

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Service Rules for the 746-764 and)	WT Docket No. 99-168
776-794 MHz Bands, and)	
Revisions to Part 27 of the)	
Commission's Rules)	

SECOND MEMORANDUM OPINION AND ORDER

Adopted: August 28, 2000

Released: September 14, 2000

By the Commission: Commissioner Tristani approving in part, dissenting in part and issuing a statement.

I. INTRODUCTION

1. In this Second Memorandum Opinion and Order, we address a Petition for Reconsideration filed by US West Wireless, LLC ("US West") asking that in the auction of licenses in the 747-762 and 777-792 MHz bands ("Auction No. 31"), we apply to bidders that seek a 20 MHz nationwide aggregation any limits on bid withdrawal payments made available to bidders that seek a nationwide 30 MHz aggregation.¹ We also address the question whether the competitive bidding rules, particularly the default payment rule, need to be modified for Auction No. 31 in light of the decision of the Wireless Telecommunications Bureau ("the Bureau") to offer combinatorial (package) bidding for this auction.

2. In an earlier ruling in this docket, we found that in designing the procedures for Auction No. 31, we should not use a combinatorial (package) bidding design because of the time required to further develop such an auction design.² Instead, we directed the Bureau to adopt, if operationally feasible, a special nationwide bid withdrawal procedure to limit the exposure of bidders seeking a 30 megahertz nationwide aggregation.³ In response to this ruling, US West filed its Petition for Reconsideration. In a *Memorandum Opinion and Order* released June 30, 2000, we noted that there has been significant progress in the design and testing of a combinatorial bidding system.⁴ In addition, Auction No. 31 has

¹ Petition for Expedited Reconsideration of US West Wireless, LLC, ("US West Petition") (filed February 3, 2000).

² In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476, 526-27 ¶¶ 124-25 (2000) ("700 MHz First Report and Order").

³ *Id.*

⁴ In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission Rules, WT Docket No. 99-168; Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120; Advanced Television Systems and Their Impact upon the Existing Television (continued....)

been postponed to September 6, 2000.⁵ Because of these developments, we deferred ruling on the US West Petition and stated that the Bureau may implement a combinatorial bidding design for Auction No. 31, if appropriate.⁶ In that regard, the Bureau issued a *Public Notice*⁷ that sought comment on procedures for implementing combinatorial (package) bidding for Auction No. 31. The *Auction No. 31 Package Bidding Comment Public Notice* also sought comment on application to a package bidding auction of the general competitive bidding rules regarding default.⁸ After careful review of the comments, the Bureau issued another *Public Notice*⁹ that set forth specific procedures for conducting a simultaneous multiple round auction with combinatorial or package bids. For the reasons set forth below, we dismiss US West's Petition as moot and adopt a special default payment rule for Auction No. 31.

II. US WEST PETITION FOR RECONSIDERATION

A. Background

3. In the *700 MHz First Report and Order*, we adopted service and auction rules for the commercial use of the 746-764 MHz and 776-794 MHz bands. These bands had been reallocated from use solely for broadcast service.¹⁰ The new service rules established 12 licenses (six regional licenses of 10 MHz each and six regional licenses of 20 MHz each) for the 30 megahertz of spectrum in the 747-762 MHz and 777-792 MHz bands.¹¹ In that ruling, we noted that there may be bidders that do not wish to acquire any licenses if they cannot acquire a nationwide aggregation of 30 MHz licenses.¹² We further noted that the bid withdrawal provisions of our general competitive bidding rules at Part 1, Subpart Q, might discourage bidders from attempting a nationwide aggregation.¹³ This is because if a bidder

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Broadcast Service, MM Docket No. 87-268, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 00-224 at 32 ¶ 76 (rel. June 30, 2000) ("*700 MHz MO&O*").

⁵ See Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed until September 6, 2000, *Public Notice*, DA 00-942 (rel. May 2, 2000), 65 Fed. Reg. 30598 (May 12, 2000).

⁶ *700 MHz MO&O* at 33 ¶ 77.

⁷ Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000; Comment Sought on Modifying the Simultaneous Multiple Round Auction Design to Allow Combinatorial (Package) Bidding, *Public Notice*, DA 00-1075 (rel. May 18, 2000), 65 Fed. Reg. 35636 (June 5, 2000) ("*Auction No. 31 Package Bidding Comment Public Notice*").

⁸ *Id.* at 12.

⁹ Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000 Procedures Implementing Package Bidding for Auction No. 31 Bidder Seminar Scheduled for July 24, 2000, *Public Notice*, DA 00-1486, ("*Auction No. 31 Package Bidding Procedures Public Notice*") (rel. July 3, 2000).

¹⁰ See Section 337(a) of the Communications Act, 47 U.S.C. § 337(a), as added by § 3004 of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

¹¹ *700 MHz First Report and Order*, 15 FCC Rcd at 488-494 ¶¶ 26-42, 498-502 ¶¶ 54-61.

¹² *700 MHz First Report and Order*, 15 FCC Rcd at 526 ¶ 126.

¹³ See 47 C.F.R. § 1.2104(g).

unsuccessfully attempted a nationwide aggregation, it might be left with a subset of licenses for which its bids exceeded the value it placed on that subset, absent the complete aggregation.¹⁴ The bidder would then have to choose between withdrawing any high bids it holds, subject to a bid withdrawal payment, or retaining the licenses. To address this concern, we directed the Bureau to adopt, if operationally feasible, a nationwide bid withdrawal procedure to limit the exposure of bidders that seek a 30 MHz aggregation. The Bureau adopted such a procedure.¹⁵ In its Petition, US West asks that we apply the same nationwide bid withdrawal provisions to any bidder that seeks a 20 MHz nationwide aggregation, as may be applied to a bidder seeking a 30 MHz nationwide aggregation.¹⁶ According to US West, a bidder that fails at a 20 MHz aggregation runs the same risk as a bidder that fails at a 30 MHz aggregation -- being left with a subset of licenses whose value to the bidder is less than would be the case in a complete aggregation.¹⁷

B. Discussion

4. In the *Auction No. 31 Package Bidding Procedures Public Notice*, the Bureau determined that bidders may place bids on individual licenses and may also place bids on up to twelve different packages of each bidder's choosing.¹⁸ By providing for package bidding, the Bureau has addressed the exposure problem that may exist for a bidder that desires all or none of the licenses in a particular aggregation.¹⁹ For example, a bidder that seeks a 20 MHz or a 30 MHz nationwide aggregation can now bid on a package that includes these licenses and thus avoid the risk of winning only some of the desired licenses.²⁰ Because, under package bidding, bidders that seek a 30 MHz nationwide aggregation no longer run the risk of being left with unwanted licenses in a failed nationwide aggregation, we conclude that the 30 MHz nationwide bid withdrawal procedure established by the Bureau at our direction is no longer necessary and the Bureau need not apply the procedure in Auction No. 31. Because the Bureau has stated that, upon Commission approval, it will not apply the nationwide bid withdrawal procedure in Auction No. 31,²¹ US West's request that we implement a similar bid withdrawal procedure for 20 MHz aggregation is moot. Accordingly, we dismiss the US West Petition.

¹⁴ 700 MHz *First Report and Order*, 15 FCC Rcd at 526 ¶ 126.

¹⁵ See Auction of Licenses in the 747-762 and 777-792 MHz Bands; Auction Notice and Filing Requirements for 12 Licenses in the 700 MHz Bands Auction Scheduled for May 10, 2000; Minimum Opening Bids and Other Auction Procedural Issues, *Public Notice*, 15 FCC Rcd at 2952-56, DA 00-292 (rel. Feb. 18, 2000) ("*Auction No. 31 Procedures Public Notice*").

¹⁶ US West Petition at 4-5.

¹⁷ *Id.*

¹⁸ *Auction No. 31 Package Bidding Procedures Public Notice* at 1-6.

¹⁹ See *id.*

²⁰ *Id.* at 3.

²¹ See *Auction No. 31 Package Bidding Procedures Public Notice* at 3, 29.

III. DEFAULT

A. Introduction.

5. In the *700 MHz MO&O*, we stated that we would adopt any necessary rule changes after the Bureau had determined whether to implement package bidding for Auction No. 31.²² In the *Auction No. 31 Package Bidding Comment Public Notice*, the Bureau sought comment on application of the Commission's rules regarding bidder defaults.²³ We received three comments and one reply comment on this issue.²⁴

B. Licenses Subject to Auction After a Default

6. Under our Part 1 auction rules, if a bidder defaults on a bid (or bids), we may sell the license(s) for the spectrum in a new auction.²⁵ For Auction No. 31, the Bureau proposed that if a bidder defaults on a package bid, it would auction the licenses making up the package on which the party defaulted, and only those licenses.²⁶ The Bureau would do this even if, under the package bidding procedures, a different set of packages would have won had the defaulting bidder not bid.²⁷ For example, if the winning set of bids contains a 20 MHz nationwide package and a 10 MHz nationwide package, and the 20 MHz winner then defaults, the Bureau would auction only the six licenses making up the nationwide 20 MHz package. The 10 MHz package would be unaffected. The Bureau proposed to take this approach even if, had the 20 MHz winner not submitted its winning bid, the licenses would have been sold in a different set of packages (for example, the six 30 MHz regional packages).²⁸

²² See *700 MHz MO&O* at 33 ¶ 77 and n. 153. We had previously sought comment generally on whether any of the Part 1 auction rules would be inappropriate for this auction. In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Notice of Proposed Rule Making*, 14 FCC Rcd 11006, 11046-47 ¶¶ 82-83 (1999).

²³ The Bureau took this action pursuant to its delegated authority to establish procedures for conducting spectrum auctions. See 47 C.F.R. §§ 0.131(c), 0.331.

²⁴ See Comments of Alekandar Pecec and Michael H. Rothkopf, "Making the FCC's First Combinatorial Auction Work Well" (filed June 9, 2000) ("Pecec/Rothkopf Comments"); Joint Comments of SBC Wireless, Inc. and BellSouth Cellular Corp. ("SBC/BellSouth Joint Comments") and Attachment of Prof. Ronald M. Harstad ("Harstad Attachment") (filed June 9, 2000); Comments of Verizon Wireless (filed June 9, 2000); and Joint Reply Comments of SBC Wireless, Inc. and BellSouth Cellular Corp. (filed June 16, 2000).

²⁵ See 47 C.F.R. § 1.2109(b). The Commission may also offer the license to the other highest bidders. *Id.*

²⁶ *Auction No. 31 Package Bidding Comment Public Notice* at 12.

²⁷ *Id.*

²⁸ *Id.* In an auction with package bidding, bidders seeking inconsistent sets of packages may be competing against each other. Whether the licenses are sold as one type of package or another depends on which set yields the highest bids. In Auction No. 31, for example, the Bureau originally proposed that bidders could bid on a package consisting of all twelve licenses (global), a package consisting of the six 10 MHz licenses (nationwide 10 MHz), a package consisting of the six 20 MHz licenses (nationwide 20 MHz), and six packages, each consisting of the 10 MHz and the 20 MHz license in the same region (regional 30 MHz). The nationwide packages and the regional (continued....)

7. SBC Wireless, Inc. and BellSouth Cellular Corp. (“SBC/BellSouth”) are the only commenters that object to this proposal.²⁹ They are concerned that bidders may strategically default, and argue that we should not award any licenses after a default unless the non-defaulting winners clearly would have won absent the default.³⁰ SBC/BellSouth instead propose that we “rewind” the auction to before the round where it is clear the defaulting bidder was attempting to manipulate the outcome.³¹

8. While we recognize the possibility that a bidder may attempt to strategically default, we are not inclined to adopt SBC/BellSouth’s proposal that we “rewind” the auction. We believe that attempting to “rewind” an auction would be largely unworkable and unreasonable. First, bidders may default for other reasons, and determining when a bidder began “manipulating” the outcome, if indeed it was attempting to do so, could be extremely difficult. Second, if the auction were subject to being “rewound” in the event of a default, the prevailing bidders would be only contingent winners until all long form applications were approved and all money was paid, possibly some months after the auction closed. For each winner, the contingency would not be under the winner’s control, but rather would depend on the actions of others. Moreover, all bidders, both those that prevailed and those that did not, would have to be at the ready during this time to continue the auction from the point to where it was unwound. We therefore do not believe that SBC/BellSouth’s proposal is feasible.

9. We also believe that SBC/BellSouth underestimate the deterrence value of the current default rule. SBC/BellSouth find it “highly conceivable” that bidders will be facing bid increments of \$1 billion in a single day. Using the example of a defaulting nationwide 20 MHz bidder and SBC/BellSouth’s example of its penalty equal to 7.85 percent (a 5 percent shortfall plus a 3 percent penalty), if the winning bid for that license is \$700 million (inexpensive by SBC/BellSouth’s calculations), the penalty is approximately \$55 million. If, however, this amount is insufficient, we believe that the better course is to increase the additional default payment (*see* discussion below) rather than attempt to “rewind” the auction.

10. No other commenter supports the SBC/BellSouth’s proposal to rewind the auction, nor does any other commenter object to this portion of the proposal. Moreover, SBC/BellSouth note that any alternative following a default (including its own) is problematic.³² Accordingly, we adopt the procedure proposed in the *Auction No. 31 Package Bidding Comment Public Notice* to hold another auction only for the license(s) on which bidders default.

C. Calculation of Default Payments

11. The Commission’s Rules provide that if a bidder defaults, it is liable for a default payment that contains a deficiency portion, equal to the difference between the amount it bid and the amount of the winning bid the next time the Commission offers the license, plus an additional payment, equal to

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packages are inconsistent. The licenses may be sold either in the nationwide packages, or in the regional packages, but not both.

²⁹ SBC/BellSouth Joint Comments at 2-3.

³⁰ SBC/BellSouth Joint Comments at 2-3 and Harstad Attachment at 38-39.

³¹ *Id.*

³² *Id.*

three percent of the subsequent winning bid (or three percent of the bidder's bid, whichever is less).³³ Default payments are calculated on a license-by-license basis; that is, where a bidder that defaults has more than one winning bid, the payments are calculated separately for each bid. Gains realized from the subsequent auction of licenses for which the subsequent winning bid is higher than the defaulter's bid are not used to offset losses incurred on those licenses for which the winning bid is lower than the defaulter's bid.³⁴

12. In an auction with package bidding, a bidder that bids on a package is not placing separate bids on the individual licenses making up that package. Thus, in an auction with package bidding, it is not possible to apply the default rules in the same manner as they are applied in a simultaneous multiple round auction without package bidding. The Bureau therefore proposed to modify the default rules for Auction No. 31 as follows. Where a bidder defaults on a package bid(s), the payment would be calculated on a bid-by-bid basis, rather than on a license-by-license basis.³⁵ The deficiency portion would be equal to the difference between the amount bid for the package and the amount of the subsequent winning bid for the same package or the aggregate of the subsequent winning bids for the licenses that make up the package. The Bureau also proposed that, similar to the rule for individual licenses, if a bidder defaults on two or more packages, the default payment due for each defaulted package would be calculated separately and would not be not offset against one another. If one package was subsequently auctioned for more than the original package bid amount and the other package subsequently was auctioned for less, the excess bid price from the first package would not be used to reduce the amount owed on the second package.

13. Verizon Wireless ("Verizon") disagrees with the Bureau's proposal.³⁶ Verizon states that the Commission should calculate default payments for individual bidders based on the lump sum of the amounts paid for the licenses on which the bidder defaulted. If in a subsequent auction the Commission receives an amount that is equal to or greater than the original bid for two or more licenses or packages, the penalty should not be calculated separately, and the proceeds should be offset.³⁷ Aleksandar Pekec and Michael H. Rothkopf ("Pekec/Rothkopf") point out that the procedure proposed by the Bureau was ambiguous with respect to the treatment of multiple defaulting parties when the licenses are won as a package in a subsequent auction.³⁸ Pekec/Rothkopf propose that in such a situation, the default payment

³³ See 47 C.F.R. § 1.2104(g)(2); BDPCS, Inc., *Memorandum Opinion and Order*, FCC 00-243 ¶ 17 (rel. July 11, 2000) ("*BDPCS MO&O*"). The rule contains further details as to how the amounts are calculated in the case where either bid is subject to a bidding credit. Also, when a bidder defaults and the license has not yet been reaucted, the Commission assesses an initial default deposit of between three percent and twenty percent of the defaulted bid amount. When the license is reaucted, the Commission either assesses the balance of the appropriate default payment or refunds any amounts due, as appropriate. See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Dkt. No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 434 ¶ 102 (1997).

³⁴ See *BDPCS MO&O* at ¶¶ 20-25.

³⁵ See *Auction No. 31 Package Bidding Comment Public Notice* at 12.

³⁶ Verizon Comments at 11.

³⁷ *Id.*

³⁸ Pekec/Rothkopf Comments at § 6. Pekec/Rothkopf's comments envision, for example, the following situation: Bidder 1 defaults on Licenses A and B, which it won as Package AB, Bidder 2 defaults on Licenses C and D, (continued....)

be calculated by aggregating the original bids, subtracting that amount from the amount bid in the subsequent auction for the licenses, and then allocating the default payment to the two defaulting bidders in proportion to the amounts they originally bid.³⁹

14. We disagree with Verizon that we should as a general matter alter the rule for calculating default payments when a bidder has defaulted on more than one license or package. For the reasons we expressed in the *BDPCS MO&O*, we believe that the rule is a correct one.⁴⁰ However, we agree with Pecec/Rothkopf that the rule needs to be modified with respect to how we will calculate default payments when, after default(s) by one or more bidders, the affected licenses are won in different packages or groupings in the subsequent auction, particularly in light of the Bureau's package bidding procedures which allow bidders in Auction No. 31 to design their own packages. Our procedures do not currently provide a method for calculating a default payment when defaulted licenses are subsequently won in a package(s) and we believe that Pecec/Rothkopf's suggested clarification makes sense. While we would prefer to use our current rule for calculating default payments and not aggregate default payments or apportion payments among defaulting bidders, where licenses are won in different packages in a subsequent auction there is no choice but to do so. Thus, we set forth below a rule for Auction No. 31 that will allow the calculation of default payments in those situations where the subsequent auction results in a completely different set of winning packages.⁴¹ Where, however, we are able to apply the current method for calculating default payments, or apply an analogous rule, we will do so.

15. Accordingly, we adopt the following rule for calculating the deficiency portion of default payments in Auction No. 31 when a package bidding design is employed.⁴²

(1) Where a defaulting bidder won licenses individually (*i.e.*, not as part of a package), and in a subsequent auction the licenses are also won individually, we will calculate the deficiency portion as we do in our simultaneous multiple round auctions, and on a license-by-license basis (*i.e.*, the differences between the amount originally bid and the amount subsequently bid will not be aggregated to determine a net amount owed).⁴³ Where a license is sold individually and not

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which it won as Package CD, and in the subsequent auction, the four licenses are won in one package, Package ABCD. Pecec/Rothkopf note that the problem also occurs if in the subsequent auction the licenses are won in two packages, Package AC and Package BD.

³⁹ See Pecec/Rothkopf Comments at § 6.

⁴⁰ See *BDPCS MO&O* at ¶¶ 12-25, 32-36.

⁴¹ This rule is specific to Auction No. 31. We are not hereby amending our current rule, 47 C.F.R. § 1.2104(g), for calculating default payments.

⁴² In the case where any of the relevant bids are subject to bidding credits, the default payment will be adjusted in an analogous manner to that used in 47 C.F.R. § 1.2104(g)(1).

⁴³ For example, if a bidder defaults on two bids, one for License A for \$100 and one for License B for \$150, and in a subsequent auction, the licenses are won as License A for \$150 and License B for \$120, the default payment would be calculated separately for License A (by comparing the original bid (\$100) to the amounts subsequently bid (\$150), yielding no deficiency but an additional payment) and License B (by comparing the original bid (\$150) to the amount subsequently bid for License B (\$120), yielding a deficiency of \$30, plus an additional payment). If any of the bids were subject to bidding credits, the default payment would be adjusted in an analogous manner to that used in 47 C.F.R. § 1.2104(g)(1).

as part of a package, we find no reason to modify the calculation of the deficiency portion of the default payment.

(2) Where a defaulting bidder won licenses in package(s), and in a subsequent auction the licenses are won either (a) in the same package(s), or (b) in smaller packages or as individual licenses that correlate to the defaulted package(s), the deficiency portion will be determined on a package-by-package basis, and the differences between the amount originally bid and the amount(s) subsequently bid will not be aggregated to determine a net amount owed.⁴⁴ Thus, in this situation, we will calculate the deficiency portion in a manner analogous to where the licenses are sold individually. However, because a bid on a package does not imply any specific allocation of the total amount to the individual licenses making up that package, where the licenses are subsequently sold individually or as part of smaller packages, we believe we should aggregate the amounts received in the subsequent auction in order to determine any deficiency.⁴⁵

(3) Where a defaulting bidder or bidders won licenses either individually or as part of packages, and in a subsequent auction the licenses are won as larger packages or different packages (not including the situation described in paragraph (2)), the deficiency portion will be calculated by subtracting the aggregate amount originally bid for the licenses from the aggregate amount bid in the subsequent auction for the licenses.⁴⁶ As stated in paragraph (2), a bid on a package does not imply any specific allocation of the total amount to the licenses making up that package. We believe that in this situation we should aggregate the amounts bid on the various packages in order to calculate the deficiency portion owed.

(4) When in the situation described in paragraph (3), there are multiple defaulting bidders, the default payment (both the deficiency portion and the additional amount portion) will be allocated to the defaulting bidders in proportion to the amount they originally bid. In such a situation, we need some method to allocate the deficiency payment among them. We believe that using the

⁴⁴ For example, if a bidder defaults on Package ABC (*i.e.*, a package consisting of Licenses A, B and C) with a bid of \$900 and Package DE with a bid of \$600, and in a subsequent auction, the licenses are won as License A for \$200, Package BC for \$600, and Package DE for \$700, the default payment would be calculated separately for Package ABC (by comparing the original bid (\$900) to the amounts subsequently bid for License A and Package BC (\$200 and \$600, which equals \$800, yielding a \$100 deficiency plus the additional payment)) and Package DE (by comparing the original bid (\$600) to the amount subsequently bid for Package DE (\$700, yielding no deficiency, but an additional payment)). If any of the bids were subject to bidding credits, the deficiency payment would be adjusted in an analogous manner to that used in 47 C.F.R. § 1.2104(g)(1).

⁴⁵ Any non-price based allocation of the package bid to the individual licenses (for example, an allocation based on bidding units) would be artificial. We also note that allocating the defaulted package bid to the individual licenses based on the winning bids in the subsequent auction yields the same result as aggregating the amounts received in the subsequent auction; thus, while such an allocation may be rational, it is unnecessary.

⁴⁶ For example, if a bidder defaults on Package AB with a bid of \$200 and Package CD with a bid of \$300, and in a subsequent auction the licenses are sold as Package AC for \$250 and Package BD for \$250, the default payment would be calculated by aggregating the amounts originally bid (\$200 plus \$300 equals \$500) to the amounts subsequently bid (\$250 plus \$250 equals \$500) to determine the deficiency amount (\$500 less \$500 equals \$0); the additional payment would be based on either the original aggregate amount or the subsequent aggregate amount, whichever is less (in this case, they are the same, \$500). If any of the bids were subject to bidding credits, the deficiency portion would be adjusted in an analogous manner to that used in 47 C.F.R. § 1.2104(g)(1).

amounts they bid for the packages or licenses in the first auction, as Pecec/Rothkopf propose,⁴⁷ provides a sound economic basis for the allocation and is the most appropriate method to use. For example, if Bidder 1 defaults on Package ABC for \$200, and Bidder 2 defaults on Package DE for \$400, and in a subsequent auction the licenses are won in Package AB for \$150 and Package CDE for \$350, Bidder 1 would be liable for 1/3 of the default payment and Bidder 2 would be responsible for 2/3.⁴⁸ The total default payment would be equal to the difference between the total of the original bids (\$600)⁴⁹ and the total of the subsequent amounts bid (\$500)⁵⁰ plus an additional amount of 25 percent of the total of the subsequent amounts bid.⁵¹ The total default payment therefore would equal \$100 (\$600-\$500) plus 25 percent of \$500 (\$125), for a total default payment of \$225.

D. Additional Default Payment

16. Because of the widespread implications of default under package bidding, two commenters recommend that we modify our rules to provide a stronger deterrent against default.⁵² Pecec/Rothkopf recommend that we raise the additional payment portion of the default payment from three percent to 25 percent to discourage strategic defaults and avoid potentially inefficient auction results.⁵³ SBC/BellSouth recommend that: (1) bidders be required to deposit 50 percent of their winning bids within eight business days after the close of the auction; (2) each defaulter and the real party in interest be jointly and severally responsible for the entire revenue shortfall; (3) each defaulter and its real party in interest be jointly and severally responsible for a default penalty of 25 percent of the total revenue on all licenses that are placed in different hands because of the default; and (4) to the extent allowable, all of a bidder's lines of business and those of its real party in interest be subject to suspension during the time a default penalty remains uncollected.⁵⁴

17. We agree that the effects of a default in a package bidding auction require a strong deterrent against insincere bidding and strategic default. In an auction without package bidding, a default on a license mostly affects only the bidders for that license; if the defaulting bidder had not bid, the other licenses in the auction likely still would have been won by the same bidders. In an auction with package bidding, however, a default may reasonably be expected to affect multiple licenses (and perhaps every

⁴⁷ Pecec/Rothkopf Comments at § 6.

⁴⁸ Where Bidder 1 bid \$200 and Bidder 2 bid \$400, the total bid equals \$600 and Bidder 1's proportion equals \$200/\$600 or 1/3 and Bidder 2's proportion equals \$400/\$600 or 2/3.

⁴⁹ \$200 for Package ABC plus \$400 for Package DE equals \$600.

⁵⁰ \$150 for Package AB plus \$350 for Package CDE equals \$500.

⁵¹ See *infra* Section III.D for a discussion of increasing the additional amount portion of the default payment to 25 percent.

⁵² We received no other comments on this issue.

⁵³ Pecec/Rothkopf at § 6.

⁵⁴ Joint Comments of SBC/BellSouth at 2-3.

license in the auction); as noted above,⁵⁵ if the defaulting bidder had not bid, the licenses may well have been sold in different packages. We believe, however, that the protections proposed by SBC/BellSouth are too stringent. We believe that Pekec/Rothkopf offer a more measured approach in recommending that the additional default payments of three percent be raised to 25 percent of the defaulted bid or the subsequent bid, whichever is smaller.⁵⁶ We agree that a 25 percent additional default payment will adequately discourage defaults and prevent strategic skewing of our auction and we believe that it is not so high as to be punitive. We are also concerned that in this auction a lesser amount would be inadequate to deter bidders from insincere bidding or strategically defaulting. Finally, we believe that increasing the default payment is an appropriate response to this risk, as the very purpose of the default payment rule, *inter alia*, is to deter frivolous or insincere bidding and generally protect the integrity of the auction process.⁵⁷ Therefore, for Auction No. 31, bidders that default on their bids will be subject to an additional payment of 25 percent of the subsequent winning bid(s) or the defaulting bids, whichever is less.⁵⁸

IV. PROCEDURAL MATTERS AND ORDERING CLAUSES

18. This action is taken pursuant to Sections 1, 4(i), 301, 303, 308, 309(j), and 337 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 301, 303, 308, 309(j), and 337, and the Consolidated Appropriations Act, 2000, Pub. Law 106-113, 113 Stat. 1501, Section 213.

19. Accordingly, IT IS ORDERED that Part 27 of the Commission's Rules IS AMENDED to modify the default payment rule for an auction of licenses in the 747-762 and 777-792 MHz Bands using a package bidding design, as set forth in Appendix A, and that, in accordance with Section 213 of the Consolidate Appropriations Act, 2000, Pub. Law 106-113, 113 Stat. 1501 (1999), this Rule shall be effective immediately upon publication in the Federal Register.

20. IT IS FURTHER ORDERED that the Petition for Expedited Reconsideration of US West Wireless, LLC IS DISMISSED, AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁵⁵ See *supra* para. 6 and note 28.

⁵⁶ We note that SBC/BellSouth also propose a 25% additional payment, although they would apply it to all of the licenses affected rather than simply the licenses on which the bidder defaulted.

⁵⁷ See BDPCS, Inc., *Memorandum Opinion and Order*, FCC 00-243, ¶¶ 16-19 (rel. July 20, 2000) (also noting that Commission has authority under 47 U.S.C. § 309(j)(3), (4)(B) to impose default payments for such purposes).

⁵⁸ Cf. 47 C.F.R. § 1.2104(g)(2). In the case that either bid is subject to bidding credits, the additional payment will be calculated in an analogous manner to that used in 47 C.F.R. § 1.2104(g)(2). The additional payment of 25% is applicable only to Auction No. 31. We are not changing the 3% additional payment amount that generally applies to spectrum auctions. See 47 C.F.R. § 1.2104(g)(2).

APPENDIX A**FINAL RULES**

Part 27 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 332, 336, and 337 unless otherwise noted.

2. Section 27.501 is amended by adding a note to read as follows:

Note: For auctions of licenses in the 747-762 and 777-792 MHz Bands using a package bidding design, the payments imposed on bidders who default on payments due after an auction closes or who are disqualified, set forth in Section 1.2104(g) of the Commission's Rules, shall be calculated as follows. The default payment consists of a deficiency portion and an additional payment. The additional payment shall be 25 percent of the subsequent winning bid(s) or the defaulting bids, whichever is less. In the case that either the subsequent winning bid(s) or the defaulting bid(s) is subject to bidding credits, the additional payment will be calculated in an analogous manner to that used in 47 C.F.R. § 1.2104(g)(2). The deficiency portion of the default payment shall be calculated as set forth below. In the case that any of the relevant bids are subject to bidding credits, the default payment will be adjusted in an analogous manner to that used in 47 C.F.R. § 1.2104(g)(1).

(1) Where a defaulting bidder won licenses individually (*i.e.*, not as part of a package), and in a subsequent auction the licenses are also won individually, the deficiency portion will be calculated in the same manner as in simultaneous multiple round auctions, and on a license-by-license basis (*i.e.*, the differences between the amounts originally bid and the amounts subsequently bid will not be aggregated to determine a net amount owed).

(2) Where a defaulting bidder won licenses in package(s), and in a subsequent auction the licenses are won either (a) in the same package(s), or (b) in smaller packages or as individual licenses that correlate to the defaulted package(s), the deficiency portion will be determined on a package-by-package basis, and the differences between the amount originally bid and the amount(s) subsequently bid will not be aggregated to determine a net amount owed. Thus, in this situation, the deficiency portion will be calculated in a manner analogous to where the licenses are sold individually. However, with regard to each individual package, where the licenses are subsequently sold individually or as part of smaller packages, the amounts received in the subsequent auction will be aggregated in order to determine any deficiency.

(3) Where a defaulting bidder or bidders won licenses either individually or as part of packages, and in a subsequent auction the licenses are won as larger packages or different packages (not including the situation described in paragraph (2)), the deficiency portion will be calculated by subtracting the aggregate amount originally bid for the licenses from the aggregate amount bid in the subsequent auction for the licenses.

(4) When in the situation described in paragraph (3), there are multiple defaulting bidders, the default payment (both the deficiency portion and the additional amount portion) will be allocated to the defaulting bidders in proportion to the amount they originally bid. For example, if Bidder

1 defaults on Package ABC for \$200, and Bidder 2 defaults on Package DE for \$400, and in a subsequent auction the licenses are won in Package AB for \$150 and Package CDE for \$350, Bidder 1 would be liable for 1/3 of the default payment and Bidder 2 would be responsible for 2/3. The total default payment would be equal to the difference between the total of the original bids (\$600) and the total of the subsequent amounts bid (\$500) plus an additional amount of 25 percent of the total of the subsequent amounts bid. The total default payment therefore would equal \$100 (\$600-\$500) plus 25 percent of \$500 (\$125), for a total default payment of \$225.

SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI
Approving in part, Dissenting in part

Re: *In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168 (rel. Sept. 14, 2000)*

I respectfully dissent from the decision to substantially increase the penalty imposed on a defaulting bidder in this auction. While I wholeheartedly agree that the Commission's rules should deter insincere bids and strategic default, I find that the penalty adopted here extends beyond such goals and is excessively punitive. Our existing policies, moreover, provide authority to address any such nefarious action.

The Commission generally requires that an auction winner who defaults after the close of the auction is required to pay the Commission: a) the difference between its defaulted bid and the winning bid the next time the licensed is auctioned, if the subsequent winning bid is lower; and b) an additional penalty of three percent of the defaulted bid or the winning bid, whichever is lower.¹ The action here increases this additional penalty from three percent to 25 percent because, the majority asserts, in an auction with package bidding "a lesser amount would be inadequate to deter bidders from insincere bidding or strategically defaulting."²

In crafting the original default penalty scheme, the Commission recognized that "a withdrawal that occurs after an auction closes (default) is likely to be more harmful than one that occurs before closing."³ Post-auction default, for instance, reduces the efficiency of the assignment process and imposes extra costs on the government. To deter such incidents, the Commission found that "the penalty for default . . . should be rationally related to the harm caused, yet be set high enough to deter unwanted conduct."⁴ Accordingly, the Commission concluded that in addition to paying the difference between the defaulted bid and the subsequent winning bid, an additional penalty equal to three percent would be appropriate. The three percent penalty was adopted to mirror the after-market transaction costs "that brokers of cellular licenses typically charge . . . for commission."⁵

As the Supreme Court has stated, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."⁶ While a default in a package bidding auction could significantly affect multiple licenses, I find that a 25 percent penalty – albeit intended to deter such action -- is too strong a punishment. The item offers no basis on which to conclude that the increased penalty is "rationally related" to the potential harm caused. I am concerned, moreover, that interested parties did not have a reasonable opportunity to comment on this matter. In

¹ See 47 C.F.R. § 1.2104(g)(2).

² Order at ¶ 17.

³ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2374 (¶ 154) (1994).

⁴ *Id.* at 2382 (¶ 197).

⁵ *Id.* at 2374 (¶ 155).

⁶ *Austin v. United States*, 509 U.S. 602, 610 (1993) (quotation omitted).

seeking comment on the default rules for this auction last May, slight changes were proposed but the public notice specifically observed that “[t]he additional payment will remain equal to three percent of the subsequent winning bid(s) or the defaulting bidder’s bid, whichever is less.”⁷ With no notice provided and limited comment offered, there is little basis to conclude that a 25 percent penalty is justified.

Finally, to the extent that bidders could exploit a package bidding auction for anticompetitive reasons, our auction policies already have a significant deterrent. The rules governing this auction expressly state that “if a default . . . involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.”⁸ This authority, more than a three percent penalty or a 25 percent penalty, should serve as the ultimate deterrent to protect against insincere bidding or strategic default in the upcoming auction.

⁷ *Auction of Licenses for the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000; Comment Sought on Modifying the Simultaneous Multiple Round Auction Design to Allow Combinatorial (Package) Bidding*, Public Notice, DA 00-1075 at 12 (rel. May 18, 2000).

⁸ *Auction of Licenses for the 747-762 and 777-792 MHz Bands, Auction Notice and Filing Requirements for 12 Licenses in the 700 MHz Bands; Auction Scheduled for May 10, 2000; Minimum Opening Bids and Other Procedural Issues*, Public Notice, DA 00-292 at 38 (rel. Feb. 18, 2000).