FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 21, 24, 26, 27, 90 and 95

[WT Docket No. 97–82, ET Docket No. 94–32; FCC 97–413]

Competitive Bidding Proceeding

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this *Third Report and Order*, the Commission adopts uniform competitive bidding rules for all future auctions. The Commission believes that these rule changes will simplify and streamline its regulations in order to increase the overall efficiency of the competitive bidding process. These rule changes are necessary to further the Commission's goals of simplifying and streamlining its regulations, and to develop uniform auction rules and procedures for all future auctions. The intended effect of this action is to adopt uniform final rules and procedures applicable to the Commission's spectrum auction program.

EFFECTIVE DATE: March 16, 1998.

FOR FURTHER INFORMATION CONTACT: Josh Roland or Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of the *Third Report and Order* in WT Docket No. 97–82, ET Docket No. 94–32, adopted on December 18, 1997 and released on December 31, 1997. The complete *Third Report and Order* is available for inspection and copying during normal business hours in the FCC Reference Center, Room 239, 1919 M Street, NW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20036, (202) 857–3800. The complete *Third Report and Order* also is available on the Commission's Internet home page (http://www.fcc.gov).

SUMMARY OF ACTION:

I. Background

1. On December 18, 1997, the Federal Communications Commission (Commission) adopted a *Third Report and Order* making substantive amendments and modifications to its general competitive bidding rules for all auctionable services. These changes to the Commission's general competitive bidding rules are intended to streamline the Commission's 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 the Commission's 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, the Commission stated that we would ''issue further Reports and Orders * * * to adopt auction rules for each auctionable service or class of service,'' 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. *Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* PP Docket No. 93–253, *Second Report and Order*, 59 FR 22980 (May 4, 1994) (''*Competitive Bidding Second Report and Order*''), *on recon., Second Memorandum Opinion and Order,* 59 FR 44272 (August 26, 1994) (''*Competitive Bidding Second Memorandum Opinion and Order*''). These rule changes result from the Commission's proposals in Amendment of Part 1 of the Commission's Rules—Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making,* WT Docket No. 97–82, 62 FR 13570 (March 21, 1997) (''*Notice*'').

2. The Commission also released a *Second Further Notice of Proposed Rule Making* in this Docket, in which it sought comment on additional changes to its general competitive bidding rules. The *Second Further Notice of Proposed Rule Making* was published in the **Federal Register** on January 7, 1998. *See* Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660–4685 MHz, *Second Further Notice of Proposed Rule Making,* WT Docket No. 97–82, ET Docket No. 94–32 (rel. January 7, 1998) (''*Second Further Notice of Proposed Rule Making*'').

II. Applicability of General Competitive Bidding Rules

3. With some exceptions, the Commission adopts its 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. The Part 1 rules will apply to all auctionable services, unless the Commission determines that with regard to particular matters the adoption of service-specific rules is warranted. As the Commission indicated in the *Notice*, the Commission has gained significant experience in the course of the 15 auctions conducted to date. In particular, the Commission has found that much of the auction process can be standardized and that adopting service-specific rules for many aspects of the competitive bidding process is both unnecessary and confusing. The Commission also finds 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, 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; (2) decrease uncertainty for auction participants; (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; and (4) enable the Commission to develop a consistent body of law and precedent governing the auction process.

4. The Balanced Budget Act of 1997, Pub. 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''), expands the Commission's auction authority. 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 broadcast stations. 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). 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.

5. With limited exceptions, the rules the Commission adopts 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, and believes 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, the Commission retains the discretion to use the revised general competitive bidding procedures adopted in this proceeding for any reauction of licenses in these services. The Commission also notes 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. To apply the existing rules for the most part is also strongly supported by those commenters addressing the issue. For example, AMTA states that the 220 MHz industry has encountered extraordinary delays in achieving regulatory certainty, and that amending or altering the auction rules for this service would create further uncertainty. Consistent with the Commission's discussion below, the Commission's 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, the Commission notes 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.

6. Many of the commenters who support the Commission's 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. 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). Similarly, NextWave contends that the adoption of service-specific rules may be appropriate in some circumstances. 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. 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.

7. 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. AirTouch argues in particular that the Commission should not adopt a general stopping rule for the paging auction which would be contrary to the comments received in that proceeding and the stopping rule that the Commission ultimately adopted. As discussed above, the Commission will use previously-adopted, service-specific rules for the paging auction.

8. The rule changes the Commission adopts today streamline and simplify its general competitive bidding procedures. The majority of the rules the Commission adopts today address aspects of the Commission's 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 the Commission adopts today address aspects of its 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).

9. 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. 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. 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. The Commission agrees that shared spectrum is, by definition, not auctionable under Section 309(j) due to the lack of mutual exclusivity.

10. 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 adopted in this proceeding. Although the Commission does not decide that issue now, as the Commission suggested in the *Notice*, the Commission will continue to adopt service-specific auction procedures where it finds that its general competitive bidding procedures are inappropriate.

III. Rules Governing Designated Entities

11. 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.'' 47 U.S.C. 309(j)(4)(D). 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. *See* 47 U.S.C. 309(j)(3)(B) and (j)(4)(D).

12. The Commission adopts the rules in this *Third Report and Order* in order to facilitate broad-based participation in auctions. The Commission believes 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 the Commission suspends the use of installment payments, the Commission seeks comment in the *Second Further Notice of Proposed Rule Making* in this docket on whether installment payments should be adopted in the future.

13. The Commission also notes 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, the Commission has commenced a series of studies, and has other studies in the planning process, to examine barriers encountered by minorities and women in the auctions process and the secondary market for licenses. When those studies are completed, the Commission will examine whether 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).

14. *Small Business Size Standards.* The Commission adopts its proposal to continue to define small businesses, as it has in the past, based on the characteristics and capital requirements of the specific service. The Commission believes that this approach has given it flexibility that will continue to benefit small businesses in future auctions. The Commission also notes that this approach is consistent with the Small Business Administration's practice of approving small business size standards on a service-by-service basis. 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.

15. No commenters addressed the Commission's 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, the Commission believes that adoption of this proposal is important to further its objective of establishing uniform definitions relating to small business standards for future auctions. From this point forward, the Commission's service-specific small business definitions will be expressed in terms of average gross revenues over the preceding three years ''not to exceed'' particular amounts. The Commission also continues to believe that average gross revenues provide an accurate, equitable, and easily ascertainable measure of business size. As the Commission has 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. NextWave, in its comments, agrees, stating that gross revenues are a generally reliable measure of whether a company is indeed small. In addition, while the Commission has used a total assets test in determining eligibility for entrepreneur blocks, *see, e.g.,* 47 CFR 709(a), the Commission has not used such a test for determining small business eligibility. The Commission also notes that the Small Business Act's statutory definition of small business does not use a total assets test. *See* 15 U.S.C. 632(c). Thus, the Commission declines to adopt any other measure of business size, such as a total assets test, at this time.

16. *Definition of Gross Revenues.* 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. The Commission believes that a uniform definition of gross revenues, as the essential element of our small business definitions, furthers the Commission's goal of establishing uniform definitions and is administratively efficient. Thus, the Commission adopts a uniform definition of gross revenues in the Part 1 rules.

17. Various commenters addressed specific aspects of the Commission's proposed definition of gross revenues. CII supports the Commission's proposal that applicants be permitted to use *either* fiscal year or calendar year figures for calculation purposes. No commenters opposed this proposal. The Commission is persuaded that permitting use of either of these figures will assist applicants in providing the most current information available on their applications. The Commission concludes that its general gross revenue definition should permit applicants to support their gross revenue calculations using either fiscal or calendar years.

18. Several commenters responded to the Commission's 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 the Commission's tentative conclusion that where audited financial statements are not available, they should not be required. In particular, these commenters argue that any strict requirement that financial statements be audited is unduly burdensome for most small business applicants. 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. Only two commenters, ISTA and PageNet advocate that applicants use audited financial statements in order to qualify for small business status. After review of the comments on this issue, the Commission concludes that such a requirement would be onerous to small business. The Commission also agrees with AMTA's observation that the certification requirement on the FCC Form 175 acts to ensure that applicants submit accurate information. Furthermore, as discussed below, the Commission also will retain the authority to audit applicants individually if there is any question concerning small business status. The Commission therefore declines to require all applicants to use audited financial statements to support their gross revenue calculations. Audited financial statements, however, are necessary if they exist. The Commission also notes that, consistent with the Small Business Act, 15 U.S.C. 632(c)(ii)(II), 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.

19. Accordingly, as proposed in the *Notice*, and consistent with the Commission's broadband PCS rules, the Commission 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.

20. *Definition of Affiliate*. The Commission adopts its proposal to adopt a uniform definition of the term ''affiliate'' for all future auctions. As the Commission discussed in the *Notice*, the term *affiliate* is defined by the Commission's 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. The Commission has 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. The Commission also believes that this definition, by focusing on ''indicia of control,'' is consistent with our proposals regarding attribution of gross revenues of investors and affiliates discussed in the *Second Further Notice of Proposed Rule Making* in this docket.

21. CIRI requests that the Commission include in its general definition of the term ''affiliate'' an exemption for Indian tribes and Alaska Regional or Village Corporations, as the Commission did for broadband PCS, and more recently, for LMDS. The Commission agrees 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 the Commission stated in support of a similar exemption from the 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. Furthermore, the Commission does 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.

22. The Commission also takes this opportunity to clarify its Part 1 definition of affiliate. The Commission's 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. *See* 47 CFR 1.2110(b)(4)(x). 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.'' *See, e.g.,* 47 CFR 101.1112(f) (defining the term ''consortium'' for LMDS). 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 the Commission's auctions, while still being eligible for status as a small business.

23. The Commission therefore amends § 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. The Commission believes 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 the Commission wishes to continue to make this option available.

24. *Definition of Rural Telephone Company*. The National Telephone Cooperative Association (''NTCA'') and the Rural Telecommunications Group (''RTG''), commented in support of the Commission's 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. No commenters opposed this proposal. As the Commission noted in the *Notice*, when the Commission amended the broadband PCS rule, the Commission stated that using the definition contained in the 1996 Act would likely expedite the delivery of advanced services to rural areas. the Commission 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. The Commission believes 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.

25. Thus, the Commission amends § 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 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.

26. *Installment Payments.* After careful review of the comments in this docket, and the Commission's recent decisions in the broadband PCS C block, LMDS and 800 MHz SMR services, the Commission has determined that installment payments should not be used in the immediate future as a means of financing small business participation in the Commission's auction program. *See also* ''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 Reauction, 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, and ''FCC Announces Auction Schedule for the General Wireless Communications Service,'' *Public*

Notice, DA 97–2634 (rel. December 17, 1997). 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. The Commission notes that its 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. The Commission 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.

27. 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-payment) resulting in significant delays in the provision of service to the public. While the Commission is 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. The Commission also notes that, in order to balance the impact on small businesses of its decision to discontinue the use of installment payments in the near future, the Commission is adopting higher bidding credits than those proposed in the *Notice*.

28. Therefore, subject to the Commission's proposals in the *Second Further Notice of Proposed Rule Making*, the Commission concludes 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, the Commission hereby eliminates installment payments in the auction of the lower 80 and General Category channels in the 800 MHz SMR service. 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, the Commission believes that this decision is consistent with suggestions of CIRI, as well as the Commission's general experience in examining the success of the installment payment program to date. As the Commission recently recognized in eliminating installment payments for LMDS licensees, Congress did not require the use of installment payments in all auctions, but rather recognized them as one means of promoting the objectives of Section 309(j)(3) of the Communications Act. 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. Installment payments are not the only tool available to assist small businesses. Indeed, the Commission have conducted auctions without installment payments. 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 the Commission seeks comment in the *Second Further Notice of Proposed Rule Making* on offering installment payment plans in the future, the Commission believes that Section 3007 may require that these auctions be conducted without offering long-term installment payments. *See* 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.

29. In this regard, the Commission agrees 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. Further, as the Commission has already noted, Section 309(j) requires the Commission to consider alternative methods to allow for dissemination of licenses among designated entities, including small businesses. The Commission believes that the rules it adopts below 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.

30. 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. 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. 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. The Commission disagrees with Merlin's assertions. As the Commission has discussed, the Commission believes that the increased bidding credits it adopts 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. As noted above, this approach was successful in enabling small businesses to participate in the WCS auction, in which the Commisison was unable to employ installment payments because of the statutory deadline for depositing auction revenues in the U.S. Treasury. The Commission also recently used this approach in establishing rules for the auction of licenses for 800 MHz SMR and LMDS.

31. The Commission recognizes that it previously adopted rules for both the 220 MHz and paging services that permit eligible small businesses to pay for their licenses in installments. Several petitions for reconsideration have been filed in these proceedings that remain pending before the Commission. 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 reauction licenses in a timely fashion are established.

32. *Bidding Credits.* 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, 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. 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. 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. As the Commission stated in the *Notice,* the Commission believes that an approach in which the Commission provides 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. 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. The Commission therefore adopts its proposal to create a standard schedule of bidding credits.

33. In light of the Commission's decision to suspend installment payment financing for the near future, the Commission has 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. Similarly, CIRI contends that unless the 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. The Commission notes 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. 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. The Commission believes 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 the Commission was unable to employ installment payments because of the statutory deadline for depositing auction revenues in the U.S. Treasury. Finally, while the Commission recognizes Pocket's concerns about the possibility that bidders ''bid through'' bidding credits, the Commission does 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.

34. Consistent with this reasoning, the Commission adopts 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 (percent)
Not to exceed $3 million	35
Not to exceed $15 million	25
Not to exceed $40 million	15

The Commission recognizes that these credits are higher than some previously adopted for specific services. Based on the Commission's past auction experience and the suspension of installment payments, however, the Commission believes that the approach taken here will provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions.

35. The Commission recognizes that Merlin recommends providing higher bidding credits than those which the Commission adopts. 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. As discussed above, the Commission believes that higher bidding credits than those proposed in the *Notice* are necessary now that our installment payment program is suspended. The Commission believes that the schedule of bidding credits it adopts 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, the Commission declines to adopt Merlin's proposal. The Commission also notes that it seeks comment in the *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.

36. *Unjust Enrichment.* The Commission adopts its proposal to conform the Part 1 unjust enrichment rules to the broadband PCS rules. The Commission believes 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 the Commission 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.

37. Current as well as future licensees will be governed by the rules the Commission adopts providing for unjust enrichment payments upon assignment, transfer, partitioning and disaggregation. While the Commission did not receive significant comment on this issue, the Commission notes 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, the Commission concludes that the unjust enrichment rules it adopts 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. *See* 47 CFR 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). As discussed above, the Commission suspends the use of installment payments for the immediate future as a means of financing small business participation in the Commission's auction program. As a result, the Commission's 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 the Commission reinstates installment payments).

Unjust Enrichment and Installment Payments

38. For existing licensees who make use of Commission installment payment financing, the Commission amends § 1.2111(c) to conform to the Commission's 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. 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 must seek Commission approval and must adjust its payment plan to reflect its new eligibility status.

Unjust Enrichment and Bidding Credits

39. For existing and future licensees who qualified or qualify in the future for a bidding credit in paying for their winning bid, the Commission also amends § 1.2111(c) to provide for unjust enrichment payments similar to those contained in the Commission's 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. 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.

40. The Commission also adopts its 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. In amending the rule in this manner, the Commission ensures that its 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. Consistent with the rules that exist in these services, the amount of this payment will be reduced over time as follows: 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); 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, will be governed by this modification to our general rules. The Commission believes 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 the Commission's entrepreneur blocks.

Unjust Enrichment and Partitioning and Disaggregation

41. Also as proposed in the *Notice,* the Commission will adopt a general rule modeled on the Commission's broadband PCS rules to determine the amount of unjust enrichment payments assessed for all current and future licensees. Thus, the Commission adopts 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. 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.

IV. Application Issues

42. *Electronic Filing.* The Commission believes 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, the Commission amends §§ 1.2105(a) and 1.2107(c) of its rules to require electronic filing of all short-form and long-form applications, beginning January 1, 1999, unless it is not operationally feasible. Although in the *Notice* the Commission proposed to require electronic filing commencing January 1, 1998, the Commission believes 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. 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. 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. This software helps applicants ensure the accuracy of their applications as they are filling them out, and enables them to correct errors and omissions prior to submitting their applications. To assist the public, the Commission provides 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.

43. 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. 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. The Commission does 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. In addition, the Commission emphasizes that it has typically responded rapidly to time-sensitive waiver requests filed by auction applicants, and intends to continue to do so in the future.

44. 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. The Commission believes that the system enhancements discussed above, most of which were not in place during the IVDS auction, adequately respond to Airadigm's concerns. The Commission also notes that its 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 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. The Commission did not experience problems with its electronic filing procedures.

45. Finally, as the Commission stated in the *Notice,* the Commission recognizes 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. The effective date of January 1, 1999, will provide potential bidders with adequate time in which to adapt to electronic filing requirements. Finally, although the Commission concludes that electronic filing is the preferred filing method, the Commission nevertheless reserves the right to provide for manual filing in the event of technical failure or other difficulties.

46. *Short-form Application Amendments.* The majority of commenters support the Commission's 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. 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. 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. 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).

47. After careful consideration of the comments addressing the issue, the Commission concludes that a definition of major and minor amendments similar to that provided in the Commission's PCS rules, 47 CFR 24.822, 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, 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 the Commission's 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. 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.

48. 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 the Commission recognizes 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, the Commission concludes 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. Specifically, PageNet states that because the only new information that an applicant could be deemed to 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. 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. After this point, the overall competitiveness of the auction may be threatened.

49. 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. The Commission notes 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. 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. Because of the potential anti-competitive results of allowing bidders to delete markets after the short-form filing deadline, however, the Commission believes that this type of error can be more effectively addressed by other means, including increased awareness on the part of prospective auction applicants of the consequences of choosing ''all markets,'' as well as software enhancements that make specifying particular markets on the FCC Form 175 less burdensome.

50. The Commission also emphasizes that, pursuant to § 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. *See* 47 CFR 1.65. 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. 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. The Commission further notes that it 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.

51. Finally, the Commission notes 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. While the Commission has considered WWC's argument, the Commission believes 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.

52. *Ownership Disclosure Requirements.* As the Commission indicated in the *Notice*, the Commission continues 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. 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, the Commission adopts standard ownership disclosure requirements for all auctionable services that will avoid the variations found in the Commission's current service-specific ownership disclosure requirements.

53. 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. 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. 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. 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. 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. 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.

54. For all future auctions, therefore, the Commission will model our reporting requirements on the general application requirements contained in our broadband PCS rules. 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 the Commission's current Part 1 rules require auction applicants to list all owners of a five percent or greater interest in the applicant, the Commission agrees 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 significant passive ownership interest (*i.e.,* 20 percent). Thus, the Commission amends its 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. *See* 47 CFR 1.2110(b)(4). 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. The Commission notes 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. However, as suggested above, the Commission believes that the detailed reporting requirement we create today, in combination with our comprehensive affiliation rules, permits us to determine the ''real party or parties in interest'' when parties apply to participate in an auction.

55. 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; (5) the name, address and citizenship of all controlling interests of the applicants, as this term is defined in § 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 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. *See, e.g.,* 47 CFR 20.6(d)(8).

56. In addition, consistent with the reporting requirements set forth in the 900 MHz SMR rules, the Commission 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. The Commission believes that these reporting requirements will help to assure that only qualifying applicants obtain the benefits of our small business provisions, without being unduly burdensome.

57. 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. PageNet contends that these factors can have a significant impact upon the competitiveness of the auction and the post-auction marketplace. 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. As discussed above, the Commission agrees that it is important that auction applicants disclose certain ownership information prior to the start of an auction. At the same time, however, the Commission believes 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*, the Commission retained the flexibility to conceal bidder identities if further experience showed that it would be desirable to do so. 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. The Commission believes that the uniform rules adopted today provide the Commission with the necessary flexibility to tailor the amount of bidder information made available to applicants to ensure the competitiveness of each auction. The Commission therefore declines to adopt a provision prohibiting non-disclosure of bidder identities in all future auctions.

58. *Ownership Disclosure Filings.* The Commission believes 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 in a subsequent auction, will streamline our application processes and minimize the burden on auction applicants. This concept is supported by the record. 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. The Commission believes that by requiring ownership disclosure filings, we ensure that we receive all the information necessary to evaluate an applicant's qualifications. As the

Commission indicated in the *Notice*, however, these requirements could result in duplicative filings. 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. Under the system the Commission envisions, 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. The Commission will look to implement this process in the near future as part of our Universal Licensing System.

59. *Audits.* The only commenters to address this proposal, PageNet and Airadigm, support this proposal. 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. The Commission therefore adopts its 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. 47 U.S.C. 403, 308(b). The Commission believes that these provisions, as well as the general provisions of the Administrative Procedure Act, will adequately address Airadigm's concerns, and the Commission therefore declines at this time to adopt specific rules to govern audits of applicants and licensees conducted in the future.

V. Payment Issues

60. *Determination of Upfront Payment Amount.* In the *Competitive Bidding Second Report and Order*, the Commission 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. The Commission reasoned that this method of determining the required upfront payment would enable prospective bidders to tailor their upfront payment to their bidding strategies. At the same time, however, the Commission noted that determining an appropriate upfront payment involved balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs imposed on bidders. The Commission 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.

61. 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. 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). 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. 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. 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. 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. 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 this would create a significant barrier to small businesses.

62. The Commission agrees 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. The Commission believes its 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. 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. The Commission believes 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.

63. *Refund of Upfront Payments.* After considering the issue in light of Congress's 1996 amendment to Section 309(j)(8)(C) and the comments received in this proceeding, the Commission 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 the Commission 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. The Commission continues 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. 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. 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. The Commission agrees with Airadigm and AT&T, and conclude that such a fee is

inappropriate, and therefore, rejects AirTouch's proposal.

64. Down Payment and Full Payment for Licenses

Level of Down Payments

65. The Commission created the down payment requirement in the *Competitive Bidding Second Report and Order,* in which the Commission 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. 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. 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, the Commission believes that it is important it learns early on in the licensing process when an applicant might be unable to finance its winning bid or bids.

66. Several commenters oppose any increase in the down payment beyond 20 percent of the high bid amount. 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. 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, the Commission concludes 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.

Untimely Second Down Payments and Full Payments

67. The Commission will amend sections 1.2109(a) and 1.2110(e) of its 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 the Commission recognizes 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 timely remittance of all earlier payments and prompt action to cure the delinquency.

68. The Commission recognizes 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, the Commission 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. The Commission agrees, and amends § 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 the Commission suspends the use of installment payments for the immediate future, in the event the Commission once again offers installment payments, the Commission will also amend § 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.

69. As discussed above, the Commission's rules provide that winning bidders have ten business days to make timely payment following notification that their licenses are ready to be granted. The Commission believes that in establishing this additional ten business day period, during which winning bidders will not be considered in default, the Commission will provide an adequate amount of time to permit winning bidders to adjust for any last-minute problems. The Commission declines 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 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. In addition, we believe that a five percent fee is large enough to deter winning bidders from making late payments and yet small enough so as not to be punitive. 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 § 1.2104(g) of our rules. 47 CFR 1.2104(g).

70. Finally, the Commission emphasizes that its decision to permit late payments is limited to payments owed by winning bidders who have submitted timely initial down payments. The Commission continues 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, the Commission believes that the *bona fide* ability to pay demonstrated by a timely initial down payment is essential to a fair and efficient auction process. Thus, the Commission has not proposed to modify its approach of requiring timely submission of initial down payments that immediately follow the close of an auction. The Commission did not propose to adopt a late payment period for down payments that are due soon after the close of the auction as the Commission believes 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 § 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, the Commission will not allow for any late submission of upfront payments, as to do so would slow down the licensing process by delaying the start of an auction.

Full Payment and Petitions To Deny

71. The Commission will 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. The Commission will 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. Balanced Budget Act, § 3008. As an initial matter, consistent with this legislation, the Commission amends §§ 1.2108(b) and (c) of its rules 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. 47 CFR 1.2108(b), (c). Also consistent with the Balanced Budget Act, 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. In this regard, the Commission seeks comment in the *Second Further Notice of Proposed Rule Making* 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.

72. In light of this change in our rules, the Commission believes 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, the Commission believes 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, the Commission believes 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, the Commission declines to amend its 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.

73. *Default Payments.* The Commission adopts its proposal to delete the words ''simultaneous multiple-round'' from § 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. 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. The Commission believes 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. The Commission also believes 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. *See* 47 U.S.C. 309(j)(5).

74. Our rules provide 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, plus a payment equal to three percent of the subsequent winning bid or the amount bid, whichever is lower. *See* 47 CFR 1.2104(g)(2). 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. 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. 47 CFR 24.704(a)(2). *See also* 47 CFR 1.2104(g). 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.

75. Installment Payments

Late Payments

76. In order to add certainty to the installment payment process, the Commission adopts its proposals from the *Notice* to modify its grace period provisions. As discussed above, the Commission declines to use installment payments for the immediate future as a means of financing small business participation in our auction program. As a result, the Commission's 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.

77. As proposed in the *Notice,* under this system, licensees will not be required to submit a filing to take advantage of these provisions. 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. 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 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. *See* 47 CFR 1.2110(e)(4)(iii).

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 and 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 proposed in the *Notice*, the late fees the Commission adopts will accrue on the next business day following the payment due date and will be payable with the next quarterly installment payment obligation. The Commission emphasizes 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 the Commission's spectrum management responsibilities, the Commission wishes to ensure that spectrum is put to use as soon as possible. The Commission also believes 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 the Commission adopts should be used only in extraordinary circumstances. Thus, as the Commission 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 § 1.2104(g)(2) of the Commission's rules.

78. Several commenters support the Commission's efforts to provide licensees with predetermined non-delinquency periods without requiring the submission of a formal grace period request. 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. 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. 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*. 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. 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. 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 required payment through administrative error or other unavoidable, unforeseen circumstances.

79. As an alternative to the Commission's 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. 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. GWI opposes the imposition of an additional 10 percent late payment fee where licensees require an additional 90-day late payment period. The Commission declines to adopt these alternate proposals. As the Commission 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, the Commission notes that it has an obligation under the Debt Collection Improvement Act to enforce payment obligations owed to the federal

government. *See Debt Collection Improvement Act*, Pub. L. 104–134, § 3100(j)(i), 110 Stat. 1321 (1996), codified at 31 U.S.C. 3711(a) (''DCIA'').

80. The Commission believes 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. 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. The Commission recognizes that some commenters oppose the imposition of a late fee on overdue installment payment, and in particular on the 90-day non-delinquency period. 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. 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. *See* 31 CFR 3711(g)(1).

81. The Commission recognizes that a number of commenters oppose the application of these provisions to current licensees. 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. However, the Commission's 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. The Commission notes 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. The Commission also believes 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.

82. As provided in the *Second Report and Order and Further Notice of Proposed Rule Making* in this docket, installment payments for C and F block licensees will resume effective March 31, 1998. *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 FR 55348 (October 24, 1997) (''*Second Report and Order and Further Notice of Proposed Rule Making*''). Under the Commission's decision to reinstate installment payments for these licensees, the Commission 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 the Commission indicated in the *Second Report and Order and Further Notice of Proposed Rule Making*, the Commission 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 the Commission adopts today. *See* 47 CFR 1.2110.

83. 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. CIRI notes that parties may request confidential treatment of sensitive financial information pursuant to § 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. As an initial matter, because the Commission adopts its proposals providing for automatic grace periods, the Commission does not envision licensees filing grace period requests under normal circumstances from this point forward. As a result, the Commission believes 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 the Commission's current rules and procedures, the Commission will continue its 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 § 0.459 of the Commission's rules. *See* 47 CFR 0.459. The Commission further clarifies 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 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.

Defaults on Installment Payments

84. The Commission will not adopt its tentative conclusion to apply the default provisions of § 1.2104(g) to licensees who default on an installment payment. Most commenters addressing the issue oppose this proposal. 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. 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. 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 Treasury will willingly default. 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.*

85. The Commission has 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. The Commission's current rules and installment payment terms are adequate to discourage defaults and encourage licensees to find private market solutions when they face financial difficulties. The Commission also believes that the rules it adopts 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, the Commission believes 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.

Cross Default in the Context of Installment Payments

86. After consideration of the comments in this proceeding, 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. Because the Commission will eliminate the use of installment payments as a means of financing small business participation in its auction program for the foreseeable future, the Commission notes that in practice this decision will apply only to existing licensees who are currently paying for their licenses in installments.

87. The Commission's decision not to pursue cross default remedies against current licensees who default on an installment payment is supported by the majority of commenters. For example, Airadigm contends that it is unfair to jeopardize an entire business because of a default on one license. Similarly, ISTA argues for separate treatment of separate services, regardless of ownership, lest a failure in one business cause failure in unrelated businesses. IVDS Enterprises proposes that licensees be able to discontinue installment payments on a particular license and allow that license to be cancelled or revoked. 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. 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 demonstrated bad faith.

88. The Commission recognizes 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, (2) encourages auction participants to find private market solutions to financial shortfalls, and (3) is consistent with commercial lending policies. The Commission believes, however, that the default provisions contained in § 1.2104(g)(2) serve as an adequate incentive to discourage speculation and encourage licensees to pursue non-default solutions to financial difficulties. The Commission also emphasizes 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. In addition, by making licensees who default on an installment payment subject to the default payment set forth in § 1.2104(g)(2), the Commission created an additional deterrent to licensees considering default as a solution to financing shortfalls. The Commission believes 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.'' 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 § 1.2104(g) of our rules, and the Commission will initiate debt collection procedures against the licensee and accountable affiliates. 47 CFR 1.2104(g), 1.2110(e)(4)(iii). *See also* 31 U.S.C. Chapter 37; 4 CFR Parts 101–105; 47 CFR Part 1, Subpart O.

VI. Competitive Bidding Design, Procedure, and Timing Issues

89. *Balanced Budget Act of 1997 Notice and Comment Procedures.* The Commission believes 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. The Commission nevertheless believes that this legislation requires that the Commission 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. In light of the typically time-sensitive nature 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. 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, the Commission directs the Bureau, under its existing delegated authority, *see* 47 CFR 0.131(c), 0.331, 0.332, to seek comment on a variety of auction-specific issues prior to the start of each auction.

90. The Commission directs 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, 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. The Commission directs 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, the Commission notes 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 previous practice, the Commission recognizes 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. The Commission believes 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, as well as an opportunity to comment on the Bureau's intentions regarding issues relating to the day-to-day conduct of each auction.

91. *''Real time'' Bidding.* The Commission will adopt its 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 its experience in conducting 15 auctions to date, the Commission concludes that ''real time'' bidding will allow auctions to proceed more rapidly because it will allow bidders immediate feedback on new high bids. The Commission also notes 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.'' 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, and plans to employ it in the forthcoming LMDS auction.

92. 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. 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.

93. As mentioned above, the ''click-box bidding'' format should significantly improve a bidder's ability to react quickly. Further, should the Commission determine to employ ''real-time'' bidding in the future, the Commission believes 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 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. 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.

94. 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. The Commission believes 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.

95. The Commission notes 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. The Commission agrees 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. The Commission therefore concludes that the per minute charge for bidding ''on-line'' should be reexamined, and delegate to the Bureau that authority to implement such a reduced fee in the future, if appropriate.

96. No commenters addressed the Commission's 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. 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 the Commission employs ''real time'' bidding. The Commission concludes that the Bureau should undertake this task.

97. Consistent with section 3002 of the Balanced Budget Act, the Commission directs the Bureau 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. The

Commission believes 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. The Commission also notes that it seeks, on an ongoing basis, to enhance and improve our bidding processes. The Commission believes that the Bureau should explore ''real time'' bidding consistent with the requirement under section 309(j) that the Commission experiment with different bidding methodologies. *See* 47 U.S.C. 309(j)(3).

98. *Combinatorial Bidding.* The Commission did not specifically seek comment in the *Notice* on the use of combinatorial bidding as an auction design methodology. The Commission's current Part 1 rules already provide for the use of combinatorial bidding as one of our competitive bidding design options. *See* 47 CFR 1.2103(b). 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. 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. Balanced Budget Act; 47 U.S.C. 309(j)(3)(i).

99. The Commission has 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. The Commission's 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.

100. *Minimum Opening Bids and Reserve Prices.* Several commenters oppose the use of minimum opening bids. However, the Balanced Budget Act establishes a presumption in favor of a required minimum opening bid or reserve price. Balanced Budget Act, section 3002(a)(1)(C)(iii). The Commission therefore adopts its proposal in the *Notice* to delete the term ''suggested'' from § 1.2104(d). The Commission also clarifies 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 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.

101. 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. 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 as 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, the Commission does not believe that the Balanced Budget Act provision means that it 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 (*see* 47 U.S.C. 309(j)(3)) have not been eliminated, and the Commission must continue to balance and pursue them all. Therefore, the Commission concludes 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.

102. The Commission believes that the Bureau should have the discretion to employ either or both of these mechanisms for future auctions. The Commission directs 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, 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 other spectrum bands, and any other relevant factors that could reasonably have an impact on valuation of the spectrum being auctioned.

103. *Maximum Bid Increments.* Several commenters suggest that jump bidding is not a problem of serious concern. Some theoretical literature, however, suggests that bidders could use jump bidding to manipulate the auction process and potentially reduce efficiency of the auction. 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. In the absence of information about the bidders who would be willing to participate at intermediate bids, other bidders may feel compelled 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.

104. As an initial matter, the Commission notes 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). 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.'' As discussed above, 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, the Commission will reserve the discretion to employ a maximum bid increment should it return to an auction format in which jump bidding can in any way decrease the competitiveness of an auction. In this regard, the Commission disagrees 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. 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.

105. *Bid Withdrawal Payments.* As discussed above, the Commission recently implemented ''click-box bidding'' in an effort to improve the auction process and eliminate erroneous bids. The Commission also 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. The Commission therefore concludes that its proposal regarding decreased bid withdrawal payments in cases of erroneous bids is moot.

106. *Misuse of Bid Withdrawals.* 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. Both AT&T and Merlin argue that the ability to withdraw bids is critical to a bidder's auction strategy. 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. 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. 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. Finally, AirTouch suggests that the Commission permit bid withdrawals at any time, subject to certain conditions. 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.

107. 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 bidding designed to ''game'' the auction. 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. In the past, the Commission has 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, the Commission also has 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. 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, 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.

108. *Reauction Versus Offering to Second Highest Bidder.* The Commission will modify § 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. 47 CFR 1.2109(b). 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. Only two commenters oppose reauction in all circumstances. 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. However, as the Commission stated in the *Notice*, the Commission has developed a computerized auction system and conducted numerous auctions and now believes that the costs of a reauction, even for a small number of relatively low value licenses, is generally minimal. The Commission also believes that the planned use of regularly scheduled quarterly auctions will ensure rapid reauction.

109. Further, the Commission notes 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 the Commission discussed in the *Notice*, when it first adopted rules governing the licensing of defaulted licenses, the Commission 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.'' Noting that in some circumstances the costs of conducting a reauction may not always be justified, the Commission 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 reauctioned * * *.''

110. 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. 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. The Commission is aware of the dangers of adopting a rule which could have the unfortunate consequence of encouraging the filing of frivolous petitions to deny. Nevertheless, the Commission believes that by reserving the discretion to either reauction 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.

VII. Anti-Collusion Rules

111. The Commission has taken this opportunity in revisiting our general competitive bidding procedures to examine the effectiveness of the anti-collusion rule in the 15 auctions the Commission has conducted to date. The Commission continues to believe that its 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, the Commission has determined that some modifications to § 1.2105(c) can be made which will benefit bidders in several respects, without jeopardizing the competitiveness and overall integrity of our auction program.

112. In the *Collusion MO&O,* 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. *See* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, WT Docket No. 93–253, *Memorandum Opinion and Order,* 59 FR 64159 (December 13, 1994) (''*Collusion MO&O*''). The Commission therefore created an exception to the general rule contained in § 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. *See* 47 CFR 1.2105(c)(4). 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.

113. After considering the comments filed in response to our proposals in the *Notice,* the Commission has decided to adopt a second exception to our general rules prohibiting collusion. *See* 47 CFR 1.2105(c). Specifically, the Commission 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 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. 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.

114. 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. 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. However, after balancing these factors, the Commission believes 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. The Commission believes that applicants are no more likely to make false certifications about the exception which the Commission adopts today than about other information on the form. As discussed *infra,* the Commission also reminds 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.

115. Commenters in both the Paging proceeding and in this proceeding 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, (2) the purposes of the anti-collusion rules would not be threatened by such a safe harbor, and (3) existing antitrust laws and policies will adequately accomplish the goal of protecting the competitiveness of the bidding process. As the auction program has evolved, the Commission has 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. 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. The Bureau emphasized that § 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. These interpretations have provided sufficient guidance concerning the types of non-auction related communications which are permitted under § 1.2105(c), and the Commission therefore declines to create such a safe harbor.

16. The Commission affirms 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. The Commission cautions 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. Because auction applicants should avoid all discussions with each other that will likely affect bids or bidding strategies, the Commission believes 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.

117. As discussed above, the *Notice* also invited comment on any other changes to our rules prohibiting collusion that commenters believe are warranted. Section 1.2105(c)(6)(i) of the Commission's rules provide 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. 47 CFR 1.2105(c)(6)(i). 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. After careful consideration of the issue, the Commission agrees with CII. Therefore, the Commission will increase the attribution standard contained in § 1.2105(c)(6)(i) to 10 percent, or any holder of a controlling interest in the applicant.

118. 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. The Commission's decision to use an attribution threshold of 10 percent is consistent with the change the Commission makes to the general reporting requirement. The Commission recognizes 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, the Commission reemphasizes 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. In addition, the Commission reminds prospective auction participants it will continue to scrutinize carefully any instances in which bidding patterns suggest that collusion may be occurring.

119. Finally, the Commission reemphasizes that the Commission will aggressively investigate any allegations that an auction participant has violated § 1.2105(c). 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. 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.

VIII. Pre-grant Construction

120. The Commission will adopt its 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 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. 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. 47 U.S.C. 309(j)(3)(A).

121. 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. While the Commission's current service-specific rules require as a condition for pre-grant construction no pending petitions to deny, the Commission concludes 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. The Commission therefore adopts 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, the Commission notes that it expects its licensing process to be more rapid generally in light of the shortened petition to deny period permitted by the Balanced Budget Act. Balanced Budget Act, section 3008.

IX. Conclusion

122. Based on the experience the Commission has gained from its 15 completed auctions, as well as the feedback it has received from bidders, the Commission believes the time has come to streamline its competitive bidding rules in order to make our licensing process more efficient. In the past, the Commission has adjusted its auction procedures for different services and has 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 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. The Commission believes that the rules it adopts today will benefit bidders and the auction process generally. The Commission also believes 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.

X. Final Regulatory Flexibility Analysis

123. As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 603, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the expected impact on small entities of the rules adopted in the *Third Report and Order*. The Commission will send a copy of the *Third Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. (In addition, the *Third Report and Order* and FRFA (or summaries thereof) will be published in the **Federal Register**.) As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in WT Docket No. 97–82.

See 5 U.S.C. 604. The RFA is codified at 5 U.S.C. 601 *et seq. See also,* 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,* 62 FR 13570 (March 21, 1997). 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. 104–121, 110 Stat. 847 (1996).

A. Need for, and Objectives of, the Order in WT Docket No. 97–82

124. 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

125. 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. 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 businesses. 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. 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. 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. 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. 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. 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. 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. 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. 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 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

126. 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. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, there are 275,801 small organizations. ''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.'' As of 1992, there were 85,006 such jurisdictions in the United States.

127. In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under Section 3 of the Small Business Act. 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).

128. 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 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 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:

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. 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. 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. Therefore, even if all 12 of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. The Commission assumes, for purposes of its 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, the Commission notes that there are 1,758 cellular licenses; however, the Commission does 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. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the Commission is unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are fewer than 804 small cellular service carriers.

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. This definition of ''small entity'' in the context of broadband PCS auctions has been approved by the SBA. 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.

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 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.

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. *See* FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997). Consequently, the Commission estimates 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.

Air-Ground Radiotelephone Service

The Commission has not adopted a definition of small business specific to the Air-Ground radiotelephone service. 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 the Commission estimates that almost all of them qualify as small under the SBA definition.

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,'' 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.

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.

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.'' Nationwide, there are 275,801 small organizations. ''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.'' As of 1992, there were 85,006 such jurisdictions in the United States. 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. 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.

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.

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

129. 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

130. 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. 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.

131. 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. For example, two commenters, AICC and AAA, argue that shared channels should not be auctioned under the general competitive bidding procedures. Hughes contends that if satellite services are auctioned, the Commission must conduct a service-specific rulemaking tailored to the nature of the satellite industry. 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.

132. The Commission also received numerous comments with respect to the issue of eliminating installment payments. 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 *Installment Public Notice* (*see* ''Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues,'' *Public Notice*, DA 97–82, 62 FR 31777 (June 11, 1997) (''*Installment Public Notice*'')) 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 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.

133. 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.

134. 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.

135. 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.

136. 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

137. 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.

XII. Paperwork Reduction Act Analysis

Notice of Public Information Collections Submitted to OMB for Emergency Review and Approval

Paperwork Reduction Act

The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other federal agencies to take this opportunity to comment on the following emergency information collection, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility, the accuracy of the Commission's burden estimate, ways to enhance the quality, utility and clarity of the information collected, and ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. The Commission is seeking emergency approval for this information collection by March 2, 1998 under the provisions of 5 CFR 1320.13.

DATES: Persons wishing to comment on this information collection should submit comments by February 25, 1998.

ADDRESSES: Direct all comments to Judy Boley, Federal Communications Commission, Room 234, 1919 M St., NW., Washington, DC 20554 or via internet to JBoley@fcc.gov and Timothy Fain, OMB Desk Officer, 10236 NEOB 725 17th Street, NW., Washington, DC 20503 or fain__t@a1.eop.gov.

FOR FURTHER INFORMATION CONTACT: for additional information or copies of the information collection contact Judy Boley at (202) 418–0217 or via Internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION: OMB approval Number 3060–0767 Title: Auction Forms and License Transfer Disclosures: Supplement For the Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking in CC Docket No. 92–297.

Type of Review: Revised Collection.

Respondents: Businesses or Other For-profit entities.

Number of Respondents: 44,000.

Total Annual Burden: 773,000 hours.

Total Cost to Respondents: $46,347,350.

Needs and Uses

The Commission is adopting a general rule to determine the amount of unjust enrichment payments to be assessed upon assignment, transfer, partitioning and disaggregation of licenses. The new rule, applicable to all current and future licensees, is based upon the unjust enrichment rule currently applicable to broadband PCS licensees. Therefore, transfer disclosure requirements will apply in all these license transactions.

Second, the Commission is amending its general anti-collusion rules, permitting the 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 the 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 auction, and that it will not convey bidding information, or otherwise serve as a nexus between the previous and the new applicant.

These requirements are being added to the existing requirements. The number of respondents will not increase but the annual burden hours and costs will increase by an estimated 8,500 hours and $612,650.

List of Subjects

47 CFR Part 1

Communications common carriers, Reporting and recordkeeping requirements.

47 CFR Part 21

Communications common carriers, Reporting and recordkeeping requirements.

47 CFR Part 90

Reporting and recordkeeping requirements.

47 CFR Part 95

Reporting and recordkeeping requirements.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

Parts 1, 21, 24, 27, 90 and 95 of Title 47 of the Code of Federal Regulations are amended 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 (Pub. L. 103–66) and the Balanced Budget Act of 1997 (Pub. L. 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) and adding a note to the section 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.

* * * * *

(d) The Commission may use real time bidding in all electronic auction designs.

5. 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.

* * * * *

(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) of this section 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) of this section, 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.

* * * * *

6. 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.

7. 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.

* * * * *

8. 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.

* * * * *

9. 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.

* * * * *

10. Section 1.2110 is revised to read as follows:

§ 1.2110 Designated entities.

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

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

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

(3) Rural telephone companies. A rural telephone company is any local exchange carrier 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 paragraph (i) of this section, 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 and must be prepared in accordance with Generally Accepted Accounting Principles.

11. 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.

12. 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.

13. Section 1.2113 is added to read as follows:

§ 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

14. 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.

15. Section 21.959 is amended by revising paragraph (a)(2) 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.

* * * * *

16. Section 21.960 is amended by revising paragraphs (b)(4) and (d)(1) 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

17. 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.

18. Section 24.304 is amended by revising paragraph (a)(2) 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.

* * * * *

19. 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.

20. Section 24.704 is amended by revising paragraph (a)(2) 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.

* * * * *

21. Section 24.711 is amended by revising paragraphs (b) and (c) to read as follows:

§ 24.711 Upfront payments, down payments and installment payments for licenses for frequency Block 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.

22. Section 24.712 is amended by adding paragraph (c) to read as follows:

§ 24.712 Bidding credits for licenses for frequency Block C.

* * * * *

(c) *Unjust enrichment. See* § 1.2111 of this chapter.

23. 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.

24. 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

25. 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.

26. 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.

27. 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

28. 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.

29. Section 90.805 is amended by revising paragraph (c) 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.

30. Section 90.812 is amended by revising paragraphs (a) and (b) 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

31. 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.

32. Section 95.816 is amended by revising paragraphs (c)(6) and (e) 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.

* * * * *

[FR Doc. 98–823 Filed 1–14–98; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 97–183; RM–9119]

Radio Broadcasting Services; Lindsborg, KS

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Michael D. Law, allots Channel 269C3 to Lindsborg, Kansas, as the community's second local FM service. *See* 62 FR 45785, August 29, 1997. Channel 269C3 can be allotted to Lindsborg in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.6 kilometers (5.4 miles) north in order to avoid short-spacing conflicts with the licensed operations of Station KFDI–FM, Channel 267C, Wichita, Kansas; Station KVOE–FM, Channel 269A, Emporia, Kansas; and Station KZSN–FM, Channel 271C, Hutchinson, Kansas. The coordinates for Channel 269C3 at Lindsborg are 38–39–03 NL and 97–42–12 WL. With this action, this proceeding is terminated.

EFFECTIVE DATE: February 23, 1998. A filing window for Channel 269C3 at Lindsborg, Kansas, will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 97–183, adopted December 17, 1997, and released January 9, 1998. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, ITS, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Kansas, is amended by adding Channel 269C3 at Lindsborg.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 98–1030 Filed 1–14–98; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 97–184; RM–9120]

Radio Broadcasting Services; New Augusta, MS

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Community Broadcasting Company, allots Channel 269A to New Augusta, Mississippi, as the community's first local aural transmission service. *See* 62 FR 45784, August 29, 1997. Channel 269A can be allotted to New Augusta, Mississippi, in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.8 kilometers (4.9 miles) northwest in order to avoid a short-spacing conflict with the site specified in Station WTKX–FM's construction permit for Channel 268C, Pensacola, Florida. The coordinates for Channel 269A at New Augusta are 31–13–41 NL and 89–06–47 WL. With this action, this proceeding is terminated.

EFFECTIVE DATE: February 23, 1998. A filing window for Channel 269A at New Augusta, Mississippi will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 97–184, adopted December 17, 1997, and released January 9, 1998. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, ITS, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Mississippi, is amended by adding New Augusta, Channel 269A.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 98–1029 Filed 1–14–98; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 97–65; RM–9002]

Radio Broadcasting Services; Chewelah, WA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of LifeTalk Broadcasting Association, allots Channel *274C3 at Chewelah, Washington, and reserves the channel for noncommercial educational use as the community's first local aural transmission service. *See* 62 FR 7981, February 21, 1997. Channel *274C3 can be allotted to Chewelah in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.8 kilometers (13.6