues for Personal Communications Services (PCS) could grow to $31 billion for equipment and services by the year 2000, *The Telecommunications Industry A Market Opportunity Analysis,* Federal Communications Commission, Office of Communications Business Opportunities (June 1995) (*1995 OCBO Analysis*) at 17 & n.30 (citing *1995 Telecommunications Market Review and Forecast,* North American Telecommunications Association), and PCS is expected to have 13.5 million subscribers by the year 2000, *id.* at 1. The cellular market itself is growing rapidly: subscribership increased from approximately 5 million in 1990 to over 24 million in 1994. *Id.* The cable industry generated nearly $23 billion in 1994 and revenues will likely continue to climb, given that over 65% of all households with television sets subscribe to cable for video programming and over 95% of the country is wired for cable. *Id.* at 3.

[13] For example, the SBAC noted that SBA sales and employment data for the period 1989–1991 indicated that while the total number of small telecommunications enterprises had increased, cumulative market share possessed by those businesses decreased significantly. ''Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen Docket 90–314,'' reprinted at 8 FCC Rcd 7820, 7826 (1993) (SBAC PCS Report). Stated differently, bigger businesses were commanding larger portions of telecommunications revenues. Of a total of 990 firms in Standard Industrial Code 4812 (radiotelephone industries) in 1989, 971 firms with 249 employees or less possessed a 35.1% cumulative market share in 1991, compared to 927 firms in the same employment size range with a cumulative market share of 52.5% in 1989. *Id.* In contrast, there were a total of 19 firms with over 249 employees commanding a 64.9% cumulative market share in 1991, compared to 21 firms of the same size range with a cumulative market share of 47.5% in 1989. *Id.*; *see also* FCC, ''Telecommunications Industry Revenue: TRS Fund Worksheet Data'' (February 1996) at Table 21 (of all 1,347 local exchange carriers (LEC) filing FCC Form 431 Telecommunications Relay Service (TRS) Fund Worksheets, the top fifth represent 98% of all LEC revenues; of all 97 interexchange carriers (IXC) filing TRS Fund Worksheets, the top fifth represent 99% of all IXC revenues); *Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* Fifth Report and Order, 9 FCC Rcd 5532, 5578, 59 Fed. Reg. 37,566 (1994) (*Competitive Bidding Fifth Report and Order*) (comments of DCR Communications asserting that ten large companies—the six RBOCs, AirTouch (formerly owned by Pacific Telesis), McCaw (now owned by AT&T), GTE and Sprint—control nearly 86 percent of the cellular industry, and that nine of these ten companies control 95% of the cellular population and licenses in the 50 BTAs that have one million or more people).

[14] Consistent with the definition of ''minority'' in our rules, minority identification should be Black, Hispanic, American Indian, Alaskan Native, Asian, or Pacific Islander, as appropriate. *See, e.g.,* 47 CFR §§ 1.1621(b) and 24.720(i); *see also Race and Ethnic Standards for Federal Statistics and Administration Reporting,* OMB Statistical Policy Directive, No. 15 (1977).

Comments should be as specific as possible and identify with particularity the types of services and geographic regions covered.

(1) What obstacles do small businesses face in accessing capital and credit?

(2) Do small businesses obtain capital and credit under terms and conditions less favorable than those provided large businesses? If so, why?

(3) What difficulties do small businesses face in their dealings with suppliers, vendors, contractors, or FCC licensees?

(4) What obstacles do small businesses face in their abilities to resell, interconnect, or benefit from economies of scale?

(5) Do high deposit requirements deter small business entry into resale?

(6) Do small businesses have difficulty attracting or retaining clients?

(7) Do small businesses have difficulty dealing with trade associations and other private entities?

(8) Do small businesses have particular difficulties in obtaining government contracts, licenses, franchises, or other government benefits? Have small businesses faced any such problems regarding FCC policies or rules?

(9) Do contracts for a single bidder to serve a large volume and diversity of companies through one contract disadvantage small businesses?

(10) Do small businesses encounter difficulties attracting strategic partners?

(11) In forming alliances with other entities, are small businesses required to do so under unfavorable terms and conditions for the small business?

(12) Are there unique obstacles that small businesses face in entering or operating in the telecommunications field that are not faced by small businesses operating in other sectors (for example, in the retail or service sectors)?

(13) Do small businesses experience difficulties identifying and obtaining access to spectrum?

9. We request comment on how these impediments vary depending on the particular service provided. What particular types of businesses have difficulty getting started, operating, and expanding? Does the cost of capital differ for small broadcast stations versus small wireless providers? Does the cost of capital vary depending on the particular type of wireless (paging, SMR, PCS, etc.) or broadcast (television or radio) service offered? Do any other market entry barriers exist? For what services? Parties should comment on the geographic scope of any identified barrier, i.e., does the barrier exist nationwide, or in particular regions or locales? For any barrier, commenters also should identify whether it is a statutory requirement,[15] government regulation, or external factor, e.g., difficulty obtaining loans.

10. We also request comment on how these difficulties are influenced by size. Are impediments to entry and expansion greater for very small businesses? For example, does the cost of capital increase as the size of a small business decreases? Do very small businesses encounter greater difficulties in dealings with suppliers, vendors, or contractors than larger small businesses?

B. Unique Market Entry Barriers

11. In this section, we seek information to help us identify any unique obstacles that small telecommunications businesses owned by women or minorities encounter in forming firms, providing service, or expanding in the telecommunications market. We explore this area because first, the legislative history of Section 257 suggests Congress was concerned about the underrepresentation of minority and women-owned small businesses in the telecommunications market and sought to increase competition by diversifying ownership. Second, Section 309(j) specifically requires that we further opportunities for businesses owned by women and minorities in the provision of spectrum-based services. Third, based on our licensing information and other statistical data, we know that a portion of small communications businesses are owned by women and minorities and there is evidence that these entities encounter unique market barriers.

12. Evidence demonstrates that a principal barrier is minority or female status, rather than race or gender-neutral factors, and that this barrier contributes directly to low participation rates. For example, in the 1992 Small Business Act, Congress found that businesses owned by minorities or women have particular difficulties in obtaining capital.[16] In the Women's Business Ownership Act of 1988,[17] Congress found that women as a group are subject to discrimination that adversely affects their ability to raise or secure capital. In 1993, the National Foundation for Women Business Owners found that women-owned firms are 22% more likely to report difficulties with banks than are businesses at large, and that removal of financial barriers would encourage stronger growth among women-owned businesses, resulting in much greater growth throughout the economy.[18] Further, in a 1992 Report to the President and Congress, the National Women's Business Council cited lack of access to capital as the most pervasive barrier to success for women business owners.[19]

13. As to communications businesses specifically, the American Women in Radio and Television, Inc. asserts that ''[b]ased on their gender, women today confront significant barriers in raising the amount of capital necessary to seize the ownership opportunity. This lack of access to capital has contributed directly to the low level of female ownership of mass media facilities.'' The Commission has recognized that ''considerable evidence has been presented showing that the primary impediment to minorities seeking to enter the communications industry or to increase their mass media holdings has been lack of access to capital.'' In April 1995, the National Telecommunications and Information Administration (NTIA) found that ''there are real barriers to minority participation in telecommunications, and that minorities often lack access to the types and amount of capital required to form and expand telecommunications businesses.'' Congressional testimony regarding minority discrimination in telecommunications shows that controlling for education, work experience, age, gender, and other factors, bank loan dollars, per dollar of owner equity investment, are 160% higher for white firms ($1.85) than black firms ($1.16).[20]

14. The relatively low representation of women or minority-owned communications businesses also suggests that these types of businesses encounter unique obstacles in entering the telecommunications industry. According to the U.S. Census Bureau, in 1987 women owned and controlled 1.9% (27) of 1,342 commercial television stations and 3.8% (394) of 10,244 commercial radio stations in the

[15] Section 257 requires that we report to Congress any statutory barriers that the Commission recommends be eliminated. 47 U.S.C. 257(c).

[16] 1992 Small Business Act, sections 112(4) and 33(a)(4).

[17] Public Law No. 100–533 (1988).

[18] ''Financing the Business, A Report on Financial Issues from the 1992 Biennial Membership Survey of Women Business Owners,'' The National Foundation for Women Business Owners (October 1993).

[19] ''Annual Report to the President and Congress,'' National Women's Business Council (1992) at 11.

[20] *Policies and Rules Regarding Minority and Female Mass Media Ownership of Mass Media Facilities*, Notice of Proposed Rulemaking, 10 FCC Rcd 2788, 2791, 60 Fed. Reg. 6,068 (1995) *(Minority/Female Mass Media Ownership NPRM).*

United States.[21] In 1994, minorities owned and controlled 2.7% of the commercial television stations and 2.9% of the commercial radio stations in the United States.[22] According to the Census Bureau, in 1992, Blacks owned 3.5% of the entities characterized generally as communications firms [23] and women owned 31%; and most of these businesses were solely-owned.[24]

15. Finally, the participation level of minority or women-owned businesses in the Commission's spectrum auctions so far suggests that these entities may face unique obstacles. Because auctions will continue and various factors influence participation,[25] we are not able to fully assess participation by women and minorities. Figures preliminarily indicate, however, that participation in auctions without bidding incentives for minorities and women is lower than participation in auctions with incentives. For example, in the broadband PCS auction for A and B blocks, which concluded in March 1995, no minority-owned businesses won a broadband PCS license and only one license (for one of the lower-priced markets) was won by a woman-owned business. In the MDS auction, which concluded on March 28, 1996, 7.7% of the eligible bidders claimed woman-owned status; 8.4% of the eligible bidders claimed minority-owned status. Of the 67 winners, 5.9% indicated they were women-owned; 7.5% indicated they were minority-owned.[26] In the 900 MHz SMR auction, which concluded on April 15, 1996, 7.8% of the eligible bidders claimed woman-owned status and 3.9% claimed minority-owned status. Of the 80 successful bidders, 6.3% indicated they were women-owned; 5% indicated they were minority-owned. Statistics for the PCS C block auction, which ended May 6, 1996, were higher, even though no competitive bidding incentives were available for businesses owned by minorities or women: [27] 13.3% of the eligible bidders claimed woman-owned status, 18.0% claimed minority-owned status; [28] and of the 89 successful bidders, 16.9% indicated they were woman-owned; 28.1% indicated they were minority-owned.[29]

16. By comparison, auctions that offered incentives for women and minority-owned businesses yielded higher participation by those entities (both as bidders and winners).

For example, in the July 1994 IVDS auction, 22.5% of the registered bidders claimed status as minority-owned, and 33.2% as women-owned; of the auctioned licenses, 23.6% were awarded to bidders claiming minority-owned status, and 38.2% to bidders claiming women-owned status.[30] In the nationwide narrowband PCS auction, also held in July 1994, of the 29 qualified bidders, 20.1% claimed minority-owned status and 10.3% claimed women-owned status.[31] None of the winners were minority or women-owned businesses. In the Fall 1994 regional narrowband PCS auction, which offered a larger bidding credit than was available in the nationwide narrowband PCS auction, of the 28 qualified bidders, 35.7% claimed minority-owned status, and 28.6 % claimed women-owned status.[32] Of the nine winners, 22.2% claimed minority-owned status, and 33.3% claimed women-owned status.[33]

17. We seek a broad and comprehensive record from which to determine whether the experiences of women and particular minority groups in entering and participating in the telecommunications market warrant adopting more significant gender or race-based incentives for minority or women-owned small businesses. Parties may submit personal accounts of individual experiences, studies, reports, statistical data, or any other relevant information.

18. Commenters should address whether there are particular barriers to entry and expansion based on a small business owner's race or gender. If so, for which services? Do barriers differ by service, e.g., radio, television, advanced television, DBS, PCS, equipment manufacturing? What specific obstacles do women and minorities encounter in trying to start small communications businesses? Are there problems endemic to small women and minority-owned telecommunications businesses but not to small businesses owned by women and minorities in other industries (e.g., retail, real estate), and if so, why? Are any such difficulties the result of race/gender neutral factors such as economic status, geographic location, level of experience? Are differences in capital requirements determinative? What other factors play a role? Commenters should address to what extent any impediments are unique to small businesses owned by women or minorities, rather than small businesses generally.

19. Discrimination can be a market entry barrier. Parties may submit evidence of past or current discrimination based on race or gender. Judicial findings of discrimination are

[21] *See* Comments of American Women in Radio and Television, Inc. in MM Docket No. 94–149 and MM Docket No. 91–140, at 4 n.4 (filed May 17, 1995), citing 1987 Economic Censuses, ''Women-Owned Business,'' WB87–1, U.S. Department of Commerce, Bureau of the Census, August 1990 (based on 1987 Census).

After the 1987 Census report, the Census Bureau did not provide data by particular communications services (four-digit Standard Industrial Classification (SIC) Code), but rather by the general two-digit SIC Code for communications (#48). Consequently, since 1987, the U.S. Census Bureau has not updated data on ownership of broadcast facilities by women, nor does the FCC collect such data. However, we sought comment on whether the Annual Ownership Report Form 323 should be amended to include information on the gender and race of broadcast license owners. *Minority/Female Mass Media Ownership NPRM,* 10 FCC Rcd at 2797.

[22] ''Analysis and Compilation of Minority-Owned Commercial Broadcast Stations in the United States,'' U.S. Department of Commerce, National Telecommunications and Information Administration, The Minority Telecommunications Development Program (MTDP) (September 1994). These percentages are based on reported ownership of 1,155 commercial television stations and 9,973 commercial radio stations. MTDP considers ''minority ownership'' as ownership of more than 50% of a broadcast corporation's stock, or have voting control in a broadcast partnership.'' *Id.* Of the 11,128 combined radio and television stations nationwide, minorities owned 2.9% (323). *Id.*

[23] ''Communications'' firms are a subcategory in a larger grouping called ''transportation and public utilities.''

[24] ''1992 Survey of Black-Owned Businesses,'' U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census (''1992 Black-Owned Businesses''); ''1992 Survey of Women-Owned Businesses,'' U. S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census (1992 Women-Owned Businesses''). These figures represent firms classified by the Census Bureau as Standard Industrial Classification Code (SIC) #48 and 1,517 Black-owned firms out of 43,666 total communications firms and 13,592 women-owned firms out of 43,665 total communications firms.

[25] Factors that may influence participation, include for example, the type of service, presence of incumbents, projected cost of a successful bid, capital requirements for offering service, access to capital, license coverage area, availability of Commission bidding incentives, and the extent of Commission outreach to small minority or women-owned businesses and new entrants.

[26] ''Multipoint Distribution Service Questions and Answers,'' FCC Auctions, Press Information (released March 29, 1996) at 3.

[27] In the *Competitive Bidding Sixth Report and Order,* the Commission noted that many minority-owned and women-owned applicants prepared to bid in the C Block auction in reliance on race and gender-based incentives. Thus, their rate of participation is likely higher than it would have been in the absence of any pre-auction incentives. *See Amendment of Part 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Radio Service Spectrum Cap,* Notice of Proposed Rulemaking, WT Docket No. 96–59, GN Docket No. 90–314, 61 Fed. Reg. 13,133 (released March 20, 1996) (*D, E & F Block NPRM*) at ¶ 27 (citing *Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* Sixth Report and Order, 11 FCC Rcd 136, 60 Fed. Reg. 37,786 (1996).

[28] Id.

[29] ''Distribution of Licenses in PCS C-Block Auction,'' FCC Auctions, Press Information (released May 6, 1996).

[30] ''*Visitor's Auction Guide, FCC Auction, Broadband Personal Communications Services*'' (December 5, 1994) *(1994 FCC Visitor's Auction Guide)* at Section IX.

[31] *Id.* at Section VIII.

[32] *Id.* at Section VII.

[33] *Id.*

not required.[34] Evidence of discrimination can be derived from a variety of sources, including academic research studies, adjudications, legislative findings, statistical data, and personal accounts. To the extent possible, evidence should relate to a particular racial, ethnic, or gender group.

20. Women and minority owned businesses may have experienced discrimination or difficulty in obtaining government licenses. These experiences may have impeded the ability of such entities to enter the communications market, and consequently, impeded subsequent opportunities. We seek evidence of discrimination or unfavorable treatment by any governmental or public entity with respect to communications-related licenses, contracts or other benefits. It has been argued to the Commission that as a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975[35] and that special incentives for minority businesses ''are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum.''[36] We solicit comment on this particular argument.

21. Race or gender discrimination in employment may impede participation and advancement in the communications industry. Employment provides business knowledge, judgment, technical expertise, and entrepreneurial acumen, and other experience that is valuable in attaining ownership positions. For example, the Commission has found that employment in the broadcast industry is a valuable stepping stone to broadcast ownership.[37]

22. We seek any evidence that employment discrimination in the communications industry has been a barrier to entry in the telecommunications market by small businesses owned by minorities or women. Submissions should be detailed and should explain why the commenter believes the conduct at issue (e.g., failure to hire or promote) was based on race or gender discrimination, rather than the result of a race or gender-neutral factor (e.g., no job vacancy, job applicant not qualified for the position).

IV. Eliminating Market Barriers

A. Small Businesses Generally

23. Section 257 requires that after identifying market barriers, we prescribe regulations to eliminate those barriers. In implementing this mandate, first, how should we define small businesses under Section 257? By number of employees, gross revenue, net revenue, assets, or any other factor? Should we adopt a general size standard or specific standards for particular services (e.g., broadcast, PCS)? For example, the Commission's current Section 309(j) definitions are based on gross revenues and assets. Are there other factors the Commission should consider in defining what constitutes a small business? Should the Commission explore minimum capital requirements, debt/equity ratios, cash flow, net worth or other indicia of a business' ability to enter and compete in the marketplace? To formulate a policy using such indicia, the Commission would need specific financial information for small businesses generally, and requests that commenters recommending new approaches indicate the type of information needed by the Commission.

24. Second, we seek comments and proposals regarding ways to eliminate market entry barriers and enhance opportunities for small businesses in communications services, including, e.g., wireline, wireless, mass media, cable, satellite. What types of incentives or requirements would be most effective in eliminating market entry barriers? Commenters may propose new initiatives or suggest changes to existing rules or make any other recommendation. Proposals may address, for example, sale of subscriber lists to independent directory publishers as recognized by Congress in enacting Section 257,[38] or any other area. Commenters should provide data to support their proposals. Because Section 257 states that in prescribing rules to eliminate barriers we must rely on our rulemaking authority under provisions of the Act other than Section 257, we also request that commenters identify specific rulemaking provisions in the Act, e.g., Section 4(i)[39] that would support any such proposals.

25. Our Section 309(j) competitive bidding incentives for small businesses are examples of the types of mechanisms we could adopt in furtherance of our Section 257 mandate. Have bidding credits, installment payments, and reduced upfront payments enhanced opportunities for small business participation? Did the Commission's outreach efforts in providing information to prospective bidders enhance small business participation in each auction? If commenters believe the Commission's existing mechanisms could be modified to enhance opportunities for small businesses, please explain how, or suggest new approaches. In addition, we seek preliminary views on how the Section 309(j) incentives have operated in the five completed auctions employing small business incentives.[40] For example, we are aware of concerns that due to the high level of bidding in the PCS C Block auction successful bidders may find it difficult later on to secure the necessary financial resources to build out their systems, and may ultimately encounter problems in the market against established competitors like incumbent cellular providers and the generally large, well-financed winners of PCS A and B block licenses.[41] How do we balance the

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[34] Parties should be mindful, however, that to the extent it is applicable to federal action, *Croson* requires that the government have a '' 'strong basis in evidence for its conclusion that remedial action was necessary,' '' *City of Richmond* v. *J.A.Croson*, 488 U.S. 469, 500 (1989) (quoting *Wygant*, 476 U.S. at 277); *see also* Memorandum Regarding *Adarand* to General Counsels from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice (dated June 28, 1995) (DOJ Memorandum) at 11.

[35] *See* ''Statement of David Honig, Executive Director, Minority Media and Telecommunications Council,'' *En Banc* Advanced Television Hearing, MM Docket No. 87–268 (December 12, 1995) at 2–3 & n.2.

[36] *Id.* at n.2 citing *Southland Television Co.*, 10 RR 699, 750, *recon. denied*, 20 FCC 159 (1955) (awarding a Shreveport VHF license to the owner of a segregated movie theaters because such segregation 'would be legal under the laws of [Louisiana]').''

[37] *See Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include Forfeiture Guidelines*, MM Docket No. 96–16, FCC 96–49, 61 Fed. Reg. 9,964 (released February 16, 1996) (*1996 EEO Order & NPRM*) at ¶ 4 (''employment discrimination in the broadcast industry . . . imped[es] opportunities for minorities and women to learn the operating and management skills necessary to become media owners and entrepreneurs''); *see also Policy Statement, Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules*, 9 FCC Rcd 929, 930, 59 Fed. Reg. 12,606 (1994) (*EEO Forfeiture Policy Statement*), *vacated on other grounds, 1996 EEO Order and NPRM* (''increased employment opportunities are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership'').

[38] *See supra* note 10 (citing legislative history of Section 257).

[39] 47 U.S.C. 154(i).

[40] Bidding ended in the IVDS MSA auction on July 29, 1994, regional narrowband PCS auction on November 8, 1994, MDS auction on March 28, 1996, 900 MHz SMR auction on April 15, 1996, and the C Block auction on May 6, 1996.

[41] ''$6 Billion Bid so Far in Latest F.C.C. Auction For Airwaves,'' N.Y. Times, February 14, 1996, at D1 Column 6 (noting concerns of one industry consultant that the C Block auction was overvaluing the wireless market by 20%); ''Billions Pledged at Wireless License Auction,'' Washington Post, February 17, 1996 at B1 Column 1 (noting that even with the Commission's liberal payment terms for

desire to do more with the need to ensure that larger businesses do not usurp measures designed to aid small businesses? Do we need to do more to make sure that small businesses have meaningful opportunities to participate in the provision of spectrum-based services?

B. Minority or Women-Owned Small Businesses

26. In Part III.B. above, we request data to identify whether small businesses owned by minorities or women experience unique market barriers. In this section, we explore whether there is sufficient evidence of market barriers to justify special incentives to eliminate those barriers. We do so because governmental action that takes race or gender into account is subject to particular constitutional standards: strict scrutiny for race-based incentives; intermediate scrutiny for gender-based incentives. We discuss these standards below and then seek comment on possible incentives that would satisfy the standards while at the same time furthering the mandate of Section 257.

1. Constitutional Standards

27. The Constitution limits the power of government to classify individuals based on race or gender. Thus, federal incentive programs that take race or gender into account must satisfy constitutional standards. Courts reviewing government programs have applied different standards of review and reached various results depending on whether the classification covers race or gender and whether the classification burdens or benefits its subjects. Race-based programs must be narrowly tailored to further a compelling governmental interest. Gender-based programs must be substantially related to serve an important governmental interest.

28. In *Adarand Constructors, Inc.* v. *Peña,* [42] the Supreme Court held that the federal government's use of race-based criteria for decisionmaking must satisfy the requirements of strict scrutiny.[43] The Court wrote:

[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.[44]

By this decision, the Court rejected its earlier legal analysis in *Metro Broadcasting, Inc.* v. *FCC,*[45] which had applied the intermediate scrutiny standard of judicial review to the Commission's broadcasting distress sale and comparative preference policies for minorities.[46]

29. Overruling this aspect of *Metro Broadcasting,* the Court in *Adarand* clarified the permissible scope of affirmative action. First, the Court rejected the notion that the characterization of a racial classification as ''benign'' should entitle it a lower level of judicial review. Second, the Court applied to federal minority preference programs the strict scrutiny standard it had applied to a local contracting set-aside program in *City of Richmond* v. *J.A. Croson Co.*[47] Yet in doing so, the Court emphasized its intention not to impinge upon the federal government's ability to actively combat both the practice and the continuing effects of discrimination. A majority of the Court rejected any notion that strict scrutiny review is ''strict in theory, but fatal in fact.'' As Justice O'Connor stated in *Adarand,* ''[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.'' [48] In rejecting the *Metro Broadcasting* standard, the Court nonetheless reasoned that because the Constitution protects individuals rather than groups, any governmental action based upon a racial group classification should be subject to ''detailed judicial inquiry.'' [49]

30. Thus, *Adarand* established a new strict scrutiny standard for federal minority programs, based upon the two prong analysis of *Croson:* (1) the governmental interest underlying the affirmative action measure be ''compelling;'' and (2) the measure adopted must be ''narrowly tailored'' to serve that interest. Because a federal minority program has not yet been subjected to strict scrutiny pursuant to *Adarand,* judicial guidance regarding the strict scrutiny standard thus far is limited to *Croson* and lower court decisions applying strict scrutiny to state and local programs.[50]

31. Under these cases, the most clearly permissible compelling governmental interest is remedying the effects of present or past discrimination. Thus, federal minority incentive programs that serve a remedial interest are likely to satisfy the compelling governmental interest prong. Discrimination can be that committed by the government itself, or by private actors within the government's jurisdiction (such that the government was a ''passive participant'' or facilitated the perpetuation of a system of exclusion). The government must identify with some precision the discrimination to be redressed,[51] including evidence of discrimination against particular minority groups.[52] General, historical discrimination is an insufficient predicate. ''[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.'' [53] In addition, the government should have a ''strong basis,'' approaching a ''prima facie case of constitutional or statutory violation'' [54] of the rights of minorities. *Croson* permits remedial relief on the basis of ''evidence of a pattern of individual discriminatory acts * * * supported by appropriate statistical proof.'' [55] Post-*Croson* cases have held that statistical evidence can be probative of discrimination in the remedial setting,[56] and that anecdotal evidence can buttress statistical evidence.[57]

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small businesses, which some analysts figure amounts to a 40–60% discount, small businesses may find difficulty surviving if the market proves soft or glutted with competitors).

[42] 115 S. Ct. 2097 (1995).

[43] Prior to *Adarand,* the standard differed for federal and state programs. *Compare Fullilove v. Klutznick,* 448 U.S. 448 (1980) (federal program evaluated under intermediate scrutiny) with *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989) (state program evaluated under strict scrutiny).

[44] *Id.* at 2113.

[45] 497 U.S. 547 (1990).

[46] In *Metro Broadcasting,* the Court held:

[B]enign race-conscious measures mandated by Congress—even if those measures are not ''remedial'' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Id. at 564–65.

[47] 488 U.S. 469 (1989).

[48] *Adarand,* 115 S. Ct. at 2117.

[49] *Id.* at 2113.

[50] *See Hopwood v. Texas,* 78 F.3d 932 (5th Cir. 1996) *petition for cert. filed* (holding that the University of Texas School of Law may not use race as a factor in law school admissions).

[51] *Croson* requires that a government ''identif[y] discrimination with the particularity required by the Fourteenth Amendment.'' *Croson,* 488 U.S at 492, 499, 509; *see also* DOJ Memorandum at 22.

[52] *Croson* 488 U.S. at 506 (''The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.'')

[53] *Id.* at 499.

[54] *Id.* at 500.

[55] *Id.* at 509.

[56] *See, e.g., Peightal v. Metropolitan Dade County,* 26 F.3d 1548, 1556 (11th Cir. 1994) (statistical evidence constitutes ''requisite 'strong basis in evidence' mandated by *Croson*'').

[57] *See, e.g., Coral Construction Co.,* 941 F.2d at 919 (convincing anecdotal and statistical evidence

Continued

32. Courts generally give more deference to Congressional race-based remedial action than to state action because of Congress' special remedial powers under the Fourteenth Amendment. Thus, it is possible that the *Croson* standards for remedial action, e.g., the degree of discrimination required to justify remedial action,[58] might be lower where Congressional findings are involved.[59]

33. A government may adopt race or gender based programs for reasons other than to remedy discrimination. Such objectives are nonremedial. For example, in *Regents of the University of California* v. *Bakke*,[60] the purpose of the state of California's college admissions program was to diversify the student body. No majority opinion of the Court has addressed the sufficiency of nonremedial objectives. Because *Croson* addressed the authority of a local government to engage in remedial action, it did not decide the sufficiency of nonremedial objectives as a compelling interest. In *Croson*, Justice O'Connor stated that affirmative action must be ''strictly reserved for the remedial setting.'' [61] In Justice Stevens' dissent in *Adarand*, however, he stated that *Adarand* does not expressly adopt the view that past discrimination is the only valid compelling governmental interest; nor does it prohibit nonremedial objectives.[62] In *Bakke*, Justice Powell found that a university has a compelling interest in taking the race of applicants into account in its admission process in order to foster greater diversity among the student body to enhance the exchange of ideas on campus,[63] and in *Wygant* v. *Jackson Board of Education*,[64] Justice O'Connor expressed approval of that view.[65]

34. The second prong of strict scrutiny analysis requires that the use of any racial classification be ''narrowly tailored,'' to ensure that ''the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'' [66] In *Adarand*, the Court identified two factors in determining whether the use of a racial classification is narrowly-tailored: (1) Whether race-neutral alternatives were considered, and (2) whether the measure is appropriately limited in duration so that it will not continue longer than purposes for which it was adopted. Additional factors, identified in post-*Croson* cases, are: (3) the flexibility of the program, e.g., whether it contains a waiver provision that may narrow its scope; (4) the manner in which race is used, whether as a determinant, or as one of several factors; (5) whether any numerical target is compared to the relevant number of qualified minorities or to the population of minorities as a whole; (6) the extent of the burden on nonminorities.

35. Since *Adarand*, the Supreme Court has not ruled on the standard of review for federal gender-based programs, although the issue is before it in a pending case.[67] Prior to *Adarand*, the Court applied intermediate scrutiny; that standard currently applies.[68] Under the intermediate scrutiny standard, ''[t]o withstand constitutional challenge * * * classifications by gender must serve important governmental objectives and must be substantially related to those objectives.'' [69]

36. In applying intermediate scrutiny to invidious gender-based classifications, the Court has expressed concern that such classifications are, in fact ''reflective of 'archaic and overbroad' generalizations about gender'' or are ''based on 'outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.' '' [70]

37. It is unclear what standard would apply to benign gender classifications. In *Adarand*, the Court refused to apply a less strict standard to benign race-based classifications than the standard applied to ''invidious'' race-based classifications. Although *Adarand* did not address gender, its rejection of a lower standard for benign action in the race context suggests that the same standard applied to invidious gender classifications should apply to benign gender classifications. This conclusion is supported by the Court's analysis in *Mississippi University for Woman* v. *Hogan*,[71] which held that a state university's exclusion of men from its nursing program violated the Equal Protection Clause under a test of intermediate scrutiny.

38. In evaluating the second prong of the intermediate scrutiny test—whether a gender classification is substantially related to the government's objective—courts consider several factors, including the correlation between gender and the actual activity the government seeks to regulate and the practical effect of the program.[72]

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can be ''potent''); *see also* DOJ Memorandum at 12–13.

[58] *Croson*, however, involved a race preference program adopted at the local, rather than federal, level. *See Croson*, 488 U.S. at 469.

[59] In the DOJ Memorandum, Justice states that *Adarand* ''hinted'' that where a federal preference program is congressionally mandated, the *Croson* standards may apply more loosely. DOJ Memorandum at 30. The *Adarand* majority confronted the issue of congressional versus state remedial power, noting that various Members of the Court have taken different views of the authority that Section 5 of the Fourteenth Amendment confers upon Congress—power not delegated to the states—and the extent to which courts should defer to congressional exercise of that authority. *Adarand*, 115 S. Ct. at 2114. The Court concluded it did not need to resolve those differences in *Adarand*, and rejecting Justice Stevens' assertion to the contrary, stated that none of the Justices in *Adarand* repudiated previously expressed views on this subject. *Croson* suggested that Congress has broader authority than the states—a positive grant of legislative power—and rejected the City of Richmond's finding that it was remedying the present effects of past discrimination. *Croson*, 488 U.S. at 498.

[60] 438 U.S. 265 (1978) (*plurality*).

[61] *Croson*, 488 U.S. at 493.

[62] *Adarand*, 115 S. Ct. at 2127–28 (Stevens, J., dissenting).

[63] 438 U.S. at 311–14.

[64] 476 U.S. 267 (1986).

[65] *Id.* at 286. In *Hopwood*, a panel of the Fifth Circuit held that the University of Texas ''law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body.'' *Hopwood*, 78 F.3d at 934. A majority of the *Hopwood* panel specifically rejected Justice Powell's opinion in *Bakke* that diversity can be a compelling interest as ''not binding precedent'' and concluded that ''any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.'' *Id.* at 944. In a concurring opinion, Judge Wiener disagreed with the panel's opinion that diversity can never be a compelling governmental interest, but concluded that the program in question was not narrowly tailored because it singled out only two minority groups—Blacks and Mexican Americans. *Id.* at 962–68.

[66] *Croson*, 488 U.S. at 493.

[67] *United States* v. *Commonwealth of Virginia*, 44 F.3d 1229 (1995), *cert. granted* 116 S. Ct. 281 (1995) (No. 94–1941) (argued Jan. 17, 1996). The case presents the question whether the Equal Protection Clause permits a state to maintain single-sex military-style educational programs.

[68] *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). Thus far, the Court has not decided whether gender is a suspect category. *See, e.g., J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. at 1419, 1425 n.6 (1992) (concluding that gender-based peremptory challenges are not substantially related to an important governmental objective and finding ''once again'' that the Court need not decide whether gender classifications are inherently suspect''); *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 724 n.9 (1982) (finding it ''unnecessary'' to decide whether classifications based upon gender are inherently suspect).

[69] *Boren*, 429 U.S. at 197; *see also J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 (1994) (''our Nation has had a long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today''); *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 440 (1985) (''[l]egislative classifications based on gender * * * call for a heightened standard of review'').

[70] *J.E.B.*, 114 S. Ct. at 1424–25 (citations omitted). The Court has rejected attempts to exclude or protect one gender based on presumptions. *See Hogan*, 458 U.S. at 725.

[71] 458 U.S. 718 (1982).

[72] *See, e.g., Boren*, 429 U.S. at 200–04 (finding that the low disparity between drunk driving statistics for men and women ''exemplifies the ultimate unpersuasiveness of this evidentiary

2. Possible Incentives

39. As described above, a record of discrimination against a particular group is necessary to support remedial measures to remedy such discrimination. We seek comment on whether under the compelling governmental interest prong, there is sufficient evidence of discrimination in the communications industry against any particular minority group to support race-based incentives to eliminate market entry barriers for such group. As discussed above, minority groups include African Americans, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.[73] We also ask whether there is sufficient evidence of discrimination against women in telecommunications to justify remedial-based mechanisms to eliminate market entry barriers for women, under either the compelling governmental interest prong (strict scrutiny) or important governmental interest (intermediate scrutiny). Parties may use any data submitted in response to Part III above to support their comments.

40. We also seek comment on any nonremedial objectives that would justify the use of race and gender-based incentives and also serve the Section 257 mandate of decreasing market entry barriers for small telecommunications firms owned by minorities and women. Nonremedial objectives could be in addition to the objective of remedying past discrimination; thus, they may provide a separate basis for governmental action that takes race and gender into account. For example, the Commission has sought to fulfill the nonremedial objective of increasing diversity of voices and viewpoints over the airwaves through various minority and women-based programs.[74] Those programs also decrease market entry barriers by providing new opportunities for women and minorities and by increasing incentives for other firms to do business with those entities. Other nonremedial objectives that could justify taking race or gender into account in Commission programs and also help eliminate market entry barriers might include favoring diversity of media voices as required by Section 257(b),[75] promoting economic opportunity and competition as encouraged in the legislative history of Section 257[76] and Section 257(b),[77] and as required by Section 309(j),[78] or promoting the public interest.[79] We seek comment on these nonremedial objectives[80] and request commenters to suggest other nonremedial objectives that would satisfy the governmental interest prong under strict (race) or intermediate (gender) scrutiny.

41. We also request that parties propose incentives to meet these remedial or nonremedial objectives. Commenters may address incentives that the Commission has adopted in the past that eliminated or reduced barriers to market entry, e.g., designated entity rules for Section 309(j) services, as well as propose new incentives. We also seek comment on whether incentives that foster ownership or employment of women or minorities in telecommunications would further these objectives.[81] Parties should explain what objective an incentive would be intended to achieve and whether it is properly designed to achieve that objective, i.e., narrowly tailored (strict scrutiny); substantially related (intermediate scrutiny). Parties may support their proposals with data and should identify specific provisions of the Act that would authorize us to implement those proposals.

C. Furthering Section 257(b) Objectives

42. As described in the Introduction to this NOI, in Section 257(b), Congress required that in implementing our market barriers initiatives, the Commission must ''promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.''[82] We ask for comment on how the Commission should foster these objectives in its efforts to eliminate market barriers for entrepreneurs and small businesses.

V. Administrative Matters

43. *Reason for Action:* Section 101 of the Telecommunications Act of 1996 (1996 Telecommunications Act),[83] adds new Section 257 to the Communications Act of 1934.[84] Section 257 requires the Commission, within 15 months after enactment, to complete a proceeding ''for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act * * * market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and

record''); *Hogan*, 458 U.S. at 730–32 (finding that presence of men in nursing school would not have negative effect on women students, and that the record is ''flatly inconsistent'' with the claim that excluding men is necessary to reach the state's educational goals and falls ''far short'' of the '''exceedingly persuasive justification''' needed to sustain a gender-based classification).

[73] *See supra* n.14 (definition of minority). When considering incentives for Native Americans, the Commission looks for guidance to the Indian Commerce clause, which recognizes the status of tribes as sovereign nations. *See Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 155–56. *See also* DOJ Memorandum at 8 (''*Adarand* does not require strict scrutiny review for programs benefiting Native Americans as members of federally recognized Indian tribes'').

[74] *See, e.g.*, the broadcast licensing policy which was adopted following the D.C. Circuit decision in *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). The Commission considered a minority applicant's proposed participation in station operation as one of several factors in comparing applicants for mutually exclusive broadcast licenses. In *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 567 (1990), the Supreme Court upheld our licensing policy, however, in *Lamprecht* v. *FCC*, 958 F.2d 395, 398 (D.C. Cir. 1992), the D.C. Circuit found the policy for women to be unconstitutional. Thereafter, in *Bechtel* v. *FCC*, 10 F.3d 875, 877, 887 (D.C. Cir. 1993), the D.C. Circuit held that the integration credit, upon which the minority/female licensing policy is based, was arbitrary and capricious. Following *Bechtel*, the Commission suspended comparative hearings altogether.

[75] 47 U.S.C. 257(b).

[76] *See supra* ¶ 3 and n.8.

[77] Section 257(b) provides: ''In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring * * * vigorous economic competition.'' 47 U.S.C. § 257(b).

[78] 47 U.S.C. 309(j).

[79] *See, e.g.*, 47 U.S.C. 201 (public interest regulation of common carriers); 47 U.S.C. 257(b) (promotion of public interest, convenience and necessity in carrying out Section 257(a)); 47 U.S.C. 303 (public interest regulation of radio services).

[80] Depending on the record of discrimination developed, any such nonremedial objectives could be remedial in nature. For example, if there were a strong record of discrimination against women-owned small businesses in the telecommunications market (which itself would be an entry barrier), we could adopt a mechanism intended to increase ownership opportunities for those businesses. The immediate objective—increasing ownership—would be a means of achieving the ultimate objective—remedying discrimination.

[81] The legislative history of Section 257 indicates that Congress recognized a nexus between ownership and competition: ''[M]inority and women-owned small businesses continue to be extremely under represented in the telecommunications field * * *. Underlying this amendment [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. telecommunications marketplace.'' 142 Cong. Rec. H1141 at H1177–78 (daily ed. Feb. 1, 1996) (statement of Rep. Collins).

We note that communications is among a handful of industries with the highest expected growth between the year 1990 and 2005, and is predicted to provide women opportunities for advancement into management and decisionmaking positions. *A Solid Investment: Making Full Use of the Nation's Human Capital*, Recommendations of the Federal Glass Ceiling Commission (November 1995) (*Glass Ceiling Report*), Special Supplement at S–9. In addition, facilitating employment could serve the public interest by enhancing productivity: the Glass Ceiling Commission found that ''[o]rganizations that excel at leveraging diversity (including hiring and promoting minorities and women into senior positions) can experience better financial performance in the long run than those which are not effective in managing diversity.'' *Glass Ceiling Report*, Special Supplement at S–8.

[82] 47 U.S.C. 257(b).

[83] Telecommunications Act of 1996, Public Law No. 104–104, 110 Stat. 56 (1996).

[84] 47 U.S.C. 151 *et seq.*

information services, or in the provision of parts or services to providers of telecommunications services and information services.'' In implementing Section 257, the Commission must ''promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.'' Every three years following the completion of the market barriers proceeding, the Commission must report to Congress on regulations that have been issued to eliminate barriers and any statutory barriers that the Commission recommends be eliminated. This *Notice of Inquiry* commences our omnibus Section 257 proceeding.

44. *Objectives:* The Commission seeks to develop a full record of profile data on the type and scope of market entry barriers in the telecommunications industry faced by small businesses. To this end, the Commission solicits specific information regarding financing sources and terms, services provided, markets served, geographic areas of operation, and employee workforce. The Commission also seeks information concerning obstacles small telecommunications businesses encounter, as well as any unique obstacles that such businesses owned by women and minorities encounter. We also will undertake specific initiatives that further the objective of Section 257 to eliminate market entry barriers for small businesses. The record developed in connection with these initiatives also will assist us in achieving our mandate under Section 309(j) of the Communications Act to disseminate licenses for auctionable spectrum-based services to small businesses, rural telephone companies, and businesses owned by women and minorities, as well as in fulfilling our general obligation to serve the public interest.

45. *Legal Basis:* The proposed action is authorized under the Communications Act of 1934, 47 U.S.C. 257.

46. *Reporting, Recordkeeping, and Other Compliance Requirements:* None

47. Description, Potential Impact and Number of Small Entities Effected: None

48. *Federal Rules Which Overlap, Duplicate or Conflict With These Rules:* None

49. *Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives:* This NOI solicits comment on a variety of issues and recommendations that impact small businesses. Any additional significant issues or recommendations related to small businesses in the telecommunications industry presented in the comments also will be considered.

50. *Paperwork Reduction Act:* The requirements proposed herein have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose no new or modified information collection requirements.

VI. Procedural Matters

51. This proceeding is exempt from *ex parte* restraints or disclosure requirements, as provided in Section 1.1204(a)(4) of our rules.

52. Parties must file initial comments on or before July 24, 1996 and reply comments on or before August 23, 1996. To file formally in this proceeding, interested parties must file an original and six copies of all comments. If parties want each Commissioner to receive a personal copy of their comments, they must file an original plus ten copies.

53. Parties should send comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties also should send one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information, contact Linda L. Haller in the Office of General Counsel at (202) 418–1720 or S. Jenell Trigg in the Office of Communications Business Opportunities at (202) 418–0990.

54. We also ask parties to submit comments and reply comments on diskette in addition to and not as a substitute for the formal filing requirements stated above. Parties submitting diskettes should submit them to S. Jenell Trigg, Office of Communications Business Opportunities, Federal Communications Commission, Suite 644, 1919 M Street, N.W., Washington D.C. 20554. Submissions should be on a 3.5 inch diskette formatted in an IBM compatible form using WordPerfect 5.1 for Windows software. The diskette should be submitted in ''read only'' mode. The diskette should be accompanied by a cover letter and clearly labelled with the party's name, proceeding, type of pleading (comment or reply comment), and the date of submission.

VII. Ordering Clause

55. Accordingly, IT IS ORDERED that, pursuant to our authority under the Communications Act of 1934, 47 U.S.C. 4(i) and 403, an inquiry IS COMMENCED to identify and eliminate market entry barriers for small businesses in the provision and ownership of telecommunications and information services in the telecommunications market.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 96–16259 Filed 6–25–96; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 64

[CC Docket No. 96–128; DA 96–983]

Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of time.

SUMMARY: In this Order, we are extending the comments and reply comments deadlines in order to grant to the parties more time to address all issues raised in the Notice of Proposed Rulemaking. This Order is issued on the Commission's own motion because of the relatively short time that was accorded to the parties to comment on the important issues.

DATES: *Comments due:* July 1, 1996; Reply *Comments due:* July 15, 1996.

ADDRESSES: In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain__t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: Michael Carowitz, Enforcement Division, Common Carrier Bureau, (202) 418–0960. For additional information concerning the information collections contained in this Further Notice of Proposed Rule Making contact Dorothy Conway at 202–418–0217, or via the Internet at dconway@fcc.gov.