

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of )
)
Amendment of Part 1 of the ) WT Docket No. 97-82
Commission's Rules -- )
Competitive Bidding Procedures )
)
Allocation of Spectrum Below ) ET Docket No. 94-32
5 GHz Transferred from )
Federal Government Use )
)
4660-4685 MHz )

THIRD REPORT AND ORDER AND
SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1997

Released: December 31, 1997

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Reply Comments Due: February 17, 1998

By the Commission: Commissioners Furchtgott-Roth and Tristani issuing separate statements.

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## I. INTRODUCTION

1. In this *Third Report and Order*, we make substantive amendments and modifications to our general competitive bidding rules for all auctionable services. These changes to our general competitive bidding rules are intended to streamline our regulations and eliminate unnecessary rules wherever possible, increase the efficiency of the competitive bidding process, and provide more specific guidance to auction participants. The changes also advance our auction program by reducing the burden on the Commission and the public of conducting service-by-service auction rule makings. In the *Competitive Bidding Second Report and Order* in PP Docket No. 93-253, we stated that we would "issue further Reports and Orders . . . to adopt auction rules for each auctionable service or class of service,"<sup>1</sup> and we identified criteria that would govern our choice of service-specific auction rules and procedures, which may be found in Subpart Q of Part 1 of our rules.<sup>2</sup> Since adoption of the *Competitive Bidding Second Report and Order*, the Commission has completed 15 spectrum auctions, adopting service-specific competitive bidding rules for each

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<sup>1</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2360, ¶ 68 (1994) ("*Competitive Bidding Second Report and Order*"), on recon., *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) ("*Competitive Bidding Second Memorandum Opinion and Order*").

<sup>2</sup> 47 C.F.R. §§ 1.2101 *et seq.*

one.<sup>3</sup> Based on the experience we have gained from the completed auctions and the comments we have received from commenters,<sup>4</sup> we here adopt general competitive bidding rules to provide for a more consistent and efficient licensing process for all auctionable services.

2. In this *Second Further Notice of Proposed Rule Making* we seek comment on additional issues relating to our general competitive bidding rules for all auctionable services, including ways in which the Commission might offer an effective installment payment program in the future. Finally, we seek comment on our proposal to supersede the rules for the auction of General Wireless Communications Services (GWCS) spectrum with the Part 1 rules adopted in this proceeding. We believe that these proposals will assist our efforts to simplify and streamline our regulations in order to increase the overall efficiency of the competitive bidding process.

## II. EXECUTIVE SUMMARY

3. This *Third Report and Order* is intended to establish a uniform set of provisions for all auctionable services, which incorporates our experience to date and allows us to conduct future auctions in a more consistent, efficient, and effective manner. More specifically, the *Third Report and Order* modifies and amends Subpart Q of Part 1 of the Commission's rules as follows:

### *Rules Governing Status as a Designated Entity*

- Continues our practice of defining small business size standards on a service-specific basis so that we may take into account the characteristics and capital requirements of specific services in determining what size businesses should be eligible for bidding credits.

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<sup>3</sup> See 47 C.F.R. §§ 24.301-24.320 (narrowband Personal Communications Service (PCS)); 47 C.F.R. §§ 24.701-720 (broadband PCS); 47 C.F.R. §§ 90.901-90.913 (800 and 900 Specialized Mobile Radio (SMR)); 47 C.F.R. § 95.816 (Interactive Video and Data Service (IVDS)); 47 C.F.R. §§ 100.71-100.80 (Direct Broadcast Satellite (DBS)); 47 C.F.R. §§ 21.921-21.961 (Multipoint Distribution Service (MDS)); 47 C.F.R. §§ 22.960-967 (Cellular Unserved); 47 C.F.R. §§ 25.101-531 (Digital Audio Radio Service (DARS)); 47 C.F.R. §§ 27.1-27.325 (Wireless Communications Services (WCS)).

<sup>4</sup> The Commission received 24 comments and 19 reply comments in response to *Amendment of Part 1 of the Commissions Rules -- Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket 97-82, 12 FCC Rcd 5686 (1997) ("*Notice*"). Appendix A contains a list of full and abbreviated names of parties commenting parties. In addition, Appendix A contains a list of parties filing comments, reply comments and *ex parte* comments in response to a public notice seeking comment in this docket, "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," *Public Notice*, DA 97-82 (rel. June 2, 1997) ("*Installment Payment Public Notice*").

- Adopts, for all auctions in which special provisions are made for "designated entities"<sup>5</sup> of a certain business size, uniform definitions of "gross revenues" and "affiliate."
- Eliminates the use of installment payments for the 800 MHz Lower 80 and General Category channels services, and suspends the use of installment payments for other services to be auctioned in the immediate future. Indicates that the Commission intends to eliminate installment payments for the paging and 220 MHz services.
- Provides for higher bidding credits, in lieu of installment payments, to encourage and facilitate the participation of designated entities in future auctions. Adopts schedules of bidding credits for which designated entities qualify (although in service-specific rule making proceedings we will continue to establish the appropriate size standards for each auctionable service).
- Modifies the unjust enrichment rule, Section 1.2111(c), which governs the payment of unpaid principal and accrued interest by existing licensees utilizing installment payments who seek to transfer or assign their licenses, to conform with the broadband PCS rules.<sup>6</sup>

#### *Rules Governing Auction Application and Payment Issues*

- Amends Sections 1.2105(a) and 1.2107(c) to require that all short-form and long-form applications be filed electronically beginning January 1, 1999, if feasible.<sup>7</sup>
- Amends Section 1.2105(b)(2) to provide a uniform definition of major amendments to FCC Form 175.

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<sup>5</sup> See 47 C.F.R. § 1.2110(a). The Commission's rules define designated entities as small businesses, businesses owned by women or members of minority groups, and rural telephone companies. See also 47 U.S.C. §§ 309(j)(4)(C), (D). After the Supreme Court's decision in *Adarand Constructors v. Peña* that federal measures awarding preferential treatment on the basis of race are subject to strict scrutiny, the Commission revised its designated entity provisions so that all designated entities must be small businesses. See *Adarand Constructors v. Peña*, 115 S. Ct. 2097 (1995).

<sup>6</sup> See 47 C.F.R. §§ 24.716(d), 24.717(c).

<sup>7</sup> Sections 1.2105(a) and 1.2107(c) were erroneously amended by the *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making* in this docket. The *Notice* portion of the *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making* only requested comment on these proposed amendments to the Commission's rules; the Commission did not intend to adopt the rule at that time. See *Notice* at ¶ 46.

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- Creates general ownership disclosure requirements to eventually allow auction applicants to submit ownership information for one auction that will be stored in a central database and updated as necessary for subsequent auctions, instead of requiring resubmission of ownership information on each short-form and long-form application.
  - Affirms our policy of refunding upfront payments before the end of the auction to bidders that lose eligibility to continue in the auction.
  - Amends Section 1.2104(g) to apply uniform default rules to all auctionable services and all auction designs.
  - Amends Sections 1.2109(a) and 1.2110(e) to permit auction winners who have submitted a timely down payment to submit their final payments on the licenses which they have won 10 business days after the applicable deadline, provided they also pay an appropriate late fee.
  - Modifies our rules applicable to licensees currently paying for their licenses in installments to provide for one 90-day non-delinquency period and one automatic 90-day grace period, subsequent to the current 90-day non-delinquency period, and institutes a late payment fee on overdue installment payments, which is similar to that contained in our rules for the broadband PCS F block.
  - Clarifies that we will not pursue a policy of cross default, either within or across services, where licenses default on an installment payment.

*Rules Governing Competitive Bidding Design, Procedure and Timing Issues*

- Clarifies that under its general delegated authority, the Wireless Telecommunications Bureau ("Bureau") may seek comment on specific mechanisms relating to day-to-day auction conduct prior to the start, and during each auction, as required by the Balanced Budget Act of 1997.<sup>8</sup>
- Allows for "real time" bidding in simultaneous multiple-round auctions.
- Amends Section 1.2104, consistent with the Balanced Budget Act of 1997, to provide that the Bureau will seek comment on and specify a minimum opening bid and/or reserve price in future auctions, unless it determines that doing so is not in the public interest.

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<sup>8</sup> Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997), to be codified in relevant part at 47 U.S.C. § 309(j)(2)(E) and 309(j)(4)(F) ("Balanced Budget Act").

- Adopts for all auctionable services our broadband PCS rules governing bid withdrawal payments in the event of erroneous bids.
- Retains Section 1.2109(b) in its current form, which governs the Commission's options in the event a winning bidder defaults on its down payment.
- Modifies the attributable investor threshold of the anti-collusion rule, 47 C.F.R. § 1.2105(c), to include controlling interests and/or holders of a 10 percent or greater interest in the applicant and to permit an entity that has invested in an applicant that withdraws from an auction to invest in other applicants who have applied to bid in the same markets.
- Permits all auction winners to begin construction of their systems, at their own risk, upon issuance of a public notice announcing auction winners.

In this *Second Further Notice of Proposed Rule Making* we seek comment on a variety of additional proposals relating to our general competitive bidding rules. Specifically, we seek comment on:

- Whether there is a compelling governmental interest that would justify the use of provisions for minority-owned businesses and "exceedingly persuasive justification" for provisions for women-owned businesses.
- Whether there are mechanisms that might further opportunities for rural telephone companies to provide spectrum based services.
- How the Commission might offer an effective installment payment program, while minimizing the concerns (*e.g.*, licensee default or difficulty meeting financial obligations to the Commission) that have persuaded us to suspend the use of installment payments for now, and whether there are other provisions or mechanisms by which the Commission could encourage Section 309(j) designated entity participation in future auctions.
- Whether to adopt a controlling interest standard, whether such a standard is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits, whether we should adopt our proposed rule, and whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet our goals. We also seek comment on whether this proposed standard would be strengthened by imposing a minimum equity requirement (*e.g.*, 15 percent) that any person or entity identified as controlling must hold. Alternatively, we ask whether we should not adopt a minimum equity requirement, but rather

indicate only that an absence of equity would raise a question as to whether *de facto* control exists.

- Whether to supersede the competitive bidding rules previously adopted for GWCS with our Part 1 rules.

### III. THIRD REPORT AND ORDER

#### A. Applicability of General Competitive Bidding Rules

4. Background. In the *Notice*, we proposed to apply the general competitive bidding rules adopted in this proceeding to all future auctions, to the extent possible.<sup>9</sup> In keeping with our goal of simplifying and streamlining the rule making process for all auctionable services, we sought comment on whether the rules adopted in this proceeding should supersede all existing, service-specific competitive bidding rules for future auctions. Specifically, we proposed that these rules would affect all services that are subject to pending proceedings<sup>10</sup> and any services that have existing competitive bidding rules that might apply to licenses that have not yet been auctioned or that will be reauctioned. In the alternative, we sought comment on whether we should phase-in the applicability of the revised general competitive bidding rules, such that, at a minimum, initial auctions may be completed under the existing service-specific rules while later auctions in the same service would be conducted pursuant to the rules adopted in this proceeding. In addition, we asked whether we should subject licenses that are reauctioned (due to defaults or if no winning bidder is otherwise declared) to these revised Part 1 general competitive bidding rules in the event we decide that these rules will not supersede existing service-specific auction rules. Finally, we

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<sup>9</sup> *Notice* at ¶ 18.

<sup>10</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding - *Tenth Report and Order*, PP Docket No. 93-253, 11 FCC Rcd 19974 (1996) (Interactive Video and Data Service (IVDS)); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 2732 (1997) ("*Paging Second Report and Order and Further Notice of Proposed Rule Making*") (Paging); Rule Making To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services -- Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making* (rel. March 13, 1997) ("*LMDS Second Report and Order*") (Local Multipoint Distribution Service (LMDS)); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order on Reconsideration*, FCC 97-224 (rel. July 10, 1997) ("*800 MHz Memorandum Opinion and Order and Order on Reconsideration*"), 11 FCC Rcd 22114 (1996) (800 MHz SMR).



asked that to the extent commenters believe that service-specific rules should be maintained, they explain which ones and why.

5. Discussion. With some exceptions, we adopt our proposal in the *Notice* to apply the general competitive bidding rules adopted herein to all future auctions, regardless of whether service-specific auction rules have previously been adopted. Our Part 1 rules will apply to all auctionable services, unless we determine that with regard to particular matters the adoption of service-specific rules is warranted. As we indicated in the *Notice*, we have gained significant experience in the course of the 15 auctions conducted to date. In particular, we have found that much of our auction process can be standardized and that adopting service-specific rules for many aspects of the competitive bidding process is both unnecessary and confusing. We also find that conducting separate rule makings for each individual service often slows the delivery of service to the public because it results in regulatory delays before the licensing process begins. The majority of commenters addressing this issue agree,<sup>11</sup> emphasizing that the adoption of uniform auction procedures will (1) shorten the rule making process for future auctions by narrowing the issues on which the Commission must seek comment in service-specific rule makings;<sup>12</sup> (2) decrease uncertainty for auction participants;<sup>13</sup> (3) benefit small businesses because uniform rules are more easily understood and complied with, particularly by those with limited resources and those that participate in different auctions;<sup>14</sup> and (4) enable the Commission to develop a consistent body of law and precedent governing the auction process.<sup>15</sup>

6. The Balanced Budget Act expands the Commission's auction authority.<sup>16</sup> Section 309(j)(2) formerly stated that mutually exclusive applications for initial licenses or construction permits were auctionable if the principal use of the spectrum was for subscription-based services and competitive bidding would promote the expressed objectives. As amended, Section 309(j)(2) provides that, in cases of mutually exclusive applications, all spectrum is auctionable except licenses or construction permits for (1) public safety services; (2) digital television service given to existing broadcasters to replace their analog license; and (3) non-commercial educational or public

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<sup>11</sup> See, e.g., PageNet Comments at 2; CII Comments at 4-5; Airadigm Comments at 2; NTCA Comments at 1-2; AT&T Comments at 1-2; AMTA Comments at 1; Metrocall Comments at 3; NextWave Reply Comments at 2; AICC Reply Comments at 2; ISTA Comments at 3 and Reply Comments at 1.

<sup>12</sup> See PageNet Comments at 1-2; AT&T Comments at 1-2; AICC Reply Comments at 2.

<sup>13</sup> See PageNet Comments at 1-2.

<sup>14</sup> See NTCA Comments at 2.

<sup>15</sup> See PageNet Comments at 7-8.

<sup>16</sup> See generally, Balanced Budget Act, Title III.

broadcast stations.<sup>17</sup> In addition, the Balanced Budget Act authorizes the Commission to assign pending broadcast license applications filed before July 1, 1997 by means of competitive bidding pursuant to Section 309(j).<sup>18</sup> Because these legislative changes significantly increase the number of services that will be licensed by competitive bidding, we believe that adopting uniform competitive bidding rules for all auctionable services is even more necessary.

7. With limited exceptions, the rules we adopt today will not apply to the initial auction of licenses in the paging, 220 MHz, and Local Multipoint Distribution ("LMDS") services. The Commission previously adopted service-specific auction rules for the auction of these services.<sup>19</sup> We believe that this decision is in the best interest of prospective applicants for these auctions, who may have relied upon the service-specific rules previously adopted by the Commission in formulating business plans and making early efforts to obtain financing. As discussed below, however, we are retaining the discretion to use the revised general competitive bidding procedures adopted in this proceeding for any reauction of licenses in these services. We also note that while service-specific rules exist for the auction of the 220 MHz service, many of these rules are similar, or refer to the Part 1 rules.<sup>20</sup> To apply the existing rules for the most part is also strongly supported by those commenters addressing the issue.<sup>21</sup> For example, AMTA states that the 220 MHz industry has encountered extraordinary delays in achieving regulatory certainty, and

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<sup>17</sup> Balanced Budget Act, § 3002.

<sup>18</sup> Balanced Budget Act, § 3002(a)(3). Comment is currently being sought on the use of the Part 1 rules for the auction of this service. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Fixed Television Service Licenses, MM Docket No. 97-234, *Notice of Proposed Rule Making*, FCC 97-397 (rel. November 26, 1997) ("*Broadcast NPRM*").

<sup>19</sup> See *Paging Second Report and Order and Further Notice of Proposed Rule Making*; Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Report and Order and Fifth Notice of Proposed Rule Making* (rel. March 12, 1997) ("*220 MHz Third Report and Order and Fifth Notice of Proposed Rule Making*"); Amendment of Part 90 of the Commission's Rules to Facilitate the Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463 (1996); *LMDS Second Report and Order*.

<sup>20</sup> See, e.g., 47 C.F.R. § 90.1001.

<sup>21</sup> See, e.g., Nextel Comments at 2 and Reply Comments at 2; AMTA Comments at 4-5. The Commission received similar comments requesting that the rules adopted in this proceeding not be used for the initial auction of licenses in the 800 MHz service. See Nextel Comments at 2 and Reply Comments at 2. Because the 800 MHz auction closed on December 8, 1997, this issue is moot.

that amending or altering the auction rules for this service would create further uncertainty.<sup>22</sup> Consistent with our discussion below (*see* Section III.E.4), our decision regarding the establishment of minimum opening bids will apply to the initial auction of licenses in the paging and 220 MHz services. In addition, we note that several petitions for reconsideration are pending in these proceedings. In resolving these petitions, the Commission will address installment payment financing for licenses in these services in a manner consistent with our decision herein to temporarily suspend the use of installment payments.

8. Many of the commenters who support our proposal to adopt general competitive bidding procedures for all auctionable services argue that the Commission should, in its discretion, adopt or retain service-specific rules in particular instances.<sup>23</sup> Airadigm argues that the Commission should use existing service-specific rules where it would be unfair to allow one group of licensees in the same service to benefit or be disadvantaged by operating under a different set of rules than its competitors in the same service (*e.g.*, in the case of a reauction of licenses following bidder default).<sup>24</sup> Similarly, NextWave contends that the adoption of service-specific rules may be appropriate in some circumstances.<sup>25</sup> In a related argument, some commenters believe that, in certain instances, the rules adopted in this proceeding should not be applied retroactively to supersede previously adopted service-specific rules.<sup>26</sup> For example, AirTouch and WWC suggest that when service-specific rules have been adopted after industry participation and based upon particular characteristics of a specific industry or spectrum to be auctioned, those service-specific rules should govern.<sup>27</sup>

9. With regard to the auction of licenses to provide paging services, AirTouch opposes the Commission's proposal to apply general auction rules to all future auctions, regardless of whether service specific rules have been adopted.<sup>28</sup> AirTouch argues in particular that the Commission should not adopt a general stopping rule for the paging auction which would be contrary to the

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<sup>22</sup> AMTA Comments at 4-5.

<sup>23</sup> AT&T Comments at 1-2; AICC Reply Comments at 2; Airadigm Reply Comments at 6; NextWave Reply Comments at 2.

<sup>24</sup> Airadigm Reply Comments at 6.

<sup>25</sup> NextWave Reply Comments at 2-3.

<sup>26</sup> *See* PageNet Comments at 7-8; Airadigm Comments at 2; PCIA Comments at 2, Merlin Reply Comments at 7; ISTA Reply Comments at 1-2; AirTouch Reply Comments at 4-5; WWC Reply Comments at 1.

<sup>27</sup> AirTouch Reply Comments at 4-5; WWC Reply Comments at 1.

<sup>28</sup> AirTouch Reply Comments at 4-5.

comments received in that proceeding and the stopping rule that the Commission ultimately adopted.<sup>29</sup> As discussed above, the Commission will use previously-adopted, service-specific rules for the paging auction.

10. The rule changes we adopt today streamline and simplify our general competitive bidding procedures. The majority of the rules we adopt today address aspects of our spectrum auction program that affect future auction applicants only. These rules include application procedures (*e.g.*, electronic filing, short-form application amendments, ownership disclosure requirements), upfront and down payment issues, issues relating to competitive bidding design, procedure and timing (*e.g.*, alternate bidding methodologies, minimum opening bids, and bid withdrawal), and rules prohibiting collusion during the auction. However, some of the provisions we adopt today address aspects of our rules that govern current licensees as well. Specifically, these minor rule changes affect certain license-related payment terms (*e.g.*, installment payments, grace periods, and unjust enrichment).

11. Two commenters, AICC and AAA, argue that the general competitive bidding procedures adopted in this proceeding would be wholly inappropriate for auctions of shared frequencies governed by Part 90 of the Commission's rules.<sup>30</sup> In support of this position, these commenters argue that: (1) none of the Commission's auctions have involved shared frequencies; (2) any auction of Part 90 shared spectrum would involve participants ranging in size from very large corporations to very small businesses and individual users, which would require a significant adjustment in the Commission's traditional auction rules; (3) industry participation would be crucial in crafting appropriate auction and service rules; and (4) in light of the public safety services provided using Part 90 spectrum, auctioning such spectrum is not in the public interest.<sup>31</sup> AICC and AAA further suggest that those commenters who favor the adoption of general competitive bidding procedures for all spectrum might not have considered the possibility of auctions for shared channels, since the Commission is not currently authorized to award licenses for such spectrum by means of competitive bidding.<sup>32</sup> We agree that shared spectrum is, by definition, not auctionable under Section 309(j) due to the lack of mutual exclusivity.

12. Similarly, Hughes suggests that in the event the Commission decides to auction satellite services, it should conduct a service-specific rule making specially tailored to the capital intensive nature of the satellite industry, instead of employing the general competitive bidding procedures

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<sup>29</sup> *Id.*

<sup>30</sup> AICC Comments at 1-2 and Reply Comments at 2; AAA Comments at 2 and Reply Comments at 2.

<sup>31</sup> *Id.*

<sup>32</sup> AICC Reply Comments at 2; AAA Reply Comments at 2.

adopted in this proceeding.<sup>33</sup> Although we do not decide that issue now, as we suggested in the *Notice*, the Commission will continue to adopt service-specific auction procedures where we find that our general competitive bidding procedures are inappropriate.

## B. Rules Governing Designated Entities

13. Section 309(j)(4)(D) of the Communications Act of 1934 provides that in prescribing rules for a competitive bidding system, the Commission shall "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."<sup>34</sup> The statute further directs the Commission to consider the use of tax certificates, bidding preferences, alternative payment schedules and methods of calculations and other procedures as means of accomplishing this statutory objective.<sup>35</sup>

14. We adopt the rules in this *Third Report and Order* in order to facilitate broad-based participation in auctions. We believe that standardizing the rules regarding definitions of eligible entities, unjust enrichment and bidding credits will assist small, minority and women-owned businesses because the rules' predictability will facilitate the business planning and capital fundraising process. While we suspend the use of installment payments, we seek comment in the *Second Further Notice of Proposed Rulemaking* on whether installment payments should be adopted in the future.

15. We also note that pursuant to Section 309(j)'s obligations to ensure opportunities for participation by small enterprises, rural telephone companies, and minority- and women-owned businesses, and Section 257 of the Telecommunications Act, requiring that the Commission identify and eliminate market entry barriers for small and entrepreneurial telecommunications businesses, we have commenced a series of studies, and have other studies in the planning process, to examine barriers encountered by minorities and women in the auctions process and the secondary market for licenses.<sup>36</sup> When those studies are completed, we will examine whether

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<sup>33</sup> Hughes Comments at 1, 6.

<sup>34</sup> 47 C.F.R. § 309(j)(4)(D).

<sup>35</sup> See 47 C.F.R. §§ 309(j)(3)(B) and (j)(4)(D).

<sup>36</sup> Pursuant to the Commission's report on Section 257 of the Telecommunications Act, adopted on May 7, 1997, the Commission found that further study was required to investigate barriers facing minorities and women in the telecommunications industry, and delegated responsibility to the Office of Communications Business Opportunities ("OCBO") to conduct studies on this topic. To date, OCBO has commenced studies examining five major areas: (1) barriers to acquisition of cellular, paging and Specialized Mobile Radio licenses on the secondary market, and barriers to entry or growth, comparing small, large, minority and women-owned licensees; (2) barriers to acquisition of

additional measures are warranted to promote the objectives of giving small businesses, rural telephone companies, and women- and minority-owned businesses the chance to provide spectrum-based services, as required in Section 309(j).

### 1. Small Business Size Standards

16. Background. In the *Notice*, we proposed to continue our practice, stated in Section 1.2110(b)(1) of our rules, of establishing "the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service."<sup>37</sup> We noted that thus far we have used gross revenue ceilings of \$3 million, \$15 million, \$40 million, and \$75 million to define small businesses (and \$75 million and \$125 million to define entrepreneurs), which qualify for special provisions such as bidding credits and installment payment plans.<sup>38</sup> We also proposed, for purposes of future auctions, to define small businesses purely in terms of gross revenues. Once the small business definition for any particular service was adopted, we proposed that the special provisions for which such businesses qualify would be determined by schedules set forth in the general competitive bidding rules.<sup>39</sup>

17. We also noted in the *Notice* that some of our eligibility requirements are defined in terms of gross revenues of "less than" a certain amount, rather than "not exceeding" a certain amount. We tentatively concluded that a uniform method of measurement is preferable because it is more equitable and administratively simpler.<sup>40</sup> Thus, we proposed that when we adopt size standards,

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broadcast licenses on the secondary market, and barriers to entry or growth, comparing small, large, minority and women-owned licensees; (3) barriers to entry or growth due to advertising industry practices such as paying less to advertise on stations targeting minority communities, and the impact of such practices on ownership opportunities and viewpoint diversity; (4) the impact of duopoly and multiple ownership rules on broadcast station ownership; and (5) the impact of small, minority and women ownership of broadcast stations on service. The Commission is also planning to undertake a study on the experiences of small, minority- and women-owned businesses in the auctions process. *See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report)*, FCC 97-164 (rel. May 8, 1997) ("*Section 257 Report*").

<sup>37</sup> 47 C.F.R. § 1.2110(b)(1). *See Notice* at ¶¶ 19-20.

<sup>38</sup> 47 C.F.R. § 90.814(b)(1)(i) (\$3 and \$15 million definition of small business in 800 MHz and 900 MHz SMR); 47 C.F.R. § 24.720(b)(2) (\$15 million definition of small business in broadband PCS F block); 47 C.F.R. § 24.720(b)(1) (\$40 million definition of small business in broadband PCS for C and F blocks); 47 C.F.R. § 21.961(b)(1) (\$40 million definition of small business in MDS); 47 C.F.R. § 24.711(b)(1) (\$75 million definition in broadband PCS C and F blocks); 47 C.F.R. § 24.709(a)(1) (\$125 million gross revenues threshold for determining entrepreneurs' block eligibility in the broadband PCS C and F blocks); and 47 C.F.R. § 101.1112(d) (\$15, \$40 and \$75 million gross revenues threshold for determining small business and entrepreneurs' block eligibility in LMDS).

<sup>39</sup> *Notice* at ¶ 20; *see infra* at Section III. B.6.

<sup>40</sup> *Notice* at ¶ 21.

those standards should be expressed so as to require businesses to have gross revenues "not to exceed" particular amounts, and that all standards already adopted be modified to conform to this method of defining size.<sup>41</sup> We also proposed to base all small business size standards on the applicant's average gross revenues over the preceding three years.

18. Discussion. We adopt our proposal to continue to define small businesses, as we have in the past, based on the characteristics and capital requirements of the specific service. We believe that this approach has given us flexibility that will continue to benefit small businesses in future auctions. We also note that this approach is consistent with the Small Business Administration's practice of approving small business size standards on a service-by-service basis.<sup>42</sup> Commenters addressing this issue support this conclusion. For example, AMTA and NextWave both believe that the determination of appropriate small business size standards should be made on a case-by-case basis.<sup>43</sup>

19. No commenters addressed our proposal in the *Notice* to create size standards that require small businesses to have gross revenues "not to exceed," as opposed to "less than" a certain amount. Nevertheless, we believe that adoption of this proposal is important to further our objective of establishing uniform definitions relating to small business standards for future auctions. From this point forward, our service-specific small business definitions will be expressed in terms of average gross revenues over the preceding three years "not to exceed" particular amounts. We also continue to believe that average gross revenues provide an accurate, equitable, and easily ascertainable measure of business size. As we have discussed in the past, a single gross revenues size standard is an established method for determining size eligibility for various kinds of federal programs that aid smaller businesses.<sup>44</sup> NextWave, in its comments, agrees, stating that gross revenues are a generally reliable measure of whether a company is indeed small.<sup>45</sup> In addition, while we have used a total assets test in determining eligibility for

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<sup>41</sup> For example, the eligibility rule for the broadband PCS C and F blocks would be modified to read "gross revenues *not to exceed* \$125 million." *See* 47 C.F.R. § 24.709.

<sup>42</sup> *See, e.g.*, Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, re: Approval of Small Business Size Standards -- Competitive Bidding Rules for 800 MHz Specialized Mobile Radio Services (October 27, 1997).

<sup>43</sup> AMTA Comments at 5; NextWave Reply Comments at 3. *See also* Airadigm Comments at 2-3.

<sup>44</sup> Fifth Memorandum Opinion and Order, ¶ 23, PP Docket 93-253, FCC 94-285 (Rel. November 23, 1994) (*Fifth Memorandum Opinion and Order*).

<sup>45</sup> NextWave Reply Comments at 3.

entrepreneur blocks,<sup>46</sup> we have not used such a test for determining small business eligibility. We also note that the Small Business Act's statutory definition of small business does not use a total assets test.<sup>47</sup> Thus, we decline to adopt any other measure of business size, such as a total assets test, at this time.<sup>48</sup>

## 2. Definition of Gross Revenues

20. Background. Previously, each of our revenue-based small business size standards for specific services has required applicants to calculate their average gross revenues over a certain number of years. In the *Notice*, we proposed to adopt a single definition of gross revenues to promote uniformity of regulation.<sup>49</sup> Specifically, we proposed to use our broadband PCS definition of gross revenues, subject to the modification that unaudited financial statements used as a basis for gross revenue calculations must be prepared in accordance with Generally Accepted Accounting Principles ("GAAP"). As we stated previously, this modification would ensure that all gross revenues calculations, audited and unaudited, will be prepared consistently from this point forward. This modification also would discourage bidders from manipulating unaudited financial statements in order to qualify for more advantageous bidding credits or payment terms.

21. In the *D, E, and F Block Report and Order* we amended our broadband PCS rules, which required that an applicant's determination of average gross revenues be based on the three most recently completed fiscal years, to allow for the use of fiscal or calendar years and simplified our rules to permit D, E, and F block applicants to use unaudited financial statements to support their statements of gross revenues.<sup>50</sup> We sought comment on whether we should incorporate this practice into our general auction rules and thereby permit future applicants in all auctionable services to use either fiscal or calendar years and unaudited financial statements to support

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<sup>46</sup> See, e.g., 47 C.F.R. § 709(a).

<sup>47</sup> See 15 U.S.C. § 632(c).

<sup>48</sup> Parties in our LMDS proceeding requested that we consider a total asset test for LMDS. Under a "total assets" test, the Commission would exclude entities with total assets exceeding a specific threshold from eligibility for small business provisions. While we declined to adopt such a test for LMDS, we indicated that we would consider it in this proceeding. Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Petitions for Reconsideration of the Commission's Competitive Bidding Rules, *Second Order on Reconsideration*, Docket 92-297 (rel. September 12, 1997) ("*LMDS Second Order on Reconsideration*") at ¶ 22.

<sup>49</sup> *Notice* at ¶ 23.

<sup>50</sup> Amendment of Parts 20 and 24 of the Commission's Rules, *Report and Order*, WT Docket No. 96-59, 11 FCC Rcd 7824, 7891, ¶ 141 (1996) ("*D, E, and F Block Report and Order*"); 47 C.F.R. § 24.720(f).



statements of gross revenues.<sup>51</sup>

22. Discussion. All commenters addressing the issue support the Commission's proposal in the *Notice* to adopt a uniform definition of gross revenues for all auctionable services.<sup>52</sup> We believe that a uniform definition of gross revenues, as the essential element of our small business definitions, furthers our goal of establishing uniform definitions and is administratively efficient. Thus, we adopt a uniform definition of gross revenues in our Part 1 rules.

23. Various commenters addressed specific aspects of our proposed definition of gross revenues. CII supports our proposal that applicants be permitted to use *either* fiscal year or calendar year figures for calculation purposes.<sup>53</sup> No commenters opposed this proposal. We are persuaded that, just as we concluded in the *D, E, and F Block Report and Order*, permitting use of either of these figures will assist applicants in providing the most current information available on their applications.<sup>54</sup> We conclude that our general gross revenue definition should permit applicants to support their gross revenue calculations using either fiscal or calendar years.

24. Several commenters responded to our tentative conclusion in the *Notice* to accept the use of unaudited financial statements where audited financial statements are unavailable, if prepared in accordance with Generally Accepted Accounting Principles, for gross revenue calculations by auction applicants seeking to qualify for small business status. A majority of these commenters supported our tentative conclusion that where audited financial statements are not available, they should not be required.<sup>55</sup> In particular, these commenters argue that any strict requirement that financial statements be audited is unduly burdensome for most small business applicants.<sup>56</sup> In addition, AMTA contends that the certification requirement already present on the short-form (FCC Form 175) application is sufficient to ensure that small business applicants submit only accurate information, both financial and otherwise, as part of their applications.<sup>57</sup> Only two

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<sup>51</sup> *Notice* at ¶ 24.

<sup>52</sup> See CII Comments at 7; ISTA Comments at 1; Airadigm Comments at 3; AMTA Comments at 5; NextWave Reply Comments at 3.

<sup>53</sup> CII Comments at 7.

<sup>54</sup> *D, E, and F Block Report and Order*, at 134, 141.

<sup>55</sup> See AMTA Comments at 5-6; CII Comments at 7, 11-12; Airadigm Reply Comments at 9, 11-12; NPCRS Reply Comments at 4.

<sup>56</sup> *Id.*

<sup>57</sup> AMTA Comments at 6.

commenters, ISTA and PageNet advocate that applicants use audited financial statements in order to qualify for small business status.<sup>58</sup> After review of the comments on this issue, we conclude that such a requirement would be onerous to small business. We also agree with AMTA's observation that the certification requirement on our FCC Form 175 acts to ensure that applicants submit accurate information. Furthermore, as discussed below (*see* Section III.C.5, *infra*), we also will retain the authority to audit applicants individually if there is any question concerning small business status. We therefore decline to require all applicants to use audited financial statements to support their gross revenue calculations. Audited financial statements, however, are necessary if they exist. We also note that, consistent with the Small Business Act,<sup>59</sup> where an entity has been in existence for less than three years, the entity's gross revenues should be averaged for the relevant number of years the entity, or its predecessor in interest (affiliate), has been in existence.

25. Accordingly, as proposed in the *Notice*, and consistent with our broadband PCS rules,<sup>60</sup> we will define gross revenues for all auctionable services as:

all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited financial statements for the three (3) most recent calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not have audited financial statements, its gross revenues must be certified by its chief financial officer or its equivalent and must be prepared in accordance with Generally Accepted Accounting Principles.

### 3. Definition of Affiliate

26. Background. We sought comment in the *Notice* on our definition of "affiliate." In seeking comment on this uniform Part 1 definition, we asked, for example, whether we should amend our definition of affiliate to provide an exception for Indian tribes and Alaska Regional or

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<sup>58</sup> *See* ISTA Comments at 1; PageNet Comments at 9.

<sup>59</sup> *See* 15 U.S.C. § 632(c)(ii)(II).

<sup>60</sup> 47 C.F.R. § 24.720(f).

Village Corporations, as we did for broadband PCS and LMDS.<sup>61</sup> We also recognized that in August of 1996, the Small Business Administration amended and simplified its regulations governing small business size standards, including its definition of the term "affiliate",<sup>62</sup> and asked whether we should consider making similar changes to our rules.

27. Discussion. We adopt our proposal to adopt a uniform definition of the term "affiliate" for all future auctions. As we discussed in the *Notice*, the term "affiliate" is defined by our Part 1 rules as an individual or entity that directly or indirectly controls or has the power to control the applicant; is directly or indirectly controlled by the applicant; is directly or indirectly controlled by a third person(s) that also controls or has the power to control the applicant; or has an "identity of interest" with the applicant.<sup>63</sup> We have found that this definition, which also contains detailed discussion and examples of relevant terms such as "control" and "identity of interest," has proven workable and is broad enough to address a wide variety of business structures. In particular, this definition has helped to ensure that businesses seeking small business status are truly small. We also believe that this definition, by focusing on "indicia of control," is consistent with our proposal in the *Second Further Notice of Proposed Rulemaking* (See Section IV, *infra*).

28. CIRI requests that we include in our general definition of the term "affiliate" an exemption for Indian tribes and Alaska Regional or Village Corporations, as we did for broadband PCS,<sup>64</sup> and more recently, for LMDS.<sup>65</sup> We agree with CIRI that entities owned and controlled by Indian tribes and Alaska Regional or Village Corporations should be eligible to bid in future auctions as small businesses, notwithstanding their affiliation with other entities owned by tribes or Alaska Native Corporations whose gross revenues cause the combined average gross revenues of the entity and its affiliates to exceed the general limits for eligibility for bidding as such a business. As we stated in support of a similar exemption from our affiliation rules in LMDS, this exception will ensure that these entities will have a meaningful opportunity to participate in spectrum-based services from which they would otherwise be precluded.<sup>66</sup> Furthermore, we do

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<sup>61</sup> See 47 C.F.R. §§ 24.720(l)(11), 101.1112(h)(11).

<sup>62</sup> See Small Business Administration, Amendment of Small Business Size Standards, *Final Regulations*, 61 Fed. Reg. 3177 (January 31, 1996); *Corrected Final Regulations*, 61 Fed. Reg. 41496 (August 9, 1996) (amending 13 C.F.R. Part 121).

<sup>63</sup> 47 C.F.R. §§ 1.2110(b)(4), 24.839(d).

<sup>64</sup> See 47 C.F.R. § 24.720(l)(11).

<sup>65</sup> See 47 C.F.R. § 101.1112(h)(11).

<sup>66</sup> See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint

not believe that this exemption for the specified entities will entitle them to an unfair advantage over entities that are otherwise eligible for small business status.<sup>67</sup>

29. We also take this opportunity to clarify our Part 1 definition of affiliate. Our Part 1 rules provide that parties to a joint venture are considered to be affiliated with each other for purposes of determining the gross revenues of an applicant seeking to qualify for status as a small business.<sup>68</sup> In the past, however, the term "consortium" has been defined on a service-by-service basis as "a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a very small business, small business or entrepreneur."<sup>69</sup> This results in each member of a consortium being defined as an affiliate of each other member. The resulting attribution of gross revenues of each member of the consortium is inconsistent with our intention to permit small or very small businesses to form consortia as a means of increasing the capital available to participate in our auctions, while still being eligible for status as a small business.

30. We therefore amend Section 1.2110(b)(4)(x) to provide that a "consortium" as defined on a service-by-service basis for purposes of determining status as a designated entity will not be treated as a "joint venture" under our attribution standards. As a result, when two or more entities form an association that meets the service-specific definition of a "consortium," the gross revenues of each entity will not be attributed to each entity in determining eligibility for designated entity status. We believe that this clarification to the general definition of the term "affiliate" will enhance the ability of small businesses to form associations that will permit them to bid for licenses that would be too expensive for them individually. Auction winners have successfully used consortium structures to acquire licenses and "spin-off" licenses post-auction, and we wish to continue to make this option available.<sup>70</sup>

#### 4. Definition of Rural Telephone Company

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Distribution Service and for Fixed Satellite Services -- Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, *Order on Reconsideration* (rel. September 12, 1997) ("*LMDS Order on Reconsideration*") at ¶ 10.

<sup>67</sup> *Id.*

<sup>68</sup> *See* 47 C.F.R. § 1.2110(b)(4)(x).

<sup>69</sup> *See, e.g.*, 47 C.F.R. § 101.1112(f) (defining the term "consortium" for LMDS).

<sup>70</sup> *See* "Rural Success Stories" in FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, *Report*, FCC 97-353 (rel. October 9, 1997) ("*Report to Congress*") at 26.

31. Background. Our current Part 1 rules define "rural telephone company" (or "rural telco") as any local exchange carrier, including affiliates, with 100,000 access lines or fewer.<sup>71</sup> We noted at the time this definition was adopted that it comported with the definition that had been adopted for broadband PCS.<sup>72</sup> In the *Notice*, however, we noted that we have revised the definition of rural telephone company contained in our broadband PCS rules to conform with that contained in the Communications Act, as amended by the Telecommunications Act of 1996 ("1996 Act").<sup>73</sup> We tentatively concluded that the definition of rural telco set forth in the 1996 Act should apply to all auctionable services.

32. Discussion. The National Telephone Cooperative Association ("NTCA") and the Rural Telecommunications Group ("RTG"), commented in support of our proposal in the *Notice* to adopt the definition of a rural telephone company contained in the Telecommunications Act of 1996 as the single definition of the term to be used in all auctionable services.<sup>74</sup> No commenters opposed our proposal. As we noted in the *Notice*, when we amended the broadband PCS rule, we stated that using the definition contained in the 1996 Act would likely expedite the delivery of advanced services to rural areas.<sup>75</sup> We also noted that adopting the 1996 Act definition would promote uniformity of regulations and is therefore consistent with the mandate of that legislation to ease regulatory burdens and eliminate unnecessary regulation.<sup>76</sup> We believe that the same reasons for amending this definition in the broadband PCS rules justify amending the definition in Part 1 for all services subject to competitive bidding.

33. Thus, we amend Section 1.2110(b)(3) to define the term "rural telephone company" as a local exchange carrier operating entity to the extent that such entity -- (A) provides common carrier service to any local exchange carrier study area that does not include either (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier

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<sup>71</sup> 47 C.F.R. § 1.2110(b)(3).

<sup>72</sup> *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7245, 7257.

<sup>73</sup> Pub. L. No. 104-104, § 3 110 Stat. 56 (1996) ("1996 Act"); *codified at* 47 U.S.C. § 153 (37). *See also* 47 C.F.R. § 24.720(e) and *D, E, and F Block Report and Order*, 11 FCC Rcd at 7855, ¶ 62.

<sup>74</sup> *See* NTCA Comments at 2; RTG Reply Comments at 1-3.

<sup>75</sup> *See D, E, and F Block Report and Order*, 11 FCC Rcd at 7855, ¶ 66.

<sup>76</sup> *Id.*

study area with fewer than 100,000 access lines; or (D) had less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

## 5. Installment Payments

34. Background. Section 309(j) of the Communications Act encourages participation by small businesses and other "designated entities" in the Commission's competitive bidding process.<sup>77</sup> Among other methods, allowing winning bidders to pay for their licenses using installment plans has been one method we have used to encourage small business involvement in the wireless marketplace. In the *Competitive Bidding Second Report and Order* we adopted a framework for establishing installment payment plans that we believed would be an effective way to promote the participation of small businesses in the provision of spectrum-based telecommunications services and an effective tool for efficiently distributing licenses and services among geographic areas.<sup>78</sup> Our general competitive bidding rules currently allow small businesses to pay a substantial amount of their high bids in installments over the term of their licenses.<sup>79</sup> We observed in the *Notice* that small businesses have been successful bidders in the auctions in which installment payment plans were offered.<sup>80</sup> In the *Notice*, we sought comment on a variety of proposals regarding our installment payment program intended to improve the ability of small businesses to participate successfully in future auctions. We also sought comment on whether we should offer higher bidding credits in lieu of installment payments.

35. In considering several petitions for reconsideration of the *LMDS Second Report and Order*, we recently eliminated installment payment provisions in LMDS and indicated that we would reexamine our installment payment rules in considering the general proposals regarding installment payments in this proceeding.<sup>81</sup> Similarly, we eliminated installment payment provisions in the upper 200 channels of the 800 MHz SMR service,<sup>82</sup> and deferred until this proceeding our

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<sup>77</sup> 47 U.S.C. §§ 309(j)(4)(A), (D).

<sup>78</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391, ¶ 240.

<sup>79</sup> 47 C.F.R. § 1.2110(e).

<sup>80</sup> See *Notice* at ¶ 34. See also *Report to Congress* at 27.

<sup>81</sup> See *LMDS Second Order on Reconsideration*. See also, Petitions for Reconsideration of the *LMDS Second Report and Order* filed by CellularVision USA, Inc. ("CellularVision"), WebCel Communications, Inc. ("WebCel"), Cook Inlet Region, Inc. ("Cook Inlet"), LBC Communications, Inc. ("LBC"), the Rural Telecommunications Group ("RTG"), the Independent Alliance, and Sierra Digital Communications, Inc.

<sup>82</sup> See *800 MHz Memorandum Opinion and Order and Order on Reconsideration* at ¶ 130.

decision on whether to make an installment payment plan available for the auction of the lower 80 and General Category channels in the 800 MHz SMR service.<sup>83</sup>

36. Earlier this year, the Commission received several requests, from both C and F block licensees, for relief associated with the installment payment program.<sup>84</sup> On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their installment payment obligations, and because of other debt collection issues, the Bureau suspended the deadline for payment of installment payments for all C block licensees.<sup>85</sup> On April 28, 1997, the Bureau extended the suspension to F block licensees.<sup>86</sup>

37. On June 2, 1997, the Bureau, explaining that it had received several proposals from C block licensees regarding alternative financing arrangements and a petition for rule making regarding the issue of broadband PCS C block installment payments, issued the *Installment Public Notice* seeking comment on these proposals and invited any "additional proposals for addressing the C and F block broadband PCS financing terms."<sup>87</sup> The Bureau also sought comment on whether C block licensees should be permitted to prepay their installment debt.<sup>88</sup> After consideration of the extensive record in this proceeding, the Commission adopted a menu of options to assist C block licensees experiencing financial difficulties under their installment

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<sup>83</sup> See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, FCC 97-223 (rel. July 10, 1997) at ¶ 279.

<sup>84</sup> See *Installment Payment Public Notice*. See also Letter from Thomas Gutierrez, Esq., *et al* to Michele C. Farquhar, Esq., Chief, Wireless Telecommunications Bureau (March 13, 1997).

<sup>85</sup> See *Installment Payments for PCS Licenses*, *Order*, DA 97-649 (rel. March 31, 1997).

<sup>86</sup> See "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," *Public Notice*, DA 97-883 (rel. April 28, 1997) at 2.

<sup>87</sup> *Installment Payment Public Notice*. Several parties also filed petitions for reconsideration in the Commission's paging proceeding, in which they requested that the Commission reconsider its adoption of installment payment plans for small businesses. See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Petitions for Reconsideration*, filed by Paging Network, Inc. and Personal Communications Industry Association, April 11, 1997.

<sup>88</sup> The Bureau also conducted an "FCC Public Forum" on June 30, 1997, to discuss broadband PCS C and F block installment payment issues. In addition, the Commission established an FCC Task Force which included representatives from the Bureau, the Office of Plans and Policy, the Office of General Counsel, and the Office of Communications Business Opportunities. This Task Force was charged with evaluating the C block installment payment program, considering proposals for alternative financing arrangements submitted by licensees, and recommending to the Commission how to respond to those proposals.

payment obligations.<sup>89</sup> Citing the difficulties encountered in the past, the Commission proposed not to adopt an installment payment plan for the reacquisition of licenses surrendered pursuant to these options.<sup>90</sup>

38. Discussion. After careful review of the comments in response to our general Part 1 rule making, the comments in response to the *Installment Payment Public Notice*, and our recent decisions in the broadband PCS C block, LMDS and 800 MHz SMR services, we have determined that installment payments should not be used in the immediate future as a means of financing small business participation in our auction program.<sup>91</sup> As we indicated in the *Second Report and Order* in this Docket, the Commission must balance competing objectives in Section 309(j) that require, *inter alia*, that it promote the development and rapid deployment of new spectrum-based services and ensure that designated entities are given the opportunity to participate in the provision of such services.<sup>92</sup> We note that our experience has demonstrated that installment payments may not be necessary to ensure a meaningful opportunity for small businesses to participate successfully in our auction program. For example, in the cellular auction of licenses for unserved areas, which had no special bidding provisions, 36 percent of the licenses went to small or very small businesses. We also stated that in assessing the public interest, we must try to ensure that all the objectives of Section 309(j) are considered. The Commission has found, for example, that obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants.<sup>93</sup>

39. In addition, questions have been raised in bankruptcy litigation about whether the Commission can quickly reclaim licenses should a licensee declare bankruptcy (even though licenses are expressly conditioned upon payment and cancel automatically in the event of non-

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<sup>89</sup> See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 62 Fed Reg 55348 (rel. October 16, 1997) ("*Second Report and Order and Further Notice of Proposed Rule Making*").

<sup>90</sup> *Second Report and Order and Further Notice of Proposed Rule Making* at ¶ 101.

<sup>91</sup> See "FCC Announces Spectrum Auction Schedule for 1998," *Public Notice*, DA 97-2497 (rel. November 25, 1997), announcing the following upcoming auctions: LMDS, 220 MHz, broadband C block Reacquisition, 39 GHz, Paging, 800 MHz SMR (Lower 80 and General Category Channels), Location Monitoring Services (LMS), Public Coast Stations, Pending Analog Broadcast Licenses for Commercial Radio and Television Stations. See also "FCC Announces Auction Schedule for the General Wireless Communications Service," *Public Notice*, DA 97-2634 (rel. December 17, 1997).

<sup>92</sup> See 47 U.S.C. §§ 309(j)(3) and (4).

<sup>93</sup> See 800 MHz Memorandum Opinion and Order at ¶ 130.



payment) resulting in significant delays in the provision of service to the public.<sup>94</sup> While we are confident of prevailing in any litigation, until controlling precedent is established or legislation addressing the conflicting rights is enacted, such delays may occur.

In this regard, the Commission has strongly urged Congress to adopt legislation that would clarify that provisions of the Bankruptcy Code (1) are not applicable to any FCC license for which a payment obligation is owed; (2) do not relieve any licensee from payment obligations; and (3) do not affect the Commission's authority to revoke, cancel, transfer or assign such licenses.<sup>95</sup> We also note that, in order to balance the impact on small businesses of our decision to discontinue the use of installment payments in the near future, we are adopting higher bidding credits than those proposed in the *Notice* (see Section III.B.6, *infra*).

40. Therefore, subject to our proposals in the *Second Further Notice of Proposed Rule Making*, Section IV, *infra*, we conclude that until further notice, installment payments should not be offered in auctions as a means of financing small businesses and other designated entities seeking to secure spectrum licenses. Consistent with this decision, we hereby eliminate installment payments in the auction of the lower 80 and General Category channels in the 800 MHz SMR service.<sup>96</sup> Although Merlin submits that the elimination of the Commission's installment payment provisions in any service would be contrary to the Commission's conclusions in previous rule makings,<sup>97</sup> we believe that this decision is consistent with suggestions of CIRI, as well as our general experience in examining the success of the installment payment program to date.<sup>98</sup> As we recently recognized in eliminating installment payments for LMDS licensees, Congress did not require the use of installment payments in all auctions, but rather recognized

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<sup>94</sup> *Report to Congress* at 39.

<sup>95</sup> See *Report to Congress* at 39. See also Letters from the FCC Commissioners (1) to the Honorable Orrin G. Hatch and the Honorable Patrick J. Leahy; and (2) to the Honorable Henry J. Hyde and the Honorable John Conors, both dated September 18, 1997; Letter from FCC Chairman Reed E. Hundt to the Honorable Pete Domenici and the Honorable John R. Kasich, dated July 25, 1997.

<sup>96</sup> See *800 MHz Second Report and Order* at ¶ 279.

<sup>97</sup> Merlin Comments at 4.

<sup>98</sup> CIRI asserts that installment payment plans fueled speculation in the broadband PCS auctions, encouraged expectations of Commission relief from payment obligations, and saddled the Commission with difficult credit-related tasks for which it has no experience. CIRI further argues that installment payment programs force the Commission to balance its duty to regulate the provision of wireless services with its sometimes conflicting obligation to manage the federal debt responsibly. See CIRI Comments at 11; Petition for Rule Making Regarding the Administration and Disposition of Competitive Bidding Installment Payment Obligations filed by Cook Inlet Region, Inc. (May 7, 1997) ("*CIRI Petition for Rule Making*").

them as one means of promoting the objectives of Section 309(j)(3) of the Communications Act.<sup>99</sup> The Commission continues to experiment with different means of achieving its obligations under the statute, and has offered installment payments to licensees in several auctioned wireless services.<sup>100</sup> Installment payments are not the only tool available to assist small businesses. Indeed, we have conducted auctions without installment payments.<sup>101</sup> Moreover, Section 3007 of the Balanced Budget Act requires that the Commission conduct certain future auctions in a manner that ensures that all proceeds from such bidding are deposited in the U.S. Treasury not later than September 30, 2002. Although we seek comment on offering installment payment plans in the future (*see* Section IV), we believe that Section 3007 may require that these auctions be

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<sup>99</sup> Specifically, Section 309(j)(4) of the Communications Act states that the Commission shall, in prescribing regulations pursuant to these objectives and others, "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B) . . . ." *See* 47 U.S.C. § 309(j)(4)(A) (emphasis added). *See also* Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255:

While it is clear that, in many instances, the objectives of section 309(j) will be best served by a traditional, "cash-on-the-barrelhead" auction, it is important that the Commission employ different methodologies as appropriate. Under this subsection, the Commission has the flexibility to utilize any combination of techniques that would serve the public interest.

<sup>100</sup> *See, e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994) (Interactive Video Data Services); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941 (1994) ("*Narrowband PCS Third Report and Order*") (regional narrowband PCS); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) (broadband PCS); Implementation 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, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589 (1995) (Multipoint Distribution Service); and Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Implementation of Sections 3(n) and 322 of the Communications Act, GN Docket No. 93-252, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639 (1995) (900 MHz Specialized Mobile Radio ("SMR")).

<sup>101</sup> Such as the auctions of licenses for the Wireless Communications Service ("WCS"), nationwide narrowband PCS, and cellular unserved areas. *See, respectively*, Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, *Report and Order*, FCC 97-50, 62 Fed. Reg. 9636 (rel. February 19, 1997) ("*WCS Report and Order*"); *Narrowband PCS Third Report and Order*; and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket No. 90-6, *Ninth Report and Order*, 11 FCC Rcd 14769 (1996).

conducted without offering long-term installment payments.<sup>102</sup>

41. In this regard, we agree with commenters such as CIRI, that contend that increased bidding credits will allow responsible small bidders with appropriately tailored business plans to secure adequate private financing to be successful in future auctions.<sup>103</sup> Further, as we have already noted, Section 309(j) requires the Commission to consider alternative methods to allow for dissemination of licenses among designated entities, including small businesses. We believe that the rules we adopt below (*see* Section III.B.6, *infra*) regarding the use of bidding credits for small business applicants in future auctions will both fulfill the mandate of Section 309(j) to provide small businesses with the opportunity to participate in auctions and ensure that new services are offered to the public without delay.

42. Merlin contends that while significant bidding credits can be useful in helping smaller entities win licenses when they bid against larger companies, bidding credits alone do not help smaller entities access the capital required to build a spectrum-based service.<sup>104</sup> In addition, Merlin states that eliminating the installment payment plan would raise the cost of capital for small businesses which would be forced to borrow additional funds from commercial lenders at higher interest rates.<sup>105</sup> Merlin also argues that because many small businesses have relied on the current installment plan terms in formulating business plans necessary to bid in upcoming auctions, any decision to eliminate the installment payment program could effectively preclude small business participation in future auctions altogether.<sup>106</sup> We disagree with Merlin's assertions. As we have discussed, we believe that the increased bidding credits we adopt below will help fulfill the mandate of Section 309(j)(4)(D) of the Communications Act to provide small businesses with the opportunity to participate in spectrum-based services.<sup>107</sup> As noted above, this approach was

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<sup>102</sup> *See* Section 3001 of the Omnibus Consolidated Appropriations Act for 1997, P.L. 104-208, 110 Stat. 3009 (1996) ("Omnibus Consolidated Appropriations Act"). *See also* the Balanced Budget Act of 1997. The Conference Report on the Balanced Budget Act of 1997 indicates that the deadline set forth in Section 3007 "applies to all competitive bidding provisions in this title of the conference agreement and any amendments to other law made in this title." Conference Report on H.R. 2015, Balanced Budget Act of 1997, Congressional Record -- House, Vol. 143, No. 109 -- Part II, at H6176.

<sup>103</sup> *CIRI Petition for Rule Making.*

<sup>104</sup> Merlin Comments at 5.

<sup>105</sup> Merlin Comments at 7.

<sup>106</sup> Merlin Comments at 5-6.

<sup>107</sup> 47 U.S.C. § 309(j)(4)(D). Additionally, providing a sufficient period of time for potential small business bidders to formulate their business plans is important. Congress acknowledged this in the Balanced Budget Act, and this is an issue to which we are sensitive. *See* "LMDS Auction Postponed Until February 18, 1998," *Public Notice*, DA 97-

successful in enabling small businesses to participate in the WCS auction, in which we were unable to employ installment payments because of the statutory deadline for depositing auction revenues in the U.S. Treasury.<sup>108</sup> We also recently used this approach in establishing rules for the auction of licenses for 800 MHz SMR and LMDS.<sup>109</sup>

43. We recognize that the Commission previously adopted rules for both the 220 MHz and paging services that permit eligible small businesses to pay for their licenses in installments.<sup>110</sup> Several petitions for reconsideration have been filed in these proceedings that remain pending before the Commission.<sup>111</sup> The Commission will resolve these petitions separately in a manner consistent with our decision herein to suspend the use of installment payment plans at least until our rights to recover and reacquire licenses in a timely fashion are established.

## 6. Bidding Credits

44. Background. The current general competitive bidding rules provide for bidding credits (*i.e.*, payment discounts) for eligible designated entities and state that service-specific rules 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.<sup>112</sup> Thus, the Commission has adopted separate rules governing bidding credits for various auctionable services.<sup>113</sup> We proposed in the *Notice* that our general competitive bidding rules be amended so that the levels of available bidding credits are defined and uniform for all auctionable services. We proposed a schedule of bidding credits that we believed would provide adequate opportunities for small businesses of

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2352 (rel. November 10, 1997).

<sup>108</sup> See Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, *Notice of Proposed Rulemaking*, FCC 96-441, 61 Fed. Reg. 59048 (rel. November 12, 1996), at ¶ 63; and *WCS Report and Order* at ¶ 182. See also Section 3001 of the Omnibus Consolidated Appropriations Act.

<sup>109</sup> See *800 MHz MO&O*. In the 800 MHz auction, 10 of the 14 bidders winning licenses qualified as either small or very small businesses. These bidders won 38 of 525 licenses offered.

<sup>110</sup> See *220 MHz Third Report and Order*, 12 FCC Rcd at 10943, ¶ 301; *Paging Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd at 2813-14, ¶ 184.

<sup>111</sup> See, e.g., Arch Communications, Inc., Petition for Partial Reconsideration and Request for Clarification (filed April 11, 1997); Paging Network, Inc., Petition for Reconsideration and Clarification (filed April 11, 1997); Personal Communications Industry Association, Petition for Reconsideration (filed April 11, 1997).

<sup>112</sup> 47 C.F.R. § 1.2110(f).

<sup>113</sup> See, e.g. 47 C.F.R § 24.712.

varying sizes to participate in spectrum auctions. We also asked how limiting the use of installment payments should affect the levels of bidding credits that are offered.

45. Discussion. Although all commenters addressing the issue are largely supportive of the use of bidding credits as a means of ensuring the widest possible participation in future auctions,<sup>114</sup> there is disagreement among commenters as to whether a standard schedule of bidding credits for small businesses is desirable. For example, CII supports our proposal to standardize the sliding scale of bidding credits that is available to an applicant. Specifically, CII believes that granting businesses of different sizes different levels of bidding credits in different services threatens to result in inconsistent participation by small businesses in spectrum auctions.<sup>115</sup> In contrast, some commenters oppose any set schedule of bidding credits, and believe that the Commission should specify appropriate bidding credits for each auctionable service.<sup>116</sup> Among these, PCIA and AMTA believe that the Commission should continue to examine what constitutes an effective bidding credit on a service-by-service basis because the financing requirements of different spectrum-based services may necessitate use of different size bidding credits to provide the proper assurances that small businesses will be able to effectively compete.<sup>117</sup> As we stated in the *Notice*, we believe that an approach in which we provide certainty for future auctions about the size of available bidding credits will benefit small businesses because potential bidders will have more information well in advance of the auction than previously about how such levels will be set.<sup>118</sup> Once a small business definition is adopted for a particular service, eligible businesses will benefit they are able to refer to a schedule in our Part 1 rules to determine the level of bidding credit available to them. We therefore adopt our proposal to create a standard schedule of bidding credits.

46. In light of our decision (*see* Section III.B.5, *supra*) to suspend installment payment financing for the near future, we have determined that higher bidding credits than those proposed in the *Notice* would better effectuate our statutory mandate. Airadigm supports larger bidding credits than those proposed by the Commission.<sup>119</sup> Similarly, CIRI contends that unless the

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<sup>114</sup> See Airadigm Comments at 6; CIRI Comments at 11-12; CII Comments at 13; PCIA Comments at 3; AMTA Comments at 10-11; Merlin Comments at 15-16 and Reply Comments at 3; Compu-DAWN Comments at 9; NTCA Comments at 2-3; RTG Reply Comments at 1, 6; NPCS Reply Comments at 5.

<sup>115</sup> CII Comments at 13.

<sup>116</sup> See PCIA Comments at 3; AMTA Comments at 10-11; Compu-DAWN Comments at 9.

<sup>117</sup> PCIA Comments at 3; AMTA Comments at 10-11.

<sup>118</sup> See *supra* at ¶¶ 36-38.

<sup>119</sup> Airadigm Comments at 6, Reply Comments at 9.

Commission is prepared to establish the creditworthiness of installment payment applicants, the Commission should offer substantial bidding credits to small businesses in lieu of government financing.<sup>120</sup> We note that some commenters argue that, in relation to installment payment provisions, bidding credits are less effective in allowing designated entities to participate in the Commission's auction program.<sup>121</sup> For example, Pocket states that bidders often "bid through" bidding credits and that bidding credits tend to result in higher bids and, in general, higher auction prices.<sup>122</sup> We believe that without installment payments, bidding credits, coupled with providing bidders sufficient time to raise financing, will enable small businesses to successfully compete in future auctions. Also, tiered bidding credits have proven to work well and provide for more competition between small business participants of different sizes. The use of tiered bidding credits was successful in enabling small businesses to participate in the WCS auction, in which we were unable to employ installment payments because of the statutory deadline for depositing auction revenues in the U.S. Treasury.<sup>123</sup> Finally, while we recognize Pocket's concerns about the possibility that bidders "bid through" bidding credits, we do not believe that this problem is significant where not all bidders are eligible for bidding credits, and the size of the bidding credit varies among those who are eligible.

47. Consistent with this reasoning, we adopt the following schedule of bidding credits for use in future auctions in which provisions for designated entities are offered:

Average Annual Gross Revenues	Bidding Credits
Not to exceed \$3 million	35%
Not to exceed \$15 million	25%
Not to exceed \$40 million	15%

We recognize that these credits are higher than some previously adopted for specific services.<sup>124</sup>

<sup>120</sup> CIRI Comments at 11 and Reply Comments at 2-3.

<sup>121</sup> See, e.g., Merlin Reply Comments at 3.

<sup>122</sup> Pocket Comments at 4-5.

<sup>123</sup> See *WCS Report and Order*, 12 FCC Rcd at 10785, ¶ 182.

<sup>124</sup> For instance, a business with average gross revenues of not more than \$3 million in the 900 MHz SMR auction received a 15% bidding credit rather than the 35% bidding credit we adopt. See 47 C.F.R. § 90.814(b)(2). In contrast, our decision is consistent with our rules for the broadband PCS F block, in which a business with average gross revenues of not more than \$15 million received a 25% bidding credit. See 47 C.F.R. § 24.717(b).

Based on our past auction experience and the suspension of installment payments, however, we believe that the approach taken here will provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions.

48. We recognize that Merlin recommends providing higher bidding credits than those which we adopt.<sup>125</sup> Specifically, Merlin suggests that (1) businesses with average gross revenues for the preceding three years not exceeding \$3 million be eligible for bidding credits of 40 percent; (2) businesses with average gross revenues for the preceding three years not exceeding \$15 million be eligible for bidding credits of 35 percent; and (3) businesses with average gross revenues for the preceding three years not exceeding \$40 million be eligible for bidding credits of 25 percent.<sup>126</sup> As discussed above, we believe that higher bidding credits than those proposed in the *Notice* are necessary now that our installment payment program is suspended. We believe that the schedule of bidding credits we adopt is reasonable in light of our decision to suspend installment payments for services auctioned in the immediate future, and expect that it will prove sufficient to enable small businesses to obtain spectrum licenses through our auction program. Thus, we decline to adopt Merlin's proposal. We also note that we seek comment in this *Second Further Notice of Proposed Rule Making* on means other than bidding credits and installment payments by which the Commission might facilitate the participation of small businesses in our spectrum auction program.

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<sup>125</sup> Merlin Comments at 15-16.

<sup>126</sup> Merlin Comments at 17-18.

## 7. Unjust Enrichment

49. Background. In the *Notice*, we observed that unjust enrichment provisions in our general competitive bidding rules and service-specific rules vary. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing installment payments is required to pay the remaining principal balance as a condition of the transfer. No payment is required, however, when the proposed transferee or assignee is qualified to obtain the same installment financing and assumes the applicant's installment payment obligations.<sup>127</sup> In the broadband PCS unjust enrichment rule, however, we specify that applicants seeking to assign or transfer control of a license to an entity not meeting the eligibility standards for installment payments must pay not only unpaid principal as a condition of Commission approval but also any unpaid interest accrued through the date of assignment or transfer.<sup>128</sup> This rule also provides that if a licensee utilizing installment financing seeks to make any change in its ownership structure that would result in the loss of eligibility for installment payments, it must pay the unpaid principal and accrued interest as a condition of Commission approval of the change.<sup>129</sup> Finally, in recognition of the tiered installment payment plans offered to broadband PCS licensees, the rule provides that if a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan, it must seek Commission approval and adjust its payment plan to reflect its new eligibility status.<sup>130</sup> A licensee, under this rule, may not switch its payment plan to a more favorable plan.

50. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing bidding credits, or proposing to take any other action relating to ownership or control that will result in loss of eligibility for such bidding credits, is required to pay the sum of the amount of the bidding credit plus interest as a condition of FCC approval.<sup>131</sup> Under our broadband PCS rules, if, within the original term, a licensee applies to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would

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<sup>127</sup> 47 C.F.R. § 1.2111(c).

<sup>128</sup> 47 C.F.R. § 24.716(d)(1).

<sup>129</sup> 47 C.F.R. § 24.716(d)(2).

<sup>130</sup> 47 C.F.R. § 24.716(d)(3).

<sup>131</sup> 47 C.F.R. § 1.2111(d).



qualify must be paid as a condition of approval of the assignment or transfer.<sup>132</sup> We proposed to amend our general unjust enrichment rules to conform them to our broadband PCS rules.

51. We also requested comment in the *Notice* on whether we should adopt a uniform unjust enrichment provision, and if so, whether it should be modeled on those we have recently adopted for some other services that provides a scale of decreasing payment liability for licensees that received a bidding credit based on the number of years a license is held.<sup>133</sup> We also requested comment on unjust enrichment rules as they apply to partitioning and disaggregation.<sup>134</sup> We asked whether, assuming we decide to adopt partitioning and disaggregation for various services, how the unjust enrichment rules should apply when the partitioner or disaggregator is the recipient of a bidding credit or is paying on an installment payment plan. We also asked whether we should adopt for all auctionable services the same provisions that we adopted for broadband PCS.<sup>135</sup>

52. Discussion. We adopt our proposal to conform our Part 1 unjust enrichment rules to the broadband PCS rules. We believe that effective unjust enrichment rules are necessary to ensure that meaningful small business participation in spectrum-based services is not thwarted by transfers of licenses to non-designated entities. As we stated in the *Notice*, the broadband PCS unjust enrichment rules are preferable to our current general unjust enrichment rules because they provide greater specificity about funds due at the time of transfer or assignment and specifically address changes in ownership that would result in loss of eligibility for installment payments, which the current general rules do not address. The broadband PCS rules also address assignments and transfers between entities qualifying for different tiers of installment payments or bidding credits, thus supplying clearer guidance for auctions in which tiered installment payment plans or bidding credits are provided. Commenters addressing this issue largely support this decision. For example, Pocket and Ericsson both argue that modified unjust enrichment rules would still deter transfers designed to subvert the Commission's rules, but would provide businesses with more flexibility in situations of financial distress and permit the transfer of individual licenses that no longer comport with their business plans.<sup>136</sup>

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<sup>132</sup> 47 C.F.R. §§ 24.712(b)(2), 24.717(c)(2).

<sup>133</sup> See, e.g., 47 C.F.R. § 90.810(b)(1) (SMR).

<sup>134</sup> See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, *Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 21831 at 21851, ¶¶ 31-36, 55 (1996) ("*Partitioning and Disaggregation Report and Order*").

<sup>135</sup> *Id.*

<sup>136</sup> Pocket Comments at 6; Ericsson Reply Comments at 4.

53. Current as well as future licensees will be governed by the rules we adopt providing for unjust enrichment payments upon assignment, transfer, partitioning and disaggregation. While we did not receive significant comment on this issue, we note that in awarding licenses in the past, the Commission has emphasized that the terms associated with the continued grant of a license will be governed by current Commission rules and regulations. For example, in awarding licenses to C block licensees paying for their licenses in installments, the Commission indicated in the associated "Note" and "Security Agreement" that the terms of the installment plan would be governed by and construed in accordance with then-applicable Commission orders and regulations, as amended. Therefore, we conclude that the unjust enrichment rules we adopt apply to existing licensees, and supersede service-specific rules where applicable. Specifically, these rules will supersede existing unjust enrichment provisions in the narrowband and broadband PCS, WCS, 900 MHz, and IVDS services.<sup>137</sup> As discussed above (*see* Section III.B.5, *supra*), we suspend the use of installment payments for the immediate future as a means of financing small business participation in our auction program. As a result, our decision with regard to unjust enrichment payments as they relate to licensees paying for their licenses in installment payments will apply only to existing licensees, their transferees and assignees (until we reinstate installment payments).

#### **a. Installment Payments**

54. For existing licensees who make use of Commission installment payment financing, we amend Section 1.2111(c) to conform to our broadband PCS rules. Specifically, if a licensee seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of the assignment or transfer as a condition of Commission approval. Similarly, if the licensee seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee must first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval.<sup>138</sup> If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan, the licensee

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<sup>137</sup> See 47 C.F.R. §§ 24.309(f) (narrowband PCS), 24.711 (C block), 24.716(d) (F block), 27.209(d)(1), (2) (WCS), 90.812(b) (900 MHz), 95.816(e) (IVDS).

<sup>138</sup> We note that, consistent with our broadband PCS rules, a licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments (*i.e.*, from sources whose gross revenues and total assets are not considered under § 24.709(b)), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

must seek Commission approval and must adjust its payment plan to reflect its new eligibility status.<sup>139</sup>

### **b. Bidding Credits**

55. For existing and future licensees who qualified or qualify in the future for a bidding credit in paying for their winning bid, we also amend Section 1.2111(c) to provide for unjust enrichment payments similar to those contained in our broadband PCS rules. Specifically, during the term of the initial license grant, if a licensee seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits, or seeks to make any other change in ownership that would result in the licensee no longer qualifying for a bidding credit, the licensee must seek Commission approval and must reimburse the government for the amount of the bidding credit, plus interest based on the rate for U.S. Treasury obligations applicable on the date the license is granted, as a condition of the approval of such assignment, transfer or other ownership change.<sup>140</sup> Similarly, if the licensee seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits, or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and must pay to the United States Treasury the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible as a condition of the approval of such assignment, transfer or other ownership change. These provisions also will apply to licensees who partition or disaggregate their licenses.

56. We also adopt our proposal in the *Notice* to provide for decreasing unjust enrichment payments for licensees that utilized a bidding credit when paying for their licenses and that make transfers and assignments occurring later in the license term. This decision also is supported by the commenters.<sup>141</sup> In amending the rule in this manner, we ensure that our general rule resembles those rules the Commission has adopted in specific services (*e.g.*, MDS, narrowband PCS, and 900 MHz SMR ) that reduce the amount of unjust enrichment payments due on transfer based upon the amount of time the initial license has been held.<sup>142</sup> Consistent with the rules that exist in these services,<sup>143</sup> the amount of this payment will be reduced over time as follows: A transfer in

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<sup>139</sup> A licensee may not switch its payment plan to a more favorable plan.

<sup>140</sup> *But see Second Report and Order and Further Notice of Proposed Rule Making.*

<sup>141</sup> *See* ISTA Comments at 2; CII Comments at 13-14.

<sup>142</sup> Ericsson Reply Comments at 4-5.

<sup>143</sup> *See, e.g.*, 47 C.F.R. § 90.810(b)(1) (SMR).

the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible); in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent; and in year five the payment will be 25 percent, after which there will be no payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment, transfer, or ownership change. All current and future licensees, with the exception of entrepreneur block licensees subject to restrictions on assignments and transfers of licenses,<sup>144</sup> will be governed by this modification to our general rules. We believe that our decision to maintain the original transfer restrictions for such licensees is proper in light of the special provisions which were made available for licensees in our entrepreneur blocks.<sup>145</sup>

### c. Unjust Enrichment and Partitioning and Disaggregation

57. Also as proposed in the *Notice*, we will adopt a general rule modeled on our broadband PCS rules to determine the amount of unjust enrichment payments assessed for all current and future licensees.<sup>146</sup> Thus, we adopt a general unjust enrichment rule that treats partitioning and disaggregation by licensees in the same manner as the broadband PCS rule. Specifically, if the licensee seeks to partition any portion of its geographic service area, the amount of the unjust enrichment payment discussed above will be calculated based upon the ratio of population in the partitioned area to the overall population of the licensed area.<sup>147</sup> Similarly, if a licensee seeks to disaggregate spectrum, the amount of the unjust enrichment payment will be determined based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the disaggregating licensee.<sup>148</sup>

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<sup>144</sup> See 47 C.F.R. § 24.839(d).

<sup>145</sup> See, e.g., 47 C.F.R. § 90.810(b)(1) (SMR). *But see Broadcast NPRM* at ¶ 95 (seeking comment on somewhat different unjust enrichment provisions).

<sup>146</sup> *Notice* at ¶ 43; *Partitioning and Disaggregation Report and Order*.

<sup>147</sup> *Partitioning and Disaggregation Report and Order*, 11 FCC Rcd at 21851, ¶¶ 31-36.

<sup>148</sup> *Partitioning and Disaggregation Report and Order*, 11 FCC Rcd at 21862, ¶ 55.

## C. Application Issues

### 1. Electronic Filing

58. Background. Sections 1.2105(a) and 1.2107(c) of our rules govern the filing of short-form and long-form applications.<sup>149</sup> In recent auctions, we have allowed applicants to file their applications either manually or electronically and required applicants to submit exhibits to short-form and long-form applications that were filed manually on a 3.5 inch diskette in ASCII text (.txt) format. Only applicants that have filed their short-form applications electronically have been allowed to bid electronically from remote locations; applicants filing manually have been required to bid telephonically. In the *Notice*, we tentatively concluded that Sections 1.2105(a) and 1.2107(c) of our rules should be amended to require electronic filing of all short-form and long-form applications, beginning January 1, 1998.<sup>150</sup>

59. Discussion. We believe that electronic filing of all short-form and long-form applications for auctionable services is in the best interest of auction participants, as well as members of the public monitoring Commission auctions. Therefore, we amend Sections 1.2105(a) and 1.2107(c) of our rules to require electronic filing of all short-form and long-form applications, beginning January 1, 1999, unless it is not operationally feasible.<sup>151</sup> Although in the *Notice* we proposed to require electronic filing commencing January 1, 1998, we believe that this additional phase-in period before the requirement becomes effective will benefit potential bidders. The majority of the comments addressing the issue support the decision to require electronic filing.<sup>152</sup> For example, PageNet contends that electronic filing promotes access to applications by competing bidders, as well as the general public, by making it possible to review and download applications without traveling to FCC headquarters or contracting for photocopying of paper applications.<sup>153</sup> To facilitate public access, the Commission has developed user-friendly electronic filing software and Internet World Wide Web forms to give auction applicants the ability to conveniently file and review applications.<sup>154</sup> This software helps applicants ensure the accuracy of their applications as

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<sup>149</sup> 47 C.F.R. §§ 1.2105(a) and 1.2107(c). *See also* n.7.

<sup>150</sup> *Notice* at ¶ 46.

<sup>151</sup> 47 C.F.R. §§ 1.2105(a) and 1.2107(c).

<sup>152</sup> *See, e.g.*, AT&T Comments at 2; PageNet Comments at 16; AMTA Comments at 11.

<sup>153</sup> PageNet Comments at 16.

<sup>154</sup> We assess no fee for filing applications electronically but currently charge \$2.30 a minute for reviewing or downloading applications of other parties on line. *See* Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, Online Communications Service Charges and Bidder's Information Packages in Connection

they are filling them out, and enables them to correct errors and omissions prior to submitting their applications. To assist the public, we provide technical support personnel to answer questions and work with callers using the electronic auction system. In addition, the Commission has demonstrated its auction software at conferences organized by potential bidders and members of the industry in order to familiarize interested parties with our recent software enhancements.

60. AT&T is generally supportive of electronic filing, but proposes that the Commission create a waiver process whereby an applicant that has missed a filing deadline due to technical problems can obtain a waiver quickly or be permitted to submit a paper original of the application by hand or mail the same day.<sup>155</sup> In addition, AT&T requests that a Commission staff member be provided with the authority to grant such a waiver in the event of electronic filing difficulties.<sup>156</sup> We do not believe that a specific waiver provision is necessary. The Commission's existing waiver provisions, which specify the showing required for the grant of a waiver, provide adequate assurance that requests for waiver relating to the electronic filing of applications will receive proper consideration.<sup>157</sup> In addition, we emphasize that the Commission has typically responded rapidly to time-sensitive waiver requests filed by auction applicants, and we intend to continue to do so in the future.<sup>158</sup>

61. Only one commenter, Airadigm, opposes an electronic filing requirement. Airadigm states that the Commission experienced difficulties in processing electronic filings during the IVDS auction and argues that removing the option of manual filing could result in similar problems in future auctions.<sup>159</sup> We believe that the system enhancements discussed above, most of which were not in place during the IVDS auction, adequately respond to Airadigm's concerns. We also note that our experiences from recent auctions demonstrate that the electronic bidding system is reliable. For example, in the broadband PCS D, E, and F block auction, 94 percent of

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with Auctionable Services, *Report and Order*, No. 95-308, 60 Fed. Reg. 38276 (July 26, 1995). The public can also download other auctions related documents for no charge from the FCC internet site (<http://www.fcc.gov>).

<sup>155</sup> AT&T Comments at 2.

<sup>156</sup> *Id.*

<sup>157</sup> *See, e.g.*, 47 C.F.R. § 24.819.

<sup>158</sup> *See, e.g.*, Letter to James Hillyard, Alaskan Choice Television, L.L.C., from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau (April 23, 1997) (responding to Alaskan Choice Television, L.L.C.'s Petition for Waiver of the Upfront Payment Deadline). *See also* Letter to Mr. John Prawat, DigiVox Telecom, Inc., from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, DA 97-730 (April 11, 1997) (responding to DigiVox Telecom, Inc.'s Request for Rule Waiver of the Upfront Payment Requirement in the WCS Auction).

<sup>159</sup> Airadigm Comments at 9.

the qualified bidders filed their short-form applications electronically. In the recently completed 800 MHz SMR auction, 93 percent of the qualified bidders filed their short-form applications electronically. We did not experience problems with our electronic filing procedures.

62. Finally, as we stated in the *Notice*, we recognize that there is a need for a period of time before a comprehensive electronic filing requirement becomes effective in order for bidders to prepare and be completely comfortable with this process.<sup>160</sup> The effective date of January 1, 1999, will provide potential bidders with adequate time in which to adapt to electronic filing requirements.<sup>161</sup> Finally, although we conclude that electronic filing is the preferred filing method, we nevertheless reserve the right to provide for manual filing in the event of technical failure or other difficulties.

## 2. Short-form Application Amendments

63. Background. Section 1.2105(b) of our rules addresses modifications and amendments to applicants' short-form (FCC Form 175) applications. Specifically, Section 1.2105(b)(2) provides that bidders may make minor changes or correct minor errors in the FCC Form 175 application, but that major amendments may not be submitted after the initial application deadline.<sup>162</sup> This section further provides that the Commission will classify all amendments as major or minor pursuant to service-specific rules.<sup>163</sup> In the *Notice*, we proposed to amend our general auction rules to create a uniform definition for major amendments to FCC Form 175 for all auctionable services.<sup>164</sup> We proposed at a minimum to consider any change in ownership that constitutes a change in control to be a major amendment. We also proposed to consider application amendments that show a change in an applicant's size which would affect its eligibility for small business provisions as a major amendment.<sup>165</sup> Finally, we sought comment on what other kinds of changes should be deemed major or minor.<sup>166</sup>

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<sup>160</sup> *Notice* at ¶ 46.

<sup>161</sup> We note that this phase-in period is similar to the approach taken by the Securities and Exchange Commission when it eliminated paper financial filings. *See* 17 C.F.R. § 232.902(a).

<sup>162</sup> 47 C.F.R. § 1.2105(b).

<sup>163</sup> *Id.*

<sup>164</sup> *Notice* at ¶ 48.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

64. We also indicated in the *Notice* that in previous auctions, applicants have claimed that they made mistakes in their license selection and have requested that the Commission allow them to add or delete license selections during the resubmission period.<sup>167</sup> While the Bureau has generally refused to grant these requests in order to prevent collusive conduct or gaming that would reduce the competitiveness of the auction, we recognized that there may be some circumstances in which the competitiveness of the auction might be enhanced by allowing applicants to add licenses to their FCC Form 175 applications. We sought comment on whether an amendment to add licenses should be permissible as a minor amendment.<sup>168</sup> We also asked whether such an amendment should be permitted only until the deadline for submitting upfront payments, because after that point the risks of gaming in the auction increase due to the availability of information concerning each bidder's eligibility.<sup>169</sup>

65. Discussion. The majority of commenters support our proposal in the *Notice* to create a uniform definition of major and minor amendments to applicants' short-form (FCC Form 175) applications for all future auctions.<sup>170</sup> However, commenters' opinions differ on what types of amendments the Commission should categorize as major or minor. For example, AT&T and ISTA argue that major amendments should include all changes in ownership that constitute a change in control, as well as all changes in size that would affect an applicant's eligibility for designated entity provisions.<sup>171</sup> In contrast, Metrocall contends that all changes in ownership incidental to mergers and acquisitions, non-substantial *pro forma* changes, and involuntary changes in ownership should be categorized as minor.<sup>172</sup> Metrocall also states that an applicant should not be permitted to upgrade its designated entity status after the short form filing deadline (*i.e.*, go from a "small" to "very small" business), but should be permitted to lose its designated entity status as a result of a minor change in control (*i.e.*, exceed the threshold for eligibility as a small business).<sup>173</sup>

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<sup>167</sup> *Id.* The Commission may provide a limited opportunity, after the deadline for filing short-form applications has passed, for applicants to correct minor defects and then resubmit their corrected applications. The decision as to whether to provide such a resubmission period is made on a service-by-service basis.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See Airadigm Comments at 9; AT&T Comments at 2-3.

<sup>171</sup> AT&T Comments at 2-3; ISTA Comments at 2.

<sup>172</sup> Metrocall Comments at 6-7.

<sup>173</sup> *Id.* at 8.



66. After careful consideration of the comments addressing the issue, we believe that a definition of major and minor amendments similar to that provided in our PCS rules,<sup>174</sup> is appropriate. After the short-form filing deadline, applicants will be permitted to make minor amendments to their short-form applications both prior to and during the auction. However, applicants will not be permitted to make major amendments or modifications to their applications after the short-form filing deadline. Major amendments will include, but will not be limited to, changes in license areas designated on the short-form application, changes in ownership of the applicant which would constitute a change in control, and the addition of other applicants to any bidding consortia. Consistent with the weight of the comments addressing the issue,<sup>175</sup> major amendments will also include any change in an applicant's size which would affect an applicant's eligibility for designated entity provisions. For example, if Company A, an applicant that qualified for special provisions as a small business, merges with Company B during the course of an auction, and if, as a result of this merger, the merged company would not qualify as a small business, the amendment reflecting the change in ownership of Company A would be considered a major amendment. Otherwise, the new entity could receive small business bidding credits and installment payments when it does not qualify for them. As is the case in our PCS rules, however, applicants will be permitted to amend their short-form applications to reflect the formation of bidding consortia or changes in ownership that do not result in a change in control of the applicant, provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas.<sup>176</sup> In contrast, minor amendments will include, but will not be limited to, the correction of typographical errors and other minor defects, and any amendment not identified as major.

67. As noted above, the Commission has generally refused to grant requests to add or delete markets on an applicant's short-form application in order to prevent collusive conduct or gaming that would reduce the competitiveness of the auction. While we recognize that there may be some circumstances in which the competitiveness of the auction might be enhanced by allowing applicants to add markets to their short-form applications, we conclude that the risks of encouraging or facilitating conduct that negatively affects the competitiveness of the auction and the post-auction market structure outweigh the benefits of categorizing such amendments as minor. Several commenters support this conclusion that the addition or deletion of markets on the short-form application should always be deemed a "major" amendment.<sup>177</sup> Specifically, PageNet states that because the only new information that an applicant could be deemed to

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<sup>174</sup> 47 C.F.R. § 24.822.

<sup>175</sup> See AT&T Comments at 2-3; ISTA Comments at 2. See also Metrocall Comments at 8.

<sup>176</sup> See 47 C.F.R. § 1.2105(c).

<sup>177</sup> See ISTA Comments at 2; PageNet Comments at 8-9.

possess at this stage would be licenses on which other applicants intend to bid, amendment of the short-form application in this regard could only lead to auction abuses.<sup>178</sup> Those commenters supporting defining the addition or deletion of markets after the short-form filing deadline as a minor amendment argue that such an amendment should only be permitted prior to the upfront payment deadline or the release of the Public Notice announcing qualified bidders.<sup>179</sup> After this point, the overall competitiveness of the auction may be threatened.<sup>180</sup>

68. AT&T proposes that the deletion of markets to avoid specifying markets that overlap with another auction applicant (and thus preventing discussion on potentially non-auction-related matters such as interconnection, resale, and equipment orders that do not affect bids or bidding strategies) be deemed a minor amendment.<sup>181</sup> We note that in previous auctions some applicants have inadvertently placed themselves at risk of violating the Commission's anti-collusion rule by choosing to specify "all markets" on their short-form applications when they intended to bid only on a particular license or group of licenses. As a general matter, the anti-collusion rule does not prohibit non-auction-related business negotiations between auction applicants that have applied for the same geographic service areas.<sup>182</sup> AT&T argues that the aspect of the rule prohibiting the addition or deletion of markets often has had the unfortunate result of discouraging non-auction, business-related discussions between auction applicants who are not actually bidding for licenses in the same geographic license areas.<sup>183</sup> Because of the potential anti-competitive results of allowing bidders to delete markets after the short-form filing deadline, however, we believe that this type of error can be more effectively addressed by other means, including increased awareness on the part of prospective auction applicants of

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<sup>178</sup> PageNet Comments at 8.

<sup>179</sup> See PCIA Comments at 3-4; AirTouch Comments at 5-6; Airadigm Comments at 9-10.

<sup>180</sup> See, e.g., AirTouch Comments at 5-6 and Reply Comments at 6.

<sup>181</sup> AT&T Comments at 2-3.

<sup>182</sup> See Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996, at 1-2.

<sup>183</sup> AT&T Comments at 2-3.

the consequences of choosing "all markets," as well as software enhancements that make specifying particular markets on the FCC Form 175 less burdensome.

69. We also emphasize that, pursuant to Section 1.65 of the Commission's rules, each auction applicant is required to assure the continuing accuracy and completeness of information furnished in a pending application.<sup>184</sup> Each applicant is therefore under a continuing obligation to update its short-form and long-form applications as appropriate to reflect any changes that would make a pending application inaccurate or incomplete, or that are necessary to determine that an applicant is in compliance with our rules.<sup>185</sup> As in all prior auctions, an application that is amended by a major amendment will be considered newly filed, and therefore will not be accepted after the short-form filing deadline.<sup>186</sup> We further note that the Commission has waived its *ex parte* rules as they apply to the submission of amended short-form applications to maximize applicants' opportunities to seek the advice of Commission staff when making amendments at any time after the short-form filing deadline.<sup>187</sup>

70. Finally, we note that in the context of cellular unserved area licensing, WWC contends that the rules adopted in this proceeding addressing major and minor amendments to short-form applications should not apply to cellular unserved area applications filed in 1994 as these applications were to be governed by a "letter-perfect" standard and applicants were given no opportunity to cure minor defects.<sup>188</sup> While we have considered WWC's argument, we believe that it is inapplicable. WWC addresses the initial application procedures for cellular unserved area licenses, while the Part 1 rules, in contrast, address application procedures for participation in an auction once a finding of mutual exclusivity has been made.

### 3. Ownership Disclosure Requirements

71. Background. Currently, our general competitive bidding rules do not set forth any

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<sup>184</sup> 47 C.F.R. § 1.65.

<sup>185</sup> See, e.g., Letter to Linda Feldmann from Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 97-2261 (rel. October 24, 1997).

<sup>186</sup> See 47 C.F.R. § 1.2105(b)(2).

<sup>187</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Order on Reconsideration and Seventh Report and Order*, PP Docket No. 93-253, 11 FCC Rcd 2639, 2679, ¶ 104 (1995), and "Commission Announces that Mutually Exclusive "Short-Form" Applications (Form 175) to Participate in the Competitive Bidding Process ("Auctions") Are Treated as Exempt for *Ex Parte* Purposes," *Public Notice*, 9 FCC Rcd 6760 (1994).

<sup>188</sup> WWC Comments at 2-3.

ownership disclosure requirements for auction applicants on their short-form applications. As we recognized in the *Notice*, however, our service-specific rules require varying degrees of specific ownership information from applicants.<sup>189</sup> For example, in the 900 MHz SMR auction, an applicant claiming small business status was required to disclose on the short-form application the names of each affiliate and a gross revenues calculation. On the long-form application, such an applicant was required to disclose an additional gross revenues calculation, any agreements that support small business status, and any investor protection agreements.<sup>190</sup> At the same time, both our narrowband PCS and broadband PCS rules require detailed ownership disclosure from all auction applicants that differ from each other and from the 900 MHz SMR requirement. Rules for narrowband and broadband PCS also impose additional requirements for applicants claiming small business status. Finally, although the broadband PCS disclosure requirements are very similar to those for narrowband PCS, we have recently amended the broadband PCS application requirements to make them less burdensome on applicants.<sup>191</sup>

72. In the *Notice*, we sought comment on whether to adopt standard ownership disclosure requirements for all auctionable services in order to eliminate these inconsistencies from service to service.<sup>192</sup> Specifically, we proposed to adopt standard disclosure requirements that are similar to our current rules for broadband PCS. We sought comment on what ownership information should be required.<sup>193</sup> We also proposed to adopt a uniform reporting requirement for all applicants claiming small business status, and proposed to model this requirement on the 900 MHz SMR rules.<sup>194</sup>

73. Discussion. As we indicated in the *Notice*, we continue to believe that detailed ownership information is necessary to ensure that applicants claiming small business status qualify for such status, and to ensure compliance by all applicants with spectrum caps and other ownership limits.<sup>195</sup> Disclosure of ownership information also aids bidders by providing them with information about their auction competitors and alerting them to entities subject to our anti-collusion rules. Therefore, we adopt standard ownership disclosure requirements for all

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<sup>189</sup> *Notice* at ¶¶ 49-50.

<sup>190</sup> 47 C.F.R. § 90.815(b).

<sup>191</sup> 47 C.F.R. § 24.813.

<sup>192</sup> *Notice* at ¶ 51.

<sup>193</sup> *Id.*

<sup>194</sup> *900 MHz SMR Report and Order*; Bidder Information Package for 900 MHz SMR (November 28, 1995).

<sup>195</sup> *Notice* at ¶ 51.

auctionable services that will avoid the variations found in our current service-specific ownership disclosure requirements.

74. This decision is widely supported by the majority of comments in this proceeding. Most commenters addressing the issue of ownership disclosure support requiring some level of ownership information at the short-form application stage.<sup>196</sup> For example, PCIA believes that full disclosure of bidder ownership information is necessary if competing bidders are to accurately assess the legitimacy of their auction opponents and their respective bids.<sup>197</sup> PCIA contends that there can be no valid reason for legitimate bidders to hide their ownership. Such information, according to PCIA, is crucial for purposes of the Commission's anti-collusion rules, spectrum caps, and other ownership limits.<sup>198</sup> Similarly, PageNet contends that full ownership disclosure is important to aid bidders in compiling information about their auction competitors and, most importantly, to alert them to any conduct that might be a violation of the Commission's anti-collusion rules.<sup>199</sup> In the satellite context, Hughes argues that the submission of detailed ownership information is essential because of the extreme costs associated with the build-out of a satellite system.<sup>200</sup> In contrast, only CII argues that the Commission's objectives with regard to the rules governing designated entity status, spectrum caps, and other ownership limitations would be fully satisfied by deferring the filing of comprehensive ownership information until the long-form application stage.<sup>201</sup>

75. For all future auctions, therefore, we will model our reporting requirements on the general application requirements contained in our broadband PCS rules.<sup>202</sup> Under this standard, all auction applicants will be required to disclose the real party or parties in interest by including as an exhibit to their short-form applications detailed ownership information. Although our current Part 1 rules require auction applicants to list all owners of a five percent or greater interest in the applicant, we agree with commenters such as CII that argue that applicants should not be required to list all holders of this small an interest in the applicant, unless they are in a position of control by virtue of other factors (*i.e.*, voting agreements, management structure), or hold a

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<sup>196</sup> See PCIA Comments at 4, ISTA Comments at 2; PageNet Comments at 2-3; Hughes Comments at 6-7.

<sup>197</sup> PCIA Comments at 4.

<sup>198</sup> *Id.* at 4. See also ISTA Comments at 2.

<sup>199</sup> PageNet Comments at 2-3.

<sup>200</sup> Hughes Comments at 6-7.

<sup>201</sup> CII Comments at 13-14.

<sup>202</sup> See 47 C.F.R. § 24.813.

significant passive ownership interest (*i.e.*, 20 percent).<sup>203</sup> Thus, we amend our rules to require that applicants list controlling interests as well as all parties holding a 10 percent or greater interest in the applicant and any affiliates of these interest holders.<sup>204</sup> A 10 percent or greater interest reporting requirement is consistent with the revised definition of the term "applicant" we adopt for purposes of the anti-collusion rule (*See* Section III.F, *infra*). We note that PageNet contends that the Commission should require disclosure of entities and individuals that own more than five percent of the applicant or who have provided more than five percent of the applicant's equity.<sup>205</sup> However, as suggested above, we believe that the detailed reporting requirement we create today, in combination with our comprehensive affiliation rules (*see* Section III.B.3, *supra*), permits us to determine the "real party or parties in interest"<sup>206</sup> when parties apply to participate in an auction.

76. Specifically, all auction applicants will be required to disclose: (1) a list of any FCC-regulated business, 10 percent or more of whose stock, warrants, options or debt securities are owned by the applicant; (2) a list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest; (3) a list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC-regulated business in which a 10 percent or greater interest is held by another party which holds a 10 percent or greater interest in the applicant (*e.g.*, if company A owns 10% of company B (the applicant) and 10% of company C, a company holding or applying for an FCC-regulated business, the companies A and C must be listed in company B's application); (4) the name, address and citizenship of any party holding 10 percent or more of each class of stock, warrants, options or debt securities, together with the amount and percentage held;<sup>207</sup> (5) the name, address and citizenship of all controlling interests of the applicants, as this term is defined in Section 1.2110 of our rules; (6) if the applicant is a general partnership, the name, address and citizenship of each partner, and the share or interest

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<sup>203</sup> CII Comments at 14-15.

<sup>204</sup> *See* 47 C.F.R. § 1.2110(b)(4).

<sup>205</sup> *Id.* at 6.

<sup>206</sup> *See* 47 C.F.R. § 24.813(a).

<sup>207</sup> For purposes of determining ownership interests, stock interests held in trust shall be attributed to (1) any person who holds or shares the power to vote such stock; (2) any person who has the sole power to sell such stock; and (3) in the case of stock held in trust, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust (*See* 47 C.F.R. § 20.6(d)(3)). Non-voting stock shall be attributed as an interest in the issuing entity if equal to or greater than 20 percent of the value of the entity (*See* 47 C.F.R. § 20.6(d)(4)). Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests must be treated as if fully exercised.

participation in the partnership; (7) if the applicant is a limited partnership, the name, address and citizenship of each general partner and each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses); (8) if the applicant is a limited liability corporation, the name, address and citizenship of each of its members; and (9) a list of all parties holding indirect ownership interests in the applicant, as determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, that equal 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated and reported as if it were a 100 percent interest.<sup>208</sup>

77. In addition, consistent with the reporting requirements set forth in the 900 MHz SMR rules,<sup>209</sup> we will require that applicants claiming small business status disclose on their short-form applications the names of each controlling interest and affiliate, as these terms are defined in this proceeding, and to provide gross revenues calculations for each. On their long-form applications, such applicants will be required to disclose any additional gross revenues calculations, any agreements that support small business status, and any investor protection agreements. We believe that these reporting requirements will help to assure that only qualifying applicants obtain the benefits of our small business provisions, without being unduly burdensome.

78. Finally, in a related proposal, PageNet states that Commission should expressly prohibit "blind bidding" (*i.e.*, bidding in which auction participants do not know the identities or ownership information of the other bidders in the auction) in any pending and future auction because it (1) is unfair to auction participants; (2) encourages auction abuses; and (3) encourages speculation.<sup>210</sup> PageNet contends that these factors can have a significant impact upon the competitiveness of the auction and the post-auction marketplace.<sup>211</sup> In situations in which an incumbent has already met the Commission's build-out requirements and must still bid in an auction in which blind bidding is used, PageNet contends that a competitor is often able to bid up the price of a license that it never intends to win in order to force the incumbent to buy the license at a higher price. PageNet further contends that this higher price is then reflected in higher rates for services, which in turn affect the incumbent's ability to compete.<sup>212</sup> As discussed above, we agree that it is important that

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<sup>208</sup> See, e.g., 47 C.F.R. § 20.6(d)(8).

<sup>209</sup> 900 MHz SMR Report and Order; Bidder Information Package for 900 MHz SMR (November 28, 1995).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 4.

<sup>212</sup> *Id.*

auction applicants disclose certain ownership information prior to the start of an auction. At the same time, however, we believe that in certain circumstances, the competitiveness of an auction may be increased if less bidder information is made available. In the *Competitive Bidding Second Memorandum Opinion and Order*, we retained the flexibility to conceal bidder identities if further experience showed that it would be desirable to do so.<sup>213</sup> More recently, in the auction rules for geographic area paging licenses, the Commission concluded that the advantages of limiting information disclosed to bidders outweigh the disadvantages of this approach, and reserved the discretion to announce by Public Notice prior to the auction the precise information to be revealed to bidders during that auction.<sup>214</sup> We believe that the uniform rules we adopt today provide us with the necessary flexibility to tailor the amount of bidder information made available to applicants to ensure the competitiveness of each auction. We therefore decline to adopt a provision prohibiting non-disclosure of bidder identities in all future auctions.

#### 4. Ownership Disclosure Filings

79. Background. Currently, the Commission's ownership disclosure rules require applicants to file specific ownership information in conjunction with their FCC Form 175 applications prior to each auction.<sup>215</sup> Similarly, at the close of each auction, winning bidders are required to file ownership information on each long-form application.<sup>216</sup> In the *Notice*, we tentatively concluded that we should permit applicants to file ownership information to apply for the first auction in which they participate, and we would store this information in a central database which would be updated each time applicants participate in another auction.<sup>217</sup> We proposed that an applicant filing for a subsequent auction would either update the ownership information in the database, or certify that there have been no changes in ownership status.<sup>218</sup>

80. Discussion. We believe that permitting applicants to file ownership information when they apply for their first auction, which would then be stored in a central database and updated each time the information changes during or after the first auction and when applicants participate

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<sup>213</sup> See *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7252, ¶ 42.

<sup>214</sup> See *Paging Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd at 2803, ¶ 160.

<sup>215</sup> See 47 C.F.R. § 1.2105(a)(2). See also FCC Form 175 ¶¶ 1-5, 8-10, certification and exhibit requirements (October 1995).

<sup>216</sup> See 47 C.F.R. §§ 1.2107(c) - (d). See also, FCC Form 601 ¶¶ 1-16, 29-33, and 39 (January 1995).

<sup>217</sup> *Notice* at ¶ 54.

<sup>218</sup> *Id.*



in a subsequent auction, will streamline our application processes and minimize the burden on auction applicants. This concept is supported by the record.<sup>219</sup> For example, CII and Airadigm argue that this approach will benefit auction applicants by reducing the time spent preparing auction applications, and will benefit the Commission by eliminating the need to review and analyze duplicative filings.<sup>220</sup> We believe that by requiring ownership disclosure filings, we ensure that we receive all the information necessary to evaluate an applicant's qualifications. As we indicated in the *Notice*, however, these requirements could result in duplicative filings.<sup>221</sup> For example, where licenses for a service are offered in a series of blocks, as in the case of broadband PCS, an entity may wish to participate in several auctions, and would be required to disclose the same information a number of times.<sup>222</sup> Under the system we envision, when applying to participate in subsequent auctions, applicants will be permitted to update the database or certify that there have been no changes in ownership and that the information contained in the database remains correct. We will look to implement this process in the near future as part of our Universal Licensing System.<sup>223</sup>

## 5. Audits

81. Background. Under our broadband PCS auction rules, we have reserved the right to conduct random audits of auction applicants and licensees in order to verify information provided regarding their eligibility for certain special provisions.<sup>224</sup> These rules require that entities certify their consent to such audits on their short-form applications.<sup>225</sup> In the *Notice*, we proposed to explicitly reserve this right for all auctionable services.

82. Discussion. The only commenters to address this proposal, PageNet and Airadigm,

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<sup>219</sup> See AMTA Comments at 11-12; Airadigm Comments at 10; Hughes Comments at 7; ISTA Comments at 2; CII Comments at 15.

<sup>220</sup> See CII Comments at 15; Airadigm Comments at 11.

<sup>221</sup> *Notice* at ¶ 54.

<sup>222</sup> 47 C.F.R. §§ 24.413, 24.709(c) and 24.813.

<sup>223</sup> See generally "Wireless Telecommunications Bureau Universal Licensing System Registration Now Available," *Public Notice* (rel. November 4, 1997).

<sup>224</sup> 47 C.F.R. § 24.709(d).

<sup>225</sup> *Id.*

support this proposal.<sup>226</sup> Airadigm requests that applicants and licensees subject to audit be afforded sufficient time to provide information to the Commission and that the Commission issue written findings following its examination.<sup>227</sup> We therefore adopt our proposal, and will modify our rules governing status as a designated entity to expressly provide that applicants and licensees claiming eligibility for special provisions shall be subject to audits by the Commission. Such audits will be governed by the standards set forth in Sections 403 and 308(b) of the Communications Act.<sup>228</sup> We believe that these provisions, as well as the general provisions of the Administrative Procedure Act,<sup>229</sup> will adequately address Airadigm's concerns, and we therefore decline at this time to adopt specific rules to govern audits of applicants and licensees conducted in the future.

## D. Payment Issues

### 1. Determination of Upfront Payment Amount

83. Background. Section 1.2106 of our rules provides that the Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment in order to be eligible to bid in an auction.<sup>230</sup> Although not specifically addressed in the *Notice*, we received significant comment on the proper upfront payment to be required for participation in future auctions.

84. Discussion. In the *Competitive Bidding Second Report and Order*, we indicated that the upfront payment should be set using a formula based upon the amount of spectrum and population (or "pops") covered by the license or licenses for which parties intend to bid.<sup>231</sup> We reasoned that this method of determining the required upfront payment would enable prospective bidders to tailor their upfront payment to their bidding strategies.<sup>232</sup> At the same time, however, we noted that determining an appropriate upfront payment involved balancing the goal of

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<sup>226</sup> PageNet Comments at 9.

<sup>227</sup> Airadigm Comments at 11-12.

<sup>228</sup> 47 U.S.C. §§ 403, 308(b).

<sup>229</sup> See 5 U.S.C. § 551 *et seq.*

<sup>230</sup> 47 C.F.R. § 1.2106(a). See also 47 C.F.R. § 1.2110(g).

<sup>231</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377, ¶ 169.

<sup>232</sup> *Id.*

encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs imposed on bidders.<sup>233</sup> We concluded that the best approach would be to maintain the flexibility to determine the amount of the upfront payment on an auction-by-auction basis, because this balancing may yield different results depending upon the particular licenses being auctioned.<sup>234</sup>

85. Many commenters make specific proposals regarding the proper size and terms for assessing upfront payments in future auctions. For example, PageNet and CII suggest that the Commission adopt a standard upfront payment rule requiring separate upfront payments for each license identified in an applicant's short-form application.<sup>235</sup> CII contends that this would reduce the number of "phantom" mutual exclusivities (*i.e.*, theoretical frequency conflicts caused by the fact that the current auction rules create no financial disincentive to list licenses in an application on which the applicant has no *bona fide* intention to bid).<sup>236</sup> In contrast, Airadigm and NPCS argue that the Commission should not require a separate upfront payment for each license on which an entity elects to bid, as this would limit bidders' flexibility to change strategy and force them to reveal their bidding strategy prior to the start of the auction.<sup>237</sup> In an alternate proposal, AirTouch and CII suggest that the Commission require applicants to increase their upfront payments as an auction progresses to equal a percentage of their total bids.<sup>238</sup> AirTouch argues that this requirement would reduce the risk of defaults and discourage parties from submitting "jump bids" where they have no intention of actually winning a particular license.<sup>239</sup> Similarly, to reduce the risk of default, CII recommends that when an applicant's upfront payment drops below a specific percentage of its high bid amount, the Commission allow the applicant to increase its deposit to a certain percentage of its high bid total within ten business days.<sup>240</sup> In contrast to these two proposals, Airadigm opposes increasing the upfront payment requirement once a bidder's bid amount exceeds a certain multiple of the original upfront payment amount because

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<sup>233</sup> *Id.* at 2378.

<sup>234</sup> *Id.*

<sup>235</sup> PageNet Comments at 11; CII Comments at 11.

<sup>236</sup> CII Comments at 11-12.

<sup>237</sup> Airadigm Reply Comments at 7; NPCS Reply Comments at 5-6.

<sup>238</sup> AirTouch Comments at 6 and Reply Comments at 2-3; CII Comments at 10-11.

<sup>239</sup> AirTouch Comments at 6 and Reply Comments at 2-3.

<sup>240</sup> CII Comments at 10-11.

this would create a significant barrier to small businesses.<sup>241</sup>

86. We agree with Airadigm and NPCS that it is unnecessary to adopt additional rules governing the amount of the upfront payment and the terms under which it is assessed. We believe that our reasoning in the *Competitive Bidding Second Report and Order* remains valid, and that the required upfront payment should be tailored to the particular auction design and to the characteristics of the licenses being auctioned.<sup>242</sup> This determination can be made in a variety of ways and using a variety of techniques to estimate the value of the spectrum being auctioned; however, as a general rule we have required an upfront payment equal to \$0.02 per pop per megahertz. As discussed *infra*, under the current competitive bidding rules the Commission maintains the discretion to alter the amount of the required upfront payment or to modify the terms under which the upfront payment is assessed.<sup>243</sup> We believe that retaining this discretion provides the Commission with the greatest level of flexibility to determine the appropriate upfront payment amount on an auction-by-auction basis.

## 2. Refund of Upfront Payments

87. Background. Section 309(j)(8)(C) of the Communications Act requires that any deposits the Commission may require for the qualification of any person to bid in an auction shall be deposited into an interest bearing account.<sup>244</sup> The Communications Act further requires that within 45 days of the auction's conclusion, the deposits of successful bidders shall be paid to the United States Department of Treasury ("Treasury"), the deposits of unsuccessful bidders shall be returned, and all accrued interest shall be transferred to the Telecommunications Development Fund ("TDF").<sup>245</sup> Prior to the enactment of this provision, auction proceeds were deposited in a non-interest bearing account with the U.S. Treasury. The Commission has permitted bidders who completely withdraw during the auction to receive a refund of their upfront payments prior to the close of the auction, upon written request. In the *Notice*, we sought comment on whether this practice should be continued.<sup>246</sup>

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<sup>241</sup> Airadigm Reply Comments at 6.

<sup>242</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377, ¶ 170.

<sup>243</sup> See, e.g., *LMDS Second Report and Order*, 12 FCC Rcd at 12545, ¶ 330.

<sup>244</sup> 47 U.S.C. § 309(j)(8)(C). This provision was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 3, 110 Stat. 56 (1996).

<sup>245</sup> *Id.*

<sup>246</sup> *Notice* at ¶ 57.

88. Discussion. After considering the issue in light of Congress's 1996 amendment to Section 309(j)(8)(C) and the comments received in this proceeding, we will continue our current practice of returning the upfront payments of bidders who have completely withdrawn from an auction prior to the conclusion of competitive bidding. As we suggested in the *Notice*, it is unclear whether Congress intended, in amending Section 309(j)(8)(C), to require the Commission to change its practice of refunding upfront payments to bidders who withdraw during the course of an auction.<sup>247</sup> We continue to believe, however, that the prompt return of upfront payments is in the public interest, because it prevents unnecessary encumbrances on the funds of auction bidders, many of whom may be small businesses, after they have withdrawn from the auction. In addition, we believe that this practice minimizes the financial burdens of participating in an auction, because auction participants earn no interest on upfront payment funds on deposit with the Commission. Moreover, all commenters addressing the issue support our proposal to continue this practice.<sup>248</sup> AirTouch proposes that the Commission retain an administrative fee based upon the number of rounds an applicant has remained in the auction when it refunds upfront payments to bidders who have withdrawn.<sup>249</sup> Airadigm and AT&T state that not returning upfront payments in a prompt manner in circumstances where a bidder has withdrawn is akin to a "fee" that Congress did not intend to authorize, and that may work to discourage participation in the Commission's auction program.<sup>250</sup> We agree with Airadigm and AT&T, and conclude that such a fee is inappropriate, and therefore, we reject AirTouch's proposal.

### 3. Down Payment and Full Payment for Licenses

#### a. Level of Down Payments

89. Background. Previously, the Commission required a winning bidder to submit additional funds as necessary to bring its total deposits up to 20 percent of its high bid(s) within five business days after being notified that it is a high bidder on a particular license.<sup>251</sup> In the *Order* accompanying the *Notice*, we modified our rules to establish a due date for down payments of ten business days after the issuance of a Public Notice announcing winning bidders.<sup>252</sup> In the *Notice*,

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<sup>247</sup> *Id.*

<sup>248</sup> See AT&T Comments at 3-4; AirTouch Comments at 7; Airadigm Comments at 12 and Reply Comments at 8; AMTA Comments at 12; CII Comments at 15-16; ISTA Comments at 2 and Reply Comments at 3.

<sup>249</sup> AirTouch Comments at 7.

<sup>250</sup> Airadigm Reply Comments at 8-9; AT&T Comments at 3-4.

<sup>251</sup> 47 C.F.R. § 1.2107(b).

<sup>252</sup> See *Notice* at ¶ 14.

we proposed to retain discretion to determine the down payment amount required for each service and to delegate this authority to the Bureau, which will announce this amount in a Public Notice to be issued prior to the start of each auction.<sup>253</sup> We also noted that in an effort to help to determine the appropriate down payment amount for a particular service, the Bureau will seek input from the public. We also sought comment on whether the level of down payments used in the past should be raised for some services.<sup>254</sup>

90. Discussion. We created the down payment requirement in the *Competitive Bidding Second Report and Order*, in which we concluded that at the conclusion of the auction, a bidder must tender a significant and non-refundable down payment to the Commission over and above its upfront payment in order to provide further assurance that the winning bidder will be able to pay the full amount of its winning bid.<sup>255</sup> We believe that a substantial down payment is required to ensure that licensees have the financial capability to attract the capital necessary to deploy and operate their systems, and to protect against default. Because it is due soon after the close of the auction, the down payment is a valuable indicator of a license applicant's financial viability. In addition, we believe that it is important that we learn early on in the licensing process when an applicant might be unable to finance its winning bid or bids.

91. Several commenters oppose any increase in the down payment beyond 20 percent of the high bid amount.<sup>256</sup> Airadigm opposes granting the Bureau the discretion to establish a down payment amount because it believes that the Bureau could unfairly disadvantage small businesses by requiring disproportionately large down payments for auctions of particularly capital-intensive services.<sup>257</sup> In addition, Airadigm states that granting the Bureau this discretion could complicate applicants' financing arrangements because down payment amounts could vary with each auction. After consideration of these comments, we conclude that a standard down payment amount of 20 percent is appropriate. Finally, if unusual circumstances present themselves in the context of a particular service, the Commission reserves the right to adopt a different amount by rule in that service.

## **b. Untimely Second Down Payments and Full Payments**

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<sup>253</sup> Notice at ¶ 59.

<sup>254</sup> *Id.*

<sup>255</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2381, ¶¶ 189-92.

<sup>256</sup> See CII Comments at 10. Merlin Comments at 12; AMTA Comments at 9; Airadigm Comments at 12; NPCRS Reply Comments at 5.

<sup>257</sup> Airadigm Comments at 12.

92. Background. Section 1.2109(a) of the Commission's rules<sup>258</sup> provides that auction winners not eligible for installment payments are generally required to make final payment on their license(s) within a certain time following award of the license(s). Similarly, Section 1.2110(e) of the Commission's rules<sup>259</sup> provides that all winning bidders eligible for installment payments are required to submit a second down payment within a certain period after conditional license grant. These payment deadlines are announced by public notice when the Commission is prepared to grant the license(s). Where a winning bidder fails to make its final auction payment for the balance of its winning bid in a timely manner, it is considered in default on its license(s) and subject to the applicable default payment.<sup>260</sup> In the *Notice*, we proposed to allow winning bidders to make their final payments or second down payments within a short period after the applicable deadline, provided that they also pay a late fee.<sup>261</sup> We also sought comment on our tentative conclusion that if a winning bidder misses the final payment or second down payment deadline and also fails to remit the required payment and the applicable late fee by the end of the late payment period, it would be declared in default and subject to the applicable default payments.<sup>262</sup> Additionally, we sought comment on whether a late payment of five percent of the amount due is an appropriate late payment fee, and asked that commenters proposing alternative late payment fee(s) provide a rationale for the alternative fee amount(s).<sup>263</sup> Finally, we sought comment on the appropriate time period to allow late second down payments and final payments.<sup>264</sup>

93. Discussion. We will amend Sections 1.2109(a) and 1.2110(e) of our rules to permit auction winners to make their second down payments or final payments within ten business days after the applicable deadline, provided that they also pay an appropriate late fee, without being considered in default. As we recognized in the *Notice*, in past auctions there have been cases where a winning bidder missed the applicable second down payment deadline but subsequently made its down payment and filed a request seeking a waiver of the deadline. In some of these cases, the Bureau granted the waivers, subject to payment of a five percent late fee. In granting the waivers, the Bureau recognized the licensee's good faith and ability to pay as evidenced by its

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<sup>258</sup> 47 C.F.R. § 1.2109(a).

<sup>259</sup> 47 C.F.R. § 1.2110(e).

<sup>260</sup> 47 C.F.R. §§ 1.2104(g), 1.2107(c).

<sup>261</sup> *Notice* at ¶ 61.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at ¶ 62.

<sup>264</sup> *Id.* at ¶ 61.

timely remittance of all earlier payments and prompt action to cure the delinquency.<sup>265</sup>

94. We recognize that applicants may encounter unexpected or unforeseeable difficulties when trying to arrange financing and make substantial payments under strict deadlines. In circumstances that may warrant favorable consideration of a waiver request or an extension of the payment date, we must also evaluate the fairness to other licensees who made their payments in a timely fashion. Two commenters, Mountain Solutions, Ltd. ("Mountain Solutions") and AirTouch, the only commenters to address this issue in detail, support our proposal to permit late payment subject to a standard late fee for any licensee not able to make a timely payment.<sup>266</sup> We agree, and amend Section 1.2109(a) to permit winning bidders who are required to make final payment on their licenses within a certain period of time as announced by public notice, to submit their payment 10 business days after the payment deadline, provided that they also pay a late fee equal to five percent of the amount due. Although we suspend the use of installment payments for the immediate future, in the event the Commission once again offers installment payments, we also amend Section 1.2110(e) to permit auction winners paying for the licenses in installments to submit their second down payment 10 business days after the payment deadline, provided they also pay a late fee equal to five percent of the amount due.

95. As discussed above, our rules provide that winning bidders have ten business days to make timely payment following notification that their licenses are ready to be granted. We believe that in establishing this additional ten business day period, during which winning bidders will not be considered in default, we provide an adequate amount of time to permit winning bidders to adjust for any last-minute problems. We decline to provide for a lengthier late payment period because we believe that extensive relief from initial payment obligations could threaten the integrity, fairness, and efficiency of the auction process. As we observed in the *Notice*, a late fee of five percent is consistent with general commercial practice and provides some recompense to the federal government for the delay and administrative or other costs incurred.<sup>267</sup> In addition, we believe that a five percent fee is large enough to deter winning bidders from making late payments

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<sup>265</sup> See, e.g., Roberts-Roberts & Associates, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets, *Order*, DA 97-252, (rel. February 4, 1997); Longstreet Communications International, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market B012, *Order*, DA 97-251 (rel. February 4, 1997). But see Styles Interactive, Inc. -- Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline, *Memorandum Opinion and Order*, FCC 97-390 (rel. October 28, 1997) and Mountain Solutions LTD, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B053, B168, B172, B187, B188, B224, B247, B275, B366 and B381, *Order*, DA No 97-891 (rel. April 28, 1997) *recon pending* (denying requests for waiver of the second down payment deadline).

<sup>266</sup> See Mountain Solutions Comments at 2 and Reply Comments at 2-3; AirTouch Comments at 7-8.

<sup>267</sup> *Notice* at ¶ 62. See, e.g., Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).



and yet small enough so as not to be punitive.<sup>268</sup> Therefore, applicants who do not submit the required final payment and five percent late fee within the 10-day late payment period will be declared in default, and will be subject to the default payment specified in Section 1.2104(g) of our rules.<sup>269</sup>

96. Finally, we emphasize that our decision to permit late payments is limited to payments owed by winning bidders who have submitted timely initial down payments. We continue to believe that the strict enforcement of payment deadlines enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications. In this connection, we believe that the *bona fide* ability to pay demonstrated by a timely initial down payment is essential to a fair and efficient auction process. Thus, we have not proposed to modify our approach of requiring timely submission of initial down payments that immediately follow the close of an auction. We did not propose to adopt a late payment period for down payments that are due soon after the close of the auction as we believe it is reasonable to expect that winning bidders timely remit their down payments, given that it is their first opportunity to demonstrate to the Commission their ability to make payments toward their licenses. Further, if a winning bidder defaults on its down payment on a license, the Commission can take action under Section 1.2109(b) relatively soon after the auction has closed, by, for example, re-auctioning the license or offering it to the other highest bidders (in descending order) at their final bids. Similarly, we do not allow for any

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<sup>268</sup> Mountain Solutions Comments at 2 and Reply Comments at 3.

<sup>269</sup> See 47 C.F.R. § 1.2104(g).

late submission of upfront payments, as to do so would slow down the licensing process by delaying the start of an auction.

**c. Full Payment and Petitions to Deny**

97. Background. In the *Notice*, we recognized that under our current rules, winning bidders not eligible for installment payments are not required to submit the balance of their winning bids until petitions to deny filed against them are dismissed or denied and their licenses are ready to be granted.<sup>270</sup> Similarly, winning bidders that are designated entities paying in installments are not required to pay their second down payments until petitions to deny filed against them are dismissed or denied and their licenses are ready to be granted. In the interim, winning bidders for the same auction with no petitions filed against them are required to submit the balance of their winning bids (or, in the case of designated entities, their second down payments) earlier because their licenses are ready for grant. In the *Notice*, we sought comment on whether we should require all bidders that win licenses to make their full payments (or second down payments) at the same time.

98. Discussion. As discussed above (*see* Section III.B.5, *supra*), we suspend the use of installment payments as a means of financing small business participation in our auction program for the immediate future. As a result, all auction winners, including small businesses, will be required to submit the full payment owed on their winning bids shortly after a license is ready to be granted. As we suggested in the *Notice*, we recognize that in the past the filing of petitions to deny against a winning bidder's application(s) has often had the effect of significantly delaying the grant of the applicant's license(s), and as a result, the deadline for that applicant to submit the balance of its winning bid. However, in the Balanced Budget Act Congress granted the Commission the authority to shorten the petition to deny period, and as a result, to grant licenses much more rapidly.<sup>271</sup> As an initial matter, consistent with this legislation, we amend Sections 1.2108(b) and (c) of our rules<sup>272</sup> to provide that the Commission shall not grant a license earlier than seven days following issuance of a public notice by the Commission that long-form applications have been accepted for filing. Also consistent with the Balanced Budget Act, we

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<sup>270</sup> *Notice* at ¶ 64.

<sup>271</sup> Balanced Budget Act, § 3008. This provision provides as follows:

. . . [N]o application for an instrument of authorization for frequencies assigned under this title . . . shall be granted by the Commission earlier than 7 days following issuance of a public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereto . . . [T]he Commission may specify a period (no less than 5 days following issuance of such public notice) for the filing of petitions to deny any application for an instrument of authorization for such frequencies. *Id.*

<sup>272</sup> 47 C.F.R. §§ 1.2108(b), (c).

amend this Section to provide that in all cases the period for filing petitions to deny shall be no shorter than five days. In this regard, we seek comment in this *Second Further Notice of Proposed Rule Making*(*see infra*) on whether there are instances in which the Commission should provide for a longer period for the filing of petitions to deny or for the grant of initial licenses in auctionable services.

99. In light of this change in our rules, we believe that the concerns discussed in the *Notice* regarding delays in the granting of licenses and, as a result, in the deadline for full payment are substantially reduced. While applications that are the subject of petitions to deny ordinarily take longer to resolve than uncontested applications, we believe these changes in procedure will reduce the risk of frivolous petitions being filed solely for purposes of delay, and will enhance our ability to resolve petitions expeditiously. Finally, we believe that concerns regarding delayed payment are outweighed by the risk and uncertainty that would be imposed on an applicant if it were required to make its full auction payment while a petition against its application was still pending and could potentially result in denial of the application. As a result, we decline to amend our rules to require all winning bidders to make their full payments at the same time, regardless of whether petitions to deny their applications have been filed.

#### 4. Default Payments

100. Background. Section 1.2104(g) of the Commission's rules<sup>273</sup> provides that when a bidder withdraws, defaults, or is otherwise disqualified from a simultaneous multiple round auction, upfront and/or down payment amounts that the bidder has on deposit with the Commission will be applied first to the bid withdrawal and default payments owed to the Commission.<sup>274</sup> In the past, this rule has been interpreted to encompass upfront and/or down

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<sup>273</sup> 47 C.F.R. § 1.2104(g).

<sup>274</sup> See 47 C.F.R. §§ 1.2104 (g)(2); 1.2106(d),(e); 1.2107(b). Specifically, Section 1.2106(e) states:

(e) In accordance with the provisions of paragraph (d), in the event a penalty is assessed pursuant to § 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.

Section 1.2106(d), cross-referenced above, states:

(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.*

Section 1.2104, also cross-referenced above, at paragraph (g)(2) states:

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 subsection (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

payment funds a bidder has on deposit for licenses won at the same auction.<sup>275</sup> In the *Notice*, we proposed to delete the language "simultaneous multiple-round" from Section 1.2104(g) of our rules because we believe that this means of satisfying bid withdrawal or default payments should apply to other auction designs as well as simultaneous multiple-round auctions.<sup>276</sup>

101. Discussion. We adopt our proposal to delete the words "simultaneous multiple-round" from Section 1.2104(g), and will apply the default/withdrawal payment procedure to all auction designs. Several commenters support this decision, maintaining that rigorous enforcement of the Commission's payment deadlines is critical to preserving the integrity of the auction and licensing process by ensuring that applicants possess the necessary financial qualifications.<sup>277</sup> These commenters also suggest that default payments are an effective and necessary method of discouraging defaults and encouraging private market solutions to licensee financing difficulties.<sup>278</sup> We believe that this modification to our general rules governing bidder default will help to maintain the integrity of the auction process by discouraging defaults on the part of bidders, encouraging bidders to make secondary or back-up financial arrangements, and ensuring that default payments are made in a timely manner. We also believe that this modification will help to discourage insincere bidding and ensure that licenses end up in the hands of those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service.<sup>279</sup>

102. Our rules provide that where a winning bidder defaults on a license, the bidder becomes

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the defaulting or disqualified bidder has deposited with the Commission.

Finally, Section 1.2107(b) refers to applying upfront and down payments to satisfy penalties. *See* §§ 1.2107(b) ("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). . . . 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*").

<sup>275</sup> *Public Notice*, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481 (April 6, 1996); *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2382 ¶ 195. *See also*, CH PCS, Inc, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, DA 96-1273, 11 FCC Rcd 9343 (rel. August 9, 1996).

<sup>276</sup> *Notice* at ¶ 67.

<sup>277</sup> *See* ISTA Comments at 3; CII Comments at 16-17; Hughes Comments at 8; Airadigm Comments at 14.

<sup>278</sup> *Id.*

<sup>279</sup> *See* 47 U.S.C. § 309(j)(5).

subject to a default payment equal to the difference between the amount bid and the winning bid the next time the license is offered by the Commission, plus a payment equal to three percent of the subsequent winning bid or the amount bid, whichever is lower.<sup>280</sup> In the *Competitive Bidding Fifth Report and Order*, the Commission stated that where the default payment cannot be determined, the Commission may assess an initial default payment "of up to 20 percent" of the defaulting bidder's winning bid.<sup>281</sup> We adopt our proposal in the *Notice* to employ this practice for all auctionable services. No commenter addressed this issue. Although the Commission provided that this deposit amount will be up to 20 percent of the defaulted bid amount, we note that if a license is reauctioned for an amount greater than the defaulted bid for the license, the default payment due will be only three percent of the defaulted bid.<sup>282</sup> Thus, in the future we will assess an initial default deposit of between three percent (3%) and twenty percent (20%) of the defaulted bid amount where a winning bidder or licensee defaults and the defaulted license has yet to be reauctioned. Once the license has been reauctioned by the Commission and the total default payment can be determined, the Commission will either assess the balance of the appropriate default payment, or refund any amounts due, as necessary.

## 5. Installment Payments

### a. Late Payments

103. Background. Section 1.2110(e)(4)(i) of our rules provides that if an entity paying for its licenses in installments is more than ninety (90) days delinquent in any payment it shall be in default. Section 1.2110(e)(4)(ii) provides that upon default or in anticipation of default on an installment payment, a licensee may request that the Commission grant a three- to six-month grace period, during which no installment payments need be made.<sup>283</sup> This rule states that 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

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<sup>280</sup> See 47 C.F.R. § 1.2104(g)(2).

<sup>281</sup> See *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5563, n. 51; *Public Notice*, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481 (April 6, 1996). See also CHPCS, Inc., BTA No. B347, Frequency Block C, *Order*, DA 96-1825 (rel. November 4, 1996) (assessing an initial default deposit equal to three percent of the total default payment).

<sup>282</sup> 47 C.F.R. § 24.704(a)(2). See also 47 C.F.R. § 1.2104(g).

<sup>283</sup> 47 C.F.R. § 1.2110(e)(4)(ii).

licensee is seeking a buyer under an authorized distress sale policy.<sup>284</sup> Under this rule, licensees are required to come before the Commission with a filing as well as financial information such as an income statement or balance sheet, in the case of financial distress, to provide the necessary information for the Commission to make its ruling. As a practical matter, licensees are then required to wait for a ruling by the Commission, or the Bureau on delegated authority, before knowing whether a grace period is granted or denied. In order to simplify these grace period procedures, we proposed to maintain our initial 90-day non-delinquency period, but to provide licensees with a subsequent automatic 90-day grace period in which to make their required payment without being considered in default.

104. We also proposed in the *Notice* to adopt a late payment fee schedule similar to that employed for the broadband PCS F block auction. Under this system, licensees that are late in their scheduled installment payments are assessed a late payment fee equal to five percent (5%) of the amount of the past due payment.<sup>285</sup> Specifically, we proposed to require that licensees taking advantage of the initial 90-day non-delinquency period be assessed a late fee of five percent of the late payment, and that licensees taking advantage of the subsequent automatic 90-day grace period be assessed a late fee of 10 percent (10%) of the late payment. We further proposed that the consecutive 90-day non-delinquency and grace periods (*e.g.*, a total of 180 days in which to submit the required payment) be automatic, so that in the future licensees would not be required to file a grace period request and wait for the Commission, or the Bureau on delegated authority, to render a decision.

105. Finally, we proposed in the *Notice* to modify the method by which interest that accrues is amortized when a licensee fails to make a required installment payment. Section 1.2110(e)(4)(ii) of our rules provides that interest that accrues during a grace period will be amortized over the remaining term of the license.<sup>286</sup> In the *Notice*, we recognized that amortizing interest in this way has the effect of changing the amount of all future payments and requiring the Commission, or its designee, to generate a new payment schedule for the license. Changing the amount of the installment payment has, in turn, created uncertainty about the interest schedule, and increased the administrative burden on the Commission by requiring formulation of a new amortization schedule.<sup>287</sup> In order to avoid the potential problems associated with changing the amount of installment payments, we proposed to amend Section

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<sup>284</sup> *Id.*

<sup>285</sup> 47 C.F.R. § 24.716(c).

<sup>286</sup> 47 C.F.R. § 1.2110(e)(4)(ii).

<sup>287</sup> See also, *Second Report and Order and Further Notice of Proposed Rule Making*, which provides for the payment of interest accrued during the period in which installment payments were suspended over eight quarterly payments. *Second Report and Order and Further Notice of Proposed Rule Making* at ¶ 27.

1.2110(e)(4)(ii) to require that all current licensees who avail themselves of the automatic grace period pay the required late fee(s), all interest accrued during the non-delinquency period, and the appropriate scheduled payment with the first payment made following the conclusion of the non-delinquency period or grace period.

106. Discussion. In order to add certainty to the installment payment process, we adopt our proposals from the *Notice* to modify our grace period provisions. As discussed above (*see* Section III.B.5, *supra*), we decline to use installment payments for the immediate future as a means of financing small business participation in our auction program. As a result, our decision with regard to late payment fees for installment payments effectively will apply only to existing licensees who are currently paying for their licenses in installments. From this point forward, instead of considering individual grace period requests, the following system will apply: A licensee who does not make payment on an installment obligation will automatically have an additional 90 days in which to submit its required payment without being considered delinquent, but will be assessed a five percent late payment fee as discussed above. If the licensee fails to make the required payment at the close of this first 90-day non-delinquency period, the licensee will automatically be provided a subsequent 90-day grace period, this time subject to a second, additional late fee equal to ten percent of the initial required payment.

107. As proposed in the *Notice*, under this system, licensees will not be required to submit a filing to take advantage of these provisions.<sup>288</sup> During this 90-to-180-day period, the Commission or its designated collection agent will continue to pursue collection of past-due installments and fees.<sup>289</sup> Also during this time, the licensee will have the opportunity to raise necessary capital, continue service and construction efforts, or seek a buyer for its license(s) that will resume payments. These late payment provisions will apply independently to all installment payments. Therefore, the late payment provisions and accompanying late fees will not affect the payment schedule for future payments. Thus, even if a licensee elects to take advantage of the late payment provisions, the licensee will still be responsible for remitting all future installment payments in a timely manner, unless the licensee elects to take advantage of the late payment provisions for any future installment payment. The following example illustrates how this system will operate:

*ABC Corp. has a \$100,000 installment interest payment due on March 1. If ABC Corp. is able to make its payment on March 1, then it must remit \$100,000 to the Commission. If ABC Corp. makes its payment anytime from March 2 until May 30 (the end of the non-delinquency period), then ABC Corp. must remit \$105,000 to the Commission to be*

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<sup>288</sup> We further note that the late fee is to be paid at the time the regular quarterly installment payment is made.

<sup>289</sup> *See* Debt Collection Improvement Act, Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3711(a).

*considered current on its March 1 installment payment. If ABC Corp. does not make its March 1 payment by May 30, then it must remit \$115,000 on or before August 28. If ABC Corp. does not remit the required \$115,000 by August 29 (the end of the 90-day grace period), then it will be considered in default and its license will automatically cancel on August 30 without further action by the Commission.<sup>290</sup>*

*ABC Company's June 1 installment payment of \$100,000 remains due on June 1 regardless of the payment status of the March 1 payment. The late payment terms apply to June installment payment independently of the March payment. Thus, if ABC Company does not make its March 1 payment until June 1, the total amount due to the Commission on June 1 is \$215,000 which consists of the March payment, the March 5% non-delinquency late fee, the March 10% grace period late fee and the June payment. Assuming the licensee remits the March 1 payment and accompanying March late fees of \$115,000 to the Commission by August 29, then the total amount due to the Commission on September 1 will be \$215,000 which consists of the June installment payment of \$100,000, the June 5% non-delinquency late fee, the June 10% grace period late fee and September installment payment of \$100,000.*

*ABC Company may elect to make late payments and pay the accompanying late fees on the March and June payments. However, ABC Company must remit \$115,00 representing the required March payment and accompanying March late fees by August 29 (the end of March's 90-day grace period) or it will be considered in default and its license will automatically cancel on August 30 without further action by the Commission. Furthermore, ABC Company must remit an additional \$115,000 representing the required June payment and accompanying June late fees by November 29 (the end of June's 90-day grace period) or it will be considered in default and its license will automatically cancel on November 30 without further action by the Commission.*

As we proposed in the *Notice*, the late fees we adopt will accrue on the next business day following the payment due date and will be payable with the next quarterly installment payment obligation. We emphasize that at the close of non-delinquency or grace period, a licensee must submit the required late fee(s), all interest accrued during the non-delinquency period, and the appropriate scheduled payment with the first payment made following the conclusion of the non-delinquency period or grace period. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments. As part of our spectrum management responsibilities, we wish to ensure that spectrum is put to use as soon as possible. We also believe that licensees should be working to obtain the funds necessary to meet their payment obligations before they are due and, accordingly, that the non-delinquency and grace periods we adopt should be used only in

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<sup>290</sup> See 47 C.F.R. § 1.2110(e)(4)(iii).



extraordinary circumstances. Thus, as we emphasized in the *Notice*, a licensee who fails to make payment within 180 days sufficient to pay the late fees, interest, and principal, will be deemed to have failed to make full payment on its obligation and will be subject to license cancellation pursuant to Section 1.2104(g)(2) of the Commission's rules.

108. Several commenters support our efforts to provide licensees with predetermined non-delinquency periods without requiring the submission of a formal grace period request.<sup>291</sup> In addition, many of the commenters addressing this issue, including AMTA, Hughes, AirTouch, Mountain Solutions and CII support the imposition of a late payment fee similar to that imposed in the broadband F block auction, in order to create a significant incentive for timely payment of installment obligations.<sup>292</sup> CII believes that modifying our current grace period procedures will provide licensees with knowledge in advance of the extent of any relief that will be forthcoming from the Commission to a licensee who misses an installment payment.<sup>293</sup> AirTouch believes that any licensee who fails to make payment within 180 days should face the automatic cancellation of its license. AirTouch contends that once a certain number of installment payments have been submitted late, the Commission should declare the licensee in default and subject to the default payments proposed in the *Notice*.<sup>294</sup> In contrast, only CIRI opposes this liberalization of the current grace period rules, requesting instead that grace period relief be made available only when a licensee can demonstrate that such relief is warranted and the public debt will ultimately be satisfied.<sup>295</sup> Although Hughes recommends the imposition of a "significant" late fee to the extent that an applicant misses a payment deadline, Hughes believes that a five to ten percent late fee is large enough to discourage late payments and to ensure that the government is compensated for its administrative expenses in recouping the payment.<sup>296</sup> As an alternative to our proposal in the *Notice*, GWI proposes that any such late payment fee should be pro-rated over the 90 day payment period instead of accruing all at once regardless of when the late payment is made, in order to provide an economic incentive for licensees who are overdue in their payment obligations to retire the payment quickly instead of waiting until the end of the payment period. In addition, GWI suggests that such a pro-rated payment is fairer to licensees who inadvertently miss a

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<sup>291</sup> See AMTA Comments at 12-13; CII Comments at 16; Pocket Comments at 7-8; Airtouch Comments at 8; Merlin Reply Comments at 4; Airadigm Reply Comments at 2; ISTA Reply Comments at 5-6.

<sup>292</sup> See AMTA Comments at 13; Hughes Comments at 8; AirTouch Comments at 8; Mountain Solutions Comments at 3, CII Comments at 16.

<sup>293</sup> CII Comments at 16.

<sup>294</sup> AirTouch Comments at 8-9.

<sup>295</sup> CIRI Comments at 14 and Reply Comments at 2-3.

<sup>296</sup> *Id.*

required payment through administrative error or other unavoidable, unforeseen circumstances.<sup>297</sup>

109. As an alternative to our proposals in the *Notice*, Airadigm contends that following the first 90-day non-delinquency period, licensees should be given a second 90-day period with a five percent late fee, followed by a third 90-day grace period with a 10 percent late fee.<sup>298</sup> ISTA believes that a rule whereby any license is cancelled at the close of the second 90-day grace period is draconian, and that such a "hard-and-fast" automatic cancellation rule would doom many small businesses.<sup>299</sup> GWI opposes the imposition of an additional 10 percent late payment fee where licensees require an additional 90-day late payment period.<sup>300</sup> We decline to adopt these alternate proposals. As we indicated in the *Notice*, the grant of a grace period is an extraordinary remedy and we wish to encourage licensees to seek private market solutions to their capital problems before the payment due date. In this regard, we note that the Commission has an obligation under the Debt Collection Improvement Act ("DCIA") to enforce payment obligations owed to the federal government.<sup>301</sup>

110. We believe that the automatic grace period provisions we adopt today provide licensees with adequate financial incentives to make installment payments on time, while at the same time creating increased certainty that will help licensees pursue private market solutions to their financing difficulties. These provisions also will discourage licensees from attempting to maximize their cash flow at the government's expense by submitting a required installment payment after it is due. Several commenters agree with this assessment.<sup>302</sup> At the same time, these provisions will eliminate uncertainty for many licensees who are seeking to restructure other debt contingent upon the results of the Commission's installment payment provisions. In addition, this system will ease the burden on the Commission of considering individual grace period requests where Commission or its designee may not have the necessary resources to evaluate a licensee's financial condition, business plans, and capital structure proposals. We recognize that

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<sup>297</sup> GWI Reply Comments at 8.

<sup>298</sup> Airadigm Reply Comments at 2.

<sup>299</sup> ISTA Reply Comments at 7.

<sup>300</sup> GWI Reply Comments at 9.

<sup>301</sup> See Debt Collection Improvement Act, Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3711(a).

<sup>302</sup> See, e.g., AMTA Comments at 13; Hughes Comments at 8; AirTouch Comments at 8.

some commenters oppose the imposition of a late fee on overdue installment payment,<sup>303</sup> and in particular on the 90-day non-delinquency period.<sup>304</sup> However, this approach is consistent with the standard commercial practice of establishing late payment fees and developing financial incentives for licensees to resolve capital issues before payment due dates.<sup>305</sup> This approach also is consistent with the provisions of the DCIA, which requires that the Commission notify the Secretary of the Treasury and commence debt collection procedures where a party is more than 180 days past due on any outstanding debt owed to a federal agency.<sup>306</sup>

111. We recognize that a number of commenters oppose the application of these provisions to current licensees.<sup>307</sup> In particular, GWI and IVDS Enterprises argue that to the extent the Commission adopts a late payment fee, it should limit the imposition of such a fee to licenses issued in future auctions.<sup>308</sup> However, our recent experience with the installment payment program has shown the importance of ensuring that all licensees, including current licensees, have adequate financial incentives to make installment payments on time. We also note that in awarding licenses in the past to entities choosing to pay in installments, the Commission has emphasized that the terms of the installment payment program will be governed by current Commission rules and regulations, as amended. For example, in awarding licenses to C block licensees paying for their licenses in installments, the Commission indicated in the associated "Note and Security Agreement" that the terms of the installment plan would be governed by and construed in accordance with then-applicable Commission orders and regulations, as amended. We also believe that these licensees should obtain the benefit of increased certainty that provisions for automatic grace periods provide. This decision is supported by Mountain Solutions, who requests that current licensees obtain the benefits of any loosening of the late payment fee and grace period rules.<sup>309</sup>

112. As provided in the *Second Report and Order and Further Notice of Proposed Rule*

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<sup>303</sup> ISTA Comments at 1 and Reply Comments at 4-5; IVDS Enterprises Reply Comments at 3; Pocket Comments at 7-8; Merlin Reply Comments at 4.

<sup>304</sup> Airadigm Comments at 14; IVDS Enterprises Reply Comments at 1-2.

<sup>305</sup> See, e.g., Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

<sup>306</sup> See 31 C.F.R. § 3711(g)(1).

<sup>307</sup> See Mountain Solutions Reply Comments at 5-6; GWI Reply Comments at 7; IVDS Enterprises Reply Comments at 4.

<sup>308</sup> GWI Reply Comments at 7; IVDS Enterprises Reply Comments at 4.

<sup>309</sup> Mountain Solutions Reply Comments at 5-6.

*Making*, installment payments for C and F block licensees will resume effective March 31, 1998. Under our decision to reinstate installment payments for these licensees, we provided them with one automatic 60-day non-delinquency period following the March 31, 1998, deadline, during which time they will not be considered delinquent in their payment obligations. As we indicated in the *Second Report and Order and Further Notice of Proposed Rule Making* we will not entertain any requests for extension of the March 31, 1998 deadline beyond an automatic 60-day non-delinquency period, so that for C and F block licensees all required payments must be submitted no later than May 30, 1998. Only those licensees making a timely payment of all amounts due, as set forth in the *Second Report and Order* will be permitted to take advantage of the late payment provisions we adopt today.<sup>310</sup>

113. In commenting on these modifications to the grace period provisions, CIRI also proposes that the Commission make public the terms of any workouts or debt relief provided to licensees.<sup>311</sup> CIRI notes that parties may request confidential treatment of sensitive financial information pursuant to Section 0.459 of the Commission's rules, and that such confidential treatment should be sufficient to safeguard the privacy interests of licensees, while still making the terms of any workout available for public scrutiny.<sup>312</sup> As an initial matter, because we adopt our proposals providing for automatic grace periods, we do not envision licensees filing grace period requests under normal circumstances from this point forward. As a result, we believe that CIRI's concerns about the Commission making public a licensee's request for grace period relief are moot. Moreover, because from this point forward a licensee's taking advantage of our late payment provisions will be an administrative matter processed by the Commission's loan servicer, and not a formal waiver request, aside from instances where a licensee is declared in default, there will be no public notice of a licensee's payment status. The license is cancelled automatically under such circumstances. In contrast, for licensees who have previously filed grace period requests consistent with our current rules and procedures, we will continue our current practice of making the request public when a decision is released granting or denying the request, except to the extent that any request by the licensee for confidential treatment is granted pursuant to Section 0.459 of the Commission's rules.<sup>313</sup> We further clarify that such licensees are not deemed to be in default on these licenses until such time as the Bureau issues a decision on these grace

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<sup>310</sup> See 47 C.F.R. § 1.2110.

<sup>311</sup> CIRI Reply Comments at 3.

<sup>312</sup> *Id.* at 4.

<sup>313</sup> See 47 C.F.R. § 0.459. We note that several PCS C and F block licensees have filed requests for an extension of the deadline for making payments with the Bureau pursuant to 47 C.F.R. § 1.2110(e)(4)(ii). In addition, two parties have filed requests for the restructuring of installment payment schedules, and several parties have filed requests for annual, as opposed to quarterly payment schedules. These requests will be addressed separately by the Bureau in a manner consistent with the procedures we have outlined.

period requests. Licensees whose requests for a grace period are denied will have ten (10) business days to make the required payment or be considered in default.

#### **b. Defaults on Installment Payments**

114. Background. In the *Notice*, we tentatively concluded that licensees that default on installment payment obligations should be subject to the default payment provisions outlined in Section 1.2104(g) (*i.e.*, the difference between the defaulting winner's bid and the subsequent winning bid plus 3 percent of the lesser of these amounts). Sections 1.2110(e)(1) and 1.2110(e)(2) of our rules provide that applicants eligible for installment payments will be liable for such a payment if they fail to remit either their initial or final down payment.<sup>314</sup> Section 1.2110(e)(4)(iii) provides that (1) following the expiration of any grace period without successful resumption of payment, (2) upon denial of a grace period request, or (3) upon default with no such request submitted, the license of an entity paying on an installment basis will be cancelled automatically and the Commission will initiate debt collection procedures pursuant to Federal Claims Collection Standards and applicable laws.<sup>315</sup> This section of our rules does not clearly indicate, however, whether under these circumstances the licensee will be liable for the default payment set forth in Section 1.2104(g).

115. Discussion. We do not adopt our tentative conclusion to apply the default provisions of Section 1.2104(g) to licensees who default on an installment payment. Most commenters addressing the issue oppose this proposal.<sup>316</sup> For example, Pocket submits that default payments assessed later in the license term become highly arbitrary and unduly burdensome. Pocket also contends that such payments are greater than those traditionally required for secured creditors and create substantial disincentives for investors and creditors who might otherwise be interested in providing financing for licensees.<sup>317</sup> Pocket also notes that any default payment assessed disadvantages a licensee's other creditors, which also makes it more difficult for licensees to raise capital.<sup>318</sup> Finally, Pocket states that default payments assessed later in the license term have no deterrent effect as there is no basis to believe that licensees that have paid substantial sums to the

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<sup>314</sup> 47 C.F.R. §§ 1.1220(e)(i) and 1.2110(e)(2).

<sup>315</sup> 47 C.F.R. § 1.2110(e)(4)(iii); *see* 47 C.F.R. Part 1, Subpart O, 4 C.F.R. Parts 101-105, and 31 U.S.C §§ 3701 *et seq.*

<sup>316</sup> *See, e.g.*, Airadigm Comments at 16; Pocket Comments at 9.

<sup>317</sup> Pocket Comments at 9.

<sup>318</sup> *Id.*

Treasury will willingly default.<sup>319</sup> In contrast, AirTouch supports our tentative conclusion that licensees that ultimately fail to fulfill their installment payment obligations despite the availability of a 90-day non-delinquency period and a subsequent, automatic 90-day grace period, should be declared in default, and in turn be made subject to the default payments proposed in the *Notice*.<sup>320</sup>

116. We have considered the comments of those who oppose the proposed assessment, and find that an additional payment requirement for licensees defaulting on installments is not necessary to achieve our stated objectives. Our current rules and installment payment terms are adequate to discourage defaults and encourage licensees to find private market solutions when they face financial difficulties. We also believe that the rules we adopt today providing for a 90-day non-delinquency period followed by a subsequent, automatic 90-day grace period, subject to appropriate late fees of five percent for the 90-day non-delinquency period and 10% for automatic 90-day grace period, payable at the conclusion of these periods serve these goals without substantially risking delays or disruption in service to the public. In particular, we believe that this certainty regarding the Commission's treatment of licensees needing extra time to make their installment payments will increase the likelihood that licensees and potential investors will find solutions to capital problems before a default occurs. The risk of losing its license should provide a licensee a strong incentive to avoid default. If, however, a default does occur, the conditions on the face of each license and the terms of the notes and security agreements executed by licensees provide the Commission appropriate remedies that will ensure that defaulted licenses are returned to the Commission for reauction and that all outstanding debts, as well as the Commission's costs, are recoverable.

### c. Cross Default in the Context of Installment Payments

117. Background. As we indicated in the *Notice*, a number of parties have asked that we address the issue of cross default in the context of installment payments.<sup>321</sup> The Commission's rules currently provide that in the event of default, any default payment assessed will be deducted from any upfront payments or down payments a defaulting bidder has deposited with the Commission.<sup>322</sup> The Commission has pursued a policy of cross default for defaults on down

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<sup>319</sup> Pocket Comments at 10.

<sup>320</sup> AirTouch Comments at 8-9.

<sup>321</sup> See, e.g., Letter to Michele C. Farquhar from Jay P. Urwitz, August 2, 1996.

<sup>322</sup> 47 C.F.R. § 1.2104(g)(2).

payments.<sup>323</sup> A cross default provision would specify that if a licensee defaults on one installment payment loan, it would also default on any other installment payment loans it holds. These provisions are standard in credit-related agreements.<sup>324</sup> We sought comment on whether the Commission should apply cross defaults to its installment payment plan loans. We also asked whether to apply a cross default provision across services. We asked, for example, whether the Commission should consider pursuing default remedies against all PCS and SMR licenses when a licensee with both SMR and broadband PCS licenses defaults on one of its PCS licenses. Alternatively, we asked whether we should pursue default remedies against the single license only. We also asked whether specific factors should influence our decision to pursue cross-defaults and whether cross defaults should be applied automatically or on a case-by-case basis. Finally, we sought comment in general on what remedies are appropriate when licensees default on installment payments.

118. In response to the *Installment Payment Public Notice* the Commission received extensive comment on the issue of cross default in the context of defaults on installment payments. Several commenters urged the Commission not to adopt a cross default provision.<sup>325</sup> In addition, some commenters urged the Commission to allow licensees to distribute their licenses among independent entities as a means of insulating against cross default.<sup>326</sup> Such a decision, they contend, would allow potential financiers to invest in specific markets that meet their investment criteria without fear that a default in other markets would threaten their investment.<sup>327</sup> Furthermore, some commenters specifically requested that the Commission clarify its rules regarding cross default in the context of defaults on installment payments if licenses are held by licensees with the same or overlapping control groups.<sup>328</sup>

119. In the *Second Report and Order* in this docket, we concluded that we would not pursue cross default remedies against C block licensees who default on installment payments with regard

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<sup>323</sup> See "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," *Public Notice*, 11 FCC Rcd 10853 (1996). See also Letter to Kenneth Hobbs from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-260 (rel. February 4, 1997)

<sup>324</sup> See Stephen R. Kruft, *Cross Default Provisions in Financing and Derivatives Transactions*, 113 *Banking L.J.* 216 (1996).

<sup>325</sup> See e.g., BIA Capital Comments at 4; AmeriCall *ex parte* letter, July 11, 1997; Magnacom *ex parte* letter, August 13, 1997.

<sup>326</sup> See, e.g., ClearComm Reply Comments at 4.

<sup>327</sup> *Id.*

<sup>328</sup> See, e.g., ClearComm Reply Comments at 4; BIA Capital Comments at 4.

to other licenses in the C or F blocks.<sup>329</sup> We stated that our decision was warranted in light of our efforts to provide current C block licensees who are experiencing financing difficulties with options for meeting their financial obligations to the Commission. We deferred until completion of the Part 1 Rule Making our decision on whether to amend more comprehensively our policy of cross defaults. We also emphasized that existing installment payment default rules and license conditions would continue to apply for any C block licensees found to be in default after the March 31, 1998, date for resumption of C block installment payments.

120. Discussion. After consideration of the comments in this proceeding, we conclude that we will not pursue a policy of cross default (either within or across services) where licensees default on an installment payment. Because we eliminate the use of installment payments as a means of financing small business participation in our auction program for the foreseeable future (*see* Section III.B.5, *supra*), we note that in practice this decision will apply only to existing licensees who are currently paying for their licenses in installments.

121. Our decision not to pursue cross default remedies against current licensees who default on an installment payment is supported by the majority of commenters.<sup>330</sup> For example, Airadigm contends that it is unfair to jeopardize an entire business because of a default on one license.<sup>331</sup> Similarly, ISTA argues for separate treatment of separate services, regardless of ownership, lest a failure in one business cause failure in unrelated businesses.<sup>332</sup> IVDS Enterprises proposes that licensees be able to discontinue installment payments on a particular license and allow that license to be cancelled or revoked.<sup>333</sup> IVDS Enterprises believes that such a decision should not affect the licensee's other licenses, whether in the same or other services, where the licensee has made timely installment payments.<sup>334</sup> Alternatively, Pocket believes that the Commission should reserve the authority to impose cross defaults on a case-by-case basis only for licensees that have

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<sup>329</sup> *See Second Report and Order* at ¶¶ 79-80. We explained, for example, that if a licensee defaults on a C block license and that licensee holds other C block licenses on which it is making its payments, we will not declare it to be in default on its debt associated with the other C block licenses. Similarly, if a licensee defaults on a C block license, and also holds F block licenses on which it is making its payments, we will not declare it to be in default on its F block debt.

<sup>330</sup> *See, e.g.,* Airadigm Comments at 16; Reply Comments at 5; Pocket Comments at 11, Merlin Reply Comments at 6-7; NPCCS Reply Comments at 8; ISTA Reply Comments at 8; GWI Reply Comments at 4.

<sup>331</sup> Airadigm Comments at 16.

<sup>332</sup> ISTA Reply Comments at 8.

<sup>333</sup> IVDS Enterprises Reply Comments at 4.

<sup>334</sup> IVDS Enterprises Reply Comments at 4-5.



demonstrated bad faith.<sup>335</sup>

122. We recognize that some commenters strongly advocate a policy of cross defaults in this context. These commenters suggest that such a policy (1) prevents speculation during the auction and cherry-picking (*e.g.*, selectively defaulting on some licenses while keeping others) after the auction concludes,<sup>336</sup> (2) encourages auction participants to find private market solutions to financial shortfalls,<sup>337</sup> and (3) is consistent with commercial lending policies.<sup>338</sup> We believe, however, that the default provisions contained in Section 1.2104(g)(2) serve as an adequate incentive to discourage speculation and encourage licensees to pursue non-default solutions to financial difficulties. We also emphasize that our decision on this matter only addresses default in the context of installment payments, and does not affect our policy with regard to defaults on down payments.<sup>339</sup> In addition, by making licensees who default on an installment payment subject to the default payment set forth in Section 1.2104(g)(2), we create an additional deterrent to licensees considering default as a solution to financing shortfalls. We believe that this policy will promote the goals of Section 309(j) by not punishing otherwise successful licensees for failures in one market, and will strike an appropriate balance between our conflicting roles as both "lender" and "regulator."<sup>340</sup> Accordingly, upon default on an installment payment, a license will automatically cancel without further action by the Commission, the licensee will become subject to the default payment set forth in Section 1.2104(g) of our rules (*see* Section III.D.5, *supra*), and the

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<sup>335</sup> Pocket Comments at 12-13.

<sup>336</sup> CIRI Comments at 15-16.

<sup>337</sup> PCIA Comments at 7; Airtouch Comments at 9.

<sup>338</sup> AirTouch Comments at 9.

<sup>339</sup> *See* Section III.D.b, *supra*. *See also* BDPCS, Inc. Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997).

<sup>340</sup> *See Report to Congress* at 39.

Commission will initiate debt collection procedures against the licensee and accountable affiliates.<sup>341</sup>

## E. Competitive Bidding Design, Procedure, and Timing Issues

### 1. Balanced Budget Act of 1997 Notice and Comment Procedures

123. Background. The Balanced Budget Act of 1997 provides that "before the issuance of bidding rules" the Commission must provide adequate time for parties to comment on proposed auction procedures, and that "after the issuance of bidding rules," the Commission must provide adequate time "to ensure that interested parties have sufficient time to develop business plans, assess market conditions, and evaluate availability of equipment."<sup>342</sup> In previous auctions, it has been our practice to permit the Bureau, on delegated authority, to address a variety of issues related to the conduct of the auction and to announce these issues by public notice subsequent to the adoption of service-specific auction rules.<sup>343</sup> This practice has proven workable and efficient, and has enabled the Commission, through the involvement of the Bureau, to respond rapidly to a variety of day-to-day operational concerns associated with the conduct of each auction.

124. Discussion. We believe that in the past our service-specific rule making process has served the purpose of adequately ensuring that interested parties have sufficient time to familiarize themselves with the rules and procedures to be employed in an auction prior to the application deadlines and start date of that auction. We nevertheless believe that this legislation requires that we provide an additional opportunity for input from potential bidders prior to the issuance of detailed auction-specific information by the Bureau. To date, the Bureau has served as the primary point of contact with potential bidders and other parties interested in issues relating to each upcoming auction, and this has worked well.<sup>344</sup> In light of the typically time-sensitive nature

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<sup>341</sup> 47 C.F.R. §§ 1.2104(g), 1.2110(e)(4)(iii). *See also* 31 U.S.C. Chapter 37; 4 C.F.R. Parts 101-105; 47 C.F.R. Part 1, Subpart O.

<sup>342</sup> Balanced Budget Act of 1997, § 3002(a)(1)(B)(iv).

<sup>343</sup> *See, e.g.*, "Auction of 800 MHz Specialized Mobile Radio Service Licenses," *Public Notice*, DA 97-1672 (rel. August 6, 1997) ("*800 MHz SMR Pre-Auction Public Notice*"); "Auction of Local Multipoint Distribution Service Licenses," *Public Notice*, DA 97-2081 (rel. September 25, 1997) ("*LMDS Pre-Auction Public Notice*").

<sup>344</sup> For example, the Bureau has traditionally released a public notice announcing the licenses to be auctioned, the start date of the auction, relevant filing deadlines (*e.g.*, the short-form application (FCC Form 175) filing deadline and the deadline for submission of upfront payments) and dates for pre-auction events (*e.g.*, the auction seminar and mock auction). *See, e.g.*, "FCC Announces Upcoming Spectrum Auction Schedule; Two Auctions To Commence Before End of the Year," *Public Notice*, DA 97-1627 (rel. July 30, 1997).

of most issues arising in the weeks prior to the start of an auction, the Bureau has been equipped to make determinations and respond rapidly to potential bidders' concerns.<sup>345</sup> Consistent with the provisions of the Balanced Budget Act, and to ensure that potential bidders have adequate time to familiarize themselves with the specific provisions that will govern the day-to-day conduct of an auction, we direct the Bureau, under its existing delegated authority,<sup>346</sup> to seek comment on a variety of auction-specific issues prior to the start of each auction.<sup>347</sup>

125. We direct the Bureau to seek comment on specific mechanisms relating to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices,<sup>348</sup> minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation. We direct the Bureau to afford interested parties a reasonable time, in light of the start date of each auction and relevant pre-auction filing deadlines, to comment on auction-specific issues. In this regard, we note that it has been the Bureau's practice to release the public notice providing details concerning each upcoming auction sufficiently in advance of the short-form filing deadline (*e.g.*, 30 days prior to the deadline) to provide interested parties with an opportunity to develop business plans, assess market conditions and evaluate the availability of equipment. Also consistent with our previous practice, we recognize that the Bureau needs the flexibility to announce, at any time in the weeks leading up to the start date of each auction, any minor, non-substantive amendments or clarifications to the specific mechanisms set forth in auction-related public notices or the Bidder Information Package. We believe that this process is consistent with the requirements of Section 3002(a)(1)(B)(iv) of the Balanced Budget Act, and will afford potential bidders adequate notice,

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<sup>345</sup> See, *e.g.*, Letter to Mr. John Prawat, DigiVox Telecom, Inc. from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-730 (rel. April 11, 1997) (addressing DigiVox's Request for Rule Waiver of the Upfront Payment Requirement in the WCS Auction); Letter to Linda Feldmann, Esq., Leventhal, Senter & Lerman, from Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-2261 (rel. October 24, 1997) (addressing the request of Castle Tower Corporation (PR) for waiver of the Commission's Rules to correct its application to reflect its status as non-small business applicant in the 800 MHz SMR auction).

<sup>346</sup> See 47 C.F.R. §§ 0.131(c), 0.331, 0.332.

<sup>347</sup> We note that the Bureau has recently begun this process by seeking comment on issues relating to the 800 MHz and LMDS auctions, both of which we announced prior to the passage of the Balanced Budget Act. See "Comment Sought on Balanced Budget Provisions Calling For Reserve Prices or Minimum Opening Bids in FCC Auctions," *Public Notice*, DA 97-1933 (rel. September 5, 1997) (800 MHz SMR), and "Comment Sought on Reserve Prices or Minimum Opening Bids for LMDS Auction," *Public Notice*, DA 97-2224 (rel. October 17, 1997) (LMDS).

<sup>348</sup> See Section III.E.4, *infra*.

as well as an opportunity to comment on the Bureau's intentions regarding issues relating to the day-to-day conduct of each auction.

## 2. "Real time" Bidding

126. Background. Congress has directed the Commission to "design and test multiple alternative methodologies for auction designs."<sup>349</sup> In the *Order* accompanying the *Notice*, we amended our general auction rules to specify a menu from which the Commission may choose an auction design.<sup>350</sup> These designs include: (1) simultaneous multiple-round auctions, using remote and/or on-site electronic bidding; (2) sequential multiple-round auctions, using either oral ascending or remote and/or on-site electronic bidding; and (3) sequential or simultaneous single-round auctions, using either remote or on-site electronic bidding, or sealed bids. The simultaneous multiple-round auction methodology with discrete rounds has been used in most auctions thus far because it provides bidders with information regarding the value others place on licenses and allows bidders to pursue backup strategies as more information becomes available during the auction.

127. As we indicated in the *Notice*, the Commission is always interested in exploring new ways to reduce the length of each auction without sacrificing the economic efficiency of the competitive bidding process.<sup>351</sup> We sought comment on how we could speed our auctions, and in particular, our simultaneous multiple-round auctions. For example, we sought comment on how we could modify our current procedural rules for simultaneous multiple-round auctions to meet this objective, or what new designs we might use to efficiently allocate numerous licenses.<sup>352</sup> Among other options, we proposed to modify our current simultaneous multiple-round auction rules to allow for "real time" bidding -- a system in which bidding occurs on an open and continuous basis within each bidding period -- as another design feature for electronic multiple-round auctions.<sup>353</sup> This is in contrast to the current discrete bidding periods currently used in the simultaneous multiple round auction where bidders cannot see or react to the bids of other bidders until the close of each bidding period. In addition, we sought comment on the appropriate length for the real time bidding rounds and on what measures we can take to assure bidders that they will have enough time to determine their bidding strategies with "real time" bidding. Finally, we sought comment on the impact of "real time" bidding on small businesses, generally, and in particular on their ability to process bid information during the course of a single round.

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<sup>349</sup> 47 U.S.C. § 309(j)(3).

<sup>350</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-2374, ¶¶ 146-153.

<sup>351</sup> *Notice* at ¶ 79.

<sup>352</sup> *Id.* at ¶ 80.

<sup>353</sup> *Id.* at ¶¶ 81-84.

128. Discussion. We adopt our proposal in the *Notice* to allow for "real time" bidding as an alternate design methodology in our rules. After careful consideration of the comments received in this proceeding, as well as our experience in conducting 15 auctions to date, we conclude that "real time" bidding will allow auctions to proceed more rapidly because it will allow bidders immediate feedback on new high bids. We also note that in an effort to simplify the auction process and prevent "gaming" of bids, the Commission has recently modified its electronic bidding process by implementing "click-box bidding."<sup>354</sup> This feature, which replaces the field where bidders previously typed their dollar bid amount with a "click on check box to bid" field (where the only bid amount allowed is at the minimum acceptable bid) no longer allows bidders to type a bid amount on the Bid Submission screen. As such, "click-box bidding" can work well in a "real-time" bidding context because bidders can more rapidly respond to the bids of other bidders, permitting an auction to progress more rapidly and efficiently. The Commission has successfully employed click box bidding in the recently completed 800 MHz SMR auction,<sup>355</sup> and plans to employ it in the forthcoming LMDS auction.<sup>356</sup>

129. The Commission delegates to the Bureau the authority to determine whether the public interest will be served by "real time" bidding in a particular auction. Most commenters oppose the use of "real time" bidding, arguing it may be difficult for bidders to react quickly enough to ensure that in each bidding round they make new high bids on the necessary percentage of their bidding eligibility to meet their activity requirement.<sup>357</sup> These commenters also believe that the somewhat accelerated pace of "real time" bidding may leave less time to craft informed bidding strategies during the auction.<sup>358</sup>

130. As mentioned above, the "click-box bidding" format should significantly improve a bidder's ability to react quickly. Further, should we determine to employ "real-time" bidding in the future, we believe that the issues involving meeting activity requirements will be alleviated by our proposal in the *Notice* to open a discrete closed bidding period after each fixed period of "real

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<sup>354</sup> See, e.g., Applications of Mercury PCS II, LLC For Facilities in the Broadband Personal Communications Systems in the D, E and F Blocks, *Notice of Apparent Liability for Forfeiture*, FCC 97-388 (rel. October 28, 1997) ("*Mercury NALF*").

<sup>355</sup> See "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," *Public Notice*, DA 97-1934 (rel. September 5, 1997).

<sup>356</sup> See *LMDS Pre-Auction Public Notice*.

<sup>357</sup> See Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-14; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6; NextWave Reply Comments at 7. See Competitive Bidding Second Report and Order, 9 FCC Rcd 2371, ¶¶ 133-37 (1994), for an explanation and description of the Commission's activity rules.

<sup>358</sup> See Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-14; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6; NextWave Reply Comments at 7.

time" bidding (when only standing high bids from the previous round and new high bids from the current round count in determining the bidder's activity level). During this closed bidding period, bidders will be able to submit valid bids (bids that meet or exceed the minimum accepted bid) to ensure that they have the opportunity to meet their activity requirements for the round. Following the discrete closed bidding period, the Commission will post the final round results for the period and make all bids available to the public. This discrete period should help to eliminate any risks of not meeting eligibility requirements or having time to formulate bidding strategies which commenters suggest may be associated with "real time" electronic bidding.<sup>359</sup> In particular, this period will help to provide bidders sufficient time to meet eligibility requirements and will minimize the risks, suggested by some commenters, of the submission of erroneous bids.<sup>360</sup>

131. One of the greatest advantages to "real time" bidding is that it allows bidders to obtain immediate feedback on new high bids, withdrawn high bids and minimum accepted bids, and thereby provides them with the opportunity to immediately respond to this information and move licenses toward their final valuations more quickly. We believe that, particularly in the case of complex auctions of multiple licenses, it is one means of helping auctions to progress more efficiently. Under the current simultaneous multiple-round auction rules, each round of bidding contains a discrete bidding period during which bidders cannot see the actions of other bidders. Bidders must wait until the end of each round to see the bids placed by other bidders and determine their status as high bidder. In contrast, an open, continuous bidding round -- in which bidders know when their bid has been exceeded and are free to bid again -- can be used to reduce the delay inherent in the current design where a bidder must wait until the next discrete round to react to the actions of other bidders.

132. We note that some commenters express concern that the widespread use of "real time" bidding would increase the administrative costs of participating in the auction due to the incentive to stay on-line during the continuous bidding period and thereby work to exclude smaller entities that may lack the resources to devote to a concentrated bidding period or to stay on-line during the entire bidding period.<sup>361</sup> We agree with commenters that under some circumstances the costs of participating in an auction in which bidders are required to be "on-line" may discourage the participation of small businesses. We therefore conclude that the per minute charge for bidding

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<sup>359</sup> See Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-15; NextWave Reply Comments at 6-7; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6.

<sup>360</sup> See Nextel Comments at 3; CII Comments at 17; NextWave Reply Comments at 7.

<sup>361</sup> Nextel Comments at 3; AMTA Comments at 13-14; NextWave Reply Comments at 6-7; CellNet Reply Comments at 6.

"on-line" should be reexamined, and delegate to the Bureau that authority to implement such a reduced fee in the future, if appropriate.<sup>362</sup>

133. No commenters addressed our tentative conclusion in that *Notice* that because "real time" auctions are a variation of the simultaneous multiple-round auction design established in our rules, many of the same procedures (*i.e.*, upfront payments to determine eligibility, activity requirements that apply to each round, minimum bid increments, and a stopping rule) should apply.<sup>363</sup> These procedures have proven workable and easily understood by bidders in the context of our simultaneous multiple-round auction design, but some modifications to these procedures may be necessary if we employ "real time" bidding. We conclude that the Bureau should undertake this task.

134. Consistent with the Balanced Budget Act,<sup>364</sup> we direct the Bureau (*see* Section III.E.1, *supra*) to seek comment from the public on auction-specific issues (*i.e.*, duration of bidding rounds and activity requirements) prior to the start of each auction. We believe that this practice of seeking comment on such issues prior to the start of each auction will adequately address any additional concerns associated with the use of "real time" bidding. We also note that we seek, on an ongoing basis, to enhance and improve our bidding processes. We believe that the Bureau should explore "real time" bidding consistent with the requirement under Section 309(j) that we experiment with different bidding methodologies.<sup>365</sup>

### 3. Combinatorial Bidding

135. Background. Combinatorial bidding, also known as package bidding, allows bidders to place single bids for groups of licenses. For example, in a combinatorial auction, bidder A could place a bid of \$100,000 for licenses 1, 2 and 4, while bidder B places a bid of \$500,000 for licenses 2, 3 and 5. The bidding software then calculates the revenue maximizing solution and awards the high bids for that round to the appropriate package(s). Three commenters discussed the possible use of combinatorial bidding as a method of speeding the auction process by providing for the efficient aggregation of licenses. Specifically, the Automated Credit Exchange ("ACE") strongly supports the use of combinatorial bidding, stating that such a system can

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<sup>362</sup> The Commission adopted a fee schedule for obtaining access to the Commission's database and remote bidding software packages. The remote bidding software package is available for \$175. The current charge for on-line remote access via a 900 number is \$2.30 per minute. *See* Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Services Charges, and Bidders Information Packages in Connection with Auctionable Services, WT Docket No. 95-69, *Report and Order*, FCC 95-308 (rel. July 21, 1995).

<sup>363</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2367-68, ¶¶ 116-21 (1994). *See also* *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532, ¶¶ 24-26.

<sup>364</sup> *See* Balanced Budget Act, § 3002.

<sup>365</sup> *See* 47 U.S.C. § 309(j)(3).

increase the speed of particular auctions and provide for the deployment of spectrum resources in the most efficient license configurations.<sup>366</sup> In contrast, Merlin argues that combinatorial bidding is too complex and difficult to implement, and suggests that such a system would disadvantage smaller entities interested in bidding for smaller areas or niche markets.<sup>367</sup> Finally, AirTouch contends that combinatorial bidding should not be used in auctions of encumbered spectrum because incumbents do not undertake the same system/license acquisition planning strategy as bidders in auctions for unencumbered spectrum.<sup>368</sup>

136. Discussion. We did not specifically seek comment in the *Notice* on the use of combinatorial bidding as an auction design methodology. Our current Part 1 rules already provide for the use of combinatorial bidding as one of our competitive bidding design options.<sup>369</sup> In addition, the Commission was directed by Congress in the Balanced Budget Act of 1997 to consider the use of combinatorial bidding as an alternative auction design that could be used, in certain instances, as a means of speeding the auction process.<sup>370</sup> Specifically, the Balanced Budget Act requires the Commission, for testing purposes, to design and conduct an auction in which a system of combinatorial bidding is used.<sup>371</sup>

137. We have insufficient information to determine how this relatively new bidding methodology might be used to improve our spectrum auction program. The Commission will seek comment on a number of issues relating to combinatorial bidding, and will more thoroughly address this issue once the record is complete. The Commission has also awarded a research and development contract to a private sector consultant to examine theoretical and applied combinatorial bidding approaches where licenses exhibit strong synergies and bidders have overlapping preferences (*i.e.*, prefer different packages of licenses). The contractor will also evaluate the most appropriate of the theoretical and applied approaches to combinatorial bidding for spectrum auctions and address a number of concerns raised by the Commission and other interested parties. Our goal in awarding the contract is to allow private sector and government auction experts to address these concerns and investigate the possible effects of the use of combinatorial bidding on the auction process, including the Commission's fulfillment of the objectives of Section 309(j) of the Communications Act.

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<sup>366</sup> ACE Comments at 1-15.

<sup>367</sup> Merlin Reply Comments at 8.

<sup>368</sup> AirTouch Reply Comments at 8.

<sup>369</sup> See 47 C.F.R. § 1.2103(b).

<sup>370</sup> Balanced Budget Act.

<sup>371</sup> Balanced Budget Act; 47 U.S.C. § 309(j)(3)(i).



#### 4. Minimum Opening Bids and Reserve Prices

138. Background. Section 1.2104(d) of our rules states that the Commission may establish *suggested* minimum opening bids.<sup>372</sup> In the *Notice*, we proposed to amend Section 1.2104 to specify that the Commission may establish minimum opening bids, rather than suggested minimum opening bids.<sup>373</sup> Such a provision has been adopted in service-specific rules.<sup>374</sup> In the *Notice*, we indicated that a minimum opening bid can serve some of the same purposes as a reservation price by preventing a license from being awarded under circumstances where there would be little competition among bidders and significant incentives to collude.<sup>375</sup> In addition, we noted that establishing a minimum opening bid is one way of helping to speed the auction process, and thus the provision of service to the public.<sup>376</sup> After the release of the *Notice*, Congress passed the Balanced Budget Act of 1997, which directed the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid will be established, unless the Commission determines that a reserve price or a minimum opening bid are not in the public interest.<sup>377</sup>

139. Discussion. Several commenters oppose the use of minimum opening bids.<sup>378</sup> However, the Balanced Budget Act establishes a presumption in favor of a required minimum opening bid or reserve price.<sup>379</sup> We therefore adopt our proposal in the *Notice* to delete the term "suggested" from Section 1.2104(d). We also clarify that the Bureau has the authority to seek comment on minimum opening bids and reserve prices and to establish such mechanisms for each auction, consistent with its role in managing the auction process and setting valuations for other purposes (*e.g.*, setting upfront payment amounts). The Bureau shall establish a minimum opening bid

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<sup>372</sup> 47 C.F.R. § 1.2104(d) (emphasis added).

<sup>373</sup> *Notice* at ¶ 86.

<sup>374</sup> *See, e.g.*, 47 C.F.R. § 101.71 (DBS).

<sup>375</sup> *Notice* at ¶ 86. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2384, ¶ 207.

<sup>376</sup> *Id.*

<sup>377</sup> Balanced Budget Act; 47 U.S.C. § 309(j)(4)(F).

<sup>378</sup> *See* AirTouch Comments at 10; PageNet Comments at 12; Nextel Comments at 7 and Reply Comments at 6; CII Comments at 18; ISTA Comments at 3; Hughes Comments at 9-10; Airadigm Comments at 17; AMTA Comments at 15; CellNet Reply Comments at 7.

<sup>379</sup> Section 3002(a)(1)(C)(iii) of the Balanced Budget Act provides that the Commission must "prescribe methods by which a reasonable reserve price will be required, or a minimum opening bid will be established, to obtain any license or permit being assigned . . . unless . . . such a reserve price or minimum opening bid is not in the public interest." Balanced Budget Act, § 3002(a)(1)(C)(iii).

and/or reserve price for each auction, unless, after comment is sought prior to a particular auction, it is determined that a minimum opening bid or reserve price would not be in the public interest.

140. The terms "minimum opening bid" and "reserve price" are traditionally different, and are employed for different purposes. A reserve price is defined as an absolute minimum price below which an auctioneer will not sell an object being auctioned. It may be disclosed to bidders before an auction or during an auction, or it may be kept secret, so that a "winning" bidder does not actually find out if the object has been won until after the auction has closed. Auctioneers generally employ reserve prices to order to maximize the revenue earned from an auction.<sup>380</sup> A minimum bid is a minimum value below which bids will not be accepted in the first round of an auction. The level of a minimum opening bid is not unchangeable like a reserve price, but may be reduced at the discretion of the auctioneer if no bids are made at the existing level. The primary purpose of a minimum opening bid is to speed up the course of an auction. However, a minimum bid also can serve a revenue-enhancing function like a reserve price, because if bids will not be accepted below a certain level, they will also not be sold below that level. That is, a minimum opening bid effectively functions as a reserve price unless or until it is reduced. Regarding the level of reserves or minimum bids, we do not believe that the Balanced Budget Act provision means that we should now be attempting to *maximize* the revenue earned in all future spectrum license auctions. The other auction goals in the Act, such as ensuring the deployment and rapid deployment of new technologies and services and promoting economic opportunity and competition,<sup>381</sup> have not been eliminated, and we must continue to balance and pursue them all. Therefore, we conclude that the new provision does not call for traditional reserve prices. Rather, it calls for an added protection that licenses will not be assigned at unacceptably low prices.

141. We believe that the Bureau should have the discretion to employ either or both of these mechanisms for future auctions.<sup>382</sup> We direct the Bureau to seek comment on the use of a minimum opening bid and/or reserve price, as it will do for a variety of auction-specific issues,<sup>383</sup> prior to each auction. In addition, the Bureau should seek comment on the methodology to be employed in establishing each of these mechanisms. Among other factors, the Bureau should consider the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with

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<sup>380</sup> Auction theory shows that the reserve price device accomplishes its revenue maximization goal because it gives all bidders an incentive to increase the level of their bids above what they would be in the absence of a reserve.

<sup>381</sup> See 47 U.S.C. § 309(j)(3).

<sup>382</sup> We note that our Part 1 rules already provide that the Commission may provide for a suggested minimum opening bid and may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded. See 47 C.F.R. §§ 1.2104(c), (d).

<sup>383</sup> See Section II, *supra*.

other spectrum bands, and any other relevant factors that could reasonably have an impact on valuation of the spectrum being auctioned.

## 5. Maximum Bid Increments

142. Background. A bid increment is the amount or percentage by which a bid must be raised above the high bid of the previous round in order to be accepted as a valid bid in the current round. In the *Competitive Bidding Second Report and Order*, we determined that the Commission would reserve the right to specify minimum bid increments in dollar terms as well as in percentage terms.<sup>384</sup> We reasoned that imposing a minimum bid increment speeds the progress of the auction and, in combination with activity and stopping rules, helps to ensure that the auction comes to a close within a reasonable period of time.<sup>385</sup> We did not reserve the discretion to specify maximum bid increments. In the *Notice*, we therefore sought comment on whether the Commission should retain the discretion to employ a maximum bid increment if it finds that jump bidding (*i.e.*, placing bids that are significantly higher than the minimum acceptable bid) is impairing the auction process.<sup>386</sup>

143. Discussion. Several commenters suggest that jump bidding is not a problem of serious concern.<sup>387</sup> Some theoretical literature, however, suggests that bidders could use jump bidding to manipulate the auction process and potentially reduce efficiency of the auction.<sup>388</sup> For example, a general principle of auction theory is that the auction mechanisms that perform the best are those which are able to induce bidders to reveal the most information. To the extent that jump bids enable bidders to conceal information, the phenomenon moves us away from the informational advantages of an ascending bid (multiple round) auction in the direction of a first-price sealed bid (single round) auction. As ISTA recognizes, jump bidding can complicate bidding strategy and deny bidders information about the number of bidders who would be willing to pay prices between the minimum acceptable bid and the jump bid.<sup>389</sup> In the absence of information about the bidders who would be willing to participate at intermediate bids, other bidders may feel compelled

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<sup>384</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2369, ¶¶ 124-26.

<sup>385</sup> *Id.*

<sup>386</sup> *Notice* at ¶ 88.

<sup>387</sup> See AirTouch Comments at 11, Reply Comments at 5; PageNet Comments at 12-13; NextWave Reply Comments at 8.

<sup>388</sup> See Lawrence M. Ausubel, "Open-Outcry Auctions for FCC Licenses," Comments for MCI Telecommunications Corp in IB Docket No. 95-168, PP Docket No. 93-253 (Nov. 17, 1995) (citing Christopher Avery, "Strategic Jump Bidding in English Auctions," Working Paper, Kennedy School of Government, Harvard University, March 15, 1994).

<sup>389</sup> ISTA Comments at 3.

to shade their bids more than they would otherwise. This behavior is an attempt to avoid the "winner's curse," that is, the tendency for the winner to be the bidder who most overestimates the value of the item being auctioned.

144. As an initial matter, we note that recent changes designed to improve the Commission's electronic auction bidding process eliminate the dangers that a maximum bid increment is designed to avoid (*e.g.*, jump bidding).<sup>390</sup> In an effort to speed the auction process and eliminate unwarranted "gaming" of our processes, the Commission has simplified the electronic auction bidding process by implementing "click box bidding".<sup>391</sup> As discussed above (*see* Section III.E.2, *supra*), this feature permits bidders to enter a bid only at the maximum bid increment as determined by the Commission, and thus makes bidding tactics such as jump bidding impossible. Nevertheless, we will reserve the discretion to employ a maximum bid increment should we return to an auction format in which jump bidding can in any way decrease the competitiveness of an auction. In this regard, we disagree with NextWave's suggestion that by disallowing jump bids as one method by which bidders may obtain information about each other the Commission risks prolonging an auction.<sup>392</sup> On the contrary, the Commission has alternate methods (*e.g.*, "click-box bidding", employing minimum bid increments and activity rules and increasing the number of rounds per day) to ensure that auctions close within a reasonable time.

## 6. Bid Withdrawal Payments

145. Background. Under our current rules, if a high bid is withdrawn prior to the close of a simultaneous multiple-round auction, the Commission will impose a bid withdrawal payment equal to the difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. If a winning bidder defaults after the close of an auction, the defaulting bidder will be required to pay the foregoing payment plus an additional payment of 3 percent of the subsequent winning bid or its own withdrawn bid, whichever is lower.<sup>393</sup>

146. We adopted these bid withdrawal rules in the *Competitive Bidding Second Report and Order* and determined that they would discourage insincere bidding without causing bidders to be

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<sup>390</sup> *See, e.g.*, "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," *Public Notice*, DA 97-1934 (rel. September 5, 1997).

<sup>391</sup> *See Mercury NALF.*

<sup>392</sup> NextWave Reply Comments at 8.

<sup>393</sup> 47 C.F.R. § 1.2104(g).

too cautious in attempting to aggregate licenses.<sup>394</sup> However, in the *Atlanta Trunking Order*, we held that in some cases of erroneous bids, full application of the bid withdrawal payment provisions could impose an extreme and unnecessary hardship on bidders and that some relief appears necessary.<sup>395</sup> We also noted that it may be extremely difficult for the Commission to distinguish between "honest" erroneous bids and "strategic" bids that appear erroneous. We therefore fashioned guidelines in the *Atlanta Trunking Order* to provide for reduced bid withdrawal payments in cases of erroneous bids that balance issues of fairness to bidders with the importance of discouraging insincere bidding. We later modified the broadband PCS rules for the D, E, and F blocks to establish similar provisions governing the withdrawal of erroneous bids.<sup>396</sup> In the *Notice*, we proposed to amend Sections 1.2104 and 1.2109 of our rules to establish similar provisions to apply to all future auctions.<sup>397</sup>

147. Discussion. As discussed above (*see* Section III.E.2, *supra*), we recently implemented "click box bidding" in an effort to improve the auction process and eliminate erroneous bids. We also have recently modified the electronic bidding format to limit withdrawals. As a result of such changes, the types of erroneous bids discussed in the *Notice* cannot occur under our new bidding format. We therefore conclude that our proposal regarding decreased bid withdrawal payments in cases of erroneous bids is moot.

## 7. Misuse of Bid Withdrawals

148. Background. As we indicated in the *Notice*, in prior auctions we have found that allowing bid withdrawals risks encouraging insincere bidding and the use of withdrawals for anti-competitive strategic purposes, such as signaling other bidders.<sup>398</sup> We therefore sought comment on whether we should exercise our authority to limit withdrawals, and if so, under what

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<sup>394</sup> *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-74, ¶¶ 146-153.

<sup>395</sup> *See Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, Order*, 11 FCC Rcd 17189, FCC 96-203 (May 3, 1996) ("*Atlanta Trunking Order*") and Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, *Order*, DA 96-706 11 FCC Rcd 13728 (May 6, 1996). *See also* Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Petition for Reconsideration of Bid Withdrawal Payment and Georgia Independent PCS Corp., Application for Review of Request to Waive Bid Withdrawal Payment Provision, *Memorandum Opinion and Order*, FCC 97-154, 12 FCC Rcd 6382 (rel. May 6, 1997) (waiving the full bid withdrawal payments assessed against these parties after a finding that the Commission's remote bidding system may have contributed to some confusion leading to the submission of the erroneous bids).

<sup>396</sup> *D, E, and F Block Report and Order*, 11 FCC Rcd at 7896, ¶¶ 152-54.

<sup>397</sup> *See Notice* at ¶ 92.

<sup>398</sup> *See Notice* at ¶ 90. *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-74, ¶¶ 146-153; *Mercury NALF*.

circumstances.<sup>399</sup> Finally, we sought comment on other ways to address the concern about strategic withdrawals without unduly affecting bidders' ability to efficiently aggregate licenses, such as increasing the withdrawal payment or changing its structure.<sup>400</sup>

149. Discussion. Several commenters oppose the Commission's proposal to place limits on bid withdrawals in certain circumstances as a means of avoiding strategic withdrawals that are intended for anti-competitive purposes.<sup>401</sup> Both AT&T and Merlin argue that the ability to withdraw bids is critical to a bidder's auction strategy.<sup>402</sup> While they recognize the difficulty in determining the true intent behind a withdrawn bid, these commenters suggest that the Commission continue to monitor each auction carefully, and address abusive behavior on a case-by-case basis.<sup>403</sup> Similarly, PageNet states that the Commission should not limit bid withdrawals as they are critical to providing applicants with the flexibility to correct bids that are placed in error and to quickly change bidding strategy.<sup>404</sup> PageNet contends that concerns about strategic withdrawals intended to produce anti-competitive results are not sufficient to eliminate the bidding flexibility that bid withdrawals provide.<sup>405</sup> Finally, AirTouch suggests that the Commission permit bid withdrawals at any time, subject to certain conditions.<sup>406</sup> In particular, AirTouch recommends that: (1) all bid withdrawals should be subject to applicable bid withdrawal payments; (2) a bidder withdrawing a bid should not be permitted to regain eligibility on any bidding units lost as a result of the withdrawal; and (3) the high bidder in the round prior to the withdrawn bid should be permitted to bid again on the license, and to reacquire eligibility for bidding units necessary to resubmit the new bid.<sup>407</sup>

150. In contrast, NextWave supports a limitation on bid withdrawals. NextWave states that bid withdrawals are a necessary tool, but in some instances, bid withdrawals are used for insincere

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<sup>399</sup> Notice at ¶ 93.

<sup>400</sup> *Id.*

<sup>401</sup> See AT&T Comments at 5-6; PageNet Comments at 13-14; AirTouch Comments at 11; Merlin Reply Comments at 5-6.

<sup>402</sup> AT&T Comments at 5-6; Merlin Reply Comments at 5-6.

<sup>403</sup> AT&T Comments at 5-6, Merlin Reply Comments at 5-6.

<sup>404</sup> PageNet Comments at 13-14.

<sup>405</sup> PageNet Comments at 14.

<sup>406</sup> AirTouch Comments at 11.

<sup>407</sup> AirTouch Comments at 12.

bidding designed to "game" the auction.<sup>408</sup> To protect against such misuse, NextWave proposes, for example, that the Commission create a fourth stage of the auction, during which a bidder who has withdrawn from a particular market would be prohibited from re-bidding in the same market.<sup>409</sup> In the past, we have recognized that allowing bid withdrawals facilitates efficient aggregation of licenses and pursuit of efficient backup strategies as information becomes available during the course of an auction. Nevertheless, we also have recognized that bidders may, in some instances, seek to remove bids for improper purposes, such as to delay the close of the auction for strategic purposes. For this reason, the Bureau has traditionally retained the discretion to limit withdrawals as part of the management of an auction.<sup>410</sup> To prevent strategic delays to the close of the auction, or other abuses, the Bureau should exercise its discretion assertively. In addition, the Bureau should consider limiting the number of rounds in which bidders may withdraw bids,<sup>411</sup> and to prevent bidders from bidding on a particular market if the Bureau finds that a bidder is abusing the Commission's bid withdrawal procedures. These are among the types of issues on which the Bureau will seek comment prior to the start of each future auction.<sup>412</sup>

## 8. Reauction Versus Offering to Second Highest Bidder

151. Background. Under Section 1.2109(b) of the Commission's rules,<sup>413</sup> if a winning bidder withdraws its bid after the auction has closed or fails to remit the required down payment within ten business days after the Commission has issued a Public Notice announcing winning bidders, the bidder will have defaulted. In such event, Section 1.2109(b) provides that the Commission may, in its discretion, 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.<sup>414</sup> In the *Notice*, we requested comment on whether we should (1) retain Section 1.2109(b) in its current form; (2) modify the rule so that the Commission retains the discretion regardless of when a default occurs to offer the

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<sup>408</sup> NextWave Reply Comments at 9.

<sup>409</sup> *Id.*

<sup>410</sup> *See, e.g.*, "Auction of Broadband Personal Communications Services D, E and F Blocks -- Auction Notice and Filing Requirements," *Public Notice*, DA 96-1026 (rel. June 26, 1996).

<sup>411</sup> This practice was employed in the recently-completed 800 MHz SMR auction, and will be employed in the upcoming LMDS auction. *See* "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," *Public Notice*, DA 97-1934 (rel. September 5, 1997); *LMDS Pre-Auction Public Notice*.

<sup>412</sup> *See* Section I.A., *supra*.

<sup>413</sup> 47 C.F.R. § 1.2109(b).

<sup>414</sup> 47 C.F.R. § 1.2109(b). If a winning bidder defaults on a license or is disqualified after having made the required down payment, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications. *Id.*

license only to the second highest bidder at its bid price; (3) modify the rule so that the Commission retains discretion to offer a license on which the winning bidder has defaulted on its down payment obligation only to the second highest bidder; (4) modify the rule so that the Commission retains discretion to offer a defaulted license to the highest losing bidders (in descending order of their bids), but only at the final bid level of the second highest bidder; or (5) modify the rule to require reauction of defaulted licenses regardless of when a default occurs.<sup>415</sup> In addition, we sought comment on whether we should modify Section 1.2109(b) to codify our statement in the *Competitive Bidding Fifth Report and Order*<sup>416</sup> that where there are a relatively small number of low value licenses, and only a short time has passed since the initial auction, the Commission may choose to offer the license to the second highest bidder because the cost of conducting another auction may exceed the benefits. Finally, we requested that commenters favoring this option indicate the parameters that the Commission should employ in determining which licenses might be re-offered to bidders in the original auction.<sup>417</sup>

152. Discussion. We will modify Section 1.2109(b) to reserve the discretion to either reauction a defaulted license or offer it to the other highest bidders (in descending order) at their final bids.<sup>418</sup> Several commenters support the reauction of defaulted licenses because it helps to ensure that the price paid for a license is the current price, rather than the price that was applicable at the time the original auction occurred.<sup>419</sup> Only two commenters oppose reauction in all circumstances.<sup>420</sup> Airadigm and AMTA oppose providing the Commission with the discretion to reauction defaulted licenses because they believe that awarding licenses to the next highest bidder will be faster than reauctioning.<sup>421</sup> However, as we stated in the *Notice*, we have developed a computerized auction system and conducted numerous auctions and we now believe that the costs of a reauction, even for a small number of relatively low value licenses, is generally

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<sup>415</sup> *Notice* at ¶ 97.

<sup>416</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5537, n.55.

<sup>417</sup> *See Notice* at ¶ 97.

<sup>418</sup> 47 C.F.R. § 1.2109(b). If a winning bidder defaults on a license or is disqualified after having made the required down payment, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications. *Id.*

<sup>419</sup> Nextel Comments at 8-9 and Reply Comments at 7.

<sup>420</sup> AMTA Comments at 15-16; Airadigm Comments at 16-17.

<sup>421</sup> Airadigm Comments at 16-17; AMTA Comments at 15-16..



minimal.<sup>422</sup> We also believe that the planned use of regularly scheduled quarterly auctions will ensure rapid reauction.<sup>423</sup>

153. Further, we note that re-offering a defaulted license to the next highest bidder (in descending order) at their final bids may not ensure that the license will be awarded to the bidder who values it the most highly. In particular, as the license is offered to bidders at the next highest bids, other parties can argue that they would pay more for the license if given the opportunity. In addition, when more than one license is being auctioned, aggregation strategies may shift during the course of the auction, affecting the value placed on any individual license by a particular bidder. As we discussed in the *Notice*, when we first adopted rules governing the licensing of defaulted licenses, we stated that "[i]n the event that a winning bidder in a simultaneous multiple-round auction defaults on its down payment obligations, the Commission will generally reauction the license either to existing or new applicants."<sup>424</sup> Noting that in some circumstances the costs of conducting a reauction may not always be justified, we reserved the discretion in cases in which the winning bidder defaults on its down payment obligation to offer a defaulted license to the highest losing bidders (in descending order of their bids) at their final bids if "only a small number of relatively low value licenses are to be reaucted . . . ."<sup>425</sup>

154. Nextel and others suggest that the Commission should retain the discretion to award defaulted licenses to the next highest bidder only when the default occurs soon after the close of the auction and there has been no opportunity for parties to file petitions to deny.<sup>426</sup> Nextel suggests that in such an instance, there is little risk of a significant change in market price, and no risk of encouraging frivolous petitions to deny.<sup>427</sup> We are aware of the dangers of adopting a rule which could have the unfortunate consequence of encouraging the filing of frivolous petitions to deny. Nevertheless, we believe that by reserving the discretion to either reaucted defaulted licenses or award them to the next highest bidder, the Commission will be in the best possible position to determine which option serves the public interest in each particular situation.

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<sup>422</sup> See *Notice* at ¶ 96.

<sup>423</sup> See *Notice* at ¶ 7 (providing for regularly scheduled quarterly auctions).

<sup>424</sup> *Notice* at ¶ 95, citing *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2374, ¶ 154 n.115.

<sup>425</sup> *Id.*

<sup>426</sup> Nextel Reply Comments at 7.

<sup>427</sup> *Id.*

## F. Anti-Collusion Rules

155. Background. In the *Competitive Bidding Second Report and Order* the Commission adopted rules designed to prevent and facilitate the detection of collusive conduct in order to enhance and ensure the competitiveness of both the auction process and the post-auction market structure.<sup>428</sup> Section 1.2105(c) of the Commission's rules requires that auction applicants identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process.<sup>429</sup> Applicants are also required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bids, bidding strategies, or the particular markets on which they will or will not bid.<sup>430</sup> After short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders that have applied to bid in the same geographic license area, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.<sup>431</sup> In addition, winning bidders are required to attach as an exhibit to their long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process prior to the close of bidding.<sup>432</sup> All such arrangements must have been finalized prior to the filing of short-form applications.<sup>433</sup>

156. Under Section 1.2105(c)(4) of our rules, a party holding a non-controlling, attributable interest in one applicant may acquire an ownership interest, form a consortium with, or enter into a joint bidding arrangement with other applicants for the same geographic license area, provided that (1) the attributable interest holder certifies that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds

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<sup>428</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385-2386, ¶¶ 221-226. See also 47 C.F.R. § 1.2105(c).

<sup>429</sup> 47 C.F.R. § 1.2105(c)(1). See also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2387, ¶ 225.

<sup>430</sup> 47 C.F.R. § 1.2105(a)(2)(ix).

<sup>431</sup> 47 C.F.R. § 1.2105(c); *Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6868 (1994); *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2387, ¶ 225.

<sup>432</sup> 47 C.F.R. § 1.2107(d).

<sup>433</sup> See 47 C.F.R. § 1.2105(c)(1).

an attributable interest, has formed a consortium, or has entered into a joint bidding arrangement; and (2) the arrangements do not result in a change in control of any of the applicants.<sup>434</sup> In the *Notice*, we recognized that this exception, although helpful in facilitating the flow of capital to multiple applicants, is difficult to apply in a business setting.<sup>435</sup> In particular, we stated that entities are reluctant to invest in multiple applicants if they cannot obtain information about business plans and strategies, which often necessarily reflect bidding strategies or bids. We therefore proposed to modify this provision to permit entities to invest in multiple applicants, subject to certain conditions, if the original applicant withdraws from the auction.<sup>436</sup>

157. In the rule making proceeding adopting service-specific auction rules for paging services, several commenters suggested that discussions between bidders for the same license area regarding a business merger or acquisition may be construed as discussions of bidding or bidding strategy, and thus a violation of Section 1.2105(c)(4).<sup>437</sup> These commenters requested that the Commission create a "safe harbor" for discussions of certain non-auction related business matters between applicants for the same license areas to minimize any chilling effect on ongoing business acquisitions and transactions.<sup>438</sup> At that time, we stated that we did not believe a sufficient record had been established to enable us to make a decision on this proposal, and that we would more thoroughly examine this issue in our review of our general auction procedures.<sup>439</sup> In the *Notice*, we therefore sought comment on creation of such a "safe harbor," in light of efforts by the Commission and its staff to clarify the relationship between the anti-collusion rule and non-auction related business negotiations occurring during the time the anti-collusion rule applies to parties participating in an auction.<sup>440</sup> We also sought comment in the *Notice* on any other changes to our rules prohibiting collusion that commenters believe are warranted.<sup>441</sup> Finally, we sought comment

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<sup>434</sup> 47 C.F.R. § 1.2105(c)(4).

<sup>435</sup> *Notice* at ¶ 100.

<sup>436</sup> *Id.* at ¶ 101.

<sup>437</sup> See AirTouch Comments at 37-40 and Arch Comments at 19-20, *Paging Second Report and Order and Further Notice of Proposed Rule Making*. See also MobileMedia Comments at 26 and Metrocall Comments at 21-22 filed in the same proceeding.

<sup>438</sup> *Id.*

<sup>439</sup> *Paging Second Report and Order and Further Notice of Proposed Rule Making* at ¶ 156.

<sup>440</sup> *Notice* at ¶ 102.

<sup>441</sup> *Notice* at ¶ 102.

on the public notices and letters issued by Commission staff interpreting and clarifying these rules.<sup>442</sup>

158. Discussion. We have taken this opportunity in revisiting our general competitive bidding procedures to examine the effectiveness of the anti-collusion rule in the 15 auctions we have conducted to date. We continue to believe that our anti-collusion rules are necessary to deter bidders from engaging in anti-competitive behavior. Nevertheless, after careful review of the comments received in this proceeding, we have determined that some modifications to Section 1.2105(c) can be made which will benefit bidders in several respects, without jeopardizing the competitiveness and overall integrity of our auction program.

159. In the *Collusion MO&O*,<sup>443</sup> the Commission revisited the anti-collusion rules prior to the start of the PCS auctions, and concluded that allowing holders of non-controlling attributable interests in an applicant greater flexibility to form agreements with other applicants would help applicants to acquire the additional capital necessary to bid successfully for licenses. We therefore created an exception to the general rule contained in Section 1.2105 to permit a holder of a non-controlling attributable interest in one applicant for a particular license or licenses to obtain ownership interests in or enter into consortium arrangements with a second applicant for a license in the same geographic service area.<sup>444</sup> The attributable interest holder must certify to the Commission that it has observed and will observe certain restrictions on communication concerning the applicants in which it holds an attributable interest or with which it has entered into a bidding arrangement.<sup>445</sup>

160. After considering the comments filed in response to our proposals in the *Notice*, we have decided to adopt a second exception to our general rules prohibiting collusion.<sup>446</sup> Specifically, we will permit a holder of a non-controlling attributable interest in an applicant to obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area provided that the original applicant has withdrawn from the auction, is no longer placing bids, and has no further eligibility. To meet the requirements of this exception, the attributable interest holder will be required to certify to the Commission that it did not communicate with the new applicant prior to the date the original applicant withdrew from the

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<sup>442</sup> *Id.*

<sup>443</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, WT Docket No. 93-253, *Memorandum Opinion and Order*, 9 FCC Rcd 7684 (1994) at 7687-89, ¶¶ 8-12 (1994) ("*Collusion MO&O*").

<sup>444</sup> For purposes of this rule, an "attributable" investor is one holding five percent or more of the applicant. See 47 C.F.R. § 1.2105(c)(4).

<sup>445</sup> *Id.* See also *Collusion MO&O*, 9 FCC Rcd at 7688-89, ¶ 11.

<sup>446</sup> See 47 C.F.R § 1.2105(c).

auction, and that it will not convey bidding information, or otherwise serve as a nexus between the previous applicant and the new applicant. As stated in the *Notice*, this additional exception will further facilitate the flow of capital to auction applicants by encouraging, and providing the flexibility necessary for, non-controlling investors to invest in other auction applicants if their original applicant fails to complete the auction.<sup>447</sup> The majority of commenters addressing this proposal agree that it will encourage investment in auction applicants without threatening the overall competitiveness of the auction process.<sup>448</sup>

161. Only Nextel and PageNet oppose this exception, citing the potential for collusive activity when an investor in an applicant that has chosen to withdraw from the auction explores possible investments in other applicants, thus learning bidding strategies of multiple auction participants.<sup>449</sup> In addition, PageNet contends that this exception could encourage speculation which would threaten the integrity of the auction process and ultimately result in lower prices paid for the spectrum.<sup>450</sup> However, after balancing these factors, we believe that the benefits of this certification requirement, in particular the likelihood that auction applicants will be able to attract increased investment, exceed any possible disadvantages. The Commission requires that auction applicants certify to the truthfulness and accuracy of a number of issues on their Form 175 applications, and to make minor amendments when necessary. We believe that applicants are no more likely to make false certifications about the exception which we adopt today than about other information on the form. As discussed *infra*, we also remind prospective applicants that the Commission will conduct a detailed investigation in the event it becomes aware of a possible violation of the anti-collusion rule, and that violations may result in the loss of the down payment or full bid amount, the cancellation of licenses, and preclusion from participation in future auctions.

162. Commenters in both the Paging proceeding and in this proceeding<sup>451</sup> support the creation of a safe harbor for discussions of certain non-auction related business matters between applicants for the same license areas. In general, these commenters argue that (1) the Commission's anti-collusion rules cause unnecessary confusion in their current form,<sup>452</sup> (2) the

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<sup>447</sup> *Id.*

<sup>448</sup> See Airadigm Comments at 17 and Reply Comments at 7; AT&T Comments at 7; CII Comments at 20; ISTA Comments at 3.

<sup>449</sup> See Nextel Comments at 9-10 and Reply Comments at 8; PageNet Comments at 15.

<sup>450</sup> PageNet Comments at 15.

<sup>451</sup> See Metrocall Comments at 4; AT&T Comments at 7; PCIA Comments at 5-6; AMTA Comments at 16; PageNet Comments at 14; AirTouch Comments at 12-13, Reply Comments at 7; CII Comments at 19-20; ISTA Comments at 3; Nextel Reply Comments at 3-4; CellNet Reply Comments at 5.

<sup>452</sup> AT&T Comments at 6-7.

purposes of the anti-collusion rules would not be threatened by such a safe harbor,<sup>453</sup> and (3) existing antitrust laws and policies will adequately accomplish the goal of protecting the competitiveness of the bidding process.<sup>454</sup> As our auction program has evolved, we have continued to refine and clarify for bidders the operation and impact of the anti-collusion rule upon bidder conduct during the course of an auction.<sup>455</sup> Prior to the start of the broadband PCS D, E and F block auction, the Bureau received numerous inquiries concerning the impact of these rules upon business contacts between current broadband PCS licensees and auction winners and eligible participants in the ongoing broadband PCS D, E and F Block auction. In response to these inquiries, the Bureau released a Public Notice providing guidance on these business negotiations in the context of our anti-collusion rules.<sup>456</sup> The Bureau emphasized that Section 1.2105(c) may affect the way in which auction applicants conduct their routine business during an auction by placing significant limitations upon their ability to pursue business opportunities involving services in the geographic areas for which they have applied to bid for licenses.<sup>457</sup> These interpretations have provided sufficient guidance concerning the types of non-auction related communications which are permitted under Section 1.2105(c), and we therefore decline to create such a safe harbor.

163. We affirm the Bureau's interpretation of this aspect of the anti-collusion rule. As a general matter, the anti-collusion rule does not prohibit non auction-related business negotiations between auction applicants who have applied for the same geographic service areas. We caution auction applicants, however, that discussions concerning, but not limited to, issues such as management, resale, roaming, interconnection, partitioning and disaggregation may all raise impermissible subject matter for discussion because they may convey pricing information and bidding strategy.<sup>458</sup> Because auction applicants should avoid all discussions with each other that

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<sup>453</sup> See Metrocall Comments at 4; AT&T Comments at 7.

<sup>454</sup> AT&T Comments at 6-7.

<sup>455</sup> See *Public Notice*, "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rules for D, E and F Block Bidders," DA 96-1460 (August 28, 1996) ("*August 28 Public Notice*"); *Public Notice*, "FCC Staff Clarifies Application of Anti-Collusion Rule to Broadband PCS 'C' Block Reauction," DA 96-929 (June 10, 1996) ("*June 10 Public Notice*"); *Public Notice*, "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," DA 95-2244 (Oct. 26, 1995); *News Release*, "Staff Adopts Order and Releases Letters Clarifying Issues on Broadband PCS Auctions" (Oct. 26, 1994); Letter from William E. Kennard, FCC, to Gary M. Epstein & James H. Barker, Oct. 25, 1994; Letter from Rosalind K. Allen, FCC, to R. Michael Senkowski, Dec. 1, 1994; Letter from Rosalind K. Allen, FCC, to Leonard J. Kennedy, Dec. 14, 1994; Letter from Kathleen O'Brien Ham, FCC, to Mark Grady, Apr. 16, 1996; Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996.

<sup>456</sup> *June 10 Public Notice*.

<sup>457</sup> *Id* at 2.

<sup>458</sup> See *Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996*, at 1-2.

will likely affect bids or bidding strategies, we believe that individual applicants, and not the Commission, are in the best position to determine in the first instance which communications are permissible and which are not.<sup>459</sup>

164. As discussed above, the *Notice* also invited comment on any other changes to our rules prohibiting collusion that commenters believe are warranted.<sup>460</sup> Section 1.2105(c)(6)(i) of our rules provides that, for purposes of the anti-collusion rule, an applicant is defined as an entity submitting a short-form application, as well as all holders of partnership, ownership, and any stock interest amounting to five percent or more of the entity.<sup>461</sup> One commenter, the Coalition of Institutional Investors ("CII"), states that defining any holder of five percent or more of an auction applicant as part of the applicant for purposes of the Commission's anti-collusion rules unnecessarily restricts applicants' abilities to obtain financing from a variety of sources.<sup>462</sup> After careful consideration of the issue, we agree with CII. Therefore, we will increase the attribution standard contained in Section 1.2105(c)(6)(i) to 10 percent, or any holder of a controlling interest in the applicant.<sup>463</sup>

165. A higher attribution standard will facilitate the flow of capital to applicants by enabling parties to make investments in multiple applicants, including applicants for licenses in the same geographic areas. Our decision to use an attribution threshold of 10 percent is consistent with the change we make to our general reporting requirement (*see* Section III.C.3, *supra*). We recognize that some potential for collusion exists whenever an entity is permitted to hold an interest in more than one applicant for licenses in the same geographic service area. However, we reemphasize that auction applicants and their owners continue to be subject to existing antitrust laws, and that conduct that is permissible under the Commission's rules may be prohibited by the antitrust statute.<sup>464</sup> In addition, we remind prospective auction participants that we will continue to scrutinize carefully any instances in which bidding patterns suggest that collusion may be occurring.

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<sup>459</sup> *See August 28 Public Notice.*

<sup>460</sup> *Notice* at ¶ 102.

<sup>461</sup> 47 C.F.R. § 1.2105(c)(6)(i).

<sup>462</sup> CII Comments at 18-19.

<sup>463</sup> *See* 47 C.F.R § 1.2105(c)(6)(i).

<sup>464</sup> *See Collusion MO&O*, 9 FCC Rcd at 7684, ¶ 12.

166. Finally, we reemphasize that the Commission will aggressively investigate any allegations that an auction participant has violated Section 1.2105(c).<sup>465</sup> Bidders who are found to have violated the Commission's anti-collusion rules may, among other sanctions, be subject to the loss of their down payment or their full bid amount, face the cancellation of their licenses, and may be prohibited from participating in future auctions.<sup>466</sup> In addition, where allegations appear to give rise to violations of the federal antitrust laws, the Commission may investigate and/or refer such cases to the United States Department of Justice for investigation.<sup>467</sup>

### G. Pre-grant Construction

167. Background. Section 22.143 of the Commission's rules permits auction winners in the Public Mobile Services to begin construction of facilities prior to the grant of their applications, at their own risk and subject to certain exceptions, 35 days after the date of the public notice listing the application for that facility as acceptable for filing.<sup>468</sup> In the *Notice*, we proposed to extend similar pre-grant construction rules to all auction winners, regardless of whether petitions to deny have been filed against their long-form applications.<sup>469</sup> We further proposed to permit each auction winner to begin construction of its system, at its own risk, upon release of a public notice announcing that their post-auction long-form applications were accepted for filing. We tentatively concluded that to do so would further the public interest by expediting, in most cases, the initiation of service to the public.<sup>470</sup>

168. Discussion. We will adopt our proposal in the *Notice* to permit applicants for all licenses awarded by competitive bidding to begin construction of facilities prior to the grant of their applications. All commenters addressing the issue support our proposal to permit license

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<sup>465</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388, ¶ 226. See also *August 28 Public Notice* at 3-4.

<sup>466</sup> See *Commercial Realty St. Pete, Notice of Apparent Liability for Forfeiture*, FCC 95-58, 10 FCC Rcd 4277 (1995) (assessing two \$10,000 forfeitures for violations of the Commission's anti-collusion rules during the IVDS auction); *Application of Mercury PCS II, L.L.C. for Authority to Construct and Operate Broadband PCS Systems on Frequency Blocks D, E, and F, Memorandum Opinion and Order*, DA 97-1782 (rel. August 21, 1997) (conditioning the final grant of an applicant's licenses on any action that may be taken based on the outcome of any investigation conducted by the Commission or the Department of Justice regarding bid signaling or other bidding activity); *Mercury NALF* (assessing a \$650,000 forfeiture for an apparent violation of Section 1.2105(c) by placing trailing numbers at the end of its bids to disclose its bidding strategy in a reflexive manner that invited collusive behavior).

<sup>467</sup> *Id.*

<sup>468</sup> See 47 C.F.R. § 22.143.

<sup>469</sup> *Notice* at ¶ 104.

<sup>470</sup> *Id.*



applicants to begin construction of their facilities, at their own risk, upon release of a public notice announcing the acceptance for filing of post-auction long-form applications.<sup>471</sup> These commenters agree that allowing pre-grant construction furthers the statutory objective of rapidly deploying new technologies, products, and services for the benefit of the public.<sup>472</sup>

169. Commenters also support our proposal to permit license applicants with petitions to deny filed against their long-form applications to begin construction of their facilities at the same time as license applicants whose licenses are not the subject of pending petitions to deny.<sup>473</sup> While our current service-specific rules require as a condition for pre-grant construction no pending petitions to deny,<sup>474</sup> we conclude that the merits of petitions to deny may be judged by an applicant and factored into its assessment of the risk of proceeding with construction before license grant.<sup>475</sup> We therefore adopt a pre-grant construction rule for all services subject to competitive bidding that permits construction by applicants that are subject to petitions to deny. Of course, pre-grant construction will be subject to any service-related restrictions, including but not limited to antenna restrictions, environmental requirements, and international coordination. Any applicant engaging in pre-grant construction activity does so entirely at its own risk, and the Commission will not take such activity into account in ruling on any petition to deny. Finally, we note that we expect our licensing process to be more rapid generally in light of the shortened petition to deny period permitted by the Balanced Budget Act.<sup>476</sup>

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<sup>471</sup> See PCIA Comments at 6; PageNet Comments at 16, AMTA Comments at 17; CTIA Comments at 1; AirTouch Comments at 13 and Reply Comments at 6; Airadigm Comments at 18; NextWave Reply Comments at 9-10.

<sup>472</sup> 47 U.S.C. § 309(j)(3)(A).

<sup>473</sup> See CTIA Comments at 1; CTIA Comments at 1; AirTouch Comments at 13, Reply Comments at 6; NextWave Reply Comments at 9-10.

<sup>474</sup> See, e.g., 47 C.F.R. § 22.143(d)(1).

<sup>475</sup> See, e.g., PCIA Comments at 6.

<sup>476</sup> Balanced Budget Act, § 3008.

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**IV. SECOND FURTHER NOTICE OF PROPOSED RULE MAKING****A. Rules Governing Designated Entities****1. Designated Entities**

170. Background. Section 309(j)(4)(D) of the Communications Act provides that in prescribing rules for a competitive bidding system, the Commission shall "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." The statute further provides that for this purpose, the Commission shall consider the use of tax certificates, bidding credits and other procedures. In addition, pursuant to Section 309(j)(4)(A), the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods," in order to "disseminat[e] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."<sup>477</sup> Pursuant to these mandates, the Commission has adopted a number of measures, including entrepreneur blocks, bidding credits, reduced upfront payments/down payments and installment payments.<sup>478</sup>

171. In addition, Section 257 of the Telecommunications Act requires the Commission to identify and eliminate market entry barriers for small and entrepreneurial telecommunications businesses. We are committed to completing a study to examine barriers encountered by minorities and women in the auctions process and in the secondary market for licenses.<sup>479</sup> We have initiated this process with regard to the study on secondary markets, and will initiate the auctions study expeditiously. We will release the results in 1998.

172. Any measures that we decide to adopt that give special preferences specifically to minority- and women-owned businesses must comply with recent Supreme Court decisions, as discussed below. To that end, we seek comment on (1) whether there is a compelling governmental interest that would justify the use of preferences for minority-owned businesses and "exceedingly persuasive justification" for preferences for women-owned businesses; (2) what evidence supports the commenter's position on the issue; and (3) what measures, if any, could be

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<sup>477</sup> 47 C.F.R. §§ 309(j)(3)(B) and (j)(4)(A).

<sup>478</sup> See generally *The FCC Report to Congress on Spectrum Auctions*, FCC 97-353 (rel. Oct. 9, 1997). Congress repealed, as of January 17, 1995, that portion of section 1071 of the Internal Revenue Code, 26 U.S.C. § 1071, under which the Commission administered the tax certificate program. See *Self-Employed Health Insurance Act*, H.R. 831, § 2(d).

<sup>479</sup> See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, *Report*, 12 FCC Rcd 16802 (1997) ("*Section 257 Report*").

narrowly tailored to withstand judicial review. The specific issues that commenters should address are discussed in more detail below.

173. Discussion

**a. *Minority-based designated entity provisions***

174. As we have recognized in the past, in *Adarand Constructors, Inc. v. Peña* the Supreme Court established that governmental policies that take race into account are reviewed under a strict (as opposed to intermediate) scrutiny standard.<sup>480</sup> We tentatively conclude that, to the extent consistent with constitutional standards, we should take steps to further our statutory mandate to ensure that minorities have the opportunity to engage in the provision of spectrum services pursuant to Section 309(j)(4). We seek comment on how we can modify our designated entity provisions, consistent with the standards set forth in *Adarand*. In particular, we seek comment on what tools, such as bidding credits, might be used consistent with *Adarand*. In addition, we seek comment on whether we should limit any tools designed to ensure that minority-owned businesses have the chance to take part in our auction program to those minority-owned businesses that also qualify as small businesses. Commenters advocating the adoption of such measures should address the constitutional issue and present specific empirical evidence supporting their views.

175. Should we determine that provisions for minorities would withstand strict scrutiny as required by *Adarand*, we also seek comment on appropriate eligibility standards for applicants seeking to qualify for minority-based provisions. For example, we could specify that to qualify for any minority-based provisions, an applicant must be minority-controlled (*i.e.*, minorities must have *de facto* as well as *de jure* control of the applicant and must own more than 50 percent of the equity on a fully diluted basis) and meet the eligibility requirements set forth in 47 C.F.R. §

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<sup>480</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) ("*Adarand*"). See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, *Notice of Inquiry*, 11 FCC Rcd 6280, 6309-15 (1996); *Section 257 Report*, 12 FCC Rcd 16802, 16927-30. The Commission also has sought comment on post-*Adarand* provisions for minority- and women-owned businesses in a number of service-specific rule making proceedings. See, e.g., Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, GN Docket No. 90-314, Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Further Notice of Proposed Rule Making*, 10 FCC Rcd 1872, 1877-79 (1995); See also Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz, PP Docket No. 93-252, *Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making*, 11 FCC Rcd 188, 266-67 (1995).

1.2110(b)(2).<sup>481</sup> Alternatively, to ensure that any minority policies are reserved for businesses in which minorities have a substantial financial stake, as well as *de jure* and *de facto* control, we could strictly define equity to require that minorities have the right to receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock and the right to receive dividends, profits, and other distributions from the business in proportion to their equity interests.<sup>482</sup> This requirement would be similar to the eligibility standards for minority-owned businesses adopted but never implemented for the broadband PCS auctions, and to the eligibility standards recently proposed for the auction of pending broadcast license applications.<sup>483</sup> In addition, we seek comment on alternate formulas that might be appropriate for determining eligibility for minority-based provisions.<sup>484</sup>

176. We also observe that the Office of Management and Budget ("OMB") recently modified its standards for the classification of federal data on race and ethnicity.<sup>485</sup> Specifically, OMB: (1) separated the category for Asian and Pacific Islander category into two categories -- "Asian" and

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<sup>481</sup> Section 1.2110(b)(2) requires that minority owners must have a controlling interest in the applicant, must own on a fully diluted basis 50.1 percent of the equity, and in the case of corporate applicants, must hold at least 50.1 percent of the voting stock or, in the case of partnerships, all general partners must be minorities (or entities 100 percent owned or controlled by minorities), and minorities must collectively own at least 50.1 percent of the partnership equity. As discussed above, we also note that the Office of Management and Budget recently modified the definition of the term "minority" contained in Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting. See 62 Fed. Reg. 58782 (October 30, 1997).

<sup>482</sup> We note that these restrictions differ from the benchmarks used to attribute ownership of broadcast stations for purpose of our multiple ownership restrictions set forth in 47 C.F.R. § 73.3555, where the intent is to identify ownership interests in, or relationships to, a licensee potentially conferring the ability to influence or control the operations of a licensee, including core functions, such as programming. *Notice of Proposed Rulemaking* in MM Docket No. 94-150, et al. 10 FCC Rcd 3606, 3614 (1995); *Attribution of Ownership Interests*, 97 FCC 2d 997, 999, 1005 (1984), *recon.* 58 RR 2d 604 (1985), *further recon.* 1 FCC Rcd 802 (1986). For that purpose, ownership interests below 50% are attributed but nonvoting and other passive interests are generally disregarded. Our tentative view is that a more restrictive approach is warranted here to safeguard the integrity of our minority ownership policy by strictly limiting it to circumstances in which minority owners will have *de facto* and *de jure* control of the license.

<sup>483</sup> See *Broadcast NPRM* at ¶ 88.

<sup>484</sup> See, e.g., *Implementation of Section 309(j) of the Communications Act (Fifth Report and Order)*, 9 FCC Rcd 5532, 5611-13 ¶¶ 183, 185 (1994), *recon. Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994), *modified, Sixth Report and Order*, 11 FCC Rcd 136 (1995), *aff'd sub nom, Omnipoint v. FCC*, 78 F.3d 620 (D.C. Cir. 1996) (due to the "exceptionally great financial resources" required by broadband PCS applicants, they qualify for preferential treatment so long as minorities hold 25 percent of the equity and 50.1 percent of the voting stock, provided no single investor holds 25 percent of the corporation's passive equity). The favorable bidding credits originally intended to enhance the opportunities of minority- and female-owned small businesses were suspended after the decision in *Adarand*. In *Omnipoint* the court upheld our decision in the *Sixth Report and Order* to make these credits available to small businesses following *Adarand*.

<sup>485</sup> See Office of Management and Budget, Revisions to the Standards for the Classification of Federal Data on Race Ethnicity, *Notice of Decision*, 62 Fed Reg 58782 (October 30, 1997).

"Native Hawaiian or Other Pacific Islander"; and (2) changed the term "Hispanic" to "Hispanic or Latino". We previously have used this standard to define the term "minority" for purposes of our designated entity provisions,<sup>486</sup> and seek comment on whether we should similarly amend the current definition in our rules.<sup>487</sup>

**b. Gender-based designated entity provisions**

177. We seek comment on whether special policies are warranted for female-owned applicants. We note that the constitutionality of our former practice of awarding comparative preferences for female ownership was not addressed by the Supreme Court in *Metro*<sup>488</sup> and that we suspended that practice following *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), which held, under "intermediate" scrutiny, that our gender preference was not shown to be substantially related to achieving program diversity and that it was thus unconstitutional. More recently, the Supreme Court has ruled that a state program, which makes distinctions based upon gender, must be supported by an "exceedingly persuasive justification" in order to withstand constitutional muster. *United States v. Virginia Military Institute* 116 S.Ct 2264, 2274-76 (1996). We seek comment on whether there is sufficient evidence to justify special provisions for women-owned businesses under that standard.

178. As with minority-based provisions, we tentatively conclude that to the extent consistent with applicable constitutional standards, we should take steps to further our statutory goal of making certain that women have the opportunity to provide spectrum-based services pursuant to Section 309(j)(4). We seek comment on how we can modify our designated entity provisions, consistent with the standards set forth in recent court decisions. In particular, we seek comment on what tools, such as bidding credits, might be used consistent with judicial precedent. In addition, we seek comment on whether we should limit any tools designed to encourage participation in our auction program by women-owned businesses that also qualify as small businesses. Commenters advocating the adoption of such measures at this time should address the constitutional issue and present specific empirical evidence supporting their views.

**c. Rural Telephone Company provisions**

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<sup>486</sup> See *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 432 ¶ 52 (1994) (revising 47 C.F.R. § 24.720(i) to conform with the definition of "minority" found at, *inter alia*, 47 U.S.C. § 309(i)(3)(c)(ii) and 47 C.F.R. § 1.1621(b)). See also *Broadcast Equal Employment Opportunity Rules and FCC Form 395*, 70 FCC 2d 1466, 1473 (1979); Race and Ethnic Standards for Federal Statistics and Administration Reporting, OMB Statistical Policy Directive No. 15 (1977).

<sup>487</sup> 47 C.F.R. § 1.2110(b)(2).

<sup>488</sup> *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990) (applying an intermediate scrutiny standard, the Supreme Court upheld the constitutionality of our treatment of minority ownership policies in comparative proceedings).

179. In the Commission's recent report to Congress on the spectrum auctions, we stated our belief that auctions have generally provided rural telephone companies with favorable opportunities.<sup>489</sup> We observed that, to date, rural telephone companies have won about 44 percent of the 123 rural Basic Trading Areas (BTA) licenses in the United States and we noted some examples of rural telephone companies' successes in offering broadband PCS.<sup>490</sup> In keeping with our duties under the Act, however, we seek comment on whether there are mechanisms that might further opportunities for rural telephone companies to provide spectrum based services.

## 2. Installment Payments

180. Background. We are required by statute to provide incentives to ensure participation by small businesses and other "designated entities" when implementing our authority to conduct auctions, as set forth in Section 309(j) of the Communications Act.<sup>491</sup> Among other methods, allowing winning bidders to pay for their licenses using installment plans has been one method we have used to encourage small business involvement in the wireless marketplace. As discussed in Section III.B.5, *supra*, in this *Third Report and Order* we suspend the use of installment payments for the foreseeable future. In lieu of installment payments, we have adopted a schedule of bidding credits applicable to small businesses that is higher than that which we originally proposed.<sup>492</sup>

181. Discussion. We observed in the *Notice* in this docket that small businesses have been successful in the auctions in which installment payments plans were offered.<sup>493</sup> We therefore seek comment on ways in which the Commission can provide an effective installment payment program while at the same time minimizing the concerns (*e.g.*, licensee default or difficulty meeting financial obligations to the Commission) that have led to our decision to suspend the use of installment payments for the present time. We seek comment, for example, on how the Commission can create an installment payment plan which fulfills our sometimes incongruent goals of encouraging only serious, financially qualified small business applicants to apply for licenses, ensuring the rapid provision of service to the public, and guaranteeing that the American public is reasonably compensated for the use of the spectrum being auctioned. We also seek comment on how the Commission might fashion an installment payment program that is consistent with the provision of the Balanced Budget Act that requires that all proceeds from

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<sup>489</sup> The FCC Report to Congress on Spectrum Auctions, WT Docket 97-150, at p. 25 (rel. Oct. 9, 1997).

<sup>490</sup> *Id.* at 25-26.

<sup>491</sup> 47 U.S.C. §§ 309(j)(4)(A), (D).

<sup>492</sup> See Section III.B.5., *supra*. See also, *Notice* at ¶ 32.

<sup>493</sup> *Notice* at ¶ 34.

certain future auctions be deposited in the United States Treasury not later than September 30, 2002. In this regard, we note that under most of the installment payment plans previously offered by the Commission, winning bidders have been permitted to pay for their licenses over the entire 10 year license term.<sup>494</sup> If we were to make installment plans available in the future, we interpret this legislation as requiring that all payments of principal and interest for covered auctions be deposited in the United States Treasury by the statutory deadline for collection, which is approximately five years away. Finally, we seek comment on means other than bidding credits and installment payments by which the Commission might facilitate the participation of small businesses and other designated entities in our spectrum auction program. Commenters should provide sufficient detail to assist the Commission in fashioning a program based upon their comments.

182. We also note that under our current rules, winning bidders that are designated entities are not required to pay their second down payment until petitions to deny filed against them are dismissed or denied. In the interim, designated entity winning bidders for the same auction with no petitions filed against them are required to submit their second down payments earlier because their licenses are ready for grant. Because Section 1.2110(e)(3)(i) of our rules provides that interest rates on installment payments will be based on the rate of U.S. Treasury obligations at the time of licensing, in previous auctions this has had the result of establishing different rates of interest on installment payments for winning bidders in the same auction.<sup>495</sup> In the event we reinstate installment payments in the future, we seek comment on whether we should establish the interest rate based upon the rate of U.S. Treasury obligations on the date of the close of the auction. We also seek comment on one aspect of our rules relating to the calculation of the total default payment owed where a winning bidder defaults on multiple licenses.

### 3. Attribution of Gross Revenues of Investors and Affiliates

183. Background. In the *Notice*, we proposed to adopt uniform rules and definitions for the attribution of gross revenues of investors and affiliates for all auctionable services. Some of our service-specific competitive bidding rules require that, in determining whether an applicant meets certain size-based eligibility requirements, we consider, among other things, the gross revenues of certain investors in the applicant and the affiliates of attributable investors. These service-specific rules have established varying standards of attribution. For example, in both narrowband and broadband PCS, the gross revenues and total assets of an applicant, together with those of its affiliates and persons who hold an interest in the applicant or its affiliates, must be below a certain

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<sup>494</sup> See, e.g., 47 C.F.R. § 24.711(b)(1).

<sup>495</sup> See "Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes," *Public Notice*, DA 97-1152 (rel. June 2, 1997) (in which the Bureau sought comment on several requests for of the interest rate assigned to PCS C block licensees conditionally granted on September 17, 1996).

threshold in order for the applicant to qualify as a small business or entrepreneur.<sup>496</sup> However, in order to avoid counting the revenue of all of these entities, the rules for each service provide different exceptions whereby the applicants can create control groups.<sup>497</sup> For example, our broadband PCS rules provide two control group exceptions,<sup>498</sup> while our narrowband PCS rules provide only one control group exception.

184. In the 900 MHz SMR service, to determine whether an applicant qualifies as a small business, we attribute the revenues of parties holding partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of the applicant in conformance with the Commercial Mobile Radio Service (CMRS) spectrum cap attribution standard.<sup>499</sup> In contrast, under our MDS rules we attribute the gross revenues of the applicant and all of the applicant's affiliates (as defined in 47 C.F.R. § 1.2110(b)(4)).<sup>500</sup>

185. Discussion. In the *Notice*, we proposed to adopt a "controlling interest" standard, similar to that which we have recently adopted in our rules for LMDS,<sup>501</sup> as our general attribution rule for all future auctions. Under this standard, determination of eligibility for small business provisions would be made by attributing the gross revenues only of principals of the applicant who exercise both "*de jure*" and "*de facto*" control, and their affiliates. Nevertheless, we seek further comment on the controlling interest standard, and whether it is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits. We also ask commenters whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet our goals. Commenters should specify what alternatives could be applied.

186. We note that our intent in proposing this standard is to provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive and evolving

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<sup>496</sup> The *total assets test* has been used only to determine entrepreneur status.

<sup>497</sup> See, e.g., 47 C.F.R. §§ 24.709(b)(3), (b)(5). A control group is an entity, or a group of individuals or entities, that possesses *de jure* and *de facto* control of an applicant or licensee.

<sup>498</sup> 47 C.F.R. §§ 24.709(b).

<sup>499</sup> 47 C.F.R. § 90.814(g). See 47 C.F.R. § 20.6 (CMRS Spectrum Cap).

<sup>500</sup> 47 C.F.R. § 21.961(b).

<sup>501</sup> See, e.g., *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding - Tenth Report and Order*, PP Docket No. 93-253 (rel. November 21, 1996) (IVDS); *LMDS Second Report and Order* at ¶ 352 (LMDS).



telecommunications marketplace.<sup>502</sup> In the *Notice*, we preliminarily concluded that structuring our standard in this manner will not invite abuse. In this regard, we seek comment on whether this proposed standard would be strengthened by imposing a minimum equity requirement (*e.g.*, 15 percent) that any person or entity identified as controlling must hold. Alternatively, we ask whether we should not adopt a minimum equity requirement, but rather indicate only that an absence of equity would raise a question as to whether *de facto* control exists.

187. We note that for purposes of calculating equity held in an applicant, we provide for full dilution of certain stock interests, warrants, *etc.*<sup>503</sup> Finally, we note that we require detailed reporting of all ownership interests as part of the general application requirement adopted in this *Third Report and Order*,<sup>504</sup> and under the proposed controlling interest standard would apply the comprehensive affiliation rule to all investors in an applicant. Thus, passive interests that were otherwise non-attributable would be attributed if they are affiliates under this rule. Finally, we note that the Commission reserves the right to conduct random audits of auction applicants and licensees in order to verify information provided regarding eligibility for small business provisions.<sup>505</sup> We seek comment on our proposed rule.<sup>506</sup>

## B. Payment Issues

### 1. Default Payments

188. Background. Section 1.2104(g) of our rules provides that where a winning bidder defaults on a license the bidder becomes subject to a default payment equal to the difference between the amount bid and the winning bid the next time the license is offered by the Commission (net or gross, whichever is less) plus an additional payment equal to three percent of the subsequent winning bid or the amount bid (net or gross, whichever is less).<sup>507</sup> In the past, where a bidder has defaulted on multiple licenses, this rule has been interpreted to require that the

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<sup>502</sup> We note, however, that in seeking comment regarding the auction of initial licenses for certain broadcast stations, the Commission has proposed stricter attribution standards and eligibility requirements for applicants seeking to qualify for minority-based provisions. *See Broadcast NPRM* at ¶ 18.

<sup>503</sup> *See* 47 C.F.R. § 24.709(b)(7).

<sup>504</sup> *See* Section III.C.3, *infra*.

<sup>505</sup> *See* Section III.C.5, *supra*.

<sup>506</sup> *See* Appendix E.

<sup>507</sup> *See* 47 C.F.R. § 1.2104(g)(2).

amount of the default payment be determined on a license-by-license basis, and then added together to determine the total default payment assessed.<sup>508</sup>

189. Discussion. We seek comment on whether we should modify Section 1.2104(g) to provide that where a winning bidder defaults on multiple licenses the default payment will be determined based upon the aggregate winning bid and the aggregate winning bid the next time the licenses are offered by the Commission. We recognize that assessing default payments through this method could significantly alter the amount of the default payment assessed under our rules. In this regard, we seek comment on whether this system could encourage insincere bidding and defaults since it could greatly reduce the effective penalty for a default. To the extent that a bidder is already intending to default on a license whose price at reauction is anticipated to exceed the initial bid price the effective penalty for defaulting on additional licenses would be limited to three percent of the subsequent winning bid or the amount bid, whichever is lower. Since the potential defaulter would not be facing the full harm caused by the default on the additional license, the incentive for insincere bidding and default could be too great. Indeed, this modification could encourage speculation by encouraging a high bidder on a relatively high valued license who anticipates default to purposely bid and default on a relatively low valued license in order to lessen the default payment assessed under our rules. Finally, we seek comment on whether such a modification could function without nullifying the provision in Section 1.2104(g) discussed above assessing an additional default payment equal to three percent of the subsequent winning bid or the amount bid, whichever is lower.<sup>509</sup>

### C. Administrative Filing Periods for Applications and Petitions to Deny

190. Background. Previously, the Commission has provided a 30-day period for filing of petitions to deny.<sup>510</sup> A 30-day petition to deny period will be used for the upcoming paging and LMDS auctions.<sup>511</sup> As discussed above (*see* Section III.A), in this *Third Report and Order* we amend Section 1.2108 of our rules to conform to the provisions in the Balanced Budget Act regarding the filing period for petitions to deny applications for initial licenses in auctionable

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<sup>508</sup> *See* BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, *Order*, 11 FCC Rcd 14399 (WTB) (1996) (assessing a \$67,695,653.23 default payment for failure to submit the required down payment for 18 licenses won in the C block auction), *reconsideration denied*, *Order*, 12 FCC Rcd 6606 (WTB) (1997), *Application for Review Pending*.

<sup>509</sup> *See* 47 C.F.R. § 1.2104(g)(2).

<sup>510</sup> *See* 47 C.F.R. § 1.2108.

<sup>511</sup> *See* 47 C.F.R. § 90.163(a)(4)(Paging); 47 C.F.R. § 101.43(a)(4)(LMDS).

services.<sup>512</sup> Specifically, notwithstanding Section 309(b) of the Communications Act,<sup>513</sup> Section 1.2108 as amended will provide that the Commission shall not grant a license less than seven days after public notice that long-form applications have been accepted for filing and that in all cases the period for filing petitions to deny shall be no shorter than five days.<sup>514</sup>

191. Discussion. Although we believe that in light of Congress' directive in the Balanced Budget Act a shortened petition to deny period is generally appropriate for future auctions, we seek comment on the appropriate length of a petition to deny period in light of this legislation. For example, we seek comment on whether there are instances in which the Commission should provide for a longer period than the minimums set forth in the statute for the filing of petitions to deny or for the grant of initial licenses in auctionable services (5 days and 7 days, respectively). In particular, we ask commenters to address whether auctions for specific services (*e.g.*, broadcast licenses) require longer periods for the filing of petitions to deny, and why this may be so.

#### **D. Competitive Bidding Rules and Procedures for the Auction of General Wireless Communications Services (GWCS) Licenses**

192. Background. On July 31, 1995, the Commission adopted the *Second Report and Order* in ET Docket No. 94-32 establishing auction and service rules for the General Wireless Communications Service (GWCS) in the 4660-4685 MHz band.<sup>515</sup> Subsequently, several parties filed petitions for reconsideration of the *Second Report and Order* that remain pending before the Commission.<sup>516</sup> The 1993 Omnibus Budget Reconciliation Act requires that 5 MHz<sup>517</sup> of this

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<sup>512</sup> See 47 C.F.R. § 1.2108. See also, Balanced Budget Act, § 3008.

<sup>513</sup> 47 U.S.C. § 309(b).

<sup>514</sup> 47 C.F.R. §§ 1.2108(b), (c).

<sup>515</sup> See Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Second Report and Order, 11 FCC Rcd 624 (1995) ("*GWCS Second Report and Order*").

<sup>516</sup> See Joint Petition for Reconsideration, Association of American Public Television Stations, *et. al* (April 6, 1995). See also, Petition for Reconsideration of Wireless Cable Association International (September 8, 1995); Petition for Clarification and Reconsideration of the Association for Maximum Service Television, Inc. (September 8, 1995).

<sup>517</sup> We note that an additional five megahertz of this spectrum was auctioned as part of the spectrum offered in the WCS auction.

spectrum be auctioned and licensed not later than August 9, 1998,<sup>518</sup> and to comply with this deadline, the Commission has announced an auction date for licenses in the GWCS as May 27, 1998.<sup>519</sup>

193. Discussion. We tentatively conclude that the Part 1 rules we adopt in the *Third Report and Order* should apply to the auction of GWCS spectrum and specifically supersede the previously-adopted GWCS rules setting forth auction rules and procedures.<sup>520</sup> In this regard, consistent with our decision in the *Third Report and Order*, we note that we would no longer offer installment payments as a means of financing small business participation in the GWCS auction, but instead would offer somewhat higher bidding credits. Employing Part 1 rules for the GWCS auction furthers our goal of simplifying and streamlining all competitive bidding rules and procedures for future auctions. In addition, by applying the Part 1 rules to the GWCS auction, we assure that GWCS auction participants, like participants in other future auctions, benefit from the experience we have gained in the 15 spectrum auctions we have conducted to date. We seek comment on this tentative conclusion.

194. In light of the statutory deadline for the auction and licensing of GWCS spectrum, we also tentatively conclude to use our discretion to truncate the petition to deny period for the grant of licenses in the GWCS auction. We believe that a shortened petition to deny period will assure issuance of the GWCS licenses by Congress' deadline. As discussed above (*see* Section IV.C), notwithstanding Section 309(d)(1) of the Communications Act, the Balanced Budget Act provides for shortened periods for the filing of petitions to deny and for the grant of licenses.<sup>521</sup> Under this provision, the Commission is permitted to grant any application for authorization assigned under competitive bidding not earlier than 7 days following public notice that an application has been accepted for filing, and may specify a period of not less than 5 days for filing petitions to deny.<sup>522</sup> We seek comment on this tentative conclusion.

## V. CONCLUSION

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<sup>518</sup> See 47 U.S.C. § 309(j)(9). The auction for this service has been delayed pending resolution of potential interference with U.S. operations. See Defense Communications, "Federal Frequency Spectrum Sale Could Impair Military Operations," United States General Accounting Office Report to Congressional Committees, June, 1997, and letters included therein.

<sup>519</sup> See "FCC Announces Auction Schedule for the General Wireless Communications Service," *Public Notice*, DA 97-2634 (rel. December 17, 1997).

<sup>520</sup> See 47 C.F.R. §§ 26.1 *et seq.*

<sup>521</sup> Section 3008, Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997).

<sup>522</sup> *Id.*

195. Based on the experience we have gained from our 15 completed auctions, as well as the feedback we have received from bidders, we believe the time has come to streamline our competitive bidding rules in order to make our licensing process more efficient. In the past, we have adjusted our auction procedures for different services as we gained experience with the process, resulting in the adoption of different procedures for different auctionable services. This *Third Report and Order* amends Subpart Q of Part 1 of the Commission's rules<sup>523</sup> to reflect substantive amendments and modifications intended to simplify these regulations, supersede unnecessary rules wherever possible, and eliminate the need to conduct separate, comprehensive rule making proceedings prior to each auction. We believe that the rules we adopt today will benefit bidders and the auction process generally. We also believe these rules will help to provide more specific guidance and flexibility on a number of issues that will increase the overall effectiveness of our auctions. This *Second Further Notice of Proposed Rule Making* seeks comment on additional issues relating to our general competitive bidding rules for all auctionable services. We believe that these proposals will further enable us to achieve our goals of simplifying and streamlining our regulations in order to increase the overall efficiency of the competitive bidding process.

## VI. PROCEDURAL MATTERS AND ORDERING CLAUSES

### A. Regulatory Flexibility Act

196. The Final Regulatory Flexibility analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. Section 604, is contained in Appendix B.

197. With respect to this Second Further Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis is contained in Appendix C. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the Initial Regulatory Flexibility Analysis. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis we ask a number of questions in our Initial Regulatory Flexibility Analysis regarding the prevalence of small businesses in the industry. Comments on the Initial Regulatory Flexibility Analysis must be filed in accordance with the same filing deadlines as comments on the Second Further Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Second Further Notice of Proposed Rulemaking, including the initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

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<sup>523</sup> 47 C.F.R. §§ 1.2101 *et seq.*

**B. Ex Parte Presentations**

198. This *Second Further Notice of Proposed Rule Making* a permit but disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

**C. Comments**

199. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before February 6, 1998, and reply comments on or before February 17, 1998. In addition, a courtesy copy should be delivered to Josh Roland and Ken Burnley, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 2025 M Street, Room 5202, Washington, DC 20554. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

**D. Additional Information**

200. For further information concerning the *Third Report and Order and Second Further Notice of Proposed Rule Making* contact Josh Roland or Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418-0660.

**E. Ordering Clauses**

201. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), 303(r), and 309(j), this *Third Report and Order and Second Further Notice of Proposed Rule Making* is hereby ADOPTED, and Part 1, Subpart Q of the Commission's rules are amended as set forth in Appendix D, effective 60 days after publication in the *Federal Register*. The information collection contained in these rules becomes effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

202. IT IS FURTHER ORDERED THAT pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. §§ 0.131(c) and 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures as set forth herein, including the authority to seek comment on and set forth mechanisms relating to the day-to-day conduct of specific auctions.

203. IT IS FURTHER ORDERED THAT the Secretary shall send a copy of this *Third Report and Order and Further Notice of Proposed Rule Making*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

**APPENDIX A**  
**List of Parties**

**I. Comments in Response to the *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making***

Parties Filing Comments

Airadigm Communications, Inc., Loli, Inc., New Wave Communications, Inc., KMC Interactive TV, Inc., MAR IVDS, Inc., New Wave PCS, Inc. and Euphemia Banas ("Airadigm")  
AirTouch Paging, Inc. ("AirTouch")  
Alarm Industry Communications Committee ("AICC")  
American Automobile Association ("AAA")  
American Mobile Telecommunications Association, Inc. (AMTA)  
AT&T Wireless Services, Inc. ("AT&T")  
Automated Credit Exchange ("ACE")  
Cellular Telecommunications Industry Association ("CTIA")  
Compu-DAWN, Inc. ("Compu-DAWN")  
Cook Inlet Region, Inc. ("CIRI")  
Coalition of Institutional Investors: Fleet Equity Partners, Media/Communications Partners, OneLiberty Ventures and Spectrum Equity Associates ("CII")  
Hughes Electronic Corporation ("Hughes")  
Interactive Video Data Trade Association ("ISTA")  
Merlin Telecom, Inc. ("Merlin")  
Metrocall, Inc. ("Metrocall")  
Motorola, Inc. ("Motorola")  
Mountain Solutions, Ltd. ("Mountain Solutions")  
National Telephone Cooperative Association ("NTCA")  
Nextel Communications, Inc. ("Nextel")  
Paging Network, Inc. ("PageNet")  
Personal Communications Industry Association ("PCIA")  
Pocket Communications, Inc. ("Pocket")  
Western Wireless Corporation ("WWC")

Parties Filing Reply Comments

Airadigm Communications, Inc., Loli, Inc., New Wave Communications, Inc., KMC Interactive TV, Inc., MAR IVDS, Inc., New Wave PCS, Inc., and Euphemia Banas ("Airadigm")  
AirTouch Paging, Inc. ("AirTouch")  
Alarm Industry Communications Committee ("AICC")  
American Automobile Association ("AAA")  
CellNet Data Systems, Inc. ("CellNet")



Cook Inlet Region, Inc. ("CIRI")  
Ericsson, Inc. ("Ericsson")  
U.S. Federal Trade Commission, Bureau of Consumer Protection ("FTC")  
General Wireless, Inc. ("GWI")  
Interactive Video Data Trade Association ("ISTA")  
IVDS Enterprises, Joint Venture ("IVDS Enterprises")  
Merlin Telecom, Inc. ("Merlin")  
Mountain Solutions, Ltd. ("Mountain Solutions")  
Narrowband PCS Companies ("NPCS")  
Nextel Communications, Inc. ("Nextel")  
NextWave Telecom, Inc. ("NextWave")  
Omnipoint Corporation ("Omnipoint")  
The Rural Telecommunications Group ("RTG")  
Western Wireless Corporation ("WWC")

**II. Comments in Response to the *Public Notice*, "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," WT Docket 97-82, DA 97-697 (rel. June 2, 1997)**

Parties Filing Comments

Airadigm Communications, Inc. (Airadigm)  
ALLTEL Communications, Inc. (ALLTEL)  
Alpine PCS, Inc. (Alpine)  
AmeriCall International, L.L.C. (AmeriCall)  
Bay Springs Telephone Company, Inc. (Bay Springs)  
Bear Stearns  
BellSouth Corporation  
BIA Capital Corporation (BIA Capital)  
Brookings Municipal Utilities (BMU)  
Central Wireless Partnership (CWP)  
Chase Telecommunications, Inc. (Chase)  
ClearComm, L.P.  
Comcast Corporation  
Community Service Communications, Inc. (CSCI)  
ComScape Telecommunications of Charleston License, Inc. (ComScape)  
Conestoga Wireless Company (Conestoga)  
CONXUS Communications, Inc. (CONXUS)  
Cook Inlet Region, Inc., Cook Inlet Western Wireless, PV/SS PCS, L.P., Western Wireless Corporation, AirGate Wireless, L.L.C., Aerial Communications, Inc., TeleCorp, Inc., and Airadigm Communications, Inc. (collectively, CIRI)

Creative Airtime Services, L.L.C. (Creative)  
Cyber Sites, L.L.C.  
Dewey Ballantine  
DiGiPH PCS, Inc. (DiGiPH)  
Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. (collectively, Duluth PCS)  
Eldorado Communications, L.L.C. (Eldorado)  
Fortunet Communications, L.P. (Fortunet)  
General Wireless Inc. (GWI)  
Holland Wireless, L.L.C., Wireless 2000, Inc., and Northern Michigan PCS Consortium, (collectively, Holland)  
Horizon Personal Communications, Inc. (Horizon)  
Indus, Inc.  
Integrated Communications Group (Integrated)  
Kansas Personal Communications Services, Ltd. (KPCS)  
Ken W. Bray  
Magnacom Wireless, L.L.C., PCSouth, Inc., and Communications Venture PCS Limited Partnership (collectively, Magnacom)  
MCI Communications Corporation (MCI)  
Merotel Communications Limited Partnership (Merotel)  
MFRI, Inc.  
Morris Communications, Inc. (Morris)  
National Wireless Resellers Association (NWRA)  
National Association of Black-Owned Broadcasters, Inc. (NABOB)  
National Association of Black Telecommunications Professionals, Inc. (NABTP)  
National Telephone Cooperative Association (NTCA)  
Nextel Communications, Inc. (Nextel)  
NextWave Telecom, Inc. (NextWave)  
Northcoast Communications, L.L.C. (Northcoast)  
Official Committee of Unsecured Creditors of Pocket Communications, Inc. (Pocket Creditors)  
Omnipoint Corporation  
OneStop Wireless  
OnQue Communications, Inc. (OnQue)  
PCS Plus L.L.C. and McKenzie Telecommunications Group, Inc. (collectively, PCS Plus)  
Pioneer Telephone Association, Inc. (Pioneer)  
Pocket Communications, Inc. (Pocket)  
Point Enterprises, Inc. (Point)  
R&S PCS, Inc. (R&S)  
RFW, Inc.  
Rural Telephone Finance Corporation (RTFC)  
Small Business Coalition (SBC)  
SouthEast Telephone Limited Partnership, Ltd. (SouthEast Telephone)

Southwestern Bell Mobile Systems (SBMS)  
SpectrumWatch  
Sprint Spectrum L.P.  
Sprint Corporation  
Tennessee L.P. 121 (Tennessee)  
Toronto Dominion Bank and Toronto Dominion Securities (collectively, Toronto Dominion)  
Urban Communicators PCS Limited Partnership (Urban Comm)

Parties Filing Reply Comments

Airtel Communications, Inc. (Airtel)  
ALLTEL  
Alpine  
American Mobile Telecommunications Association, Inc. (AMTA)  
Antigone Communications Limited Partnership and PCS Devco, Inc. (collectively,  
Antigone/Devco)  
BellSouth Corporation  
Carlson Technologies, Inc. (Carlson)  
Cellexis International, Inc. (Cellexis)  
ClearComm, L.P.  
Comcast Corporation  
Conestoga  
CONXUS  
CIRI  
Duluth PCS  
Fortunet  
GWI  
GTE Service Corporation (GTE)  
Ken W. Bray  
MCI  
Millison Investment Management, Inc. (MIM)  
Mountain Solutions LTD, Inc. (Mountain Solutions)  
Nextel  
NextWave  
Northcoast  
Omnipoint Corporation  
OnQue  
PCS Wisconsin, LLC  
PrimeCo Personal Communications, L.P. (PrimeCo)  
Radiofone PCS, L.L.C. (Radiofone)  
R&S  
RTFC

Sprint Spectrum L.P.  
Stan P. Doyle  
Telecommunications Resellers Association (TRA)  
UniDial Communications (UniDial)  
Urban Comm  
U.S. Airwaves, Inc.  
Wireless Nation, Inc.

Parties Filing Ex Parte Comments

AirGate Wireless, July 18, 1997  
AirGate Wireless, July 22, 1997  
AirGate Wireless, September 9, 1997  
Alpine, September 17, 1997  
Alpine, September 23, 1997  
AmeriCall, July 11, 1997  
AmeriCall, August 5, 1997  
AmeriCall and Hughes Network Systems, Inc., September 16, 1997  
AmeriCall, ClearComm, and Chase, September 17, 1997  
BIA Capital, August 4, 1997  
Chase, August 11, 1997  
ClearComm, August 7, 1997  
Congressman Rick Boucher, July 25, 1997  
Congressman Richard Burr, August 11, 1997  
Congressman Thomas Davis, July 30, 1997  
Congressman John D. Dingell, September 16, 1997  
Congressman Steny H. Hoyer, August 7, 1997  
Congresswoman Sue W. Kelly, August 11, 1997  
Congressman W.J. "Billy" Tauzin, August 13, 1997  
Congressmen W.J. "Billy" Tauzin and Edward J. Markey, September 16, 1997  
CONXUS, August 27, 1997  
Cook Inlet Communications, August 5, 1997  
Cook Inlet Communications, August 15, 1997  
Cook Inlet Region, Inc., September 23, 1997  
El Dorado, August 13, 1997  
GWI, August 4, 1997  
GWI, August 15, 1997  
GWI, August 18, 1997  
Magnacom Wireless, LLC, August 13, 1997  
MCI, August 14, 1997  
NextWave, June 23, 1997  
NextWave, July 29, 1997  
NextWave, August 5, 1997

Nokia, September 15, 1997  
Nokia, September 16, 1997  
Northern Michigan PCS Consortium, L.L.C., August 14, 1997  
Omnipoint Corporation, August 18, 1997.  
Omnipoint Corporation, September 3, 1997  
Omnipoint Corporation, September 5, 1997  
Omnipoint Corporation, September 23, 1997  
R&S, August 11, 1997  
Senator Christopher S. Bond, July 14, 1997  
Senator Paul D. Coverdell, September 24, 1997  
Senator Pete V. Domenici, September 10, 1997  
Senators James M. Inhofe, Don Nickles, and Conrad Burns, August 7, 1997  
Senator John McCain, August 19, 1997  
Senator John McCain, September 18, 1997  
Senator Daniel Patrick Moynihan, August 4, 1997  
Triumph Capital, August 7, 1997  
Triumph Capital, September 23, 1997 ("McCarthy Letter")  
Urban Comm, August 21, 1997  
Urban Comm, September 17, 1997  
U.S. Small Business Administration, September 8, 1997 ("Glover Letter")

**III. Comments in Response to the Wireless Telecommunications Bureau's *Public Notice*, "Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes," DA 97-1152 (rel. June 2, 1997).**

Parties Filing Comments

Airadigm Communications, Inc. ("Airadigm")  
Comscape Telecommunications of Charleston License, Inc. ("ComScape")  
DiGiPH PCS, Inc. ("DiGiPH")  
Eldorado Communications, L.L.C., Kmtel L.L.C., Mercury PCS L.L.C., and Miccom Associates ("Eldorado")  
Fortunet Communication, L.P. ("Fortunet")  
Indus, Inc, and Chase Telecommunications, Inc. ("Indus and ChaseTel")  
Integrated Communications Group Corporation ("Integrated")  
Kansas Personal Communication Services, Inc. ("KPCS")  
Vincent D. McBride ("McBride")  
Morris Communications, Inc. ("Morris")  
National Association of Black-Owned Broadcasters, Inc. ("NABOB")  
National Telephone Cooperative Association ("NTCA")  
NextWave Telecom, Inc. ("NextWave")

Pinnacle Telecom, L.P. ("Pinnacle")  
Pioneer Telephone Association, Inc. ("Pioneer")  
Rural Telephone Finance Cooperative ("RTFC")  
September 17 Alliance ("Alliance")  
Sprint Spectrum, L.P. ("Sprint")  
Urban Communicators PCS Limited Partnership ("Urban Comm")  
Quantum Communications Group, Inc. ("Quantum")  
Wireless 2000, Inc., Northern Michigan PCS Consortium, L.L.C., PCSouth, Inc., and  
Communications Venture PCS Limited Partnership ("Wireless 2000")

Parties Filing Reply Comments

Omnipoint Corporation ("Omnipoint")  
Savannah Independent PCS Corporation, Brookings Municipal Utilities, PVT Wireless  
Limited Partnership, PCS Plus, L.L.C., Southwestern Minnesota PCS Limited Partnership,  
Western Minnesota PCS Limited Partnership, North Dakota PCS Limited Partnership, and  
Horizon Personal Communications, Inc. ("Joint C block Applicants").

**APPENDIX B**  
**Final Regulatory Flexibility Analysis**  
*(Third Report and Order)*

As required by the Regulatory Flexibility Act (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in WT Docket No. 97-82.<sup>2</sup> The Commission sought written public comment on the proposals in the Notice of Proposed Rulemaking, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) in this Third Report and Order (Order) conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).<sup>3</sup>

A. Need for, and objectives of, the Order in WT Docket No. 97-82.

This Order makes substantive amendments and modifications to the Commission's general competitive bidding rules for all auctionable services. These changes to the competitive bidding rules are intended to simplify the Commission's rules and regulations and eliminate unnecessary rules wherever possible, increase the efficiency of the competitive bidding process, and provide more specific guidance to auction participants while also giving them more flexibility.

B. Summary of significant issues raised by public comments in response to the IRFA

One party, Merlin Telecom, Inc. (Merlin), filed comments directly in response to the IRFA. Merlin raises six arguments: (1) Merlin urges the Commission not to impose additional reporting requirements or additional fees on applicants seeking installment payments.<sup>4</sup> In this Order, the Commission concludes that installment payments should not be offered in auctions as a means of financing small businesses and other designated entities seeking to secure spectrum licenses. The Commission eliminates installment payments in the auction of the lower 80 and General Category channels in the 800 MHz SMR service. The Commission notes that installment payments are not the only tool available to assist small

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<sup>1</sup> See 5 U.S.C. § 604. The RFA is codified at 5 U.S.C. § 601 *et seq.*

<sup>2</sup> Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 12 FCC Rcd 5686, 5749 (1997).

<sup>3</sup> Title II of CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>4</sup> Merlin Comments at 23.

businesses. Section 3007 of the Balanced Budget Act<sup>5</sup> requires that the Commission conduct certain future auctions in a manner that ensures that all proceeds from such bidding are deposited in the U.S. Treasury not later than September 30, 2002. The Commission seeks comment in the Further Notice on offering installment payments in the future; however, section 3007 of the Balanced Budget Act may require that these auctions be conducted without offering long-term installment payments. Thus, there probably will be no reporting requirements or fees for future installment payments.

(2) Merlin contends that including past affiliates in the proposed new definition of affiliate would require small businesses to keep more extensive records and would be unduly burdensome.<sup>6</sup> This Order adopts a uniform definition of "affiliate" for all future auctions. The term "affiliate" is defined in the Part 1 rules as an individual or entity that directly or indirectly controls or has the power to control the applicant; is directly or indirectly controlled by the applicant; is directly or indirectly controlled by a third person(s) that also controls or has the power to control the applicant; or has an "identity of interest" with the applicant.<sup>7</sup> The Commission concludes that this definition has helped to ensure that businesses seeking small business status are truly small. In addition, the Commission finds that this definition is consistent with the decision to adopt a controlling interest threshold for purposes of attribution of gross revenues of investors and affiliates of an applicant.

(3) Merlin argues that the Commission's proposal to lower the financial caps which permit small businesses to take advantage of special benefits would limit the number of small businesses eligible for benefits and thus increase the barriers to entry that small businesses face.<sup>8</sup> This Order adopts the proposal in the Notice to continue to define small businesses based on the characteristics and capital requirements of a specific service, in order to reduce the barriers to entry faced by small businesses.

(4) Merlin argues that the Commission's proposals to reduce bidding credits, raise the interest rate on installment payments, raise down payments, and eliminate installment payments will have a negative effect on the ability of small businesses to compete effectively in the telecommunications industry.<sup>9</sup> In this Order, the Commission concludes that installment payments should not be offered in auctions as a means of financing small

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<sup>5</sup> Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997), to be codified in relevant part at 47 U.S.C. § 309(j)(2)(E) and 309(j)(4)(F) ("Balanced Budget Act").

<sup>6</sup> Merlin Comments at 24.

<sup>7</sup> 47 C.F.R. §§ 1.2110(b)(4), 24.839(d).

<sup>8</sup> Merlin Comments at 24.

<sup>9</sup> *Id.*



businesses and other designated entities seeking to secure spectrum licenses. In the Further Notice, the Commission seeks comment on offering installment payments in the future; however, section 3007 of the Balanced Budget Act may require that these auctions be conducted without offering long-term installment payments. In light of the decision to suspend installment payment financing for the near future, the Commission determined that higher bidding credits would better fulfill the mandate of Section 309(j)(4)(D) of the Communications Act to provide small businesses the opportunity to participate in spectrum-based services. Therefore, the Commission adopts bidding credits of 35 percent for designated entities with average gross revenues not to exceed \$3 million, 25 percent for designated entities with average gross revenues not to exceed \$15 million, and 15 percent for designated entities with average gross revenues not to exceed \$40 million. With respect to down payments, the Commission adopts the proposal in the Notice to delegate to the Bureau the discretion to determine the down payment amount on a service-by-service basis. The Commission believes that a substantial down payment is required to ensure that licensees have the financial capability to attract the capital necessary to deploy and operate their systems and to protect against default.

(5) Merlin argues that the proposal to require auction winners to pay their second down payment regardless of a pending petition to deny would increase the defaults by small businesses.<sup>10</sup> In this Order, the Commission is suspending the use of installment payments as a means of financing small business participation in the auction program for the immediate future. As a result, all auction winners, including small businesses, will be required to submit the full payment owed on their winning bids shortly after the license is ready to be granted. The Commission notes that in the Balanced Budget Act Congress granted the Commission authority to shorten the petition to deny period, and as a result, to grant licenses much more rapidly. Sections 1.2108(b) and (c) of the rules are amended to provide that the Commission shall not grant a license less than seven days after public notice that long-form applications have been accepted for filing. In addition, the Commission amends this section to provide that in all cases the period for filing petitions to deny shall be no shorter than five days. Applications that are the subject of petitions to deny will ordinarily take longer to resolve than uncontested applications, these changes in procedure will reduce the risk of frivolous petitions being filed solely for the purpose of delay and will enhance the Commission's ability to resolve petitions expeditiously. The Commission declines to require all winning bidders to make their full payments at the same time regardless of whether petitions to deny their applications have been filed.

(6) Finally, Merlin contends that the Commission should not adopt a cross-default rule.<sup>11</sup> In this Order, the Commission concludes that it will not pursue a policy of cross-default (either within or across services) where licensees default on an installment payment. The Commission

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<sup>10</sup> *Id.* at 25.

<sup>11</sup> *Id.* at 26.

is eliminating the use of installment payments as a means of financing small business participation in the auction program for the foreseeable future. Therefore, in practice this decision will apply only to existing licensees who are currently paying for their licenses in installments.

C. Description and estimate of the number of small entities to which rules will apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.<sup>12</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>13</sup> A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>14</sup> Nationwide, there are 275,801 small organizations.<sup>15</sup> "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."<sup>16</sup> As of 1992, there were 85,006 such jurisdictions in the United States.<sup>17</sup>

In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.<sup>18</sup> Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).<sup>19</sup>

The rules adopted in this Order will allow all entities, including existing cellular, PCS, paging, and other small communications entities to obtain licenses in auctionable services through competitive bidding. These rules generally apply to future auctions, but, with limited exceptions, will not apply to the initial auctions of licenses in the paging, 220 MHz, 800 MHz

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<sup>12</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>13</sup> 5 U.S.C. § 601(6).

<sup>14</sup> 5 U.S.C. § 601(4).

<sup>15</sup> 1992 Economic Census, U.S. Bureau of the Census, Table 6, (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

<sup>16</sup> 5 U.S.C. § 601(5).

<sup>17</sup> U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

<sup>18</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

<sup>19</sup> 15 U.S.C. § 632.

Specialized Mobile Radio (SMR), and Local Multipoint Distribution (LMDS) services. In estimating the number of small entities who may participate in future auctions of wireless services, we anticipate that current wireless services licensees are representative of future auction participants. The following is our estimate of the number of small entities who are current wireless licensees:

1. Estimates for cellular licensees

The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.<sup>20</sup> The size data provided by the SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees.<sup>21</sup> The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.<sup>22</sup> Therefore, even if all 12 of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. We assume, for purposes of our evaluations and conclusions in this FRFA, that all of the current cellular licensees are small entities, as that term is defined by the SBA. In addition, we note that there are 1,758 cellular licenses; however, we do not know the number of cellular licensees, since a cellular licensee may own several licenses. The most reliable source of information regarding the number of cellular service providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS). The report places cellular licensees and Personal Communications Service (PCS) licensees in one group. According to the data released in November, 1997, there are 804 companies reporting that they engage in cellular or PCS service.<sup>23</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular

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<sup>20</sup> 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>21</sup> U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, (radiotelephone communications industry data adopted by the SBA Office of Advocacy) (SIC Code 4812).

<sup>22</sup> U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

<sup>23</sup> FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997).

service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 804 small cellular service carriers.

## 2. Estimates for broadband and narrowband PCS licensees

Broadband PCS. The broadband PCS spectrum is divided into six frequency blocks designated A through F. The Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than \$40 million in the three previous calendar years.<sup>24</sup> This definition of "small entity" in the context of broadband PCS auctions has been approved by the SBA.<sup>25</sup> The Commission has auctioned broadband PCS licenses in Blocks A through F. Of the qualified bidders in the C and F block auctions, all were entrepreneurs -- defined for these auctions as entities together with affiliates, having gross revenues of less than \$125 million and total assets of less than \$500 million at the time the FCC Form 175 application was filed. Ninety bidders, including C block reauction winners, won 493 C block licenses and 88 bidders won 491 F block licenses. For purposes of this FRFA, the Commission assumes that all of the 90 C block broadband PCS licensees and 88 F block broadband PCS licensees, a total of 178 licensees, are small entities.

Narrowband PCS. The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded in the auctions. Given that nearly all radiotelephone companies have no more than 1,500 employees, and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, the Commission assumes, for purposes of this FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

## 3. Estimates for 220 MHz radio services

Since the Commission has not yet defined a small business with respect to 220 MHz radio services, it will utilize the SBA definition applicable to radiotelephone companies -- an entity employing no more than 1,500 persons. With respect to the 220 MHz services, the Commission has proposed a two-tiered definition of small business for purposes of auctions: (1) for Economic Area (EA) licensees, a firm with average annual gross revenues of not more than \$6 million for the preceding three years; and (2) for regional and nationwide licensees, a

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<sup>24</sup> See 47 C.F.R. § 24.720(b)(1).

<sup>25</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-84 (1994).

firm with average annual gross revenues of not more than \$15 million for the preceding three years. Since this definition has not yet been approved by the SBA, the Commission will utilize the SBA definition applicable to radiotelephone companies. Given that nearly all radiotelephone companies employ no more than 1,500 employees, the Commission will consider the approximately 3,800 incumbent licensees as small businesses under the SBA definition.

#### 4. Common Carrier Paging

The Commission has proposed a two-tier definition of small businesses in the context of auctioning geographic area paging licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. Under the proposal, a small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. Since the SBA has not yet approved this definition for paging services, the Commission will utilize the SBA definition applicable to radiotelephone companies -- an entity employing no more than 1,500 persons. At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to *Telecommunications Industry Revenue* data, there were 172 "paging and other mobile" carriers reporting that they engage in these services.<sup>26</sup> Consequently, we estimate that there are fewer than 172 small paging carriers. The Commission estimates that the majority of private and common carrier paging providers would qualify as small businesses under the SBA definition.

#### 5. Air-Ground radiotelephone service

The Commission has not adopted a definition of small business specific to the Air-Ground radiotelephone service.<sup>27</sup> Accordingly, the Commission will use the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground radiotelephone service, and we estimate that almost all of them qualify as small under the SBA definition.

#### 6. Specialized Mobile Radio licensees

The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to two tiers of firms: (1) "small entities," those with revenues of no more than \$15 million in each of the three previous calendar years; and (2) "very small entities,"

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<sup>26</sup> FCC, *Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier)* (Nov. 1997).

<sup>27</sup> Air-Ground radiotelephone service is defined in Section 22.99 of the Commission's Rules. 47 C.F.R. § 22.99.

those with revenues of no more than \$3 million in each of the three previous calendar years. The regulations defining "small entity" and "very small entity" in the context of 800 MHz SMR and 900 MHz SMR have been approved by the SBA. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. The Commission assumes for purposes of this FRFA that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 900 MHz SMR band, and recently completed an auction for geographic area 800 MHz SMR licenses. There were 60 winning bidders who qualified as small and very small entities in the 900 MHz auction. In the recently concluded 800 MHz SMR auction there were 524 licenses won by winning bidders, of which 38 licenses were won by small and very small entities.

#### 7. Private Land Mobile Radio Licensees (PLMR)

The Commission has not developed a definition of small entities specifically applicable to PLMR licensees. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area. The Commission is unable at this time to estimate the number of small businesses which could be impacted by the rules. However, the Commission's 1994 Annual Report on PLMRs indicates that at the end of fiscal year 1994 there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Any entity engaged in a commercial activity is eligible to hold a PLMR license, therefore, these rules could potentially impact every small business in the United States if PLMR licenses are subject to auction under these new auction rules.

#### 8. Aviation and Marine radio service

Small entities in the aviation and marine radio services use a marine very high frequency (VHF) radio, any type of emergency position indicating radio beacon (EPIRB) and/or radar, a VHF aircraft radio, and/or any type of emergency locator transmitter (ELT). The Commission has not developed a definition of small entities specifically applicable to these small businesses. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to a small organization, generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>28</sup> Nationwide, there are 275,801 small organizations.<sup>29</sup> "Small governmental jurisdiction" generally means "governments of cities, counties, towns,

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<sup>28</sup> 5 U.S.C. § 601(4).

<sup>29</sup> 1992 Economic Census, U.S. Bureau of the Census, Table 6, (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

townships, villages, school districts, or special districts, with a population of less than 50,000."<sup>30</sup> As of 1992, there were 85,006 such jurisdictions in the United States.<sup>31</sup> The Commission is unable at this time to make a meaningful estimate of the number of potential small businesses under these size standards. Most applicants for individual recreational licenses are individuals.<sup>32</sup> Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. Therefore, for purposes of the evaluations and conclusions in this FRFA, the Commission estimates that there may be at least 712,000 potential licensees which are individuals or are small entities, as that term is defined by the SBA.

#### 9. Offshore radiotelephone service

This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition for radiotelephone communications.

#### 10. General Wireless Communication Service

This service was created by the Commission on July 31, 1995 by transferring 25 MHz of spectrum in the 4660-4685 MHz band from the federal government to private sector use. The Commission has announced that an auction of 875 GWCS licenses will begin on May 27, 1998. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition for radiotelephone communications.

#### D. Description of the projected reporting, recordkeeping, and other compliance requirements

All license applicants will be subject to reporting and recordkeeping requirements to comply with the competitive bidding rules. Specifically, applicants will apply for license auctions by filing a short-form application and will file a long-form application at the conclusion of the auction. Additionally, entities seeking treatment as "small businesses" will need to submit information pertaining to the gross revenues of the small business applicant, its affiliates, and certain investors in the applicant.

#### E. Steps taken to minimize the economic impact on small entities and significant alternatives considered

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<sup>30</sup> 5 U.S.C. § 601(5).

<sup>31</sup> U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

<sup>32</sup> The Commission no longer requires individual licenses.

Among other goals, Section 309(j) directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses and other designated entities.<sup>33</sup> At the same time, Section 309(j) requires that the Commission ensure the development and rapid deployment of new technologies, products, and services for the benefit of the public, and recover for the public a portion of the value of the public spectrum resource made available for commercial use.<sup>34</sup>

The Commission received numerous comments addressing the applicability of general competitive bidding rules for future auctions. Many commenters support general competitive bidding rules, but argue that the Commission should adopt service-specific rules in particular instances, such as a reauction.<sup>35</sup> For example, two commenters, AICC and AAA, argue that shared channels should not be auctioned under the general competitive bidding procedures.<sup>36</sup> Hughes contends that if satellite services are auctioned, the Commission must conduct a service-specific rulemaking tailored to the nature of the satellite industry.<sup>37</sup> The Commission does not address the issue of the auctionability of particular services in this proceeding; however, service-specific auction rules will be adopted in the future where the general competitive bidding rules are inappropriate.

The Commission also received numerous comments with respect to the issue of eliminating installment payments.<sup>38</sup> The Commission has reviewed all of the comments in response to the Notice of Proposed Rulemaking in this docket, as well as the comments filed in response to the *Installment Public Notice*,<sup>39</sup> and concludes that installment payments should not be offered in auctions as a means of financing small businesses and other designated entities seeking to secure spectrum licenses. In this Order, Commission eliminates installment payments in the auction of the lower 80 and General Category channels in the 800 MHz SMR service. The Commission notes that installment payments are not the only tool available to assist small businesses, and that section 3007 of the Balanced Budget Act requires that the Commission conduct certain future auctions in a manner that ensures that all proceeds from such bidding

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<sup>33</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>34</sup> 47 U.S.C. §§ 309(j)(3)(A), (C).

<sup>35</sup> See, e.g., AT&T Comments at 1-2; AICC Reply Comments at 2; Airadigm Reply Comments at 6; NextWave Reply Comments at 2.

<sup>36</sup> See AICC Comments at 1-2 and Reply Comments at 2; AAA Comments at 1-2 and Reply Comments at 2.

<sup>37</sup> See Hughes Comments at 1, 6.

<sup>38</sup> See, e.g., Merlin Comments at 4.

<sup>39</sup> "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," *Public Notice*, DA 97-82, rel. June 2, 1997 (*Installment Public Notice*).



are deposited in the U.S. Treasury not later than September 30, 2002. The Commission seeks comment in the Further Notice on offering installment payments in the future; however, section 3007 of the Balanced Budget Act may require that these auctions be conducted without offering long-term installment payments.

In assessing the public interest, the Commission must try to ensure that all the objectives of section 309(j) are considered. In this Order, the Commission continues the practice of defining small business standards on a service-specific basis; adopts uniform definitions of "gross revenues" and "affiliate"; eliminates the use of installment payments for the 800 MHz Lower 80 channels and General Category channels services; suspends the use of installment payments for other services to be auctioned in the immediate future; provides for higher bidding credits, in lieu of installment payments, to encourage and facilitate the participation of designated entities in future auctions; and modifies the unjust enrichment rule.

In addition, this Order requires electronic filing of all short-form and long-form applications, beginning January 1, 1999; adopts a uniform definition of major amendments to the short-form; adopts general ownership disclosure requirements; affirms the policy of refunding upfront payments before the end of an auction to bidders that lose eligibility; adopts uniform default rules to all auctionable services; permits auction winners who have submitted a timely down payment to submit final payments 10 business days after the applicable deadline, provided the appropriate late fee is paid; adopts one 90-day non-delinquency period and one automatic 90-day grace period, and a late payment fee, similar to the rules for broadband PCS F block for licensees currently paying under installments; and clarifies that the Commission will not pursue a policy of cross-default, either within or across services, where licensees default on an installment payment.

Finally, this Order delegates authority to the Wireless Telecommunications Bureau to seek comment on specific mechanisms relating to auction conduct; allows for real-time bidding in simultaneous multiple-round auctions; provides that the Bureau will seek comment on and specify a minimum opening bid and/or reserve price in future auctions; adopts, for all auctionable services, the broadband PCS rules for bid withdrawal payments in the event of erroneous bids; modifies the attributable investor threshold of the anti-collusion rule to include controlling interests and/or holders of a 10 percent or greater interest in the applicant and to permit an entity that has invested in an applicant that withdraws from an auction to invest in other applicants that have applied to bid in the same markets; and permits all auction winners to begin construction at their own risk upon issuance of a public notice announcing the auction winners.

The Commission believes that the objectives of section 309(j) are met by the rule changes in this Order. In addition, this Order serves the public interest by simplifying regulations, eliminating unnecessary rules, increasing the efficiency of the competitive bidding process, and providing more specific guidance to auction participants while also giving them more flexibility.

F. Report to Congress

The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of the Order and this FRFA (or a summary thereof) will be published in the Federal Register. See 5 U.S.C. § 604(b). A copy of the Order and this FRFA will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

**APPENDIX C**Initial Regulatory Flexibility Analysis  
(*Second Further Notice of Proposed Rulemaking*)

As required by the Regulatory Flexibility Act (RFA),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the rules proposed in the Second Further Notice of Proposed Rulemaking (Notice) in WT Docket No. 97-82. Written public comments are requested on the IRFA. Comments on the IRFA must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines for comments on the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.

## A. Need for, and objectives of, the proposed rules

This Notice is being initiated to secure comment on additional issues relating to the general competitive bidding rules for all auctionable services that are necessary in light of the Balanced Budget Act of 1997.<sup>2</sup> This Notice seeks comment on the use of installment payments for future auctions, the controlling interest standard as a general attribution rule, the appropriate petition to deny period for future auctions, and whether the Part 1 rules adopted in the Third Report and Order (Order) should apply to the auction of General Wireless Communications Services (GWCS) and supersede the previously adopted GWCS auction rules and procedures. The Commission believes that these proposals will further simplify and streamline the rules and regulations and increase the overall efficiency of the competitive bidding process.

## B. Legal basis

This action is taken pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309 (j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), 303(r), and 309(j).

## C. Description and estimate of the number of small entities to which the proposed rules will apply

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>2</sup> Balanced Budget Act of 1997, Pub. Law 105-33, 111 Stat. 251 (1997) (to be codified at 47 U.S.C. § 309(j)(4)(F)).

The Commission is required to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>3</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>4</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.<sup>5</sup> Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).<sup>6</sup>

The rules proposed in this Notice would allow all entities, including existing cellular, PCS, paging, and other small communications entities to obtain licenses in auctionable services through competitive bidding. These rules apply to future auctions, but will not apply to the initial auctions of licenses in the paging, 220 MHz, 800 MHz Specialized Mobile Radio (SMR), and Local Multipoint Distribution (LMDS) services. In estimating the number of small entities who may participate in future auctions of wireless services, the Commission anticipates that the makeup of current wireless services licensees is representative of future auction winning bidders.

As noted in the FRFA, *supra*, various wireless small entities may be affected by the rules in the Order. These same entities are included in this IRFA. Also, as noted, with a few exceptions, the Commission has not developed a precise definition of small entities for the various affected wireless services. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.<sup>7</sup> The Commission hereby incorporates into this IRFA section the FRFA analysis and descriptions of potentially affected small entities, *supra*, regarding the cellular, narrowband PCS, 220 MHz, paging, air-ground, SMR, PLMR, aviation and marine, offshore radiotelephone services, and GWCS.<sup>8</sup> In addition, we incorporate the more refined definitions described *supra* pertaining to the broadband PCS, 220

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<sup>3</sup> 5 U.S.C. §§ 603(b)(3).

<sup>4</sup> 5 U.S.C. § 601(6).

<sup>5</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

<sup>6</sup> 15 U.S.C. § 632.

<sup>7</sup> 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>8</sup> See Appendix B at section C, *supra*.

MHz, paging, and SMR services.<sup>9</sup> A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>10</sup> Nationwide, there are 275,801 small organizations.<sup>11</sup> "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."<sup>12</sup> As of 1992, there were 85,006 such jurisdictions in the United States.<sup>13</sup>

#### D. Description of reporting, recordkeeping, and other compliance requirements

There are no additional reporting, recordkeeping, or other compliance requirements as a result of the Notice.

#### E. Steps taken to minimize significant economic impact on small entities, and significant alternatives considered

The Commission proposes, pursuant to the Balanced Budget Act of 1997, to use competitive bidding for the award of any initial licenses or construction permits, unless excepted under Section 309(j)(2), when mutual exclusivity exists among applications that have been accepted for filing. The Commission proposes to employ various mechanisms such as eligibility restrictions, spectrum caps, size limits on service areas, and providing for partitioning of service areas and disaggregation of spectrum in order to provide opportunities for avoiding mutually exclusive license applications. These different mechanisms are intended to help ensure that the marketplace for the various services continue to promote economic opportunity, provide incentives for the development and rapid deployment of new technologies, and to achieve efficient and intensive use of this spectrum.

The Commission observes that small businesses have been successful in the auctions in which installment payments plans were offered, and seeks comment on ways to provide an effective installment payment program while at the same time minimizing the concerns that have led to the decision to discontinue the use of installment payments for the present time. The Commission seeks comment on how to create an installment payment plan which fulfills the sometimes incongruent goals of encouraging only serious, financially qualified small

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<sup>9</sup> *Id.*

<sup>10</sup> 5 U.S.C. § 601(4).

<sup>11</sup> 1992 Economic Census, U.S. Bureau of the Census, Table 6, (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

<sup>12</sup> 5 U.S.C. § 601(5).

<sup>13</sup> U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

business applicants to apply for licenses, ensuring the rapid provision of service to the public, and guaranteeing that the American public is reasonably compensated for the use of the spectrum being auctioned. The Commission also seeks comment on how to fashion an installment payment program that is consistent with the provision of the Balanced Budget Act of 1997 that requires that all proceeds from future competitive bidding be deposited in the United States Treasury not later than September 30, 2002. In addition, the Commission seeks comment on means other than bidding credits and installment payments to facilitate the participation of small businesses and other designated entities in the spectrum auction program.

With respect to general attribution rules, the Commission proposes to adopt a "controlling interest" standard as the general attribution rule for all future auctions. Under this standard, determination of eligibility for small business provisions would be made by attributing the gross revenues only of principals of the applicant who exercise both "de jure" and "de facto" control, and their affiliates. The Commission seeks comment on whether the standard is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits, or whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet the Commission's goal to facilitate the participation of small businesses and other designated entities in the spectrum auction program. In addition, the Commission seeks comment on whether the controlling interest standard would be strengthened by imposing a minimum equity requirement.

The Commission believes that the provision in the Balanced Budget Act of 1997 requiring that interested parties have adequate time to develop business plans, assess market conditions and evaluate the availability of equipment necessary to make use of the specific spectrum to be auctioned is primarily intended to ensure that interested parties have adequate time to familiarize themselves with the rules and procedures to be employed in an auction prior to the application deadlines and start date of that auction. Nevertheless, it is unclear whether this legislation requires an additional opportunity for notice and comment prior to the issuance of detailed auction-specific information by the Wireless Telecommunications Bureau (Bureau). In order to comply with this provision of the Balanced Budget Act of 1997, and to ensure that potential bidders have adequate time to familiarize themselves with the specific provisions that will govern the day-to-day conduct of the auction, the Commission proposes to delegate to the Bureau the authority to seek comment on a variety of auction-specific issues prior to the start of each auction.

The Commission proposes that the Bureau seek comment on specific mechanisms relating to day-to-day bidding, the round structure, minimum opening bid/reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, the stopping rules to be employed, and information relating to auction delay, suspension, or cancellation. The Commission also proposes that the Bureau afford interested parties a reasonable time (e.g., seven days), in light of the start date of each auction and relevant pre-auction filing deadlines, to comment on these

auction-specific issues. Also, the Commission proposes that the Bureau announce, at any time in the weeks leading up to the start date of each auction, any amendment or clarifications to the information contained in the auction-related public notices or the Bidder Information Package.

The Commission tentatively concludes that the Balanced Budget Act of 1997 establishes a presumption that a reserve price or minimum opening bid will be required for each auction, unless it is determined that such mechanisms are not in the public interest. Comment is sought on this conclusion. The Commission tentatively concludes that the new provision establishing reserve prices or a minimum opening bid does not call for traditional reserve prices; rather, it calls for an added protection that licenses will not be assigned at unacceptably low prices. The Commission also seeks comment on suggested methods by which a reserve price or minimum bid can be established in future auctions, in light of the tentative conclusion above.

The Commission believes that in light of Congress' directive in the Balanced Budget Act, a shortened time period for the grant of initial licenses in auctionable services, as well as a shortened petition to deny period, is generally appropriate for future auctions. The Commission seeks comment on the appropriate length of a petition to deny period in light of this legislation, and in particular, whether auctions for specific services require longer periods for the grant of initial licenses or for the filing of petitions to deny.

Section 309(j) of the Communications Act directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses and other designated entities.<sup>14</sup> Section 309(j) also requires that the Commission ensure the development and rapid deployment of new technologies, products, and services for the benefit of the public, and recover for the public a portion of the value of the public spectrum resource made available for commercial use.<sup>15</sup> The Commission believes these provisions in the Notice help meet those goals and promote efficient competition while maintaining fairness and efficiencies of process in the Commission's rules.

F. Federal rules which overlap, duplicate, or conflict with these rules

None.

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<sup>14</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>15</sup> 47 U.S.C. §§ 309(j)(3)(A), (C).

**APPENDIX D**  
**Final Rules**

Parts 1, 21, 24, 27, 90 and 95 of Title 47 of the Code of Federal Regulations are amended to read as follows:

**PART 1 - PRACTICE AND PROCEDURE**

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

Authority: 47 U.S.C. 151, 154, 207, 303 and 309(j), unless otherwise noted.

2. Section 1.2101 is revised to read as follows:

**§ 1.2101 Purpose.**

The provisions of this subpart implement Section 309(j) of the Communications Act of 1934, as added by the Omnibus Budget Reconciliation Act of 1993 (Public Law 103-66) and the Balanced Budget Act of 1997 (Public Law 105-33), authorizing the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for certain initial licenses.

3. Section 1.2102 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 1.2102 Eligibility of applications for competitive bidding.**

(a) Mutually exclusive initial applications are subject to competitive bidding.

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

(1) Public safety radio services, including private internal radio services used by state and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that

(i) Are used to protect the safety of life, health, or property; and

(ii) Are not commercially available to the public;

(2) Initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(3) Noncommercial educational and public broadcast stations described under 47 U.S.C. § 397(6).



Note to § 1.2102: To determine the rules that apply to competitive bidding, specific service rules should also be consulted.

4. Section 1.2103 is amended by revising paragraph (a) and adding paragraph (d) to read as follows:

**§ 1.2103 Competitive bidding design options.**

(a) 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) Simultaneous multiple-round auctions (using remote or on-site electronic bidding);
- (2) Sequential multiple round auctions (using either oral ascending or remote and/or on-site electronic bidding);
- (3) Sequential or simultaneous single-round auctions (using either sealed paper or remote and/or on-site electronic bidding); and
- (4) Combinatorial (package/contingent) bidding auctions.

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(d) The Commission may use real time bidding in all electronic auction designs.

3. Section 1.2104 is amended by revising paragraphs (d) and (g) to read as follows:

**§ 1.2104 Competitive bidding mechanisms.**

\* \* \* \* \*

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

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(g) Withdrawal, Default and Disqualification Payment. As specified below, when the Commission conducts an auction pursuant to § 1.2103, the Commission will impose payments 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 is subject to a payment 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. The bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount is 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 payment in paragraph (g)(1) plus an additional payment equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. If either bid amount is subject to a bidding credit, the 3 percent credit will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the payment in paragraph (g)(1) of this section. Thus, for example, if gross bids are used to calculate the payment in paragraph (g)(1), the 3 percent will be applied to the gross amount of the subsequent winning bid, or the gross amount of the defaulting bid, whichever is less.

\* \* \* \* \*

4. Section 1.2105 is revised to read as follows:

**§ 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 upfront payment set forth by Public Notice. Beginning January 1, 1999, all short-form applications must be filed electronically.

(1) All short-form applications 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 short-form application must contain the following information:

(i) Identification of each license on which the applicant wishes to bid;

(ii)(A) 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 general 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; and

(B) Applicant ownership information, as set forth in § 1.2112.

(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 § 1.2110, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under § 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 Short-Form Application (FCC Form 175).** (1) Any short-form application (FCC Form 175) that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the 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. During the resubmission period for curing defects, a short-form application may be amended or modified to cure defects identified by the Commission or to make minor amendments or modifications. After the resubmission period has ended, a short-form application may be amended or modified to make minor changes or correct minor

errors in the application. Major amendments cannot be made to a short-form application after the initial filing deadline. Major amendments include changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid. Minor amendments include, but are not limited to, the correction of typographical errors and other minor defects not identified as major. An application will be considered to be newly filed 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 § 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; or

(iii) When an applicant has withdrawn from the auction, is no longer placing bids and has no further eligibility, a holder of a non-controlling, attributable interest in such an applicant may obtain an ownership interest in or enter into a consortium with another applicant for a license in the same geographic service area, provided that the attributable interest holder

certifies to the Commission that it did not communicate with the new applicant prior to the date that the original applicant withdrew from the auction.

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

(6) For purposes of this paragraph:

(i) The term "applicant" shall include all controlling interests in 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 10 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: 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 Company D's bids or bidding strategy.

5. Section 1.2107 is amended by revising paragraphs (b) and (c) to read as follows:

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

\* \* \* \* \*

(b) Unless otherwise specified by Public Notice, within ten (10) 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 bid withdrawal or default payments) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under § 1.2103, however, bidders may be required to submit their down payments with their bids.) Unless otherwise specified by Public Notice, this down payment must be made by wire transfer 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. 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 or authorization, 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 payments. No interest on any down payment will be paid to the bidders.

(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. 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. Specific procedures for filing applications will be set out by Public Notice. Beginning January 1, 1999, all long-form applications must be filed electronically. An applicant that fails to submit the required long-form application under this paragraph and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the payments set forth in § 1.2104.

\* \* \* \* \*

6. Section 1.2108 is amended by revising paragraphs (b) and (c) to read as follows:

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

\* \* \* \* \*

(b) Within a period specified by Public Notice, and after the Commission by public notice announces that long-form applications have been accepted for filing, petitions to deny such applications may be filed. In all cases, the period for filing petitions to deny shall be no shorter than five (5) days. 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 time for filing such oppositions shall be at least five (5) days from the filing date for petitions to deny, and the time for filing replies shall be at least five (5) days from the filing date for oppositions. The Commission may grant a license based on any long-form application that has been accepted for filing. The Commission shall in no case grant licenses earlier than seven (7) days following issuance of a public notice announcing long-form applications have been accepted for filing.

\* \* \* \* \*

7. Section 1.2109 is amended by revising paragraphs (a), (b) and (c) to read as follows:

**§ 1.2109 License grant, denial, default, and disqualification.**

(a) Unless otherwise specified by Public Notice, auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following the release of a Public Notice establishing the payment deadline. If a winning bidder fails to pay the balance of its winning bids in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due. When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of winning bids and any applicable late fees.

(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 ten (10) 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 payment specified in § 1.2104(g)(2). In such event, the Commission, at its discretion, 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 § 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 payment set forth in § 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.

\* \* \* \* \*

8. Section 1.2110 is revised to read as follows:

**§ 1.2110 Designated entities.**

\*\*\*\*\*

(b) \*\*\*

(3) Rural telephone companies. A rural telephone company is any local exchange carrier operating entity to the extent that such entity --

(i) provides common carrier service to any local exchange carrier study area that does not include either

(A) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or

(B) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(ii) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(iii) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(iv) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

(4) Affiliate.

(i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an 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. Nothing in this subsection shall be construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint venture under attribution standards provided in this section.

(xi) Exclusion from affiliation coverage. For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. §1601 *et seq.*), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. §2701 *et seq.*) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

(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) Bidding credits.

(1) 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.

(2) Size of bidding credits. A winning bidder that qualifies as a small business or a consortium of small businesses may use the following bidding credits corresponding to their respective average gross revenues for the preceding 3 years:

(i) Businesses with average gross revenues for the preceding years 3 years not exceeding \$3 million are eligible for bidding credits of 35 percent;

(ii) Businesses with average gross revenues for the preceding years 3 years not exceeding \$15 million are eligible for bidding credits of 25 percent; and

(iii) Businesses with average gross revenues for the preceding years 3 years not exceeding \$40 million are eligible for bidding credits of 15 percent.

(f) Installment payments. 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 by Public Notice, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within ten (10) 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 a default payment pursuant to § 1.2104(g)(2).

(2) Within ten (10) days of the conditional 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 default payments pursuant to § 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 and that it must execute a promissory note and security agreement as a condition of the 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) Any licensee that fails to submit payment on an installment obligation will automatically have an additional ninety (90) days in which to submit its required payment without being considered delinquent. Any licensee making its required payment during this period will be assessed a late payment fee equal to five percent (5%) of the amount of the past due payment. Late fees assessed under this paragraph will accrue on the next business day following the payment due date. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments.

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in subsection (i) above, the licensee will automatically be provided with a subsequent 90-day grace period. Any licensee making a required payment during this subsequent period will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due payment. Licensees shall not be required to submit any form of request in order to take advantage of the initial 90-day non-delinquency period and subsequent automatic 90-day grace period. All licensees that avail themselves of the automatic grace period must pay the required late fee(s), all interest accrued during the non-delinquency and grace periods, and the appropriate scheduled payment with the first payment made following the conclusion of the grace period.

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period will be declared in default, its license will automatically cancel, and will be subject to debt collection 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.

(l) Audits.

(1) Applicants and licensees claiming eligibility under this section shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding FCC-licensed service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(m) Gross Revenues. Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

9. Section 1.2111 is amended by revising paragraphs (c) and (d) and adding paragraph (e) to read as follows:

**§ 1.2111 Assignment or transfer of control: unjust enrichment.**

\* \* \* \* \*

**(c) Unjust Enrichment Payment: installment financing.**

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval. A licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments, debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

(3) If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan under this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status. A licensee may not switch its payment plan to a more favorable plan.

**(d) Unjust enrichment payment: bidding credits.**

(1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the restructured licensee would qualify), plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer.

**(2) Payment Schedule.**

(i) The amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

(A) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A transfer in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit;

(C) A transfer in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit;

(D) A transfer in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit; and

(E) for a transfer in year 6 or thereafter, there will be no payment.

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, or ownership change.

(e) Unjust Enrichment: Partitioning and Disaggregation.

(1) **Installment Payments.** Licensees making installment payments, that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(2) **Bidding Credits.** Licensees that received a bidding credit that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(3) **Apportioning Unjust Enrichment Payments.** Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

10. Section 1.2112 is added to read as follows:

**§ 1.2112 Ownership disclosure requirements for short- and long-form applications.**

(a) Each application for a license or authorization or for consent to assign or transfer control of a license or authorization shall disclose fully the real party or parties in interest and must include in an exhibit the following information:

(1) A list of any FCC-regulated business 10 percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, attributable stockholder or key management personnel of the applicant. This list must include a description of each such business's principal business and a description of each such business's relationship to the applicant;



(2) A list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest;

(3) A list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC-regulated business in which a 10 percent or more interest is held by another party which holds a 10 percent or more interest in the applicant (e.g., If company A owns 10 percent of Company B (the applicant) and 10 percent of Company C then Companies A and C must be listed on Company B's application;

(4) A list of the names, addresses, and citizenship of any party holding 10 percent or more of each class of stock, warrants, options or debt securities together with the amount and percentage held;

(5) A list of the names, addresses, and citizenship of all controlling interests of the applicants, as set forth in § 1.2110;

(6) In the case of a general partnerships, the name, address and citizenship of each partner, and the share or interest participation in the partnership;

(7) In the case of a limited partnerships, the name, address and citizenship of each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses);

(8) In the case of a limited liability corporation, the name, address and citizenship of each of its members; and

(9) A list of all parties holding indirect ownership interests in the applicant, as determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, that equals 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated and reported as if it were a 100 percent interest.

(b) In addition to the information required under paragraph (a) of this section, each applicant for a license or authorization claiming status as a small business shall, as an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant and its affiliates, the applicant's attributable investors, affiliates of its attributable investors, and, if a consortium of small businesses, the members comprising the consortium;

(2) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto and de jure control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

11. Section 1.2113 is added to read as follows:

**Sec. 1.2113 Construction prior to grant of application.**

Subject to the provisions of this section, applicants for licenses awarded by competitive bidding may construct facilities to provide service prior to grant of their applications, but must not operate such facilities until the FCC grants an authorization. If the conditions stated in this section are not met, applicants must not begin to construct facilities for licenses subject to competitive bidding.

(a) When applicants may begin construction. An applicant may begin construction of a facility upon release of the Public Notice listing the post-auction long-form application for that facility as acceptable for filing.

(b) Notification to stop. If the FCC for any reason determines that construction should not be started or should be stopped while an application is pending, and so notifies the applicant, orally (followed by written confirmation) or in writing, the applicant must not begin construction or, if construction has begun, must stop construction immediately.

(c) Assumption of risk. Applicants that begin construction pursuant to this section before receiving an authorization do so at their own risk and have no recourse against the United States for any losses resulting from:

- (1) Applications that are not granted;
- (2) Errors or delays in issuing Public Notices;
- (3) Having to alter, relocate or dismantle the facility; or
- (4) Incurring whatever costs may be necessary to bring the facility into compliance with applicable laws, or FCC rules and orders.

(d) Conditions. Except as indicated, all pre-grant construction is subject to the following conditions:

- (1) The application does not include a request for a waiver of one or more FCC rules;
- (2) For any construction or alteration that would exceed the requirements of § 17.7 of this chapter, the licensee has notified the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460-1), filed a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the FCC, PRB, Support Services Branch, Gettysburg, PA 17325;
- (3) The applicant has indicated in the application that the proposed facility would not have a significant environmental effect, in accordance with §§ 1.1301 through 1.1319;
- (4) Under applicable international agreements and rules in this part, individual coordination of the proposed channel assignment(s) with a foreign administration is not required; and
- (5) Any service-specific restrictions not listed herein.

**PART 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES**

1. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 403, 404, 410, 602, 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552, 554, unless otherwise noted.

2. Section 21.959(a)(2) is revised to read as follows:

**§ 21.959 Withdrawal, default and disqualification.**

\*\*\*\*\*

(a) \*\*\*

- (2) Default or disqualification after close of auction. See § 1.2104 (g)(2) of this chapter.

\*\*\*\*\*

3. Section 21.960(b)(4) and (d)(1) are revised to read as follows:

**§ 21.960 Designated entity provisions for MDS.**

\*\*\*\*\*

(b) \*\*\*

- (4) Conditions and obligations. See § 1.2110(f)(4) of this chapter.

\*\*\*\*\*

(d)\*\*\*

- (1) Unjust enrichment. See § 1.2111 of this chapter.

\*\*\*\*\*

**PART 24 - PERSONAL COMMUNICATIONS SERVICES**

1. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. Sections 154, 301, 302, 303, and 332, unless otherwise noted.

2. Section 24.304(a)(2) is revised to read as follows:

**§ 24.304 Withdrawal, default and disqualification penalties.**

(a) \*\*\*

(2) Default or disqualification after close of auction. See § 1.2104(g)(2) of this chapter.

\* \* \* \* \*

3. Section 24.309 is amended by revising paragraphs (b) and (f) to read as follows:

**§ 24.309 Designated entities**

\* \* \* \* \*

(b) Designated entities will be eligible for certain special narrowband PCS provisions as follows:

(1) Installment payments.

(i) Small businesses, including small businesses owned by members of minority groups and women, will be eligible to pay the full amount of their winning bids on any regional, MTA or BTA license in installments over the term of the license pursuant to the terms set forth in § 1.2110(g) of this chapter.

(ii) Businesses owned by members of minority groups and women that are winning bidders for the regional licenses indicated by an (\*\*) in § 24.129 may pay the full amount of their winning bids (less the applicable bidding credit and down payment) in installments with

(A) Interest imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent;

(B) Interest-only payments for the first two years; and

(C) Principal and interest payments amortized over the remaining eight years of the license.

(2) **Bidding Credits.** Businesses owned by member of minority groups and women, including small businesses owned by members of minority groups and women, will be eligible for a twenty-five (25) percent bidding credit when bidding on the following licenses:

- (i) The nationwide licenses on Channel 5, Channel 8 and Channel 11; and
- (ii) All MTA licenses on Channel 19, Channel 22, Channel 24; and
- (iii) All BTA licenses on Channel 26. This bidding credit will reduce by 25 percent the bid price that businesses owned by members of minority groups and women will be required to pay to obtain a license. Businesses owned by women and/or minorities, including small businesses owned by women and/or minorities will be eligible for a forty (40) percent bidding credit when bidding on all regional licenses on Channel 13 and Channel 17. In § 24.129, the licenses that will be eligible for 25 percent bidding credits are indicated by an (\*); the licenses that will be eligible for 40 percent bidding credits are indicated by an (\*\*).

\*\*\*\*\*

(f) **Unjust Enrichment.** Designated entities using installment payments, bidding credits or tax certificates to obtain a narrowband PCS license will be subject to the unjust enrichment provisions contained in § 1.2111 of this chapter.

5. Section 24.704(a)(2) is revised to read as follows:

**§ 24.704 Withdrawal, default and disqualification penalties.**

(a) \* \* \*

(2) Default or disqualification after close of auction. See § 1.2104(g)(2) of this chapter.

\* \* \* \* \*

7. Section 24.711 is amended by revising paragraph (b) to read as follows:

**§ 24.711 Upfront payments, down payments and installment payments for licenses for frequency Blocks C.**

\* \* \* \* \*

(b) **Installment Payments.** Each eligible licensee of frequency Block C or F may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to § 1.2110(g) of this Chapter and under the following terms:

(1) For an eligible licensee with gross revenues exceeding \$75 million (calculated in accordance with § 24.709(a)(2) and (b)) in each of the two preceding years (calculated in accordance with § 24.720(f)), interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 3.5 percent; payments shall include both principal and interest amortized over the term of the license.

(2) For an eligible licensee with gross revenues not exceeding \$75 million (calculated in accordance with § 24.709(a)(2) and (b)) in each of the two preceding years, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first year and payments of interest and principal amortized over the remaining nine years of the license term.

(3) For an eligible licensee that qualifies as a Small business or as a consortium of small businesses, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term.

(4) For an eligible licensee that qualifies as a business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first three years and payments of interest and principal amortized over the remaining seven years of the license term.

(5) For an eligible licensee that qualifies as a small business owned by members of minority groups and/or women or as a consortium of small business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first six years and payments of interest and principal amortized over the remaining four years of the license term.

(c) Unjust Enrichment. See § 1.2111 of this chapter.

8. Section 24.712 is amended by revising paragraph (d) to read as follows:

**§ 24.712 Bidding credits for licenses for frequency Blocks C.**

\* \* \* \* \*

(d) Unjust Enrichment. See § 1.2111 of this chapter.

9. Section 24.716 is amended by revising paragraph (c) and (d) to read as follows:

**§ 24.716 Upfront payments, down payments, and installment payments for licenses for frequency Block F.**

\* \* \* \* \*

(c) Late Installment Payments. See § 1.2110(f)(4) of this chapter.

(d) Unjust Enrichment. See § 1.2111 of this chapter.

10. Section 24.717 is amended by revising paragraph (c) to read as follows:

**§ 24. 717 Bidding credits for licenses for frequency Block F.**

\* \* \* \* \*

(c) Unjust Enrichment. See § 1.2111 of this chapter.

**PART 27 - WIRELESS COMMUNICATIONS SERVICE**

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

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

2. Section 27.203 is amended by revising paragraph (b) to read as follows:

**§ 27.203 Withdrawal, default and disqualification payments.**

\* \* \* \* \*

(b) Default or disqualification after close of auction. See § 1.2104(g)(2) of this chapter.

2. Section 27.209 is amended by revising paragraph (d) to read as follows:

**§ 27.209 Designated entities; bidding credits; unjust enrichment.**

\* \* \* \* \*

(d) Unjust Enrichment. See § 1.2111 of this chapter.

**PART 90 - PRIVATE LAND MOBILE RADIO SERVICES**

1. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 251-2, 303 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251-2, 303 309 and 332, unless otherwise noted.

2. Section 90.805(c) is revised to read as follows:

**§ 90.805 Withdrawal, default and disqualification payments.**

\*\*\*\*\*

(c) Default or disqualification after close of auction. See § 1.2104 (g)(2) of this chapter.

\*\*\*\*\*

3. Section 90.812 (a) and (b) are revised to read as follows:

**§ 90.812 Installment payments for licensees won by small businesses.**

(a) Installment Payments. See § 1.2110(f)(4) of this chapter.

(b) Unjust Enrichment. See § 1.2111(c) of this chapter.

**PART 95 - PERSONAL RADIO SERVICES**

1. The authority citation for Part 95 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.



2. Section 95.816(c)(6) and (e) are amended to read as follows:

**§ 95.816 Competitive bidding proceedings.**

\*\*\*\*\*

(c) \*\*\*

(6) Default or disqualification. See § 1.2104 (g)(2) of this Chapter.

\*\*\*\*\*

(e) Unjust Enrichment. See § 1.2111 of this Chapter.

\*\*\*\*\*

**APPENDIX E**  
**Proposed Rules**

Part 1 of Title 47 of the Code of Federal Regulations is proposed to read as follows:

**PART 1 - PRACTICE AND PROCEDURE**

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

Authority: 47 U.S.C. 151, 154, 207, 303 and 309(j), unless otherwise noted.

2. Section 1.2110 is revised to read as follows:

**§ 1.2110 Designated entities.**

(a) \*\*\*

\*\*\*\*\*

(b) Eligibility for small business provisions.

(1) Size Attribution. The gross revenues of the applicant (or licensee), its controlling interests and their affiliates shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business under this section. Applicants seeking status as a small business under this section must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues of the applicant (or licensee), its controlling interests and their affiliates.

(2) Aggregation of Affiliate Interests. Persons or entities that hold interest in an applicant (or licensee) that are affiliates of each other or have an identity of interests identified in § 1.2110(d) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the requirements of this section.

Example 1. ABC Corp. is owned by individuals, A, B, and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A & B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person or entity.

Example 2. ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(3) Exceptions.

(i) Small business consortia. Where an applicant (or licensee) is a consortium of small businesses, the gross revenues and total assets of each small business consortium member shall

not be aggregated. Each small business consortium member must constitute a separate and distinct legal entity to qualify.

(ii) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(c) 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) Controlling interest.

(i) For purposes of this section, controlling interest includes individuals or entities with both de jure and de facto control of the applicant. De jure control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(A) the entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) the entity plays an integral role in management decisions.

(ii) Calculation of Certain Interests.

(A) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(C) Stock interests held in trust shall be attributed to 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. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth in paragraph (d)(2)(ii)(B) of this section.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for

each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person or its affiliate pursuant to paragraph (c)(5) of this subsection, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence

- (i) The nature or types of services offered by such an applicant or licensee;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

- (i) The nature or types of services offered by such an applicant or licensee;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

(3) 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 greater than 50 percent equity ownership and, in the case of a corporate applicant, have a greater than 50 percent voting interest. For applicants that are partnerships, every general partner must be either a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50 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.

\*\*\*\*\*

Amendment of Part 1 of the Commission's Rules -- Competitive  
Bidding Proceeding, Third Report and Order and  
Second Further Notice of Proposed Rule Making

STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

By today's action, the Commission has consolidated and streamlined its spectrum auction rules. At the same time, and in order to provide existing licensees and future bidders additional regulatory certainty and fairness, the Commission has endeavored to harmonize its auction rules among the various spectrum-based services to which these rules apply. I believe the benefits of these changes will outweigh their costs. Accordingly, I support the item.

We did not, however, undertake the more difficult task of revamping our entire auction system. In my view, this proceeding (the latest round of which began nearly a year ago) should have elicited more thorough public comment on how the system could be improved.

For example, with a more complete record, we could have used this opportunity to permanently discard rules -- such as our ill-fated installment payment system -- that thrust the Commission into the role of unwitting (and unqualified) banker to our licensees. I find it incredibly inefficient and unsound policy for a federal government agency, especially one with no banking expertise, to substitute itself and its judgments for those of private financial institutions and markets.

In the end, however, we have respected the requirements of the law and, where appropriate, we have recognized the critically important role of all designated entities under Section 309(j) of the Act, including small businesses and rural telephone companies, in our economy and society. I believe that, within the bounds of the law, we must be faithful to companies such as these, just as companies in competitive markets must be faithful to their customers. As regulators, the FCC's fidelity can be measured in part by how little burden we force industry and consumers to shoulder. By adding certainty and fairness to our auction rules, today we have lifted some part of the burden of regulation.

**Statement of Commissioner Gloria Tristani  
on the Adoption the Third Report and Order and  
Second Further Proposed Rulemaking on the Amendment of  
the Commission's Part 1 Auction Rules**

It is fitting that we streamline, simplify and standardize our auction rules. These rules reduce the burden for applicants and licensees by adopting, where appropriate, uniform rules that will apply regardless of the service to be provided. But we also retain the flexibility to tailor some provisions to individual services. The guidance these rules provide will serve the public and the Commission alike by easing, and speeding, the auctions rulemaking process.

I wish to note a vital issue that remains. Today we affirm our commitment to eliminate barriers to entry and to ensure that minorities and women have the opportunity to participate in the provision of spectrum-based services. Under Section 257, we have already initiated several studies in the broadcast area, and we will soon initiate a study concerning participation and barriers to entry in the auctions context.

To date, minority and women-owned businesses have benefitted from the small business provisions we have offered -- installment payments, bidding credits and entrepreneurs blocks. Thus, of the more than four thousand licenses awarded by auction, approximately 11 percent have been awarded to minority-owned businesses and 11 percent to women -owned businesses. However, in light of our decision today to suspend use of installment payments for the foreseeable future, we must pay attention to the unique obstacles facing minorities and women as they seek to participate in the telecommunications revolution. In the further notice, we seek comment on these obstacles and on what remedies we might offer to facilitate widespread participation. I will be especially interested in the comments and proposals we receive to fulfill our statutory obligations.