

1993.⁵¹ In its March 8, 1994 *Second Report and Order*,⁵² the Commission established general rules and procedures and a broad menu of competitive bidding methods to be used for all auctionable services, including MDS. We indicated in the *Second Report and Order* that in subsequent Reports and Orders we would set forth specific competitive bidding rules that would be applicable to individual services. To date, the Commission has established competitive bidding rules specifically applicable to, and has conducted auctions for, narrowband Personal Communications Services (PCS),⁵³ the Interactive Video and Data Service (IVDS),⁵⁴ and broadband PCS.⁵⁵ This *Report and Order* establishes competitive bidding rules and procedures for MDS.

85. Given the interdependencies we believe exist between authorizations for certain BTA service areas and the declining cost of conducting simultaneous multiple round bidding, we choose this auction method for use in MDS. We also adapt the general procedures set forth in the *Second Report and Order* so as to be compatible with the application procedures established for MDS in this *Report and Order*. Finally, we set forth rules to deter possible abuses of the bidding and application procedures, and establish special provisions for small businesses, including those owned by minorities and women, to encourage their participation in the competitive bidding process and in the provision of MDS system offerings.

2. Auction Eligibility

86. The Commission has in the past employed a random selection process (*i.e.*, a lottery) to select from among mutually exclusive MDS initial applications. See 47 C.F.R. § 1.824. However, Section 309(j) of the Communications Act, as amended, permits auctions where (1) mutually exclusive applications for initial licenses or construction permits are

⁵¹ *Notice of Proposed Rule Making* in PP Docket No. 93-253, 8 FCC Rcd 7635 (1993) (*Competitive Bidding Notice*).

⁵² *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (*Second Report and Order*), recon. granted in part, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) (*Second Memorandum Opinion and Order*).

⁵³ *Third Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2941 (1994) (*Third Report and Order*), recon. granted in part, *Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 175 (1995) (*Third Memorandum Opinion and Order*).

⁵⁴ *Fourth Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2330 (1994) (*Fourth Report and Order*), petition for recon. pending.

⁵⁵ *Fifth Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 5532 (1994) (*Fifth Report and Order*), recon. granted in part, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1995) (*Fifth Memorandum Opinion and Order*).

accepted for filing by the Commission; (2) the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals; and (3) the objectives set forth in Section 309(j) would be promoted. In the *Second Report and Order*, we concluded that single and multichannel MDS as classes of services would satisfy the Section 309(j) criteria for auctionability, and, thus, new initial applications in MDS would be eligible for competitive bidding. *Id.* at 2359. The *Second Report and Order* did not, however, expressly resolve the question of the auctionability of mutually exclusive MDS station applications filed prior to July 26, 1993, the date specified in the Commission's auction authority in the 1993 Budget Act. *Id.* For the reasons set forth in Section 3 below, we now determine to lottery these previously filed MDS applications.

3. Disposition of Previously Filed MDS Applications

87. Before the Commission conducts competitive bidding for the BTA service areas applied for under the revised procedures set forth herein, we must first process the remaining acceptable, mutually exclusive applications for MDS station licenses that were filed prior to July 26, 1993.⁵⁶ Under the procedures in effect prior to the enactment of competitive bidding authority in the 1993 Budget Act, these mutually exclusive MDS applications were to have been lotteried. In September 1993, the Commission tentatively concluded to lottery rather than auction pre-July 26, 1993 MDS applications. *See Competitive Bidding Notice* at 7661. In reaching this decision, the Commission first noted that these applications had already incurred substantial delays. The Commission then tentatively decided to eschew auctions in favor of lotteries for pending MDS applications to avoid "further delay" in granting MDS station licenses and providing service to the public during the time it would take for the Commission to promulgate competitive bidding rules. *Id.*⁵⁷ Subsequently, in the *Second Report and Order*, the Commission concluded that new initial applications in MDS would be eligible for competitive bidding, but did not resolve the question of whether to employ lotteries or auctions to dispose of the previously filed MDS applications. *Second Report and Order* at 2359. Thus, due to processing delays and further delays resulting from the consideration of issues raised in the Budget Act regarding competitive bidding, this group of previously filed MDS applications, through no fault of the applicants themselves, has never been lotteried.

⁵⁶ Once we complete our processing, we expect that this group of previously filed, acceptable MDS station applications will likely be quite small, consisting of approximately 100 mutually exclusive applications for five rural locations. The applications for these five locations have been pending since 1991.

⁵⁷ We note that commenters supported the Commission's tentative conclusion to lottery previously filed MDS applications. *See, e.g.,* Comments of JAP Telecom Systems, Inc. at 7 and Comments of MW TV, Inc. at 2-3, filed in response to *Competitive Bidding Notice*.

88. The 1993 Budget Act empowers the Commission to either auction or lottery these previously filed MDS applications.⁵⁸ Consistent with the statute, our tentative conclusion in the *Competitive Bidding Notice*, and Commission precedent,⁵⁹ we now exercise our discretion to lottery this group of remaining previously filed, mutually exclusive MDS applications. By employing lotteries for pre-July 26, 1993 MDS applications, and by holding auctions for initial applications accepted for filing after that date, we adopt a straightforward approach that is easy to apply, fair to the applicants and serves the public interest.

89. As previously noted by the Commission, the Budget Act's legislative history reflects Congress' recognition that equitable considerations and administrative costs may justify the use of lotteries for those applicants who, in reliance on the existing lottery procedures, had filed applications prior to July 26, 1993. *See Cellular Unserved Order* at 7391. In examining the equities and administrative costs at stake here, and based on the record before us, we believe that the public interest would be served by using a lottery to dispose of the relatively few remaining previously filed MDS applications for the handful of locations at issue. Indeed, we believe this situation presents facts that are precisely the type that warranted the grant of discretion to the Commission on this point. Specifically, with regard to equitable considerations, we note that most of these MDS applications on file have been pending for over four years due to the aforementioned processing delays, which were not the fault of the applicants.⁶⁰ Particularly given this lengthy delay, we believe it would be unfair to require these previously filed applicants to refile their applications and participate in an auction for BTA service areas, as they submitted their applications with the expectation of participating in a lottery for a site-specific conditional station license. Our decision will ensure that these pending applications will be processed under the rules in effect at the time the applications were filed. It will also result in similar treatment for MDS applications filed within the same general time period. Those few applications that remain pending due to administrative delay will be processed in a manner similar to other MDS applicants that filed prior to July 26, 1993, but were able to have their applications processed and conditional station licenses granted under the lottery procedures then in effect.⁶¹

⁵⁸ *See* 47 U.S.C. §§ 309(i) & (j); Budget Act, Pub. L. No. 103-66, § 6002(e) (Special Rule), 107 Stat. 312, 397 (1993).

⁵⁹ *See Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7387 (1994) (*Cellular Unserved Order*) (determining to lottery previously filed applications for cellular unserved areas).

⁶⁰ This four year period that these previously filed MDS applications have been pending is considerably longer than the one year period that the cellular unserved applications had been on file before the Commission determined to lottery those applications.

⁶¹ Likewise, the winning applicants for the small number of lotteries held pursuant to this decision will receive the benefits of the expanded protected service area definition for site-specific stations that we adopt today in a companion item. *See Second Order on*

90. Moreover, if the Commission were to require the previously filed MDS applicants to participate in an auction, it would be necessary to allow the applicants to submit the information required by the competitive bidding rules set forth herein. In contrast, a lottery would require no further submissions by the applicants, and could be conducted almost immediately, unlike an auction, which likely could not be held until the end of this year. Furthermore, in fairness to the previously filed applicants, those who indicate no desire to participate in an auction may be entitled to a refund of their application fees. Given the expected low commercial value of the MDS channels in the small number of rural locations at issue here,⁶² we feel that these administrative costs associated with conducting an auction for the approximately 100 previously filed applications would not be justified. *See Cellular Unserved Order* at 7391-7392. In summary, we believe that it would be inequitable and administratively burdensome to require applicants for MDS station licenses, who filed their applications over four years ago in reliance upon the lottery procedures then in effect, to participate in an MDS auction.

91. We also believe that any concern that many of these previously filed MDS applications at issue were prepared and filed by the same entities on behalf of the individual applicants "does not, by itself, justify the use of auctions in these circumstances." *Id.* at 7391. There is no evidence before us that these individual applicants, if awarded an MDS conditional station license by lottery, would not construct and operate an MDS station. These applicants did expend the time and the funds required to have their MDS station applications prepared and filed, and we have no evidence, on the record before us, to conclude that they will fail to construct an MDS station and provide service to the public. *See, e.g.,* Comments of MW TV, Inc. filed in response to *Competitive Bidding Notice* at 2 (stating that it would be "terribly inequitable" to force MW TV into a "bidding process to secure [MDS] authorizations for which it has already expended a substantial amount of funds").⁶³

Reconsideration. Thus, the approximately five lottery winners of site-specific conditional station licenses will be afforded treatment similar to other applicants who filed applications for site-specific MDS licenses prior to July 26, 1993, but who managed to avoid administrative delay and to have their applications processed and conditional licenses granted.

⁶² As we note in our discussion of the treatment of designated entities (*see infra* Section 7), for various reasons unique to MDS we anticipate that the BTA service areas will be auctioned for relatively modest amounts under our prospective licensing regime. It seems reasonable to assume that the small number of rural, site-specific MDS conditional station licenses at issue here would draw even less money at auction than the relatively modest amounts we anticipate for the larger geographic areas that will be auctioned in the future.

⁶³ We emphasize that the MDS station applicants prevailing in a lottery will be subject to a one year build-out requirement. *See* 47 C.F.R. § 21.43 (requiring completion of construction of MDS stations within twelve months from date of conditional station license

92. Moreover, dismissal of these previously filed applications without prejudice to participate in a future BTA auction -- on the basis of a theory that the service for which the applicants previously applied either has changed significantly or no longer exists -- presents several potential drawbacks. Significantly, dismissal of these pending applications likely would engender reconsideration proceedings at the Commission and legal challenges in the courts. Such administrative and judicial delays could further postpone granting MDS licenses and providing service to the public, contrary to the public interest. In addition, while we are changing the conditions under which MDS service may be provided in the future, such as moving to larger geographic area authorizations and expanded service area protection, we are not fundamentally changing the nature of the service. Licensees still will be providing wireless cable service to subscribers, albeit under altered conditions designed to make the service more competitive with cable television. Therefore, on the basis of this record, and considering the equitable and administrative factors identified above, we conclude, as we did in the *Cellular Unserved Order*, that the use of a lottery, rather than competitive bidding, to award MDS conditional station licenses to the remaining previously filed applicants would best serve the public interest.

93. We also conclude that our balancing of the equitable and administrative factors identified above to determine whether a lottery or an auction of the previously filed MDS applications best serves the public interest is consistent with the specific terms of the 1993 Budget Act and existing relevant case law. We note that the factors set forth in Section 309(j)(3) pertaining to competitive bidding methodologies do not specifically govern the decision as to how to treat these previously filed MDS applications. The Section 309(j)(3) factors are incorporated into Section 309(j)(2) as part of the determination of whether a service "may" be auctioned. 47 U.S.C. § 309(j)(2) & (3). There is no doubt that we have the authority under the statute to use auctions to dispose of these previously filed applications for MDS station licenses, if using auctions satisfies the Section 309(j)(3) factors. Rather, the question before us here is not whether we *may* utilize an auction, but whether we *should*. For that determination, the relevant provision of law is Section 6002(e) of the Budget Act.

94. Section 6002(e), entitled "Special Rule," made an exception to the general requirement that, if a service met the standards for auctionability under Section 309(j)(2), the Commission could not use a lottery to award licenses for such service. Under the Section 6002(e) Special Rule, the Commission may use a lottery to award licenses even for an otherwise auctionable service for certain previously filed applications. In adopting this provision, Congress indicated that the exception would "permit" the Commission to use lotteries for certain IVDS and "several other licenses." H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 498 (1993). Thus, even if the factors set forth in Section 309(j)(3) are met with regard to auctions, our discretion under the Section 6002(e) Special Rule to choose lotteries for other reasons is not diminished.

grant).

95. Congress did not, however, establish any standards for the exercise of the Commission's discretion under the Special Rule. As set forth in the *Cellular Unserved Order*, we continue to believe the proper approach is to balance the advantages and disadvantages of lotteries and auctions to determine which best serves the public interest on the facts before us. This approach is consistent with judicial precedent, which indicates that in determining whether to apply new rules to pending applicants, the Commission should balance the "ill effect" of the new rule on the pending applicants with the "mischief of frustrating the interests the rule promotes." *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554 (D.C. Cir. 1987). In certain circumstances, as in *Maxcell*, which involved switching from comparative hearings to lotteries in the cellular radio service, the benefits in broadly applying the Commission's new rules outweigh the harms to previously filed applicants. In the situation before us, however, as in the *Cellular Unserved Order*, we conclude, for the reasons discussed above, that the "ill effects" on the applicants that previously filed applications substantially outweigh any potential "mischief" that may be caused to the development of MDS in the small number of rural markets likely at issue. Accordingly, we conclude that the use of lotteries for these few pending applications best serves the public interest.

4. Competitive Bidding Design

96. In this *Report and Order*, we have attempted to design auction rules and procedures that are compatible with the unique characteristics of MDS and that meet the congressional objectives set forth in the Communications Act. See 47 U.S.C. § 309(j)(3). We believe that these objectives are embodied in two basic Commission policy goals: promoting economic growth and enhancing access to telecommunications service offerings for consumers, producers and new entrants. *Second Report and Order* at 2349-2350. In the paragraphs below, we implement competitive bidding for MDS, pursuant to Section 309(j) of the Communications Act and based on the record in this proceeding.⁶⁴ The methodology and

⁶⁴ Very few comments were filed in response to the *Competitive Bidding Notice* addressing either the applicability of competitive bidding to mutually exclusive MDS initial applications or the auction method to be employed for MDS. MW TV, Inc. and JMP Telecom Systems, Inc. commented solely on whether to apply competitive bidding rules to pending MDS applications. The Association was the only commenter to address the issue of MDS auction design.

In the *Notice*, the Commission invited further comment concerning MDS competitive bidding procedures. Of the twenty-two sets of comments submitted in response to this *Notice* and listed in Appendix A, comments relating to competitive bidding in particular were submitted by American Telecasting, CAI Wireless, ACS Enterprises, *et al.*, Dalager, Heartland, Mitchell, PacTel, Vega, Rural Wireless, U.S. Wireless and Association. Only eight commenters addressed MDS auction design specifically (American Telecasting, CAI Wireless, ACS Enterprises, *et al.*, Heartland, Mitchell, PacTel, Vega and Association). Reply comments addressing competitive bidding issues were submitted by American

procedures we will utilize in conducting MDS auctions are identified below, and additional details about specific competitive bidding procedures will be provided by public notice prior to the MDS auction.

a. General Competitive Bidding Designs

97. The *Second Report and Order* established the criteria to be considered in selecting the auction methodology for each auctionable service. We generally concluded that awarding licenses to those parties that value them most highly will best advance congressional policy goals. *Id.* at 2360. We also indicated that, because a bidder's ability to introduce valuable new services and to deploy them rapidly, intensively and efficiently increases the value of the license to that bidder, an auction design that awards licenses to those bidders who are willing to pay the highest bid tends to promote the development and deployment of new services and the efficient and intensive use of the spectrum. *Id.* at 2349-2350.

98. With regard to auction methodologies specifically, the Commission previously determined that: (1) licenses with strong interdependencies should be auctioned simultaneously;⁶⁵ (2) multiple round auctions, by providing bidders with information regarding other bidders' valuations of licenses, generally will yield more efficient allocations of licenses and higher revenues, especially where there is substantial uncertainty as to value; and (3) because they are relatively expensive to implement and time-consuming, simultaneous and/or multiple round auctions become less cost-effective as the value of licenses decreases. *Second Report and Order* at 2360. We also found that simultaneous multiple round bidding facilitates the efficient aggregation of licenses across spectrum bands and geographic areas, and, because of the superior information and flexibility this bidding methodology provides, is likely to yield greater revenues than other auction designs. Thus, we concluded in the *Second Report and Order* that the use of simultaneous multiple round bidding would generally be preferred. *Id.* at 2366.

99. We also recognized in the *Second Report and Order* that simultaneous multiple round bidding may appear more complex to bidders and could be more difficult and expensive to implement than other auction methods. *Id.* at 2364. We have, however, in the past year gained considerable experience in conducting simultaneous multiple round bidding. This competitive bidding method has been utilized in several narrowband and broadband PCS

Telecasting, ACS Enterprises, *et al.*, Telephone Cooperative, Rural Wireless, CAI Wireless and Association.

⁶⁵ Licenses are interdependent when the value of a license to the bidder depends on the other licenses that the bidder acquires. *Second Report and Order* at 2361. Licenses may be interdependent because they are substitutes or because they are complements. *Id.* at 2364.

auctions,⁶⁶ and has proved to be an efficient and effective way to conduct spectrum auctions. In addition, the cost to the Commission of conducting simultaneous multiple round bidding has decreased considerably since the initial simultaneous auctions because the computer software used in these auctions has now been developed. We have also recently initiated procedures permitting remote bidding from personal computers throughout the country. Consequently, bidders may now participate in simultaneous multiple round auctions in a variety of ways -- on site, by personal computer using remote bidding software, or via telephone.

b. MDS Competitive Bidding Design

100. Given our growing and successful experience with this auction design, we conclude that the generally favored method of simultaneous multiple round bidding is appropriate for MDS. We accordingly adopt this method to auction the BTA service areas.

101. In the *Notice*, we had tentatively concluded that simultaneous multiple round bidding was less appropriate for MDS than other auction methods primarily because the "value of and interdependence between" the geographic service areas might not be "sufficiently high to justify the use" of the generally preferred auction method. *Notice* at 7678. After further consideration, and based upon our continuing successful experience with simultaneous multiple round bidding, we now conclude that simultaneous multiple round bidding is in fact appropriate for MDS.

102. With regard to the expected value of the BTA service areas at auction, we realize that some areas -- particularly those with sparse populations -- may be auctioned for relatively modest amounts.⁶⁷ The value of any BTA service area at auction will, however, vary, depending in large part upon the population of and the amount of usable spectrum in that area.⁶⁸ Heavily populated BTA service areas may therefore attract more substantial

⁶⁶ The Commission has also recently proposed to utilize simultaneous multiple round bidding for both the 800 and 900 MHz Specialized Mobile Radio services. *Further Notice of Proposed Rule Making* in PR Docket No. 93-144 and PP Docket No. 93-253, FCC 94-271 (released Nov. 4, 1994); *Second Report and Order and Second Further Notice of Proposed Rulemaking* in PR Docket No. 89-553, PP Docket No. 93-253, and GN Docket No. 93-252, FCC 95-159 (released April 17, 1995).

⁶⁷ See, e.g., Comments of Vega at 18; Association at 43; American Telecasting at 5-7; ACS Enterprises, *et al.* at 17 (asserting that MDS channels are low valued).

⁶⁸ See Comments of CAI Wireless at 9 (population of the relevant area, availability of ITFS and MDS channels, and bidder company business strategies "will substantially impact the valuation of 'area licenses'"). Wireless cable valuations, whether of companies, systems or channels, have generally been done on a population basis. See, e.g., Gerard Klauer

sums, depending on the availability of spectrum within such areas. *See* Comments of PacTel at 3 (noting that "areas with the largest populations should be of significant value"). Given the substantially decreased costs associated with implementing simultaneous multiple round bidding, we believe that BTA service area values are sufficient to justify the use of this auction method. We must consequently disagree with the commenters who state that simultaneous multiple round bidding is inappropriate for MDS because this auction method is overly expensive, particularly when compared to an open outcry method, and administratively complex for the Commission. *See* Comments of ACS Enterprises, *et al.* at 17-19; Vega at 18. *See also* Comments of Association at 43-44 (supporting use of open outcry method on grounds of cost and complexity, if national filing window approach is adopted).⁶⁹

103. With regard to the question of interdependence, we believe that the BTA service area authorizations to be auctioned possess a degree of interdependence. As explained in the *Notice*, "[t]here appears to be some geographic interdependence due to coordination of interference at the borders." *Id.* at 7678. Indeed, because we have selected a filing approach based on predetermined geographic areas, rather than a national filing window, we emphasize that authorizations for adjacent BTA service areas will be interdependent, as common ownership of such areas will reduce problems of controlling interference at the borders of the BTAs. *See Second Report and Order* at 2364; *See also* Comments of Association at 37 (adjacent geographic markets may be interdependent). Interdependence between the BTA authorizations may also arise from economies of scale achieved by wireless cable operators spreading of fixed costs over more units of output. *See Second Report and Order* at 2364; *See also* Comments of PacTel at 3 (there may be interdependencies "due to the desire to achieve significant economies of scale"). We accordingly conclude that there is some degree of interdependence between BTA authorizations and that this interdependence may be significant for geographically contiguous BTAs. *See* Comments of PacTel at 3 (noting "some significant interdependence" between "contiguous markets"). Thus, the

Mattison & Co., Inc., *The Wireless Cable Industry: Summary of 1994 and Outlook for 1995* (Dec. 22, 1994) at 3; Singer, *Wireless Values: Wall Street Eyes Management and Spectrum, Private Cable and Wireless Cable* (Nov. 1994) at 21; Paul Kagan Associates, Inc., *Wireless Cable Investor* (Nov. 30, 1994) at 7.

⁶⁹ Other commenters, while not explicitly asserting that simultaneous multiple round bidding is overly complex and expensive for the Commission, nonetheless support the use of oral bidding for MDS on the grounds that an open outcry auction would be simple and economic (*see* Comments of CAI Wireless at 9) or efficient (*see* Comments of Heartland at 9-10; American Telecasting at 25). We do not dispute that oral bidding can be a cost-effective and efficient method of auctioning spectrum. However, we believe that, for the reasons described above, simultaneous multiple round bidding will be more cost effective and efficient for MDS than oral bidding, particularly given the interdependencies that exist between authorizations for adjacent BTA service areas.

adoption of simultaneous multiple round bidding should result in the most efficient award of these BTA authorizations. *See Second Report and Order* at 2363. In particular, we believe that potential bidders that operate (or are planning to operate) MDS systems in geographically adjacent BTAs and/or in several regions of the country will be able to make more informed bidding decisions in a simultaneous auction where all BTA service areas may be bid upon at the same time. *See Comments of Association* at 37 (if Commission selects filing approach based on defined geographic areas, Commission should "permit simultaneous multi-round bidding . . . that permits an applicant to bid for licenses for adjacent geographic markets that may be interdependent.").

104. We must, given the sources noted above from which interdependence may arise, disagree with those commenters who indicate that there is little or no interdependence between MDS channels and who oppose simultaneous multiple round bidding on that basis. *See Comments of American Telecasting* at 26; *Heartland* at 8-9; *Vega* at 17. Indeed, we note that some commenters acknowledge that their opposition to simultaneous bidding is based, not on firm evidence that BTA authorizations lack interdependence, but rather on their preference for a national filing window approach to MDS licensing.⁷⁰ However, because we are adopting a filing approach based on predetermined geographic areas, the authorizations for adjacent BTA service areas will, as discussed above, be interdependent. *See Comments of Association* at 37; *PacTel* at 3. While it may be difficult to determine the exact degree of interdependence between the BTA authorizations to be auctioned, as evidenced by the disagreement among the commenters,⁷¹ we believe, for the reasons stated previously, that there is some interdependence between them and that simultaneous multiple round bidding will allow bidders to best take account of such interdependencies. Because the Commission has gained substantial experience with simultaneous bidding, which has declined significantly in cost, we conclude that simultaneous multiple round bidding is appropriate for MDS, as this bidding method will most efficiently award authorizations for those service areas (particularly contiguous BTAs) which are interdependent. *See Second Report and Order* at 2363-2364.

105. In addition to issues of cost and interdependence, other considerations support the use of simultaneous multiple round bidding for MDS. Compared with other bidding mechanisms, including open outcry and sealed bidding, simultaneous multiple round bidding

⁷⁰ *See Comments of Vega* at 17 (since we support national filing window, an interdependence issue is virtually eliminated); *Association* at 43 (under national filing window approach, simultaneous multiple round auctions are unnecessary since there will be little interdependence between different licenses).

⁷¹ *See, e.g., Comments of PacTel* at 3 ("there may be some significant interdependence . . . in contiguous markets"); *Comments of CAI Wireless* at 9 ("interdependence between geographical areas . . . will vary widely"); *Comments of ACS Enterprises, et al.* at 18 ("MDS channels to be auctioned would not have a high degree of interdependence").

will generate the most information about the value of BTA service areas during the course of the auction. Thus, it is the most likely auction method to award BTA authorizations to the bidders who value them most highly. See Comments of PacTel at 3 (simultaneous multiple round bidding provides bidders with equal information and allows bidding to continue until highest value bidder is identified). We also note that an auction method awarding BTA authorizations to the parties who value them most highly should result in the award of authorizations to *bona fide* wireless cable operators, rather than to speculators, because *bona fide* operators will likely value authorizations more highly than, and will therefore outbid, speculators, who may be reluctant to pay up front the amounts necessary to obtain authorizations through competitive bidding.⁷² Moreover, given the uncertainty as to the value of the MDS spectrum,⁷³ the information generated by simultaneous multiple round bidding should prove particularly valuable by giving bidders more flexibility to pursue back-up strategies.⁷⁴ Because of the superior information and flexibility it provides, this auction method should also yield more revenue for the MDS spectrum than other auction designs, including open outcry.⁷⁵ Although the raising of revenue is not our dominant concern, we note that Congress directed the Commission, in designing auction methodologies, to promote "recovery for the public of a portion of the value of the public spectrum resource."

⁷² Sealed bidding is not generally favored by commenters expressing any opinion on auction design, and is not supported by the Commission for MDS, because this bidding method will generate no information about the value of the BTA service areas during the course of an auction, and thus may not award BTA authorizations to the parties who value them the most. See *Second Report and Order* at 2362; Comments of Association at 43-44; Heartland at 9-10; ACS Enterprises, *et al.* at 18-19. The only commenter recommending sealed bidding presents no substantive arguments to support its position and fails to address the drawbacks inherent in an auction method that provides no information about spectrum value to bidders. See Comments of Mitchell at 4.

⁷³ See Comments of Association at 43-44; ACS Enterprises, *et al.* at 18-19.

⁷⁴ Commenters recognize the importance of selecting an auction design allowing bidders to pursue back-up strategies. See Comments of Association at 44 (opposing sealed bidding because it provides no opportunity to pursue back-up strategies).

⁷⁵ A simultaneous auction for MDS will tend to raise more revenue than a sequential oral auction for two reasons. First, it will increase the value of the BTA service areas by facilitating efficient aggregation. Second, because it will provide more information about the value of the BTA service areas, it will reduce the propensity of sophisticated bidders to bid cautiously to avoid the "winner's curse"-- the tendency for the winner to be the bidder who most overestimates the value of the item up for bid.

47 U.S.C. § 309(j)(3)(C).⁷⁶ Finally, the employment of simultaneous multiple round bidding for MDS, rather than open outcry, will eliminate the need for the Commission to select the order in which the BTA service areas will be auctioned. *See Second Report and Order* at 2360, 2363, 2366.

106. We conclude that these numerous advantages for MDS of simultaneous multiple round bidding outweigh any remaining disadvantages cited by some commenters. In addition to the objections, as described above, offered against simultaneous bidding based on the assumed high cost and administrative burden for the Commission and the perceived lack of interdependence, some commenters also assert that simultaneous multiple round bidding is complex and expensive for bidders and favor open outcry auctions in part because of their perceived simplicity and relatively low cost for bidders. *See Comments of Vega* at 18; *ACS Enterprises, et al.* at 17. *See also Comments of Association* at 43 (supporting open outcry as less expensive bidding method if national filing window approach is selected).

107. The simultaneous multiple round auction design adopted herein includes several features that should allay the concerns expressed by these commenters as to the perceived burdensome nature of simultaneous bidding. We expect, for example, to have bidding rounds of shorter duration than in other simultaneous multiple round auctions, such as broadband PCS. This measure should shorten the MDS auction substantially so that the length of the auction should not prove burdensome to bidders. In addition, the burden on bidders will be reduced by the variety of methods through which they may participate in the MDS simultaneous multiple round auction. Bidders will be able to submit bids on site, via personal computers using remote bidding software, or via telephone;⁷⁷ however, given the space limitations for on site bidding and the uncertainty as to the exact number of prospective bidders, the Commission reserves the right to have only remote bidding -- by personal computer and by telephone -- for the MDS auction. Thus, the expense to the bidders of participating in a simultaneous multiple round auction should be less than in an open outcry auction, where bidders (and/or their representative(s)) would need to travel to and remain in

⁷⁶ We agree with commenters to the extent they suggest that the Commission's primary mandate is not to adopt an application procedure and auction design that maximize revenue. *See Reply Comments of CAI Wireless* at 6-7; *Comments of Association* at 29-30; *Comments of American Telecasting* at 4-5. Given the clear language of Section 309(j)(3)(C), we do, however, believe that the Commission has a duty to consider the recovery of the value of the MDS spectrum as a factor in its adoption of an appropriate MDS auction design.

⁷⁷ Telephonic bidding should, in particular, be a simple and inexpensive method for bidders to submit bids. If submitting bids by telephone, bidders may utilize the Internet to learn of the round-by-round results of the auction; on-line services such as Compuserve provide Internet access at low cost. Bidders may also, at negligible cost, utilize a bulletin board service, accessible by long distance telephone, from which auction results can be downloaded to a personal computer.

Washington, D.C. for the duration of the auction. Finally, the Commission will hold a seminar for prospective bidders to acquaint them with this bidding design and all alternative bid submission methods.

108. Given the numerous advantages of the generally preferred auction method of simultaneous multiple round bidding, we believe that this methodology will best serve for conducting MDS auctions. We note, however, that the presence of incumbents in the BTA service areas could affect the relative desirability and value of BTA authorizations in ways we do not anticipate. In the event that the filings of short-form applications indicate that the BTA authorizations have relatively little interdependence and lower than expected value, we delegate authority to the Mass Media Bureau and the Wireless Telecommunications Bureau to reconsider the issue of whether another auction design would be more appropriate.

c. MDS Bidding Procedures

109. There will be one authorization offered in each BTA and the BTA authorizations will be awarded by simultaneous multiple round bidding. All BTA service areas will be auctioned at the same time. Bids will be accepted at the same time on all BTA service areas in each round of the auction. High bid amounts will be posted after the end of the bid submission period in each round of bidding. With modifications to take account of the unique characteristics of MDS and to reduce length, MDS auctions will follow the general bidding procedures we have used to date to conduct the narrowband and broadband PCS auctions.

110. *Bid Increments.* In using simultaneous multiple round bidding to award the BTA authorizations, it is important to specify minimum bid increments. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction comes to closure within a reasonable period of time. Establishing an appropriate minimum bid increment is especially important in a simultaneous auction with a simultaneous stopping rule. In that case, all markets will remain open until there is no bidding on any market, and a delay in closing the bidding on one market will delay the closing of all markets. *Second Report and Order* at 2369.

111. Because we plan to use simultaneous multiple round bidding with a simultaneous stopping rule to award BTA authorizations, we believe that it is necessary to impose a minimum bid increment to ensure that the MDS auction concludes within a reasonable period of time. As we recognized in the *Second Report and Order*, it is important to establish the amount of the minimum bid increment as the greater of a percentage and fixed dollar amount. This will ensure a timely completion of the auction even if bidding begins at a very low dollar amount. *Id.* at 2369. Accordingly, we will impose a minimum bid increment of some percentage of the high bid from the previous round or a fixed dollar amount, whichever is greater, in MDS auctions where simultaneous multiple round bidding is

used. We will announce by public notice prior to the MDS auction the specific bid increment that generally will be utilized.

112. The Commission will also retain the flexibility to vary the minimum bid increment during the course of the MDS auction by announcement. We may, for example, begin the MDS auction with a sizable minimum bid increment and reduce the bid increment as the auction progresses. Starting with a sizable minimum bid increment will move the auction quickly at the beginning, when prices have limited informational content and there is little benefit to either bidders or the Commission of refined price movements, while allowing bidders to express small differences in valuation as the auction nears a close, increasing both efficiency and auction revenues. Small bid increments also reduce the chances of ties. Where a tie occurs, the high bidder will be determined by the order in which the bids were received by the Commission. *See Second Report and Order* at 2369. Adjustments in the bid increment may be based in part on the level of bidding activity.

113. *Duration of Bidding Rounds.* To gain the full benefit of the information generated by a simultaneous multiple round auction, bidders will need some time between bidding rounds to evaluate back-up strategies and consult with their principals. Prior to the MDS auction, we will announce by public notice the duration of bidding rounds for the auction. We also reserve the discretion during the course of the auction to vary, by public notice or announcement, the duration of bidding rounds or the interval at which bids are accepted. We expect to allow more time for the initial rounds in the MDS auction, while bidders familiarize themselves with the bidding process, and then increase the frequency of rounds as the auction progresses. Thus, we should be able to move the auction toward closure in a reasonable period of time.⁷⁸

114. *Activity Rule.* To ensure that a simultaneous MDS auction with a simultaneous stopping rule closes within a reasonable period of time and to increase the information conveyed by bid prices during the auction, we believe that it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. Because simultaneous stopping rules generally keep all markets open for bidding as long as anyone wishes to bid, they also create an incentive for bidders to hold back until prices approach equilibrium before making a bid. As noted in the *Second Report and Order*, this could lead to very long auctions. *See id.* at 2371. Delaying serious bidding until late in an auction also reduces the information content of prices during the course of the auction. Without an activity rule, bidders cannot know whether a low level of bidding on a particular market means that the market's price is near its final level or if instead many serious bidders are holding back and may bid up the price later in the auction. When bidding closes on a

⁷⁸ Given our estimates of the value of the BTA service areas and the likely number of bidders, we expect to hold more frequent bidding rounds in the MDS auction than we have in certain other simultaneous multiple round auctions, particularly broadband PCS. *See Second Report and Order* at 2368.

market-by-market basis, an activity rule is less important. This is because failure to bid on a given market in any round may result in loss of the opportunity to bid on that market, if that round turns out to be the last one for that market.

115. In the *Second Report and Order*, we adopted the three-stage Milgrom-Wilson activity rule as our preferred activity rule when a simultaneous stopping rule is used. *Id.* at 2372. See also *Fifth Report and Order* at 5553-5556. We plan to employ this activity rule in the MDS auction as well. Under the Milgrom-Wilson activity rule, bidders are required to declare their maximum eligibility in advance of the auction and make an upfront payment proportional to that eligibility level. In the PCS auctions, activity and eligibility are defined in terms of "MHz-pops." See, e.g., *Fifth Report and Order* at 5553-5554. Specifically, the number of MHz-pops associated with a PCS license is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. We chose MHz-pops because we anticipated that PCS license values would be closely related to the number of MHz-pops in the license service areas. This choice ensures that the measure of bidding activity used in the activity rule is highly correlated with license values. In the MDS auction, bidding activity and eligibility will be defined in terms of dollar values. The Commission will assign an "activity unit" value to each BTA service area for the purpose of measuring bidding activity and eligibility. Specifically, the activity unit value for a BTA service area will be equal to the upfront payment associated with that BTA service area. A bidder's maximum eligibility (which is also the bidder's eligibility for the first round of the auction) will be equal to its total upfront payments.⁷⁹ Because the upfront payments will be related to the value of the BTA service areas (*see infra* ¶ 136), activity units will fulfill the same function that MHz-pops have fulfilled in the previous PCS auctions.

116. The Milgrom-Wilson activity rule provides that a bidder's minimum activity level, measured as a fraction of eligibility in the current round, will increase during the auction. A bidder will be considered "active" on a BTA service area in the current round if it is either the high bidder at the end of the bid withdrawal period in the previous round, or if it submits a bid in the current round which meets or exceeds the minimum valid bid (*i.e.*, a bid that exceeds the high bid in the previous round by at least the minimum bid increment). A bidder's activity level in a round is the sum of the activity units associated with the BTA service areas on which the bidder is active.

117. The minimum required bidding activity levels for each stage of the MDS auction are as follows. In each round of Stage One of the auction, a bidder who wishes to maintain its current eligibility is required to be active on BTA service areas encompassing at least fifty percent of the activity units for which it is currently eligible. Failure to maintain

⁷⁹ As explained in ¶ 138, however, a small business bidder eligible for a reduction in its upfront payment requirement will not have the number of its activity units decreased as a result of submitting a reduced upfront payment.

the requisite activity level will result in a reduction in the amount of activity units associated with BTAs upon which a bidder will be eligible to be active in the next round of bidding (unless an activity rule waiver, as described below, is used). During the first stage, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by two (2/1). Eligibility for each applicant in the first round of Stage One is determined by the amount of the upfront payment received and the BTAs identified in the applicant's short-form application. In each round of Stage Two, a bidder who wishes to maintain its current eligibility is required to be active on BTA service areas encompassing at least eighty percent of the activity units for which it is eligible in that particular round. During the second stage, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-fourths (5/4). In each round of Stage Three, a bidder who wishes to maintain its current eligibility is required to be active on BTA service areas encompassing ninety-five percent of the activity units for which it is eligible in that particular round. In the final stage, if activity in the current round is below ninety-five percent of current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by twenty-nineteenths (20/19).

118. In the PCS auctions, we specified transition guidelines for deciding when the auction would move from Stage One to Stage Two to Stage Three. Those guidelines are based on the "auction activity level," the sum of the MHz-pops of PCS licenses for which the high bid increased in the current round as a percentage of the total MHz-pops of all licenses offered in the auction. *See, e.g., Fifth Report and Order at 5555.* However, we also retained the discretion to move the PCS auctions from one stage to another at a rate different from that set out in the guidelines. *See Fourth Memorandum Opinion and Order in PP Docket No. 93-253, 9 FCC Rcd 6858, 6860 (1994).*

119. For the MDS auction, we shall employ an analogous procedure. The "auction activity level" for a given round of the MDS auction will be defined as the sum of the activity units associated with the BTA service areas for which the high bid increases in that round, divided by the sum of activity units associated with all of the BTAs being auctioned. The following transition guidelines apply. The MDS auction will begin in Stage One and move from Stage One to Stage Two when the auction activity level is below ten percent for three consecutive rounds in Stage One. The auction will move from Stage Two to Stage Three when the auction activity level is below five percent for three consecutive rounds in Stage Two. In no case can the auction revert to an earlier stage. The Commission retains the discretion to determine and announce during the course of an MDS auction when, and if, to move from one auction stage to the next, based on a variety of measures of bidder activity, including, but not limited to, the auction activity level as defined above, the percentage of BTA service areas on which there are new bids, the percentage of activity units on which there are new bids, the number of new bids, and the percentage increase in revenue.

120. To avoid the consequences of clerical errors and to compensate for unusual

circumstances that might delay a bidder's bid preparation or submission in a particular round, we will provide bidders with a limited number of waivers of the above-described activity rule. We believe that some waiver procedure is needed because the Commission does not wish to reduce a bidder's eligibility due to an accidental act or circumstances not under the bidder's control. *See Second Report and Order* at 2372.

121. In MDS auctions, bidders will be provided five activity rule waivers that may be used in any round during the course of the auction. *See Second Report and Order* at 2373. If a bidder's activity level is below the required activity level, a waiver will automatically be applied. That is, if a bidder fails to submit a bid in a round, and its activity level from any standing high bids (high bids at the end of the bid withdrawal period in the previous round) falls below its required activity level, a waiver will be automatically applied. A waiver will preserve current eligibility in the next round. An activity rule waiver applies to an entire round of bidding and not to a particular BTA service area. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level. *See Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6861 (1994). If a bidder overrides the automatic waiver mechanism, its eligibility will be permanently reduced (according to the formulas specified in ¶ 117), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no new valid bids will not keep the auction open. Bidders will have the option of pro-actively entering an activity rule waiver during the bid submission period.⁸⁰ If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

122. The Commission retains the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. We also retain the flexibility to adjust prior to an auction the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction. *See Second Report and Order* at 2373. We will announce by public notice before the MDS auction the number of waivers that will be allowed in that particular auction.

123. As with other auctions, we reserve the right to impose for the MDS auction an activity rule less complex than the Milgrom-Wilson rule. *See Second Report and Order* at 2372; *Fifth Report and Order* at 5556. We will announce by public notice before the MDS auction the activity rule that will be employed in that particular auction.

124. *Stopping Rules.* We noted in the *Second Report and Order* that, with multiple round auctions, a stopping rule must be established for determining when the auction is over.

⁸⁰ Thus, a "proactive" waiver, as distinguished from the automatic waiver described above, is one requested by the bidder.

Id. at 2369. In an MDS simultaneous multiple round auction, bidding could close separately on individual BTA service areas, simultaneously on all BTA service areas, or a hybrid approach could be used. Under an individual approach, bidding would close on each BTA service area after one round passed in which no new acceptable bids were submitted for that particular service area. With a simultaneous stopping rule, bidding would remain open on all BTA service areas until there was no new acceptable bid on any service area. This approach would have the advantage of providing bidders full flexibility to bid for any BTA service area as more information became available during the course of the MDS auction, but it could lead to a very long auction, unless an activity rule were imposed. *See id.* at 2370. A hybrid approach would combine the individual and the simultaneous approaches.⁸¹

125. For MDS auctions, we intend to utilize a simultaneous stopping rule, as we have successfully used in previous simultaneous multiple round auctions. Bidding will accordingly remain open on all BTA service areas until bidding stops on every BTA service area. The auction will close after one round passes in which no new valid bids or proactive waivers are submitted. The Commission retains the discretion, however, to keep the MDS auction open even if no new valid bids and no proactive waivers are submitted. In the event that the Commission exercises this discretion, the effect will be the same as if a bidder had submitted a proactive waiver.⁸² Since we are also imposing an activity rule (as discussed above), we believe allowing simultaneous closing for all BTA service areas will afford bidders flexibility to pursue back-up strategies without running the risk that bidders will refrain from bidding until the final rounds. We also believe that a simultaneous stopping rule will best enable bidders to take account of any interdependencies that exist between BTA authorizations (especially authorizations for adjacent areas) and will allow bidders to make the most informed bidding decisions. Thus, simultaneously closing bidding on BTA service areas will most likely award licenses to the bidders who value them most highly. *See Second Report and Order* at 2370.

126. Additionally, the Commission may also declare at any time after forty rounds that the MDS auction will end after a specified number of additional rounds. If the Commission invokes this stopping rule, it will accept bids in the final round(s) only for BTA service areas on which the high bid increased in at least one of the preceding three rounds.

⁸¹ For example, in a hybrid approach, we could use a simultaneous stopping rule (along with an activity rule designed to expedite closure) for higher valued BTA service areas. For lower valued BTA service areas, where the loss from eliminating some back-up strategies would be less, bidding on BTAs could be allowed to close individually. *See Second Report and Order* at 2370.

⁸² This will help ensure that the MDS auction is completed within a reasonable period of time, because it will enable the Commission to utilize larger bid increments, which speed the pace of the auction, without risking premature closing of the auction. *See Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7684, 7685 (1994).

See Second Report and Order at 2370 n.106. Stopping the MDS auction after a specified number of additional rounds will ensure ultimate Commission control over the duration of the auction. *See id.* at 2370. Thus, the Commission will have the means to prevent bidders from continuing to bid on a few BTA service areas (or even a single service area) solely to delay the closing of bidding for all BTA service areas in an MDS auction with a simultaneous stopping rule. This will also ensure that the Commission can end the MDS auction if it determines that the benefits from ending the auction, and hence granting BTA authorizations more rapidly, exceed the possible efficiency loss from cutting off bidding on a few BTA service areas. If we exercise this option, we favor the use of three final rounds. Allowing more than one additional round provides some opportunity for counter-offers, thus reducing the risk that a BTA authorization will not be awarded to the party that values it most highly.

127. If this fail-safe mechanism is used in an MDS auction, there are two reasons not to take bids on BTA service areas on which there has been no recent bidding. First, the fact that bidding on an individual BTA service area may close will provide an additional incentive to bid actively and thus speed the conclusion of the MDS auction. If bids are accepted on all BTA service areas in the final round(s) there is less risk to a bidder in holding back. Second, closing bidding on BTA service areas for which activity has ceased ensures high bidders for those service areas that they will not lose a BTA authorization without having an opportunity to make a counter-offer.⁸³ This reduces the uncertainty associated with aggregating BTA authorizations (such as those for adjacent BTAs) that may be worth more as a group than individually. If final bids are accepted on all BTA service areas, a high bidder on an aggregation of BTA service areas may unexpectedly lose a significant part of the aggregation and have no chance to regain it except in the post-auction market, where bargaining or other transaction costs may be high.

128. The Commission does not intend to exercise this option except in extreme circumstances, such as where the MDS auction is proceeding very slowly, there is minimal overall bidding activity, and it appears unlikely that the auction will close within a reasonable period of time. Before exercising this option, however, the Commission would first attempt to increase the pace of the auction by announcing that the auction will move into the next stage, where bidders would be required to maintain a higher level of bidding activity. Under these circumstances, the Commission may also first increase the number of bidding rounds per day and increase the amount of the minimum bid increments for those limited number of BTA service areas where there is still a high level of bidding activity.

⁸³ Either the MDS auction will close only when bidding ceases on all BTA service areas, so the high bidder will have an opportunity to respond to any new bids, or the Commission will call for final bids but not accept new bids on BTA service areas on which there have been no new bids in the previous three rounds, so no other bidder will have the opportunity to outbid the high bidder in a final round.

129. Additionally, because of the large number of BTA service areas to be auctioned at once, we will retain the discretion either to use a hybrid stopping rule or to allow bidding to close individually for these service areas if, as we gain more experience with auctions, we determine that simultaneous stopping rules are too complex to implement for very large numbers of service areas. The specific stopping rule for ending bidding on the BTA service areas will be announced by public notice prior to the MDS auction.

5. Procedural and Payment Issues

a. Pre-Auction Application Procedures

130. The *Second Report and Order* established general rules and procedures for participating in auctions. Again, however, we noted that these might be modified on a service-specific basis. As described below, we have determined that we will follow for new MDS initial applications the procedural and payment rules established in the *Second Report and Order* and set forth at 47 C.F.R. Chapter I, Part 1, Subpart Q, with modifications to fit MDS. Certain procedural details will be supplied later by public notices. Our objective has been to design rules and procedures that will reduce administrative burdens and costs on bidders and the Commission, ensure that bidders and licensees are qualified and able to construct their systems, and minimize the potential for delay of service to the public. *See* 47 U.S.C. § 309(j)(3)(A) (in designing auction rules, Commission should seek to promote development and rapid deployment of products and services for public benefit, without administrative or judicial delays).

131. Before an MDS auction, the Commission, or, pursuant to delegated authority, the Mass Media Bureau, in conjunction with the Wireless Telecommunications Bureau, will release public notices concerning the auction. The public notices will specify the BTA service areas to be auctioned, the filing deadline for short-form applications, and the time, place, and method of competitive bidding to be used, as well as applicable bid submission and payment procedures.

132. Applicants will be required to submit short-form applications by the date specified by public notice. Applicants should file a short-form application identifying all BTA service areas specified by the public notice in which they are interested in bidding.⁸⁴ If the Commission receives only one application that is acceptable for filing for the same BTA service area and thus there is no mutual exclusivity,⁸⁵ the Commission will by public notice

⁸⁴ As described in detail below, the short-form applications must also include an exhibit identifying any bidding consortia or other arrangements relating to the BTA service areas being auctioned. *See infra* ¶ 164.

⁸⁵ Absent mutually exclusive applications, the Commission is prohibited from conducting an auction. *See* 47 U.S.C. § 309(j)(1).

cancel the auction for this BTA service area and establish a date for the filing of either an initial long-form application for an MDS station license or, for a heavily encumbered BTA, a statement of intention with regard to the BTA.⁸⁶

133. To encourage maximum bidder participation, we will provide applicants whose short-form applications are substantially complete, but which contain minor errors or defects, with an opportunity to correct their applications prior to the auction. However, applicants will not be permitted to make any major modifications to their applications; for MDS, we classify all amendments to short-forms as major, except those to correct minor errors or defects, such as typographical errors, or those to reflect ownership changes or formation of bidding consortia specifically permitted under the anti-collusion rules set forth below. *See infra* ¶ 165. We note in particular that a change in control of an applicant or a change in the BTAs upon which an applicant wishes to bid will be regarded as a major amendment to the short-form application. In addition, applications that are not signed in any manner or form, including by electronic means, or that fail to make the requisite certifications will be dismissed and may not be resubmitted. *See Second Report and Order* at 2377; 47 C.F.R. § 1.2105(b).

134. After reviewing the short-form applications, the Commission will issue another public notice listing all applications containing minor defects, and applicants will be given an opportunity to cure and resubmit defective applications. On the date set for submission of corrected applications, applicants who on their own discover minor errors in their applications, such as typographical errors, also will be permitted to file corrected applications. Following a review of the corrected applications, the Commission will release another public notice announcing the names of all applicants whose applications have been accepted for filing. Applicants identified in this public notice will then be required to submit the full amount of their upfront payment. *See Second Report and Order* at 2377.

b. Upfront Payments

135. In the generic auction rules, we described five types of payments: upfront payments, down payments, final payments, bid withdrawal payments, and default and disqualification payments. Given the history of speculators filing MDS applications, we believe a substantial upfront payment is needed for MDS auctions to discourage speculative bidding and increase the likelihood of applicants who intend to provide service to the public obtaining the remaining available MDS channels. Requiring a substantial upfront payment provides some degree of assurance that only serious, qualified bidders will participate and serves as a deterrent to the filing of speculative applications, which may delay the provision of service to the public. The upfront payments will also provide the Commission with a source of funds to satisfy any bid withdrawal or default and disqualification payments

⁸⁶ *See infra* ¶¶ 150-154, for the procedures for filing either a long-form application for a station license or a statement of intention with regard to the BTA.

assessed. *See Second Report and Order* at 2378-2379. Therefore, we will require an upfront payment for the MDS auction.⁸⁷

136. We believe the upfront payment should bear a relation to the value of the BTA authorizations that a bidder hopes to be awarded. We accordingly delegate to the Mass Media Bureau and the Wireless Telecommunications Bureau the authority to determine an appropriate upfront payment for each BTA service area being auctioned, taking into account, at the Bureaus' discretion, such factors as the population and the approximate amount of usable spectrum in each BTA.⁸⁸ Bearing in mind the uncertainties associated with valuing the BTA authorizations, we expect that the Bureaus will follow the guidelines laid out in the *Second Report and Order* and establish upfront payments equal to around five percent of the expected amounts of winning bids for the various BTA service areas. *See id.* at 2378-2379. In no event will the upfront payment for any BTA service area be less than \$2500, the minimum suggested in the *Second Report and Order*, and we retain the flexibility for the Bureaus to modify this minimum if we find that a higher amount would better deter speculative filings. *Id.* at 2379.

137. Prior to the MDS auction, the Mass Media Bureau, in conjunction with the Wireless Telecommunications Bureau, will publish a public notice listing the upfront payment amounts corresponding to each BTA service area to be auctioned. The number of activity units associated with a BTA service area (*see* ¶ 115) equals the amount of the upfront payment for that BTA. A prospective bidder must submit an upfront payment equal to the largest combination of activity units on which the bidder anticipates being active in any single round. The combination of activity units on which a bidder is active in a round equals the sum of the activity units associated with the BTAs on which the bidder has submitted a bid, or on which the bidder is the standing high bidder. Although a bidder may file applications for every BTA service area being auctioned, the total upfront payment submitted by each applicant will determine the combinations of BTA service areas on which the applicant will actually be permitted to be active in any single round of bidding.⁸⁹

⁸⁷ Commenters addressing this issue agree that upfront payments should be required for MDS to deter insincere or unqualified applicants. *See Comments of Association* at 51; *Vega* at 17-18; *ACS Enterprises, et al.* at 20-21.

⁸⁸ *See Comments of Association* at 51 (if Commission adopts filing approach for MDS based on predetermined geographic areas, formula based on population and megahertz in each service area is appropriate for determining upfront payments).

⁸⁹ Consider, for example, an applicant that submits a \$100,000 total upfront payment. As explained above at ¶ 115, the maximum number of activity units for that applicant is 100,000. In any single round, the applicant could be active on two BTA service areas with 50,000 activity units each, on five BTAs with 20,000 activity units each, on ten BTAs with 10,000 activity units each, or on any combination of BTA service areas for which the sum of

138. A prospective bidder in the MDS auction that claims status as a small business, as defined in ¶¶ 190-191, will be eligible for a twenty-five percent reduction in its upfront payment requirement. *See infra* ¶¶ 184-185 for a discussion of the reduced upfront payments measure. A small business eligible for this reduction in its upfront payment will not have the number of its activity units decreased as a result of submitting a reduced upfront payment.⁹⁰

139. We do not believe that a very low upfront payment, as one commenter proposes, is sufficient to discourage speculative or insincere bidding. *See* Comments of Vega at 18 (recommending \$500 upfront payment per every five market or channel groups). We also feel that a flat fee unrelated to the value of the individual BTA service areas, as another commenter suggests, is inappropriate. *See* ACS Enterprises, *et al.* at 20 (supporting upfront payment of \$2000 per channel). Given the Commission's experience with defaults by some winning bidders in the July 1994 IVDS auction, we find that an upfront payment which reflects the value of the BTA service areas being auctioned is preferable to a low flat fee unrelated to BTA service area values. *See* Comments of Association at 52 (stating that upfront payments in excess of \$2500 minimum established in *Second Report and Order* and employed in IVDS auction are needed to assure seriousness of MDS applicants and to cover defaults by winning MDS bidders).

140. Applicants identified by public notice as those whose applications have been accepted for filing will be required to submit their upfront payments to the Commission's lock-box bank by the date specified in the public notice, which generally will be no later than fourteen days before the scheduled auction. Upfront payments may be made by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. All payments, including upfront, down and final payments, should be accompanied by FCC Form 159 (remittance advice form). After the

associated activity units totals 100,000 or less. As set forth above, a bidder is "active" on a BTA service area if it is either the high bidder on that BTA from the previous round (at the end of the bid withdrawal period), or if it submits a bid on that BTA in the current round which exceeds the previous round's high bid by at least the minimum bid increment. *See supra* ¶ 116. Thus, a bidder who begins the auction eligible to bid (based on the magnitude of its upfront payment) on BTA service areas associated with 100,000 activity units and who, in the first round, is the high bidder on a BTA service area associated with 50,000 activity units, may only, in the second round, submit new bids on a combination of BTAs associated with 50,000 or fewer activity units.

⁹⁰ For example, if a small business applicant is interested in bidding on a BTA with an upfront payment of \$100,000, it would be required, under the reduced upfront payment measure, to submit only \$75,000 to qualify to bid on that BTA. This applicant would still, however, receive 100,000 activity units -- the number of activity units equivalent to the full upfront payment amount associated with that BTA.

Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission will issue a public notice announcing the names of all applicants that have been determined to be qualified to bid in the MDS auction. Any applicant who fails to submit a sufficient upfront payment to qualify it to bid on any BTA service area being auctioned will not be identified on this public notice as a qualified bidder, will be prohibited from bidding in the MDS auction, and its application will be dismissed. *See Second Report and Order at 2377; 47 C.F.R. § 1.2106.*

141. The upfront payments submitted by prospective bidders will later be counted toward the down payments that winning bidders must make. The upfront payments of bidders who are not the high bidder on any BTA service area will be refunded as soon as possible after the MDS auction. Prior to refunding the upfront payments of non-winning bidders, however, we will determine whether they are subject to withdrawal or default payments. In some circumstances, it may be appropriate to retain upfront payments until after the winning bidders have tendered their down payments because further rounds of competitive bidding may be held if down payments are not made. No interest will be paid on upfront payments. *See Second Report and Order at 2380.*

c. Down Payments and Full Payments

142. To provide further assurance that winning bidders will be able to pay the full amount of their bids, we decided generally in the *Second Report and Order* that each winning bidder must tender a down payment sufficient to bring the total deposit up to twenty percent of the winning bid. We believe a down payment requirement is appropriate for MDS.⁹¹ Accordingly, winning bidders will be required to supplement their upfront payments to bring their total deposit with the Commission up to at least twenty percent of the final payment due for the BTA authorization(s) won in the MDS auction. If the upfront payment already tendered amounts to twenty percent or more of the winning bid, no additional deposit will be required. To the extent that any upfront payment not only covers, but exceeds, the required down payment, the Commission will refund any excess amount after determining that no bid withdrawal payments are owed by the bidder. To simplify this process administratively, the Commission will not honor requests that this excess amount be retained and applied toward later payments or obligations. The down payment will be due within five business days after the winning bidders have been notified by the Commission, and may be made by cashier's check or by wire transfer to the Commission's lock-box bank. The down payment will be held by the Commission until the winning bidder has been issued its BTA authorization and has paid the remaining balance of its winning bid, or until the winning bidder is found unqualified to be a station licensee or has defaulted, in which case it will be returned, less applicable default payments. During the period that deposits are held pending ultimate award of the BTA authorization, the interest that accrues, if any, will be retained by the

⁹¹ Commenters addressing this issue similarly see no reason to depart from the approach established in the *Second Report and Order*. *See Comments of Association at 52.*

government. See *Second Report and Order* at 2381-2382; 47 C.F.R. § 1.2107(b).

143. Based upon our experience in conducting spectrum auctions, we will require winning bidders to make full payment of the balance of their winning bids prior to the issuance of their BTA authorizations. Specifically, the Commission will, when a BTA authorization is ready to be issued, release a public notice stating that fact. The auction winner for that BTA will be required to make full payment of the balance of its winning bid within five business days following this public notice. The Commission will issue the BTA authorization to the auction winner within ten business days following notification of receipt of full payment. See *Second Report and Order and Second Further Notice of Proposed Rulemaking* in PR Docket No. 89-553, PP Docket No. 93-253, and GN Docket No. 93-252, FCC 95-159 (released April 17, 1995) at ¶ 109.

144. Auction winners that are small businesses eligible for installment financing will be subject to differing payment requirements, however. See *infra* ¶¶ 190-192 for discussion of small business eligibility. Specifically, a small business will be required to bring its total deposit with the Commission up to ten percent of its winning bid within five business days after having been notified by the Commission of its winning bidder status. An additional ten percent will be due within five business days following the public notice that its BTA authorization is ready to be issued. The Commission will then issue the BTA authorization to the small business within ten business days following notification of receipt of this additional ten percent payment.

d. Bid Withdrawal, Default and Disqualification Payments

145. In the *Second Report and Order*, we concluded that strong incentives are needed to ensure that potential bidders are financially and otherwise qualified to participate in auction proceedings, so as to avoid delays in the deployment of new services to the public. *Id.* at 2382. We accordingly stated that we will, in simultaneous multiple round auctions, impose a bid withdrawal payment requirement in instances where a high bid is withdrawn during the course of the auction and an additional default payment if a winning bid is withdrawn after the auction has closed. *Id.* at 2373-2374.

146. In an MDS simultaneous multiple round auction, any bidder who withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the BTA service area is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.⁹² No withdrawal payment

⁹² If a BTA service area is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the service area is re-offered. If a BTA service area is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder

will be assessed if the subsequent winning bid exceeds the withdrawn bid. After bidding closes, a defaulting auction winner (*i.e.*, a winner who fails to remit the required down payment within the prescribed time, fails to submit a long-form application or statement of intention, fails to make full payment, or is otherwise disqualified) will be subject to an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. *See* 47 C.F.R. §§ 1.2104(g) and 1.2109; *Second Report and Order* at 2373-2374. The additional three percent payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We will hold deposits made by defaulting or disqualified auction winners until full payment of these amounts. In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision. We believe that these payment requirements will discourage insincere bidding and default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements.⁹³

147. In addition, "if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission also may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it may deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant." *Second Report and Order* at 2383. Parties who obtain their BTA authorizations through the auction process are put on notice that if their BTA authorizations are cancelled for any reason they will lose all monies paid to the Commission regarding those authorizations. This loss of monies paid is not intended as an exclusive remedy. Where such BTA holder's conduct so warrants, additional sanctions, including monetary fines and station license revocation, may be imposed.

148. In the event that an MDS auction winner defaults or is otherwise disqualified, the Commission must determine whether to hold a new auction or simply offer the BTA service area to the second-highest bidder. As we stated in the *Second Report and Order*, we believe that, as a general rule, when an auction winner defaults or is otherwise disqualified after having made the required down payment, the best course of action is to re-auction the

will be required to pay an amount equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the BTA service area is offered by the Commission. If a BTA service area which is the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders will not be required to accept the offer. We wish to encourage losing bidders in MDS simultaneous multiple round auctions to bid on other BTA service areas, and therefore we will not hold them to their losing bids on a service area for which a bidder has withdrawn a bid or on which a bidder has defaulted.

⁹³ Commenters addressing this issue agree that default payments are needed to deter speculation and insincere bidding. *See* Comments of Association at 54; PacTel at 4-5.

BTA service area. *Id.* at 2383. Although we recognize that this may cause a brief delay in the initiation of service to the public, circumstances may change so significantly during the time between the original auction and the disqualification as to alter the value of the BTA service area to auction participants, as well as to parties who did not participate. In this situation, awarding BTA authorizations to the parties that value them most highly can best be assured through a re-auction. If, however, the default occurs within five business days after the bidding has closed, the Commission retains the discretion to offer the BTA service area to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the BTA service area to other bidders (in descending order of their bid amount) at the final bid levels. Moreover, if only a small number of relatively low value BTA service areas are to be re-auctioned and only a short time has passed since the initial auction, the Commission may choose to offer the BTA service areas to the highest losing bidders because the cost of holding another auction for MDS may not exceed the benefits. *See id.*; 47 C.F.R. § 1.2109(b) and (c).

149. If a new MDS auction becomes necessary because of default or disqualification more than five business days after bidding has ended, the Commission will afford new parties an opportunity to file applications. One of our primary goals in conducting auctions is to assure that all serious interested bidders are in the pool of qualified bidders at any re-auction. We believe that allowing new applications will facilitate achieving this goal, and that the short delay that may result from allowing new applications in a re-auction is warranted. Indeed, if we were not to allow new applicants in a re-auction, interested parties might be forced into an after-market transaction to obtain the BTA authorizations, which would itself delay service to the public and may prevent the public from recovering a reasonable portion of the value of the spectrum resource. *See Second Report and Order* at 2384; 47 C.F.R. § 1.2109(c).

e. Post-Auction Application Procedures

150. Unlike other services where auction winners may file a single long-form application to obtain a single license for the entire geographic area auctioned, the winning bidder for each BTA service area will be required, in accordance with our existing rules, to submit separate long-form applications for each channel group and location within the BTA for which the bidder wants to obtain an MDS station license. The winning bidder for each BTA service area will therefore be required to submit a separate long-form application for each Channel E group, for each Channel F group, and for each Channel 1, 2 (or 2A), H1, H2, and H3 within the BTA for which the winning bidder wishes to receive a license.

151. The long-form application for the initial MDS station license within each BTA service area will be due from the winning bidder for that BTA within thirty business days

after such bidder has been notified of its winning bidder status.⁹⁴ After the Commission receives the winning bidder's down payment and the long-form application for the initial MDS station license within the BTA, we will review the long-form application, which must include, among other items, a FCC Form 430 and exhibits concerning the winning bidder's involvement in bidding consortia and status as a designated entity.⁹⁵ If the long-form application is found to be acceptable, the Commission will release a public notice announcing this fact, triggering the thirty day filing window for petitions to deny. If the Commission denies or dismisses all petitions to deny (if any are filed), and is otherwise satisfied that the applicant is qualified, the BTA authorization will be issued and the initial conditional MDS station license within the BTA service area of the auction winner will be granted, assuming that the auction winner (except for a small business making installment payments) has made full payment as set forth in ¶ 143. *See Second Report and Order* at 2383; 47 C.F.R. §§ 1.2107(c), 1.2108. Subsequent long-form applications for MDS station licenses within BTA service areas, which auction winners may submit at any time during the five year build-out period, will be reviewed by the Commission and granted in a similar manner, except, of course, that the winning bidders will need to make no further payments.

152. However, we realize that a number of BTA service areas may be so encumbered that the winning bidder for such a BTA may be unable to file a long-form application proposing another MDS station within the BTA while meeting the Commission's interference standards as to all previously authorized or proposed MDS and ITFS facilities. The winning bidder's objective in bidding on such a heavily encumbered BTA would likely be to purchase the previously authorized or proposed MDS stations within the BTA and to maintain full flexibility to make modifications. It also seems likely that a winning bidder for a heavily encumbered BTA may itself possess most or all of the previously authorized or proposed MDS stations within that BTA, and the bidder's goal in obtaining the authorization for the BTA in which it already had MDS stations would similarly be to preserve full flexibility to make modifications. The winning bidder for a BTA service area so heavily encumbered that it believes it cannot file an acceptable long-form application proposing an MDS station with average transmitted power within its BTA should follow the post-auction

⁹⁴ We realize that other services have generally required the filing of long-form applications within ten days of notification of the winning bidders. However, given the need for MDS auction winners to protect all previously authorized or proposed MDS and ITFS facilities within their BTA service areas from harmful interference, we believe that such winning bidders will likely require a longer period of time to complete the requisite engineering studies and interference analyses before filing their initial long-form applications for MDS station licenses.

⁹⁵ The content of these exhibits is set forth in Section 21.956(b) of our amended rules, attached as Appendix C. Commenters agree that such information is needed, particularly where an applicant claims status as a designated entity. *See Comments of U.S. Wireless at 13.*

procedures set forth below.

153. After notification of its status as a winning bidder for a heavily encumbered BTA service area, the bidder must make its down payment within five business days in the normal manner. Within thirty business days after notification of its winning bidder status, the winning bidder must file with the Commission, in lieu of a long-form application for an MDS station license, a statement of intention with regard to the BTA service area, showing the encumbered nature of the BTA, identifying the incumbents, and describing in detail its plan for obtaining the previously authorized or proposed MDS stations within the BTA. We do not intend to force winning bidders to file long-form applications for MDS station licenses in BTAs so encumbered that the only proposed station to not cause harmful interference to incumbents would, for example, be a facility with a one watt transmitter and a highly directional antenna, serving no significant population. Winning bidders must, however, document in their statements of intention that additional MDS stations with average transmitted power could not be constructed in their BTAs without causing harmful interference to previously authorized or proposed MDS and ITFS facilities. If a winning bidder fails to file either this statement of intention or a long-form application within the thirty day period, it will be in default and will be subject to the appropriate default payments. The statement of intention should also include a FCC Form 430, a drug certification, and the same exhibits concerning the winning bidder's financial circumstances, involvement in bidding consortia, and status as a designated entity that must be attached to initial long-form applications. *See supra* ¶ 151.

154. The Commission will, following its review of the winning bidder's statement of intention, issue the BTA authorization to the winning bidder. Such issuance of the BTA authorization will, of course, be made only following full payment by the winning bidder as set forth in ¶ 143, except for a small business making installment payments. Parties wishing to comment on or oppose the issuance of a BTA authorization issued in connection with the filing of a statement of intention by a winning bidder must do so prior to the Commission's issuance of the BTA authorization.

f. Period of MDS Station Licenses

155. Under the Commission's rules, licenses for MDS stations are to be "issued for a period not to exceed 10 years." 47 C.F.R. § 21.45(a). "Unless otherwise specified by the Commission," the expiration of MDS station licenses as a class is, however, set on a single date (May 1) "in the year of expiration" (*i.e.*, the year which is ten years from the last expiration date of the class of MDS licenses, which was 1991). *Id.* Thus, the current term for all MDS station licenses as a class will expire on May 1, 2001, regardless of when these licenses are awarded. Because MDS station licenses as a class are due to expire on this set date, an MDS licensee who receives its station license on, for example, May 1, 1996 would in effect have the license for only five years before the licensee must apply for renewal.

156. For the reasons set forth herein, we believe that MDS auction winners should

not be subject to the fixed MDS station license renewal cycle which, under existing rules, will expire on May 1, 2001, only five years or so from the time that any auction winner could expect to receive its initial station license in its BTA service area. We believe all winning bidders in the MDS auction should be assured of receiving station licenses of a duration sufficient so that they may have a reasonable period of time to construct their systems and earn a return on the amounts they invested in acquiring the BTA authorizations and MDS station licenses by competitive bidding. In addition, we realize that bidders who must arrange financing will need to assure lenders that they will have possession of their MDS station licenses for a reasonably lengthy period of time. We therefore determine that all MDS station licenses granted in every BTA service area auctioned should be for a ten year period (the maximum specified in Section 21.45(a)) to run from the date that the Commission declares bidding in the MDS auction to be closed.

157. We conclude that awarding MDS station licenses with definite ten year terms, rather than much briefer, indeterminate terms dependent on when the license is granted, serves both prospective bidders and the Commission well. As described above, the set ten year period is of sufficient certainty and length to be fair to parties who must now pay considerable sums, and perhaps obtain outside financing, in order to acquire BTA authorizations and MDS station licenses. In addition, we note that granting MDS station licenses with set ten year terms will allow small businesses eligible for installment financing to make payments over a period comparable to the length of their initial station licenses.⁹⁶ Furthermore, specifying that MDS licenses for stations located in BTA service areas acquired by competitive bidding will be for ten year terms dated from the close of bidding in the MDS auction, rather than from the actual date of issuance of each individual station license, will be administratively convenient for the Commission. Because all MDS station licenses granted within BTA service areas acquired by competitive bidding will expire on the same date, the Commission will be able to easily process those licenses and to deal more expeditiously with their renewal. In accordance with Section 21.45(a), we hereby specify that all MDS station licenses granted in every BTA service area auctioned will have ten year terms from the date that the Commission declares bidding in the MDS auction closed.

6. Regulatory Safeguards

a. Unjust Enrichment and Anti-Trafficking Provisions

158. Congress directed that we take steps to prevent unjust enrichment due to trafficking in licenses that were obtained through competitive bidding. *See* 47 U.S.C.

⁹⁶ *See* Comments of Association at 59 (noting that Commission's general approach of permitting installment payments to be spread over term of license would be inequitable since all MDS station licenses were set to expire on May 1, 2001, regardless of when issued, and advocating that small businesses be allowed to pay for licenses in installments over a ten year period).

§ 309(j)(4)(E). In Section 7 below, we adopt specific rules to prevent designated entities from taking advantage of special provisions for such entities by transferring control of their BTA authorizations immediately following the MDS auction. Moreover, the MDS rules already contain provisions to reduce trafficking. *See* 47 C.F.R. § 21.39 (generally prohibiting assignment or transfer of MDS conditional station licenses prior to completion of construction of facility). These existing anti-trafficking provisions will continue to apply to MDS conditional station licenses granted prior to the institution of competitive bidding procedures. Consistent with the *Second Report and Order*, however, the existing MDS-specific anti-trafficking provisions will not apply to BTA authorizations and MDS conditional station licenses granted within auctioned BTA service areas.

159. With regard to BTA authorizations obtained by auction, an applicant seeking approval for an assignment or transfer of control of a BTA authorization within three years of receipt of such authorization by means of competitive bidding must, together with its assignment or transfer application, file with the Commission a statement indicating that its authorization was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration received in return for the assignment or transfer of the authorization. We will give particular scrutiny to auction winners who have not yet begun commercial service within their BTA service areas and who seek approval for an assignment or transfer of control of their authorizations within three years after the receipt of such authorizations, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context. *See Second Report and Order* at 2385-2386; 47 C.F.R. § 1.2111(a).

160. After consideration, we determine not to adopt any additional restrictions on the assignments or transfers of BTA authorizations, outside of the designated entity context. In our opinion, unjust enrichment is unlikely to be a problem in the MDS competitive bidding process where the auction winners will pay the market price for their BTA authorizations and hence resale of such authorizations should not involve any unjust enrichment. *See Second Report and Order* at 2385. Moreover, prohibitions on assignments or transfers of BTA authorizations, even if for a limited time, might have the unintended effect of delaying service to the public. *See id.* We therefore decline to impose prohibitions on assignments or transfers, such as a prohibition on the resale of MDS "channels for profit until those channels have been operational for one year," as one commenter suggests. *See Comments of Rural Wireless* at 11.

b. Construction Build-out Requirements

161. Congress has directed that the Commission, in implementing auction procedures, "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services." 47 U.S.C.

§ 309(j)(4)(B). In the *Second Report and Order*, we decided that it was generally unnecessary to impose additional construction build-out or other performance requirements for auctionable services beyond those already provided in service rules. *Id.* at 2386. However, following a review of our existing MDS rules, we determined to alter the construction requirements that will be applicable to the holders of BTA authorizations obtained by competitive bidding.

162. Our current rules require the completion of construction of MDS stations within twelve months from the date of the conditional station license grant. 47 C.F.R. § 21.43. We will continue to apply this existing requirement to MDS conditional station licenses granted prior to the institution of competitive bidding procedures. We will not, however, apply this twelve month construction requirement to MDS conditional station licenses granted in the future in the BTA service areas of auction winners. Instead, we will require the holders of BTA authorizations to meet the five year build-out requirements set forth at ¶ 43.

163. We believe that this change in our construction requirements is necessitated by our decision to grant BTA-based authorizations to MDS auction winners. Our goal in imposing any construction or other performance requirement is to insure that each auction winner provides service throughout its BTA. We believe that the imposition of a general BTA-wide build-out requirement will better achieve this goal than our continued imposition of a twelve month construction requirement on each particular MDS facility within the BTA.⁹⁷

c. Rules Prohibiting Collusion

164. In the generic auction rules, we adopted special provisions to prevent collusive conduct in the context of competitive bidding. 47 C.F.R. § 1.2105(c). We indicated that such rules would serve the objectives of the Budget Act by preventing parties, especially larger firms, from agreeing in advance to bidding strategies that might divide the market according to their strategic interests and to the disadvantage of other bidders. Such rules could also strengthen confidence in the bidding process. *Second Report and Order* at 2386. These rules apply to all auctionable services, including MDS. Applicants are required to identify in an exhibit to their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the BTA service areas being auctioned. Applicants are also required to certify that they have not entered into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular BTA service areas on which they will

⁹⁷ We also note that imposing such a build-out requirement is consistent with the requirements of other area-based services, such as PCS. *See* 47 C.F.R. §§ 24.103 and 24.203 (requiring building out of narrowband and broadband PCS systems to serve percentage of population, or specified amount of area, within relevant service area).

or will not bid. See 47 C.F.R. § 1.2105(a)(2)(viii) and (ix). Except as otherwise provided in ¶ 165, after the short-form applications are filed and prior to the time the winning bidder has made its required down payment, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing settlement agreements, with other applicants, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the applicants' short-form application. See 47 C.F.R. § 1.2105(c)(1). Communications among applicants concerning matters unrelated to the MDS auction will, however, be permitted after the filing of short-form applications. See *Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6869 (1994).

165. Despite the restrictions set forth in ¶ 164, applicants may amend their short-form applications to reflect formation of bidding consortia or changes in ownership after the short-form application filing deadline has passed, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied to bid on the same BTA service areas. In addition, after the filing of short-form applications, applicants may make agreements to bid jointly for BTA service areas, provided the parties to the agreement have not applied for the same BTA service areas. A holder of a non-controlling attributable interest in an entity submitting a short-form application may also, following the filing of the short-form application and under certain conditions specified in 47 C.F.R. § 1.2105(c)(4), acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for the same BTA service areas. To reflect these changes in ownership or in the membership of consortia or joint bidding arrangements, applicants must amend their short-form applications by submitting a revised short-form, filed within two business days of any such change; such modifications will not be considered major amendments of the applications. However, any amendment which results in the change of control of an applicant will be considered a major amendment of the short-form. See *supra* ¶ 133; 47 C.F.R. § 1.2105(c)(2), (3) and (4); *Second Memorandum Opinion and Order* at 7254; *Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7684, 7688-7689 (1994). Finally, the winning bidder for each BTA service area must, as an exhibit to its initial long-form application or statement of intention, explain the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement it had entered into relating to the competitive bidding process prior to the time bidding was completed. See 47 C.F.R. § 1.2107(d).

166. Where specific instances of collusion in the competitive bidding process are alleged, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may, among other remedies, be subject to the loss of their upfront payment, down payment or their full bid amount, cancellation of their BTA authorizations, and may be prohibited from participating in future auctions. See *Second Report and Order* at 2388; 47 C.F.R. § 1.2109(d).

7. Treatment of Designated Entities

a. General Considerations

167. Section 309(j) of the Communications Act provides that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). To achieve this congressional goal, the statute directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures." *Id.* In addition, Section 309(j)(3)(B) instructs the Commission, in establishing eligibility criteria and bidding methodologies, to promote "economic opportunity and competition . . . by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," which are collectively referred to as "designated entities." 47 U.S.C. § 309(j)(3)(B); 47 C.F.R. § 1.2110. Section 309(j)(4)(A) further provides that to promote these objectives, the Commission shall consider alternative payment schedules, including lump sums or guaranteed installment payments. 47 U.S.C. § 309(j)(4)(A).

168. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was aware of the problems that designated entities would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in accessing capital. For example, the legislative history accompanying our grant of auction authority states generally that the Commission's regulations "must promote economic opportunity and competition," and "[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women. H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993) (House Report). The House Report states that the House Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." *Id.* More specifically, the House Committee was concerned that the adoption of competitive bidding should not have the effect of "excluding small businesses from the Commission's licensing procedures," and anticipated that the Commission would adopt regulations to ensure that small businesses would "continue to have opportunities to become Commission licensees." *Id.* at 255.

169. Consistent with Congress' concern that auctions not operate to exclude small businesses, the provisions relating to installment payments in Section 309(j) were clearly intended to assist small businesses. The House Report states that these provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations, including those owned by members of minority groups and women." *Id.* at 255. It also states that the provisions in Section 309(j)(4)(A) pertaining to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not

inadvertently favor incumbents with "deep pockets" "over new companies or start-ups." *Id.*

170. Moreover, with regard to access to capital, Congress had made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit." Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 331(a)(3), 106 Stat. 986, 1007 (1992). As a result of these difficulties, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns." *Id.* at § 331(b)(2) & (3).

171. In our initial implementation of Section 309(j), the Commission established in the *Second Report and Order* eligibility criteria and general rules that would govern the special measures for small businesses, rural telephone companies, and businesses owned by minorities and women. We also identified several measures, including installment payments, bidding credits and spectrum set-asides, that we could choose from in formulating the rules for auctionable spectrum-based services. In addition, we established rules to prevent unjust enrichment by designated entities seeking to assign or transfer licenses obtained through use of one of these special measures. *See Second Report and Order* at 2388-2400.

172. In adopting provisions to provide designated entities opportunities in MDS, we note that, while Section 309(j) lists the various designated entities together, the statute does not indicate that each group must be afforded the same type of treatment. *See Competitive Bidding Notice* at 7646. We have consistently emphasized that the provisions applicable to particular designated entities would vary depending on the nature of each individual service. In particular, we have evaluated the capital requirements, the nature of the expected pool of bidders, and other characteristics of each service to determine the appropriate measures to achieve the objectives of the auction statute. *See Second Memorandum Opinion and Order* at 7256; *Fourth Report and Order* at 2336.

173. With regard to MDS, we note that this service differs from the other services that have been auctioned to date in several important ways. First, unlike PCS and IVDS, wireless cable is a heavily encumbered service with many of the channels in most major markets already occupied. Given the limited amount of remaining usable spectrum and the need to protect incumbents from harmful interference, we anticipate that the BTA service areas will be auctioned for relatively modest amounts, particularly in comparison to the sums bid in the PCS auctions. Second, it is necessary for MDS channels within a geographic area to be aggregated under the control of a single wireless cable operator, to allow it to compete with wired cable television systems in the same area. *Notice* at 7667. Thus, our goal in this proceeding is not to set the stage for the development of an entirely new industry, such as PCS, but to allow the progression and rationalization of the existing wireless cable industry. Accordingly, we cannot adopt designated entity rules that would hinder the accumulation of MDS channels within BTAs by entities financially capable of operating wireless cable

systems and providing competitive service to the public.

174. Because MDS differs from other auctionable services, we requested in our *Notice* comment on the various special measures available for designated entities. We specifically requested comment on "which entities should be eligible to receive them, and their appropriateness in light of the characteristics of MDS." *Notice* at 7678-7679. Despite our specific request for comment, no minority or women-owned entities, or organizations representing them, submitted comments on the need for special measures for such entities in MDS. Thus, the Commission has no record before it with reliable information about the percentage of minority and women-owned businesses in the wireless cable industry and no information as to how such businesses could be disadvantaged in an MDS auction without special incentives for them.

175. In this *Report and Order* we adopt specific designated entity measures appropriate for MDS, based on the record in this proceeding and on the unique characteristics of the service as identified above. Specifically, we have determined to make installment payments, reduced upfront payments and bidding credits available to small businesses, including those owned by minorities and women, and to small business consortia. We also adopt the unjust enrichment provisions set forth in the *Second Report and Order* applicable to installment payments and bidding credits. *Id.* at 2395; 47 C.F.R. § 1.2111(c) & (d). We decline to adopt spectrum set-asides. Such a measure is inappropriate for MDS, given the heavily encumbered nature of this service and the lack of sizable, discrete blocks of spectrum to auction.⁹⁸

b. Entities Eligible for Special Measures

176. Although we will offer installment financing, reduced upfront payments and bidding credits to small businesses, we have concluded that the provision of additional measures for rural telephone companies is unnecessary in the MDS auction. Congress intended by including rural telephone companies in the category of designated entities to ensure that rural consumers received the benefit of new technologies. *See* 47 U.S.C. § 309(j)(3)(A); *Fourth Report and Order* at 2337 n.66. However, many rural consumers and residents of smaller communities already receive the benefit of wireless cable services. Numerous wireless cable operators focus on uncabled rural areas and small towns, and rural

⁹⁸ This decision is consistent with the Commission's previous determination that, due to the small amount of spectrum available, spectrum set-asides were not appropriate for IVDS. *See Fourth Report and Order* at 2336. Such determination is also consistent with the comments received in this proceeding, which uniformly state that set-asides are not appropriate for MDS, given the limited amount of spectrum available and the need to aggregate channels to create competitive wireless cable service. *See* Comments of PacTel at 3; Vega at 19; Association at 64-66; American Telecasting at 26; ACS Enterprises, *et al.* at 24.

states, such as North and South Dakota, Oklahoma, and Nebraska, have among the highest numbers of operating and planned wireless cable systems. Moreover, given the anticipated modest auction prices of authorizations for sparsely populated rural BTAs, we do not believe that rural telephone companies will need either a special exemption from the MDS competitive bidding process or additional measures provided to them in order to compete in the auction process.⁹⁹ Rural telephone companies will, of course, be eligible for the incentives provided to small businesses generally if they meet those eligibility requirements. *See Reply Comments of Telephone Cooperative at 2-3 (urging Commission to provide rural telephone companies same treatment as small businesses, if they meet small business eligibility requirements.)* This determination not to provide additional measures for rural telephone companies is consistent with the Commission's decisions in the PCS and IVDS auction rules, and with other comments received in this proceeding.¹⁰⁰

177. In addition, we expect rural telephone companies to take advantage of the partitioning option described above at ¶¶ 46-47, so they will not have to bid on entire BTAs to obtain authorizations for the rural areas they are interested in serving. Thus, rural telephone companies should be able to obtain authorizations for partitioned BTAs by private negotiation and agreement with auction winners. Rural telephone companies could also form bidding consortia to participate in MDS auctions, and then partition the BTAs won among consortia participants. In our opinion, the offering of this broad partitioning option to all interested entities, including rural telephone companies, also serves to make the provision of additional measures for rural telephone companies unnecessary.

178. Although we will offer installment financing, reduced upfront payments and bidding credits to minority and women-owned small businesses, we have also for several reasons determined, in the absence of evidence in the record to the contrary, that the provision of special measures to minority and women-owned enterprises, regardless of size, is unnecessary. First, we note that installment financing, reduced upfront payments and bidding credits will not be limited to certain BTA service areas, but will be available to small businesses for every BTA service area to be auctioned. We believe that broadening the scope of opportunity for small businesses in this manner should also create substantial

⁹⁹ *See Comments of Rural Wireless at 3-9 (arguing for either an exemption from competitive bidding process or additional special measures for rural telephone companies because Congress wanted to ensure the provision of wireless cable services to rural consumers and because rural telephone companies have been unable to compete in other spectrum auctions, including PCS).*

¹⁰⁰ *See Comments of ACS Enterprises, et al. at 24; Reply Comments of Association at 18; Reply Comments of American Telecasting at 16-17 (noting that additional measures for rural telephone companies are not necessary to ensure that rural consumers receive benefit of wireless cable service, and that there is no reason to prefer rural telephone companies over others as providers of such service in rural areas).*

opportunity for minority and women-owned enterprises. Census data has shown that approximately ninety-nine percent of all women-owned and ninety-nine percent of all minority-owned businesses generate annual receipts of one million dollars or less.¹⁰¹ Thus, we expect that virtually all minority and women-owned enterprises will be eligible for the special measures adopted herein for small businesses. Moreover, we note that we are permitting consortia of small businesses to utilize installment financing, reduced upfront payments and bidding credits, if each member of the consortia is individually eligible. Small minority and women-owned enterprises may therefore join together in consortia to participate in MDS auctions and still remain eligible for all special measures available to small businesses individually.

179. Second, we believe that small minority and women-owned entities, with the various incentives they will receive as small businesses, should be able to participate successfully in competitive bidding, given the anticipated relatively modest value of many of the BTA service areas to be auctioned. Due to the heavily encumbered nature of the wireless cable industry, the Commission has estimated that the amounts bid in the MDS auction will not approach the levels reached in earlier auctions, particularly PCS. Thus, additional incentives for minority and women-owned enterprises, regardless of their size, appear less necessary for MDS than for other auctionable services.

180. Moreover, we note that minority and women-owned entities may also, like rural telephone companies, take advantage of the broad partitioning option set forth above at ¶¶ 46-47. Unlike other services that have limited the availability of partitioning to rural telephone companies, we are allowing any type of entity to negotiate with auction winners to obtain authorizations for partitioned BTAs. Thus, minority and women-owned entities that do not wish to bid on entire BTAs should be able to acquire authorizations for partitioned portions of those service areas.

181. This determination not to provide additional measures for minority and women-owned companies, regardless of their size, is consistent with the Commission's position in other auction rules. In the *Fifth Report and Order*, we specifically observed that, due to the expected high auction value of the PCS spectrum and the substantial build-out costs, it would be necessary to provide additional assistance to women and minority enterprises to ensure their opportunity to participate in broadband PCS than would be "necessary in other, less costly spectrum-based services." *Id.* at 5572-5573. We believe that the installment financing, reduced upfront payments and bidding credits available to all small businesses, along with the broad partitioning option, should be sufficient to give minority and women-owned entities the opportunity to participate in the "less costly" MDS auction.

¹⁰¹ See *Women-Owned Businesses*, WB 87-1, 1987 Economic Census, at 144, Table 8; *Survey of Minority-Owned Business Enterprises*, MB 87-4, 1987 Economic Census, at 81-82, Table 8.

c. Installment Payments

182. In this *Report and Order*, we approve installment financing for small businesses.¹⁰² Permitting a winning bidder to pay through installments is the equivalent of having the government extend credit to the bidder. With this installment financing option, a prospective bidder may not need to rely as heavily on private financing either before or after an auction. Given the difficulties experienced by small businesses in obtaining credit (*see supra* ¶ 170), this governmental extension of credit should be particularly valuable to small businesses that are winning bidders in spectrum auctions. Installment payments should therefore be both an effective method of promoting the participation of designated entities in the provision of spectrum-based services and a means of distributing licenses and services among geographic areas. *Second Report and Order* at 2389-2390. In the *Second Report and Order*, we determined that installment payments should be offered only to small businesses (including those owned by minorities and women), and then only in instances where use of the spectrum being auctioned was likely to match the business objectives of *bona fide* small businesses. *Id.* at 2390. We also specifically noted that the legislative history of the Budget Act indicates that large enterprises with established revenue streams are not intended the beneficiaries of installment financing. *Id.* Given the considerable number of small enterprises currently involved in the wireless cable industry, we believe that MDS has offered, and will continue to offer, *bona fide* business opportunities to small enterprises.

183. We will therefore permit the use of installment payment plans in all MDS auctions, and follow the general procedures set forth in the *Second Report and Order*. The installment payment option will allow a small business to pay the full amount of its winning bid in installments (less the upfront payment and the down payment, half of which is due five business days after notification to the winning bidder and the other half five days after the public notice stating that the BTA authorization is ready for issuance). Only interest payments will be due for the first two years, with principal and interest both being amortized over the remaining years of the ten year period running from the date that the BTA authorization is issued. Also, interest charges will be fixed at the time of issuance of the BTA authorization at a rate equal to that of ten year U.S. Treasury notes, plus two and one half (2.5) percent. *See Second Report and Order* at 2390. Timely payments of all installments will be a condition of the issuance of the BTA authorization. Failure to make such timely payments on or before the date due is also grounds for cancellation of the BTA authorization, although limited grace periods for defaulting small businesses may be considered on a case-by-case basis. *See id.* at 2391. If a small business making installment payments seeks to assign or transfer its BTA authorization to a non-small business entity, we will require payment of any remaining unpaid principal balance, and of any unpaid interest accrued, as a condition of the assignment or transfer. *See id.* at 2395.

d. Reduced Upfront Payments

¹⁰² No commenter opposes the adoption of an installment payments measure.

184. Upfront payment requirements are designed to ensure that bidders are qualified and serious and to provide the Commission with a source of funds in the event that it becomes necessary to assess default or bid withdrawal payments. *See Second Report and Order* at 2377-2379. Although the Commission has not chosen to create a general exception to our upfront payment requirements for designated entity applicants (*see id.* at 2380), we have previously allowed designated entities to make reduced upfront payments. *See, e.g., Fifth Report and Order* at 5600. We believe that allowing small businesses to make reduced upfront payments should facilitate auction participation by capital-constrained wireless cable operators and permit them to conserve resources for building out their systems after the MDS auction. *See infra* ¶ 191 for a discussion of the capital constraints faced by wireless cable operators.

185. Specifically, we will for the MDS auction reduce the upfront payment requirement by twenty-five percent for small businesses and for small business consortia. *See Fifth Report and Order* at 5600 (reducing upfront payment for bidders in entrepreneurs' block PCS auction by twenty-five percent). As discussed in ¶ 137, prior to the MDS auction, the Mass Media Bureau, in conjunction with the Wireless Telecommunications Bureau, will publish a public notice listing the upfront payment amount corresponding to each BTA service area to be auctioned. A prospective bidder claiming eligibility as a small business and wishing to bid on a particular BTA service area will thus be required to submit an upfront payment equal to seventy-five percent of the upfront payment specified in the public notice for that BTA. We believe that this reduction in the upfront payments for small businesses will properly permit wireless cable operators to conserve their capital for building out their systems and adding subscribers, while still serving to discourage insincere or speculative bidding.

e. Bidding Credits

186. Given the difficulties faced by small businesses in accessing capital (*see supra* ¶ 170), and based upon our expectations as to the numbers and types of bidders that will participate in the MDS auction, we conclude that a bidding credit is appropriate for small businesses in the MDS auction. A bidding credit, in effect, functions as a discount on the bid price a bidder will actually have to pay to obtain a BTA authorization and, thus, will address directly the financing obstacles encountered by small businesses. A bidding credit should accordingly "level the playing field" by helping small businesses, particularly incumbent wireless cable operators, to compete effectively in the MDS auction against larger enterprises, such as the large telecommunications carriers. We also believe the offering of a bidding credit may aid small businesses to more easily attract capital; specifically, outside investors may be more eager to invest in a small wireless cable operator if that operator will be benefited by a bidding credit in the MDS auction. For these reasons, we believe that a bidding credit will have a significant positive effect on the ability of small businesses to participate successfully in an MDS auction.

187. We note that the commenters in this proceeding differ as to the appropriateness