

will generate no revenue at all, and that whatever amounts an auction would generate would be very warmly received by Congress and the Treasury.

Finally, the majority's decision to distribute pending MDS applications by lottery is utterly inconsistent with the Commission's obligation to promote "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. 309(j)(3)(D). An auction winner would have an economic incentive to design and build its system to offer low-cost service to the public by, among other things, using spectrum-efficient technology that minimizes the need for future upgrades of its facilities to accommodate spectrum shortages. By contrast, a lottery winner, if it actually did build out its system, would be more likely to construct a system using relatively inexpensive, spectrum-inefficient technology, to allow for the sale of its license as soon as our rules permit.

Three alternatives to lotteries present themselves. The Commission could require pending applicants to bid for the specific sites for which they applied. While better than a lottery, that is ultimately an unsatisfactory alternative given the likelihood that pending lottery applicants -- the bulk of which, again, came through application mills -- are not prepared to construct MDS stations and provide wireless cable service. The Commission could reopen the filing window and then subject those specific sites to competitive bidding. But that would leave the Commission in the business of licensing small specific sites, when the rest of today's Report and Order rejects that approach in favor of one that primarily relies on authorizations to rationalize wireless cable service within a large geographical area.

The order quite persuasively explains the substantial public policy benefits of such an approach, with which, again, the majority's decision is inconsistent.

Plainly, the preferred alternative flows from recognizing that licensing additional MDS stations on a small site-specific basis, as proposed in the pending applications, would frustrate the important public policy goals that the Commission's new approach to MDS furthers. The new rules, which require (among other things) that applications may be filed and granted only on a BTA basis, should apply to all pending applications for new MDS stations. Because pending applications are not consistent with the new rules, they should be dismissed, with applicants who desire to reapply and participate in the BTA auctions free to do so. Such a dismissal would cover not only pending mutually exclusive applications for MDS licenses, which the majority would distribute by lottery, but also pending applications for which there is no competitor. A logical consequence of the majority's failure to dismiss pending applications is that applicants not facing mutual exclusivity would be entitled to receive MDS channels for free, no matter the public interest reasons for awarding those channels to the BTA authorization holder.

Although it states that there are "several potential drawbacks" to this approach, the majority mentions just one: that dismissal would lead to delays because there would be reconsideration proceedings at the Commission and legal challenges in court.⁶ But there is

⁶In the same paragraph, the majority asserts that "while we are changing conditions under which MDS service may be provided in the future, such as moving to larger geographic area authorizations and expanded service area protection to encourage aggregation

ample Commission precedent and clear legal authority for dismissing pending applications that are inconsistent with new Commission rules, as Commissioner Ness explains. See also Private Operational-Fixed Microwave Service, 48 Fed. Reg. 32,578 (1983), aff'd, Affiliated Communications Corp. v. FCC, No. 83-1686, unpublished judgment (D.C. Cir. May 8, 1985). And the majority overlooks the risk of legal challenges associated with the course it has chosen. Many of the pending applications that Commission has dismissed are awaiting judicial review, and those that the Commission dismisses in the future will likely also end up in court. These cases could take a longer time to resolve than a challenge to a blanket dismissal order, if there was one, since they involve a variety of reasons for dismissal. If pending applicants eventually prevail in those lawsuits, the result could well be further litigation when those applicants claim a right to vacant channels for which BTA authorization holders thought they had paid.

Meanwhile, bidders and BTA authorization holders will have to contend with the uncertainty associated with dismissed pending applications awaiting judicial review. They will also have to deal with the burdens of negotiating with lottery winners -- the five sites we know about as well as those that we now do not, as well as those non-mutually exclusive applicants who will simply be given their licenses for free -- in order to accomplish the aggregation of wireless cable channels that the Commission, in the portions of the Report and Order that I join, says its new rules promote. Quoting Maxcell Telecom Plus, Inc. v. FCC,

of available channels, we are not fundamentally changing the nature of the service." The facts in that sentence provide not a drawback to dismissing all pending applications, but the main reasons for doing so.

815 F.2d 1551, 1554 (D.C. Cir. 1987) -- a case in which the D.C. Circuit upheld a Commission decision to apply new rules to pending applicants -- the majority purports to "balance the 'ill effect' of the new [MDS] rule[s] on the pending applicants with the 'mischief of frustrating the interests the rule[s] promote.'" Report and Order, par. 95. Even if the Commission could properly ignore the equitable interests of those other than pending applicants, and even if the Commission could properly decline to bring the Budget Act's public interest factors to bear on its decision, I have no doubt that the "mischief" to the new MDS framework that will be caused by the majority's decision far outweighs the minimal "ill effects" of applying the new MDS rules to pending lottery applicants.

**Separate Statement
of
Commissioner James H. Quello**

June 15, 1995

Re: Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service (MM Docket No. 94-131) and Implementation of Section 309(j) of the Communications Act – Competitive Bidding (PP Docket No. 93-253)

I would like to make a few brief comments today on the issue of auctions versus lotteries for pending applications. Before I do so, I want to congratulate Barbara Kreisman and her staff for their diligence and hard work in reducing the backlog of MDS applications. This Commission unanimously agrees that the three items today will go a long way toward making this service a reality, which will benefit the American public by bringing a wireless competitor to cable television.

Where we disagree is on the decision of how to treat pending applications during a time of transition from one licensing methodology, lotteries, to another, auctions. I will not belabor the relative problems or benefits of lotteries or auctions because this should not be a philosophical debate.

We have before us approximately 100 applications for five sites that were filed many years before this Commission received auction authority. Such auction authority, I might note, was received during my tenure as Chairman. We were specifically granted discretion at that time, however, to determine how to process what I will call "pre-filed and accepted" applications for various communications services. But for our own administrative inability to process thousands of MDS applications in a timely manner we would not be faced with the problem of what to do with these applications that have been languishing in regulatory "Limbo" for over four years.

The record does not evince any *mal fides* or intent to deceive by not constructing on the part of the applicants. We must therefore conclude that these applications were filed in good faith with the expectation that they would be processed under the rules in existence at the time of filing. Even though we have decided to modify the service somewhat we should not punish those applicants who were caught in the transition through no fault of their own. I believe that they have a significant vested equitable interest in having the applications that they paid fees to file processed in accordance with their expectations and our rules at that time.

As this Commission has faced this issue in other services, such as Cellular Unserved for example, I have consistently maintained -- and will continue to conclude -- that unless directed otherwise by Congress, we should exercise the discretion we have been given to treat pending applicants fairly which means processing their applications under the rules extant at the time of filing. In this instance, this means that we should, as I believe the majority will decide, lottery the pending 100 applications for the five MDS sites and then proceed to auction new applications.

In summary, I believe that it would be inequitable and administratively burdensome to force applicants for MDS station licenses, who filed their applications many years ago in reliance upon the lottery rules then in effect, to participate in an MDS auction, which -- unlike a lottery that can be held almost immediately -- cannot be held until the end of this year, which would, yet again, delay service to the public.

Long before it became fashionable to talk about "serving our customers," I have endeavored to decide the matters before us by using common sense and fairness based on the facts. I do not believe it is our function to justify desired outcomes through legal technicalities. The fact that something is legally permissible does not make it right or fair.

I have uncharacteristically spoken at some length today because I want to convey my deep-seated conviction that pending applications should be treated fairly by processing them under the rules in effect at the time of filing.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Amendment of Parts 21 and 74 of the Commission's Rules With Regard To Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act- Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253.

By the Commission's actions today, we adopt rules to facilitate the continued deployment of Multipoint Distribution Services ("MDS"). In doing so, we process thousands of applications and initiate a competitive bidding process for the licensing of MDS. In order to process the remaining acceptable, mutually exclusive applications for MDS station licenses that were filed prior to July 26, 1993, when the Commission first received auction authority, the Commission has determined to employ a lottery rather than an auction procedure.

I support the use of a lottery for these pending mutually exclusive applications for several reasons. First and foremost, because I believe that there are compelling public interest justifications for doing so as I did when the Commission decided how to license the cellular unserved areas.¹ The pending applications in this proceeding were filed more than four years ago and the applicants relied in good faith on lottery procedures in existence at that time. Moreover, it is apparent that the delay in processing these applications was of no fault of these applicants. Therefore, it appears unreasonable to now subject their applications to a modified licensing procedure.

Second, some have argued that applicants who have filed by way of "application mills" are in large measure applicants that lack the wherewithal to build or operate the systems that are licensed to them. Moreover, some contend that these applicants tend to unnecessarily delay service to the public. Simply put, we cannot unequivocally determine that these MDS applicants have no intention of constructing the facilities in order to provide service to the public. Indeed, one could argue that the utilization of auctions does not necessarily guarantee service in

¹ See, *Memorandum Opinion and Order, Cellular Unserved Areas (License Selection Procedures)*, 9 FCC Rcd 7387, 7391 (1994). In this decision, we specifically held that to move from lotteries to auctions in the licensing of cellular facilities would be unfair to those applicants who relied in good faith upon existing lottery procedures.

a timely fashion. Finally, as a member of the "old regime," I am loathe to making the assumption that an applicant seeking a license under the lottery procedure is less likely to intend to construct facilities than an applicant seeking a license under the competitive bidding process.

In addition, some have argued that these applicants will receive an added benefit as a result of being granted a larger BTA. However, the modification we make today with respect to the protected service area will benefit current licensees who through the lottery process were granted a 15 mile protected service area. Moreover, I am not convinced that our decision today will interrupt the aggregation of licenses as some have alleged. That aggregation is already occurring, and I believe, will continue to occur and will not necessarily cease because licenses for these few locations will be subject to the lottery process.

While this action may delay the commencement of the auctions, for which authority was obtained under Commissioner Quello's leadership, I believe that the Commission is doing the right thing by using a lottery procedure to process the remaining previously filed MDS applications. In my estimation, to do otherwise would not only contradict precedent, ignore the principle of fairness as well.

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

DISSENTING IN PART

Re: *Licensing and Service Rules and Competitive Bidding Procedures for Multipoint Distribution Service*

I fully support the new rules for MDS¹ licensing that we adopt today. I am confident that the licensing of MDS on a regional basis through competitive bidding will enhance existing wireless cable systems and bring about the construction of new systems in unserved areas. However, I dissent from that portion of the decision concerning our treatment of pending applications.

I believe that the public interest would have been better served by applying our new rules to the pending MDS lottery applications, resulting in their dismissal, and permitting those applicants who choose to do so to bid in future MDS auctions.

I do not favor using auctions at all costs. There may be some situations where, in light of all the factors, lotteries would be in the public interest. This is not such a case.

I do not believe that the approach adopted today by the majority -- to permit pending applications to be awarded under the old lottery rules, but to enable them to benefit from the expanded protected service areas of the new rules -- serves the public interest. It does not comply with Congressional intent or Commission policy to reward speculation in this manner. It will delay, rather than enhance, the construction and growth of wireless cable services.

I would prefer that the pending MDS applicants be subject to the competitive bidding procedures adopted today for new MDS applicants. Congress gave the FCC the authority to auction licenses, rather than award them by lottery, where mutually exclusive applications have been filed. Congress concluded that auctions, rather than lotteries, would better ensure that spectrum licenses will be awarded to those who most value them.

The Omnibus Budget Reconciliation Act of 1993 ("OBRA") gives the Commission discretion to use either competitive bidding or lotteries for applications accepted for filing prior to July

¹"MDS" as used herein refers to both single channel Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS).

26, 1993. The MDS pending applications present us with the opportunity to exercise that discretion and to determine which approach best serves the public interest.

There are over 4,000 MDS applications pending at the FCC which were submitted before July 26, 1993. A small fraction of these applications have been accepted for filing. These applications were submitted under our old, pre-OBRA rules that authorized lotteries for specific geographic sites.

The beneficial effects of using auctions are perhaps most evident in services where speculation has been rampant. MDS has just such a history. Over the last 27 months, over 1100 MDS authorizations have been cancelled or forfeited for failure to construct. Why? Because lotteries attract speculators -- individuals who have no relevant experience and no serious intention to construct and operate a wireless cable system.

The high level of speculation has meant delay in our efforts to foster the effective delivery of wireless cable service. Incumbent MDS operators have been unable to aggregate additional channels. Potential new entrants have been smothered by the backlog of pending applications.

In February 1993, the Commission took measures to stem the increasing speculation in MDS and to prevent rewarding speculators who had already applied. One measure adopted was a prohibition on partial and full settlement agreements among MDS applicants. The Commission found that few MDS applicants entering settlement agreements had any serious intention to construct; rather, most of them wished to have their applications granted solely for the purpose of later selling their authorizations to wireless cable operators in need of spectrum.² In an attempt to ensure that "speculative applicants are not rewarded," the Commission applied the new prohibition on settlement agreements to both future and pending applications.³

The new rules we adopt today authorizing the use of competitive bidding to award MDS authorizations will finally eliminate the problems of speculation that have plagued MDS and will ensure that licenses in the future will go to those parties who value them the most.

I recognize that lotteries could be held relatively soon for the five sites where, once our processing is complete, the Mass Media Bureau predicts there will be approximately 100 acceptable mutually exclusive pending applications. But the small number of applications at

²Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in 2.1 and 2.5 GHz Bands, 8 FCC Rcd. 1444, 1447 (1993)(Report & Order).

³Id.

issue does not relieve us of the obligation to make a policy decision that carefully weighs all of the relevant factors.

The evidence is overwhelming that few, if any, of these applicants have a bona fide intention to construct and operate an MDS system. Indeed, the practical result of a lottery in this instance is very likely to be the precise result Congress sought to eliminate when it gave the FCC auction authority. Even in the improbable event that a bona fide applicant wins a lottery, the result will be one more site-specific license encumbering the BTA, further frustrating the new method of licensing that we today embrace as the best approach for the future.

The bona fide MDS applicants among these pending applications that the majority seeks to protect, if they exist, may or may not succeed in an auction. However, an auction at least ensures that they will compete for a license with parties who are equally serious in their commitment to build a wireless cable system, rather than with speculators lacking any intent to construct.

Moreover, the majority has failed to consider the resources required for the further processing of the pending applications required by continuing with lotteries. The public would benefit from the reduction of the administrative burden on the agency by the dismissal of over 4,000 pending applications, the majority of which will be, or have already been, dismissed for technical deficiencies. The blanket dismissal would also render moot the pending court appeals of previously dismissed applications from this group.

The new BTA service areas and technical and operational rules we adopt today represent a very significant change in our licensing of MDS. I am persuaded that, under these changed circumstances, applying our new rules to the pending applications would conform with Commission precedent. The Commission's authority to apply new rules to pending applications is not new and in fact has been invoked previously in MDS. In 1993, when the Commission adopted the prohibition on settlements among MDS applicants described above, the Commission specifically addressed the issue of applying the new rule to pending applications and its authority to do so. The Commission concluded at that time that "[i]t is well-settled that the rules applicable to previously-filed applications may be amended."⁴ Indeed, the new rules to expand the protected service areas of incumbents that we adopt today will be applied to pending MDS applications as well.

The Commission has applied new rules to pending applications in other cases. See, e.g., Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of

⁴Report & Order, 8 FCC Rcd. at 1447, citing United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989).

Comparative Hearings, 98 F.C.C.2d 175 (1984), recon., 101 F.C.C.2d 577 (1985); Request for Pioneer's Preference in Proceeding to Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, 7 FCC Rcd. 1625, 1628 n. 22 (1992)("the Commission by rule making may adopt threshold eligibility criteria that affect pending applications if it determines that such rules serve the public interest"); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 7 FCC Rcd. 4484, 4489 n. 66 (1992).

In this instance, application of our new rules for competitive bidding to pending lottery applications would necessarily result in the dismissal of those applications. The Commission has previously dismissed pending applications, without prejudice to the applicants' right to re-file, as a result of a change in rules. See Private Operational-Fixed Microwave Service, 48 Fed. Reg. 32,578 (1983)(citing the administrative burdens involved in resolving the changes needed as a result of rule changes, the Commission dismissed 1,400 pending applications and opened a new filing window for applicants to apply under the new rules), aff'd, Affiliated Communications Corp. v. FCC, No. 83-1686, unpublished judgment (D.C. Cir. May 8, 1985). All interested pending MDS applicants, once dismissed, would similarly be able to participate in the auctions for MDS authorizations for any BTA under our new rules.

For all these reasons, I believe that the public would be better served if the Commission had chosen to employ competitive bidding procedures for all MDS authorizations and dismissed the pending MDS lottery applications, rather than proceeding with lotteries.

Part 1, Subpart Q

of the FCC Rules

Unofficial Staff Compilation

**Mass Media Bureau
Wireless Telecommunications Bureau**

This is an unofficial staff compilation of Part 1, Subpart Q of the FCC Rules. This provides applicants with a compilation of the Rules until such time as the Government Printing Office publishes a current version in the Code of Federal Regulations (CFR). Applicants need to look to the official version of the Rules contained in Commission Orders and in the Federal Register. The official Rules will govern in the case of conflicts. Relevant Orders adopted to date by the Commission are provided in this Bidder Information Package under Tab V. Applicants should be aware that relevant rules are also contained in Part 1 Subpart I and Part 21 of the Commission's Rules. Applicants also need to stay apprised of any rule changes that occur subsequent to release of this Bidder Information Package.

Subpart Q--Competitive Bidding Proceedings

Source: 59 FR 44293, Aug. 26, 1994, unless otherwise noted.

Sec. 1.2101 Purpose

The provisions of the subpart implement Section 309(j) of the Communications Act of 1934, as added by the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66), authorizing the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for certain initial licenses.

Sec. 1.2102 Eligibility of applications for competitive bidding

(a) Mutually exclusive initial applications in the following services or classes of services are subject to competitive bidding:

(1) Interactive Video Data Service (see 47 C.F.R. Part 95, Subpart F). This paragraph does not apply to applications which were filed prior to July 26, 1993;

(2) Marine Public Coast Stations (see 47 C.F.R. Part 80, Subpart J);

(3) Multipoint Distribution Service and Multichannel Multipoint Distribution Service (see 47 C.F.R. Part 21, Subpart K). This paragraph does not apply to applications which were filed prior to July 26, 1993;

(4) Exclusive Private Carrier Paging above 900 MHz (see 47 C.F.R. Part 90, Subpart P);

(5) Public Mobile Services (see 47 C.F.R. Part 22), except in the 800 MHz Air-Ground Radiotelephone Service, and in the Rural Radio service. This paragraph does not apply to applications in the cellular radio service, such as cellular unserved area applications, that were filed prior to July 26, 1993;

(6) Specialized Mobile Radio Service (SMR) (see 47 C.F.R. Part 90, Subpart S) including applications based on finders preferences for frequencies allocated to the SMR service (see 47 C.F.R. 90.173); and

(7) Personal Communications Services (PCS) (see 47 C.F.R. Part 24).

Note to paragraph (a): To determine the rules that apply to competitive bidding the foregoing services, specific service rules should also be consulted.

(b) The following types of license applications are not subject to competitive bidding procedures:

(1) Applications for renewal of licenses;

(2) Applications for modification of license; provided, however, that the Commission may determine that applications for modification that are mutually exclusive with other applications should be subject to competitive bidding;

(3) Applications for subsidiary communications services. A "subsidiary communications service" is a class of service where the signal for that service is indivisible from that of the main channel signal and that main

channel signal is exempt from competitive bidding under other provisions of these rules. See, e.g., Sec. 1.2102(c) (exempting broadcast services). Examples of such subsidiary communications services are those transmitted on subcarriers within the FM baseband signal (see 47 CFR 73.295), and signals transmitted within the Vertical Blanking Interval of a broadcast television signal; and

(4) Applications for frequencies used as an intermediate link or links in the provision of a continuous, end-to-end service where no service is provided directly to subscribers over the frequencies. Examples of such intermediate links are:

(i) Point-to-point microwave facilities used to connect a cellular radio telephone base station with a cellular radio telephone mobile telephone switching office; and

(ii) Point-to-point microwave facilities used as part of the service offering in the provision of telephone exchange or interexchange service.

(c) Applications in the following services or classes of services are not subject to competitive bidding:

(1) Alaska-Private Fixed Stations (see 47 CFR Part 80, Subpart O);
(2) Broadcast radio (AM and FM) and broadcast television (VHF, UHF, LPTV) under 47 CFR Part 73;

(3) Broadcast Auxiliary and Cable Television Relay Services (see 47 CFR Part 74, Subparts D, E, F, G, H and L and Part 78, Subpart B);

(4) Instructional Television Fixed Service (see 47 CFR Part 74, Subpart I);

(5) Maritime Support Stations (see 47 CFR Part 80, Subpart N);

(6) Marine Operational Fixed Stations (see 47 CFR Part 80, Subpart L);

(7) Marine Radiodetermination Stations (see 47 CFR Part 80, Subpart M);

(8) Personal Radio Services (see 47 CFR Part 95), except applications filed after July 26, 1993, in the Interactive Video Data Service (see 47 CFR Part 95, Subpart F);

(9) Public Safety, Industrial/Land Transportation, General and Business Radio categories above 800 MHz, including finder's preference requests for frequencies not allocated to the SMR service (see 47 CFR 90.173), and including, until further notice of the Commission, the Automated Vehicle Monitoring Service (see 47 CFR 90.239);

(10) Private Land Mobile Radio Services between 470-512 MHz (see 47 CFR Part 90, Subparts B-F), including those based on finder's preferences, (see 47 CFR 90.173);

(11) Private Land Mobile Radio Services below 470 MHz (see 47 CFR Part 90, Subparts B-F) except in the 220 MHz band (see 47 CFR Part 90, Subpart T), including those based on finder's preferences (see 47 CFR Section 90.173);
and

(12) Private Operational Fixed Services (see 47 CFR Part 94).

[59 FR 44293, Aug. 26, 1994, as amended at 60 FR 40718, Aug. 9, 1995]

Sec. 1.2103 Competitive bidding design options.

(a) The Commission will select the competitive bidding design(s) to be used in auctioning particular licenses or classes of licenses on a service-specific basis. The choice of competitive bidding design will generally be made pursuant to the criteria set forth in PP Docket No. 93-253, FCC 94-61, adopted March 8, 1994, available for purchase from the International Transcription Service, Inc., 2100 M St. NW, suite 140, Washington, DC 20037, telephone (202) 857-3800, but the Commission may design and test alternative methodologies. The Commission will choose from one or more of the following types of auction designs for services or classes of services subject to competitive bidding: (1) Single round sealed bid auctions (either sequential or simultaneous); (2) Sequential oral auctions; (3) Simultaneous multiple round auctions.

(b) The Commission may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of licenses, in addition to bids on individual licenses. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount. Combinatorial bidding may be used with any type of auction.

(c) The Commission may use single combined auctions, which combine bidding for two or more substitutable licenses and award licenses to the highest bidders until the available licenses are exhausted. This technique may be used in conjunction with any type of auction.

Sec. 1.2104 Competitive bidding mechanisms.

(a) Sequencing. The Commission will establish the sequence in which multiple licenses will be auctioned.

(b) Grouping. In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) Reservation Price. The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.

(d) Minimum Bid Increments. The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission may also establish suggested minimum opening bids on a service-specific basis.

(e) Stopping Rules. The Commission may establish stopping rules before or during multiple round auctions in order to terminate the auctions within a reasonable time.

(f) Activity Rules. The Commission may establish activity rules which require a minimum amount of bidding activity.

(g) **Withdrawal, Default and Disqualification Penalties.** As specified below, when the Commission conducts a simultaneous multiple round auction pursuant to Sec. 1.2103, the Commission will impose penalties on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(1) **Bid withdrawal prior to close of auction.** A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(2) **Default or disqualification after close of auction.** If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in paragraph (g)(1) plus an additional penalty equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission. When the Commission conducts single round sealed bid auctions or sequential oral auctions, the Commission may modify the penalties to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such penalties shall not exceed the penalties specified above.

(h) **The Commission will generally release information concerning the identities of bidders before each auction but may choose, on an auction-by-auction basis, to withhold the identity of the bidders associated with bidder identification numbers.**

(i) **The Commission may delay, suspend, or cancel an auction in the event of a natural disaster, technical obstacle, evidence of security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding starting from the beginning of the current or some previous round or cancel the competitive bidding in its entirety.**

Sec. 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) **Submission of Short Form Application (FCC Form 175).** In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate filing fee set forth by Public Notice. Unless otherwise provided by Public Notice, the Form 175 need not be accompanied by an upfront payment (see Sec. 1.2106).

- (1) All Form 175s will be due:
- (i) On the date(s) specified by Public Notice; or
 - (ii) In the case of application filing dates which occur automatically by operation of law (see, e.g., 47 CFR 22.902), on a date specified by Public Notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.
- (2) The Form 175 must contain the following information:
- (i) Identification of each license on which the applicant wishes to bid;
 - (ii) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons;
 - (iii) The identity of the person(s) authorized to make or withdraw a bid;
 - (iv) If the applicant applies as a designated entity pursuant to Sec. 1.2110, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under Sec. 1.2110.
 - (v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to Section 308(b) of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of Section 310 is pending;
 - (vi) Certification that the applicant is in compliance with the foreign ownership provisions of Section 310 of the Communications Act of 1934, as amended;
 - (vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;
 - (viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.
 - (ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified

pursuant to paragraph (a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid;

Note to paragraph (a): The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) Modification and Dismissal of Form 175. (1) Any Form 175 that is not signed or otherwise does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to any applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. Form 175 may be amended or modified to make minor changes or correct minor errors in the application (such as typographical errors). The Commission will classify all amendments as major or minor, pursuant to rules applicable to specific services. An application will be considered to be a newly filed application if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

(3) Applicants who fail to correct defects in their applications in a timely manner as specified by Public Notice will have their applications dismissed with no opportunity for resubmission.

(c) Prohibition of collusion. (1) Except as provided in paragraphs (c)(2), (c)(3) and (c)(4) of this section, after the filing of short-form applications, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to Sec. 1.2105(a)(2)(viii).

(2) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, 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 for licenses in any of the same geographic license areas. Such changes will not be considered major modifications of the application.

(3) After the filing of short-form applications, applicants may make agreements to bid jointly for licenses, provided the parties to the agreement have not applied for licenses in any of the same geographic license areas.

(4) After the filing of short-form applications, a holder of a non-controlling attributable interest in an entity submitting a short-form

application may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for licenses in the same geographic license area, provided that:

(i) The attributable interest holder certifies to the Commission that it has not communicated and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has a consortium or joint bidding arrangement, and which have applied for licenses in the same geographic license area(s); and

(ii) The arrangements do not result in any change in control of an applicant.

(5) Applicants must modify their short-form applications to reflect any changes in ownership or in the membership of consortia or joint bidding arrangements.

(6) For purposes of this paragraph:

(i) The term "applicant" shall include the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 5 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity; and

(ii) The term "bids or bidding strategies" shall include capital calls or requests for additional funds in support of bids or bidding strategies.

Example for paragraph (c): Company A is an applicant in area 1. Company B and Company C each own 10 percent of Company A. Company D is an applicant in area 1, area 2, and area 3. Company C is an applicant in area 3. Without violating the Commission's Rules, Company B can enter into a consortium arrangement with Company D or acquire an ownership interest in Company D if Company B certifies either

(1) That it has communicated with and will communicate neither with Company A or anyone else concerning Company A's bids or bidding strategy, nor with Company C or anyone else concerning Company C's bids or bidding strategy, or

(2) That it has not communicated with and will not communicate with Company D or anyone else concerning D's bids or bidding strategy.

[59 FR 44293, Aug. 26, 1994, as amended at 59 FR 64162, Dec. 13, 1994]

Sec. 1.2106 Submission of upfront payments.

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. No interest will be paid on upfront payments.

(b) Upfront payments must be made either 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.

(c) If an upfront payment is not in compliance with the Commission's Rules, or if insufficient funds are tendered to constitute a valid upfront payment, the applicant shall have a limited opportunity to correct its submission to bring it up to the minimum valid upfront payment prior to the auction. If the applicant does not submit at least the minimum upfront payment, it will be ineligible to bid, its application will be dismissed and any upfront payment it has made will be returned.

(d) The upfront payment(s) of a bidder will be credited toward any down payment required for licenses on which the bidder is the high bidder. Where the upfront payment amount exceeds the required deposit of a winning bidder, the Commission may refund the excess amount after determining that no bid withdrawal penalties are owed by that bidder.

(e) In accordance with the provisions of paragraph (d), in the event a penalty is assessed pursuant to Sec. 1.2104 for bid withdrawal or default, upfront payments or down payments on deposit with the Commission will be used to satisfy the bid withdrawal or default penalty before being applied toward any additional payment obligations that the high bidder may have.

Sec. 1.2107 Submission of down payment and filing of long-form applications.

(a) After bidding has ended, the Commission will identify and notify the high bidder and declare the bidding closed.

(b) Within five (5) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy penalties) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under Sec. 1.2103, however, bidders may be required to submit their down payments with their bids.) This down payment must be made by wire transfer or 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. Winning bidders who are qualified designated entities eligible for installment payments under Sec. 1.2110(d) are only required to bring their total deposits up to ten (10) percent of their winning bid(s). Such designated entities must pay the remainder of the twenty (20) percent down payment within five (5) business days of grant of their application. See Sec. 1.2110(e) (1) and (2). Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be

returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties. No interest will be paid on any down payment.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder (unless it has already submitted such an application, as contemplated by Sec. 1.2105(a)(1)(b)). For example, if the applicant is high bidder for a license in the Interactive Video Data Service (see 47 CFR Part 95, Subpart F), the long form application will be submitted on FCC Form 574 in accordance with Sec. 95.815 of this chapter. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Notwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, the high bidder's long-form application must be mailed or otherwise delivered to: Office of the Secretary, Federal Communications Commission, Attention: Auction Application Processing Section, 1919 M Street, N.W., Room 222, Washington, D.C. 20554.

An applicant that fails to submit the required long-form application as required under this subsection, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the penalties set forth in Sec. 1.2104.

(d) As an exhibit to its long-form application, the applicant must provide a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior to the time bidding was completed. Such agreements must have been entered into prior to the filing of short-form applications pursuant to Sec. 1.2105.

Sec. 1.2108 Procedures for filing petitions to deny against long-form applications.

(a) Where petitions to deny are otherwise provided for under the Act or the commission's Rules, and unless other service-specific procedures for the filing of such petitions are provided for elsewhere in the Commission's Rules, the procedures in this section shall apply to the filing of petitions to deny the long-form applications of winning bidders.

(b) Within thirty (30) days after the Commission gives public notice that a long-form application has been accepted for filing, petitions to deny that application may be filed. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The times for filing such opposition and replies will be those provided in Sec. 1.45.

(d) If the Commission determines that:

(1) an applicant is qualified and there is no substantial and material issue of fact concerning that determination, it will grant the application.

(2) an applicant is not qualified and that there is no substantial issue of fact concerning that determination, the Commission need not hold a evidentiary hearing and will deny the application.

(3) substantial and material issues of fact require a hearing, it will conduct a hearing. The Commission may permit all or part of the evidence to be submitted in written form and may permit employees other than administrative law judges to preside at the taking of written evidence. Such hearing will be conducted on an expedited basis.

Sec. 1.2109 License grant, denial, default, and disqualification.

(a) Unless otherwise specified in these rules, auction winners are required to pay the balance of their winning bids in a lump sum within five (5) business days following award of the license. Grant of the license will be conditioned on full and timely payment of the winning bid.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within five (5) business days after the commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default penalty specified in Sec. 1.2104(g)(2). In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in Sec. 1.2107(b) will apply.

(c) A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the penalty set forth in Sec. 1.2104(g)(2). In such event, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications for the license.

(d) Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may be subject, in addition to any other applicable sanctions, to forfeiture of their upfront payment, down payment or full bid amount, and may be prohibited from participating in future auctions.

Sec. 1.2110 Designated entities.

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) Definitions.

(1) Small businesses. The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(3) Rural telephone companies. A rural telephone company is any local exchange carrier including affiliates (as defined in 1.2110(b)(4)), with 100,000 access lines or fewer.

(4) Affiliate. (i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant under Sec. 24.709 (both referred to herein as "the applicant") if such individual or entity--

(A) directly or indirectly controls or has the power to control the applicant, or

(B) is directly or indirectly controlled by the applicant, or

(C) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) has an "identity of interest" with the applicant.

(ii) Nature of control in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) Spousal Affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) Kinship Affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) Affiliation through stock ownership.

(A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had come owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(vi) Affiliation under voting trusts.

(A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) Affiliation under joint venture arrangements.

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

(B) The parties to a joint venture are considered to be affiliated with each other.

(C) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(D) The Commission may permit partitioning of service areas in particular services for eligible designated entities.

(E) The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer or cashier's check in the manner specified in Sec. 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within five (5) business days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to Sec. 1.2104(g)(2).

(2) Within five (5) business days of the grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to Sec. 1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) allow installment payments for the full license term;
(iii) begin with interest-only payments for the first two years; and
(iv) amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O.

(f) The Commission may award bidding credits (i.e., payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(g) The Commission may establish different upfront payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(h) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(i) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that effect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both de facto and de jure control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(j) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(k) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

Sec. 1.2111 Assignment or transfer of control: unjust enrichment.

(a) Reporting requirement. An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission's statement indicating that its license 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 local consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below market financing).

(b) Unjust enrichment payment: set-aside. As specified in this paragraph an applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor pursuant to a set-aside for eligible designated entities under Sec. 1.2110(c), or who proposes to take any other action relating to ownership or control that will result in loss of status as an eligible designated entity, must seek Commission approval and may be required to make an unjust enrichment payment (Payment) to the Commission by cashier's check or wire transfer before consent will be granted. The Payment will be based upon a schedule that will take account of the term of the license, any applicable construction benchmarks, and the estimated value of the set-aside benefit, which will be calculated as the difference between the amount paid by the designated entity for the license and the value of comparable non-set-aside license in the free market at the time of the auction. The Commission will establish the amount of the Payment and the burden will be on the applicants to disprove this amount. No payment will be required if:

(1) The license is transferred or assigned more than five years after its initial issuance, unless otherwise specified; or

(2) The proposed transferee or assignee is an eligible designated entity under Sec. 1.2110(c) or the service-specific competitive bidding rules of the particular service, and so certifies.

(c) Unjust enrichment payment: installment financing. An applicant seeking

approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor through a competitive bidding procedure utilizing installment financing available to designated entities under Sec. 1.2110(d) will be required to pay the full amount of the remaining principal balance as a condition of the license transfer. No payment will be required if the proposed transferee or assignee assumes the installment payment obligations of the transferor or assignor, and if the proposed transferee or assignee is itself qualified to obtain installment financing under Sec. 1.2110(d) or the service-specific competitive bidding rules of the particular service, and so certifies.

(d) Unjust enrichment payment: bidding credits. An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor through a competitive bidding procedure utilizing bidding credits available to eligible designated entities under Sec. 1.2110(e) or who proposes to take any other action relating to ownership or control that will result in loss of status as an eligible designated entity, must seek Commission approval and will be required to make an unjust enrichment payment (Payment) to the government by wire transfer or cashier's check before consent will be granted. The Payment will be the sum of the amount of the bidding credit plus interest at the rate applicable for installment financing in effect at the time the license was awarded. See Sec. 1.2110(e). No payment will be required if the proposed transferee or assignee is an eligible designated entity under Sec. 1.2110(e) or the service-specific competitive bidding rules of the particular service, and so certifies.

V. C. Partial Bibliography of FCC Rules and Orders for Competitive Bidding and for the Multipoint Distribution Service (MDS)

1. FCC 94-61, **Second Report and Order**, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994); 59 Fed. Reg. 22,980 (May 4, 1994); **Erratum** (released May 12, 1994).
2. FCC 94-215, **Second Memorandum Opinion and Order**, PP Docket No. 93-253, 9 FCC Rcd 7245 (1994); 59 Fed. Reg. 44,272 (Aug. 26, 1994); **Erratum**, Mimeo No. 50278 (Oct. 19, 1994).
3. * FCC 95-230, **Report and Order**, MM Docket No. 94-131 and PP Docket No. 93-253, (released June 30, 1995) *summarized at* 60 Fed. Reg. 36,524 (July 17, 1995).
4. FCC 95-231, **Second Order on Reconsideration**, Gen. Docket Nos. 80-113 and 90-54, 10 FCC Rcd 7074 (1995); 60 Fed. Reg. 36,736 (July 18, 1995).

* This document is included in this Bidder Information Package under Tab V. All other documents can be ordered from International Transcription Service (ITS) at (202) 857-3800. Additionally, some of these documents can be retrieved from the FCC Internet node via *anonymous FTP@fcc.gov*.

