



PUBLIC NOTICE

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AUCTION OF TOLL FREE NUMBERS IN THE 833 CODE

COMMENT SOUGHT ON COMPETITIVE BIDDING PROCEDURES

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I. INTRODUCTION

1. With this Public Notice, the Commission takes another step toward modernizing the way we distribute toll free numbers. Specifically, we initiate the pre-bidding process for the auction of certain toll free numbers in the 833 code (833 Auction). The 833 Auction will make available over 17,000 numbers in the 833 code for which there have been multiple competing requests. This auction will serve as an experiment in using competitive bidding as a way to assign toll free numbers equitably and efficiently.

II. BACKGROUND

2. While toll free numbers have been assigned on a first-come, first serve basis traditionally, the Commission modified its toll free assignment rule last year to provide greater flexibility and permit alternative approaches to assigning numbers.¹ Specifically, in the *Toll Free Assignment Modernization Order*, the Commission added competitive bidding as a method to assign toll free numbers and, as an experiment in using this approach, established the 833 Auction to assign numbers that were requested by two or more Responsible Organizations (“RespOrgs”) during the 833 pre-code opening process.² The Commission also opened participation in the 833 Auction to not only RespOrgs but also potential subscribers who may wish to participate directly.³

3. In establishing this experiment in the *Toll Free Assignment Modernization Order*, the Commission set out the general framework for the 833 Auction and designated Somos, Inc., the Toll Free Numbering Administrator, as the auctioneer.⁴ The *Toll Free Assignment Modernization Order* also called for a pre-bidding process during which the Commission would seek comment on detailed auction procedures, as is typical in Commission auctions.⁵ By this Public Notice, we initiate the pre-bidding process.

4. After receiving comments, the Commission will release a public notice establishing the final application and bidding procedures for the 833 Auction (833 Auction Procedures Public Notice), including the dates and deadlines by which potential bidders must meet the requirements necessary to qualify to bid. Somos will then be required to implement the established procedures to conduct the

¹ *Toll Free Assignment Modernization, Toll Free Service Access Codes*, Report and Order, 33 FCC Rcd 9274, 9275-76, paras. 3-7 (2018) (*Toll Free Assignment Modernization Order*).

² *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9276-78, paras. 8-9, 11; *Toll Free Service Access Codes*, CC Docket No. 95-155, Order 32 FCC Rcd 3153 (WCB 2017). A Responsible Organization, or “RespOrg” is “an entity chosen by a toll free subscriber to manage and administer the appropriate records in the toll free Service Management System for the toll free subscriber.” 47 CFR § 52.101(b).

³ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9288-89, paras. 38-39.

⁴ *Id.* at 9294-95, paras. 58-64.

⁵ *Id.* at 9285, paras. 28-29.

auction, including: accepting applications to participate in the bidding; accepting upfront payments; determining which applicants are qualified to bid; accepting and processing the bids; announcing the winning bidders; and accepting final payments. After the 833 Auction is complete, the Commission will use the information from the auction to determine how to proceed with assigning future toll free numbers.⁶

III. 833 AUCTION OVERVIEW

A. Numbers to be Auctioned

5. In the 833 pre-code opening process, Somos identified 17,638 numbers as mutually exclusive (i.e., requested by two or more RespOrgs). Along with this Public Notice, we provide the complete list of these 17,638 numbers in electronic format only, available at www.auction.somos.com. With the exception noted directly below, these numbers will be offered in the 833 Auction.

6. The Commission in the *Toll Free Assignment Modernization Order* provided one exception to making these numbers available at auction. Specifically, the Commission allowed government entities and non-profit health and safety organizations the ability to file a petition to set aside a previously identified mutually exclusive 833 number.⁷ On April 16, 2019, the Wireline Competition Bureau released a Public Notice seeking petitions to set aside toll free numbers for public health and safety purposes.⁸ If a petition is granted with respect to a particular number, that number will be assigned to the petitioner and unavailable in the 833 Auction.

B. Overview of Participation in the 833 Auction

7. Because we recognize that many parties interested in acquiring one or more of the identified 833 toll free numbers may not be familiar with participating in Commission auctions, we provide an overview of the process here.

8. In addition to establishing the final auction procedures for the 833 Auction, the 833 Auction Procedures Public Notice will also announce the dates during which interested parties may submit their auction applications online to Somos. In the auction application, an interested party will be required to provide certain information and make certifications, described in more detail below, and select the numbers from the available pool on which they are interested in bidding. Once Somos reviews the applications, it will announce the list of complete and incomplete applications. For applications deemed incomplete, applicants will be afforded a second filing (i.e., resubmission) window to make minor modifications to their auction applications.⁹ All interested parties will also need to submit an upfront payment, the amount of which will determine the number of 833 numbers they can bid on during the auction. Following the resubmission filing window and the submission of upfront payments, Somos will

⁶ The Commission specifically tasked the Wireline Competition Bureau, after completion of the 833 Auction and subsequent number assignments, to issue a report outlining the outcomes of the 833 Auction, lessons learned and future recommendations for toll free number assignment methodologies. *Id.* at 9285, paras. 26-27. *See also id.* at 9288, 9293, 9295, paras. 37, 56, 64.

⁷ *Id.* at 9299-300, paras. 74-76.

⁸ *Wireline Competition Bureau Seeks Petitions to Set Aside Toll Free Numbers in the 833 Code for Use by Government Entities and Non-Profit Public Health and Safety Organizations*, Public Notice, DA 19-291 (WCB Apr 16, 2019) (establishing a deadline of May 16, 2019, to file petitions to set aside 833 numbers).

⁹ Applications to which major modifications are made after the deadline for submitting applications will be denied. Major modifications include, but are not limited to: any changes in the ownership of the applicant that constitute an assignment or change of control of the applicant; changes to any certifications required in the application; or changes to the toll free numbers selected in the application or to the parties for which an applicant is bidding. *See Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9291-92, para. 49; *see also* Section V.B.1., “833 Auction Number Selection,” below.

announce the list of qualified bidders (based on the list of complete applications and sufficient upfront payments).

9. The 833 Auction will consist of a single round of bidding.¹⁰ Bidders will upload their bid information online through the Somos bidding system. After completion of the single round, Somos will announce the winning bidders for each number and establish the deadline for making final payments. Any winning bidder that is not a RespOrg must then work with a RespOrg after the auction to reserve the number in the Service Management System Database (Toll Free Database)¹¹ in accordance with the Commission's rules.¹²

C. Further Educational Opportunities for Potential Bidders

10. Because we expect that the 833 Auction will attract parties that have never participated in a Commission auction, we direct Somos to provide additional information on the application and bidding systems. This information should include, but is not limited to, demonstrations and other educational and hands-on practice opportunities that potential bidders can use to familiarize themselves with the application and bidding systems. For example, for recent spectrum license and universal service support auctions, the Commission has released an online tutorial that serves to help applicants understand auction application filing procedures. Are there any other specific types of educational and hands-on practice opportunities that potential bidders in this context would find helpful?

IV. PROPOSED IMPLEMENTATION OF 833 AUCTION PRINCIPLES

11. In the *Toll Free Assignment Modernization Order*, the Commission established certain principles to (1) promote the transparency and efficiency of the 833 Auction, and (2) reduce the instances of conflicts of interest and the likelihood of anticompetitive strategic behavior by participants.¹³ We seek comment below on specific procedures to implement these principles.

A. Participation Through Single Applicant and Application

12. In the *Toll Free Assignment Modernization Order*, the Commission decided it would allow potential subscribers the option to participate directly in the 833 Auction or indirectly through a RespOrg.¹⁴ The Commission also required that potential subscribers participate in the 833 Auction through only a single auction applicant (i.e., either on its own behalf or through a RespOrg).¹⁵ The Commission further held that a potential subscriber may not engage multiple applicants to bid on its behalf.¹⁶

13. To enforce these mandates and to help prevent possible collusion, we propose that a potential subscriber can participate in the 833 Auction either (1) through a RespOrg that will bid on all the

¹⁰ In the *Toll Free Assignment Modernization Order*, the Commission chose to conduct the 833 Auction as a Vickery single round sealed-bid auction. In this type of auction, a qualified bidder can submit a sealed bid for each available toll free number that the bidder wants. *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9285-86, para. 30-33.

¹¹ The Toll Free Database is defined in Somos's tariff as "[t]he main administrative support system of toll-free service. It is used to create and update subscriber toll-free records that are then downloaded to [Service Control Points] for handling subscriber's toll-free calls. The system is also used by Resp Orgs to reserve and assign toll-free numbers." Somos, Inc., Tariff F.C.C. No. 1 (2018), <https://www.somos.com/media/336>, at 53 (Toll Free Tariff).

¹² *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9288-89, para. 39.

¹³ *Id.* at 9290-94, paras. 43-57.

¹⁴ *Id.* at 9288-89, para. 39.

¹⁵ *Id.* at 9290, para. 45.

¹⁶ A RespOrg can bid on behalf of multiple subscribers, as long as the subscribers it represents, as well as itself, are not bidding on the rights to use the same number(s). *Id.* at 9291, n.114.

numbers in which the subscriber is interested in acquiring, or (2) by submitting its own application and bidding for all the numbers in which it is interested. Thus, a potential subscriber could not selectively choose to be represented by a RespOrg for some numbers and submit an application on its own for other numbers. This proposed application restriction is consistent with the requirement that a potential subscriber may participate through only a single auction applicant and is necessary to prevent collusion among applicants.¹⁷ Additionally, we propose that the auction application require that each applicant certify that (1) if it is bidding on its own behalf, it is also not participating in the auction through another entity, and/or (2) if it is bidding on behalf of potential subscriber(s) that it is not aware that the potential subscriber(s) are participating through another applicant. We seek comment on these proposals.

14. In the *Toll Free Assignment Modernization Order*, the Commission also prohibited a single party, or multiple parties with a controlling interest in common, from becoming qualified to bid in the 833 Auction based on multiple applications.¹⁸ Based on that restriction, we propose to require an applicant certify that it, or any commonly-controlled entity, is not submitting multiple applications in the 833 Auction.

15. The *Toll Free Assignment Modernization Order* also stated that, to define parties with common controlling interests in the pre-auction process, the Commission anticipates using definitions adopted for similar purposes in our spectrum auctions.¹⁹ We believe this approach has the benefit of ample precedent and, therefore, we propose to define a “controlling interest” for purposes of identifying commonly controlled entities in the 833 Auction as an individual or entity with positive or negative *de jure* or *de facto* control of the applicant.²⁰ We also seek comment on a presumption that spouses own or control or have the power to control interests owned or controlled by either of them and a presumption that immediate family members own or control or have the power to control interests owned or controlled by other immediate family members.²¹ We propose to place the burden on applicants to sufficiently demonstrate that spouses or family members should not be treated as having an identity of interest such that it creates common control. We propose that where the presumption has not been adequately rebutted, such spouses and family members will be subject to the prohibition on submission of multiple auction applications by commonly controlled entities. We seek comment on these proposals.

16. In the *Toll Free Assignment Modernization Order*, the Commission indicated that any 833 Auction applicants that have overlapping *non-controlling* interests must take steps to prevent communicating bid information.²² Specifically, the Commission required applicants with overlapping

¹⁷ We further believe that this approach is consistent with our proposal to prohibit any agreements among auction applicants. See Section IV.C.1., “Agreements among Applicants,” below.

¹⁸ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9290, para. 46.

¹⁹ *Id.* at 9290, n. 110, citing 47 CFR § 1.2105(a)(4)(i).

²⁰ *De jure* control includes holding 50 percent or more of the voting stock of a corporation or holding a general partnership interest in a partnership. Ownership interests that are held indirectly by any party through one or more intervening corporations may be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain meets or exceeds 50 percent or represents actual control, it may be treated as if it were a 100 percent interest. *De facto* control is determined on a case-by-case basis. Examples of *de facto* control include constituting or appointing 50 percent or more of the board of directors or management committee; having authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the entity; or playing an integral role in management decisions. See 47 CFR § 1.2105(a)(4)(i).

²¹ Cf. 47 CFR § 1.2110(c)(5)(iii) (identity of interest between and among persons in defining affiliates of an applicant). In this context “immediate family member” would mean 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. *Id.*

²² *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9291, n.114.

non-controlling interests to certify they have established internal controls to preclude any person acting on behalf of an applicant from possessing information about the bids or bidding strategies of more than one applicant, or communicating such information to another person acting on behalf of and possessing such information regarding another applicant.²³ Thus, we plan to include such a certification in the auction application.

B. Prohibition on Certain Communications

17. In the *Toll Free Assignment Modernization Order*, the Commission stated that, for the 833 Auction, there should be a prohibition on certain communications similar to the prohibition that applies in our spectrum license and universal service support auctions.²⁴ Specifically, in those auctions, applicants are prohibited from communicating certain auction-related information to other applicants beginning on the auction application filing deadline and concluding upon a specific post-auction deadline for winning bidders (e.g., the down payment deadline or deadline to file long-form applications).²⁵ This prohibition on certain communications is intended to reinforce existing antitrust laws, facilitate detection of collusive conduct, and deter anticompetitive behavior.²⁶

18. We propose that each applicant in the 833 Auction will be prohibited from cooperating or collaborating with any other applicant with respect to its own, or one another's, or any other competing applicant's bids or bidding strategies. Further, an applicant will be prohibited from communicating, with any other applicant in any manner, the substance of its own, or one another's, or any other competing applicant's bids or bidding strategies (including with respect to the post-auction market for toll free numbers). The proposed prohibition will begin at the deadline for submitting auction applications and will end at the post-auction deadline for winning bidders to submit their final payments (which will be announced by Somos after bidding concludes). The proposed prohibition will not apply to all communications between or among applicants; it would apply only to any communications conveying, in whole or part, directly or indirectly, the applicant's or a competing applicant's bids or bidding strategy (including with respect to the post-auction market for toll free numbers). We seek comment on these proposals.

19. Moreover, as we do in spectrum license and universal service support auctions, we propose to define "applicant" broadly for purposes of this prohibition. We propose that "applicant" for purposes of the prohibition on certain communications for the 833 Auction includes: all controlling interests in the entity submitting the auction application; all holders of partnership and other ownership interests and any stock interest amounting to 10% or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting the auction application; all officers and directors of that

²³ *Id.*

²⁴ *Id.* at 9292, para. 50.

²⁵ See 47 CFR §§ 1.2105(c), 1.21002(b).

²⁶ See *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6736, para. 397 (2014) (citing *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2386-88, paras. 221, 225 (1994) (*Competitive Bidding Second Report and Order*)). Regardless of compliance with the Commission's rules and the specific procedures for the 833 Auction, applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace. See *Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures*, Third Further Notice of Proposed Rulemaking, 14 FCC Rcd 21558, 21560-61, para. 4 & n.17 (1999) (quoting *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Memorandum Opinion and Order, 9 FCC Rcd 7684, 7689, para. 12 (1994) ("[W]e wish to emphasize that all applicants and their owners continue to be subject to existing antitrust laws. Applicants should note that conduct that is permissible under the Commission's Rules may be prohibited by the antitrust laws.")); *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858, 6869 n.134 (1994) ("[A]pplicants will also be subject to existing antitrust laws.").

entity; and any entity listed as a potential subscriber on whose behalf the entity submitting the auction application will be bidding.²⁷ We seek comment on this proposal.

20. Finally, to implement the prohibition of certain communications, we propose to require an applicant that makes or receives a prohibited communication to report such communication to the Commission and Somos staff immediately, and in any case no later than five business days after the communication occurs.²⁸ We also propose to rely to the extent appropriate on past precedent and guidance regarding our rules on prohibited communications in connection with our spectrum auctions.²⁹ We seek comment on these proposals.

C. Restrictions on Agreements

1. Agreements Among Applicants

21. We propose to prohibit certain agreements among applicants (whether the applicants are RespOrgs or potential subscribers) in the 833 Auction. The prohibition would apply to any agreements, arrangements, or understandings of any kind relating to the toll free numbers being auctioned to which the applicant, or any party that controls or is controlled by the applicant, is a party.³⁰ This includes any agreements that address or communicate directly or indirectly bids (including specific prices), bidding strategies (including the specific numbers on which to bid or not to bid), or the post-auction market for toll free numbers. Similar to our proposed prohibition on certain communications, we propose to define “applicant” for these purposes broadly.³¹ We seek comment on these proposals.

22. This proposed prohibition would not apply to agreements unrelated to the toll free numbers being offered in the 833 Auction. Business discussions and negotiations that are *unrelated* to bidding in the 833 Auction and that do not convey information about the numbers being auctioned or bidding strategies would not be prohibited. Moreover, not all auction-related information would be covered by the prohibition. For example, communicating merely whether a party has or has not applied to participate in the 833 Auction would not violate the proposed rule. In contrast, communicating how a party will participate, including specific numbers or bid amounts, would convey bid or bidding strategies and would be prohibited under the proposed rule.

2. Agreements Among RespOrgs

23. Given RespOrgs’ dominant position in the toll free number market, we propose to prohibit certain auction-related agreements among RespOrgs even where only one of the RespOrgs is an applicant in the 833 Auction. Thus, an applicant RespOrg would be prohibited from having an agreement related to the toll free numbers being offered in the 833 Auction with a non-applicant RespOrg. Similar to our proposed prohibition on agreements among applicants, this proposed prohibition between applicant RespOrgs and non-applicant RespOrgs would not apply to agreements unrelated to the toll free numbers being offered in the 833 Auction. Thus, business discussions and negotiations that are *unrelated* to bidding in the 833 Auction and that do not convey information about the numbers being auctioned or bidding strategies would not be prohibited.

²⁷ See 47 CFR §§ 1.2105(c)(5)(i), 1.21002(a).

²⁸ See 47 CFR §§ 1.2105(c)(4), 1.21002(c). An applicant’s obligation to make such a report would continue until the report has been made.

²⁹ See Summary Listing of Documents Addressing Application of the Rule Prohibiting Certain Communications, <https://www.fcc.gov/economics-analytics/auctions-division/auctions/summary-listing-documents-addressing-application-rule> (last visited on May 9, 2019).

³⁰ This proposed prohibition is similar to that applied by the Commission in spectrum auctions. See 47 CFR §§ 1.2105(a)(2)(ix), 1.2105(c)(1).

³¹ See *supra* para. 19.

24. This proposed prohibition would not apply to RespOrgs that are commonly controlled.³² When RespOrgs share a common officer or director or control, the Commission presumes that bids and bid strategies will be communicated.³³ Moreover, the *Toll Free Assignment Modernization Order* stated that commonly controlled RespOrgs cannot submit multiple applications to participate in the 833 Auction.³⁴ Instead, the commonly controlled RespOrgs would need to choose one of the entities to be the applicant and disclose the existence of the other commonly controlled RespOrgs in the application. We seek comment on these proposals.

3. Agreements Between RespOrgs and Potential Subscribers

25. As noted above, the *Toll Free Assignment Modernization Order* allows potential subscribers to participate directly in the 833 Auction or indirectly through a RespOrg.³⁵ Given the unique position of RespOrgs participating on their own behalf or bidding on behalf of other entities, we propose to require any applicant RespOrg that bids for a potential subscriber to acquire a letter of authorization from the potential subscriber. Somos, as the Toll Free Numbering Administrator, currently requires RespOrgs to present similar letters of authorization when a subscriber changes RespOrgs. We propose that the letter of authorization to represent the subscriber in the 833 Auction should be substantially the same—i.e., identifies the parties and toll free number(s), and includes a signed and dated authorization. We seek comment on this proposal. We also seek comment on whether to require the applicant RespOrg to provide the letter of authorization as part of its auction application (e.g., to upload it as an attachment) or to simply allow the applicant RespOrg to certify that it is in possession of the letter and be able to produce it to the Commission if requested.

D. Responsibility for Winning Bid Payment

26. We emphasize that any RespOrg that applies to participate in the 833 Auction, including a RespOrg participating on behalf of one or more potential subscribers, assumes a binding obligation to pay its full winning bid amount,³⁶ and is responsible for complying with all post-auction requirements, regardless of whether a potential subscriber on whose behalf the RespOrg bid fulfills its financial or contractual obligation to the RespOrg. While an applicant RespOrg may seek reimbursement from the potential subscriber for which it bid, the RespOrg—as the bidder in the auction—is ultimately responsible for full payment of any winning bid.

³² Commonly-controlled entities are those in which the same individual or entity either directly or indirectly holds a controlling interest (as determined by positive or negative *de jure* or *de facto* control). See *supra* para. 15 & n.20; see also 47 CFR § 1.2105(a)(4)(i).

³³ In our spectrum auctions, Commission staff have found that, where an individual serves as an officer and director for two or more applicants, the bids and bidding strategies of one applicant are presumed conveyed to the other applicant through the shared officer. See, e.g., Letter from Barbara A. Kreisman, Chief, Video Division, FCC Media Bureau, and Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, FCC Wireless Telecommunications Bureau, to Colby M. May, TCCSA, Inc., d/b/a Trinity Broadcasting Network, 20 FCC Rcd 14648, 14648-49 (2005) (finding apparent violation of communication prohibitions in section 1.2105(c) where applicants with mutually exclusive applications reported sharing same individual as an officer and director and reported having no bidding agreement, disclosure of which would have made an exception to the prohibition applicable under the rule then in effect).

³⁴ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9290, para. 46.

³⁵ *Id.* at 9288-89, para. 39.

³⁶ See, e.g., 47 CFR § 1.2104(g)(2) (“A bidder assumes a binding obligation to pay its full bid amount upon acceptance of the winning bid at the close of an auction.”).

V. PROPOSED APPLICATION REQUIREMENTS

A. Applicant Identification

27. Any party interested in obtaining an 833 number available through the auction must submit an auction application to become qualified to bid in the 833 Auction.³⁷ We propose that as a first step in the application process, an interested party must acquire an “Auction ID” from Somos, which will verify the potential applicant’s identity. Moreover, we propose that any entity that cannot be verified through the Somos verification process must then participate through a RespOrg (i.e., the RespOrg will bid on its behalf and will be responsible for making final payment on any winning bids). We seek comment on this proposal.

B. Auction Application Requirements

28. In the *Toll Free Assignment Modernization Order*, the Commission established general principles governing the information that must be provided in the auction application.³⁸ We now seek comment on specific application requirements consistent with the principles of (1) promoting the transparency and efficiency of the auction, and (2) reducing the instances of conflicts of interest and the likelihood of undesirable and/or anticompetitive strategic behavior by participants.³⁹

1. 833 Auction Number Selection

29. We propose that an applicant in the 833 Auction must identify, in its auction application, each toll free number (from the list of available 833 numbers) on which it may wish to place a bid during the auction, and the party for which it is bidding for each number. If qualified to bid in the auction, the entity will not be obligated to place a bid on each of the numbers selected in its application, but an entity will not be able to bid on any numbers that it does not select in its application.⁴⁰ We further propose that any changes made to the numbers selected on an application will be considered a major modification of the application, which will result in a dismissal of the application. We seek comment on these proposals. We also note that there is no limit to how many numbers for which an entity can place a bid.⁴¹ Given that there are over 17,000 possible numbers, are there any special considerations that we (or Somos) should account for in the item and entity selection process?

30. In addition, in the *Toll Free Assignment Modernization Order*, the Commission stated that each auction participant will be required to certify, as applicable, that it is not bidding on behalf of multiple interested parties (including itself) for the same toll free numbers or that each interested party is bidding through one entity for a given number.⁴² To implement this prohibition, the Commission stated that it expects that an applicant will need to disclose each party on whose behalf it is bidding, for each toll free number that it selects.⁴³ Requiring an applicant to identify the party for which it is bidding will allow Somos to verify that a potential subscriber is seeking to bid based on only one application and will make it clear to applicants that they can represent only one entity per number. Thus, we propose that, for each

³⁷ In the *Toll Free Assignment Modernization Order*, the Commission stated that it will not require winning bidders to submit a post-auction, long-form application given the lack of need to verify winning bidders’ qualifications in the toll free context and to limit the administrative burden on bidders, the auctioneer, and the Commission. *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9290, para. 43.

³⁸ *Id.* at 9290-91, paras. 43-48.

³⁹ *Id.* at 9290, para. 44.

⁴⁰ If a particular available toll free number is not selected on any auction application, it will not be available in the auction.

⁴¹ *See id.* at 9293, para. 55.

⁴² *Id.* at 9291, para. 48.

⁴³ *Id.*

number on which an applicant wishes to be able to bid, it must identify the party (either itself or another entity) for which it is bidding.⁴⁴ We also propose that any changes made on an application regarding the disclosure of the party for which an applicant is bidding will be considered a major modification of the application, which will result in application dismissal. We seek comment on these proposals.

31. Moreover, as detailed below,⁴⁵ we propose that the 833 numbers selected by an applicant will not be made public until after the bidding is complete. However, the party for which an applicant is bidding will be made public once Somos announces which applications are complete or incomplete (i.e., when most auction application information typically becomes public in a Commission auction). We seek comment on this proposal.

2. Ownership Disclosure / Identity of Applicant

32. In the *Toll Free Assignment Modernization Order*, the Commission stated that it expected that any entity wishing to participate in the 833 Auction would have to fully disclose information regarding the real party or parties-in-interest in the applicant or application and the ownership structure of the applicant, including both direct and indirect ownership interests of 10% or more.⁴⁶ Requiring applicants' ownership information provides several benefits. First, it promotes auction transparency by providing insight—to the Commission, Somos, other bidders, and the public—into the entities participating in the auction. Second, it provides information to help bidders comply with the prohibition on certain communications. Third, it provides information to the Commission and Somos to enforce the restrictions against multiple applications, including prohibiting commonly-controlled entities from submitting separate applications.

33. We propose to require applicants in the 833 Auction to provide the same level of ownership disclosure required in Commission spectrum auctions—namely, section 1.2112(a) of the Commission's rules.⁴⁷ Specifically, we propose that applicants in the 833 Auction must disclose: (1) the real party or parties in interest of the applicant or of the application; (2) any direct interest holder of 10% or greater; (3) any indirect interest holder of 10% or greater;⁴⁸ and (4) any FCC-regulated entity or applicant for an FCC license in which the applicant, or any direct interest holder of 10% or greater, owns 10% or more stock, whether voting or non-voting. We seek comment on this proposal.

3. Agreement Disclosure / Letters of Authorization

34. To the extent that an applicant may be a party to a permitted auction-related agreement,⁴⁹ we propose that an applicant must disclose the agreement on its auction application. Specifically, we

⁴⁴ In the case where the potential subscriber is the applicant, or the RespOrg is bidding on its own behalf, the applicant would put itself in the field asking for this information.

⁴⁵ See Section VI. B. "Limited Information Procedures During the Auction Process," below.

⁴⁶ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9291, para. 48, citing 47 CFR § 1.2112(a).

⁴⁷ 47 CFR § 1.2112(a).

⁴⁸ We propose that applicants will follow the indirect ownership disclosure requirement in section 1.2112(a)(6), whereby an applicant must list 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. 47 CFR § 1.2112(a)(6).

⁴⁹ As noted in Section IV.C., "Restrictions on Agreements," above, we propose to prohibit auction-related agreements among applicants and agreements among RespOrgs, but to permit such agreements between RespOrgs and potential subscribers or among potential subscribers. Thus, under our proposal, if an applicant does have such agreement, it would need to disclose it on its auction application.

propose that an applicant must disclose any agreement related to the numbers being auctioned, including the names of the parties to the agreement(s).

35. In Commission spectrum license and universal service support auctions, where certain agreements are allowed, the applicant must disclose certain limited information about the agreements in their pre-auction short-form applications (e.g., the parties to the agreement and a brief summary of the agreements), while winning bidders often may be required to provide more detailed information about the agreements in their post-auction long-form applications. Since there will be no long-form application following the 833 Auction, we seek comment on whether the limited information normally provided in the short-form application (i.e., names of the parties to the agreement and a brief description of the agreement) is sufficient for the 833 Auction.

4. Additional Disclosures and Certifications

36. The Commission stated in the *Toll Free Assignment Modernization Order* that it would also require applicants in the 833 Auction to provide additional information and make additional certifications in the application, as may be found in the pre-auction process to be necessary to implement the Commission's decisions in that order.⁵⁰ Therefore, in addition to the certifications discussed above, we propose to require each applicant to certify that it is not currently in default or delinquent on a non-tax debt to the Federal government, as is our practice in Commission spectrum auctions, in order to preserve the integrity of the auction process and to ensure that bidders are capable of meeting their financial commitments.⁵¹ The applicant's status as a current defaulter will be determined as of the auction application deadline. We seek comment on this proposal. We also take this opportunity to encourage prospective applicants to pay any delinquent debts prior to the auction application deadline.⁵²

37. Are there are other certifications that we should consider requiring auction applicants to make in order to become qualified to bid in the 833 Auction? Are there any legal restrictions that may be relevant here, as in Commission spectrum auctions, limiting participation based on a prior bar against participating in such an auction?⁵³

VI. PROPOSED BIDDING PROCEDURES

A. Auction Design: Single Round, Vickery Auction

38. The Commission decided in the *Toll Free Assignment Modernization Order* that the 833 Auction will be conducted as a single round, sealed-bid auction, in which bidders submit their bids for individual numbers simultaneously, with the winning bid for each number determined solely by bids for that number, independent of the bids for any other number.⁵⁴ Moreover, the Commission also chose to use a Vickery auction, in which the amount paid by the winning bidder is determined by the second-

⁵⁰ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9291, para. 48. We note that we propose a certification, discussed in Section IV.B., "Prohibition on Certain Communications," above, that auction applicants have not entered into any explicit or implicit agreements, arrangements, or understandings of any kind with any parties, other than those identified.

⁵¹ Cf. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, 15 FCC Rcd 15293, 15316, para. 40 (2000); 47 CFR § 1.1910(b)(2) (withholding action on applications based on debts owed to the Commission). As a reminder, the Commission's Red Light database does not reflect delinquencies on any non-tax debt owed to any other federal agency of the United States.

⁵² After the deadline, an applicant can dispute the status of the debt, but consistent with our practice in spectrum auctions under section 1.2105(a)(2), applicants will not be able to cure the default or delinquency after the auction application deadline to participate in the auction. See 47 CFR § 1.2105(a)(2).

⁵³ See 47 U.S.C. § 1404.

⁵⁴ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9285-86, paras. 30-32.

highest bid.⁵⁵ Therefore, in the 833 Auction, the winning bidder for each 833 number will be the bidder with the highest bid and will pay the second-highest bid amount for that number.

39. In the event that a toll free number receives only one bid, we propose that the toll free number will be awarded to the bidder placing the sole bid. Consistent with a Vickery auction, we further propose that the bidder in that case would acquire the right to use the number and not be required to pay anything because there was no second-highest bid. We seek comment on this proposal.

40. In the event that a toll free number receives two or more tied amounts for the highest bid, we propose that the winning bidder will be determined by use of a pseudo-random number. We propose that Somos assign the pseudo-random number to each bid for each toll free number submitted to the 833 Auction. Moreover, because the Commission required the 833 Auction to be a Vickery auction where the winning bidder pays the second highest bid (i.e., the value that the second highest bidder attached to the toll free number), we propose that, in the case of tied bids, the winning bidder would still pay the second highest bid, which would be the same amount as its placed bid. We seek comment on this proposal.

B. Limited Information Procedures During the Auction Process

41. Consistent with our procedures in many recent Commission auctions,⁵⁶ we propose that Somos conduct the 833 Auction using procedures for limited information disclosure (sometimes also referred to as anonymous bidding). We propose that Somos withhold, until after the close of bidding and announcement of auction results, the public release of bidders' particular 833 number selections and any information that may reveal the identities of bidders placing bids and taking other bidding-related actions. More specifically, the Commission proposes to not make public until after bidding has closed: (1) the numbers that an applicant selects for bidding in its auction application, (2) the amount of any upfront payment made by or on behalf of an applicant for the 833 Auction, (3) any applicant's bidding eligibility, and (4) any other bidding-related information that might reveal the identity of the bidder placing a bid.⁵⁷

42. Because the 833 Auction will be conducted using a single round of bidding, we do not anticipate that there will be the same need for release of bidding-related actions during the auction that there would be in a multiple-round auction. If such circumstances were to arise prior to the release of non-public information and auction results, however, our proposal would mean that we would not indicate the identity of any bidders taking such actions. After the close of bidding, bidders' number selections, upfront payment amounts, bids, and any other bidding-related actions and information will be made publicly available. We seek comment on this proposal.

⁵⁵ *Id.*

⁵⁶ See, e.g., *Broadcast Incentive Auction Scheduled to Begin on March 29, 2016; Procedures for Competitive Bidding in Auction 1000, Including Initial Clearing Target Determination, Qualifying to Bid, and Bidding in Auctions 1001 (Reverse) and 1002 (Forward)*, Public Notice, 30 FCC Rcd 8975, 9046, para. 138 (2015); *Auctions of Upper Microwave Flexible Use Licenses for Next-Generation Wireless Services; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auctions 101 (28 GHz) and 102 (24 GHz); Bidding in Auction 101 Scheduled to Begin November 14, 2018*, Public Notice, 33 FCC Rcd 7575, 7596-98, paras. 50-56 (2018); see also 47 CFR § 1.2104(h).

⁵⁷ As noted above in Section V.B.1., "833 Auction Number Selection," once Somos has performed an initial review of the auction applications and announced which are complete or incomplete, we propose that Somos will make public the information contained in the application except the toll free numbers that an applicant selects for bidding. This includes the names of any potential subscribers for which an applicant RespOrg is bidding.

C. Auction Structure**1. Bidding Format and Period**

43. We expect Somos to conduct the auction online.⁵⁸ The single-round format will consist of one bidding round, which will occur on one day. While we expect the bidding round to be open for several hours, we propose that Somos, in consultation with the Commission, will announce the actual start and finish time of the bidding round at least one week before the start of the auction. We believe this approach will provide certainty to the bidders, while providing Somos with flexibility. We seek comment on this proposal.

2. Information Relating to Auction Delay, Suspension, or Cancellation

44. For the 833 Auction, we propose that, by public notice or by announcement during the auction, the Commission, or Somos in consultation with the Commission, may delay or suspend the auction in the event of a natural disaster, technical failures, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding. In such cases, Somos would seek guidance from the Commission about resuming, rescheduling, or canceling the auction in its entirety. If the bidding is delayed or suspended, the Commission may direct Somos to resume the auction starting from the beginning of the scheduled bidding round or for a shorter period, or cancel the auction in its entirety. The Commission will exercise this authority solely at its discretion. We seek comment on this proposal.

D. Bidding Procedures**1. Upfront Payment and Bidder Eligibility**

45. We propose that potential bidders must provide an upfront payment of \$100 per number to participate in the 833 Auction. Upfront payments help ensure that only serious qualified bidders participate in an auction and provide a source of available funds in the event a penalty must be assessed for an auction default.⁵⁹ In the *Toll Free Assignment Modernization Order*, the Commission chose to require upfront payments in the 833 Auction but deferred to the pre-auction process what the upfront payments should be, though it stated that it generally expected the approach to be modeled on those used in the Commission's spectrum auctions.⁶⁰

46. In determining the amount of upfront payment required in spectrum license auctions, the Commission has balanced "the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs that will be imposed on bidders."⁶¹ At this point, the Commission has little information about the value of the toll free numbers being auctioned—in fact, one of the goals of the 833 Auction is to help inform the Commission on the value of the available toll free numbers.⁶² Moreover, we do not wish to discourage participation of sincere bidders. Therefore, we propose to require an upfront payment of \$100 per number. We believe

⁵⁸ We recognize that in a number of Commission auctions, telephone bidding is made available as a back-up to online bidding. Given that this auction will involve large numbers of bids and because there will be ample time for online bidding during the proposed single round, we do not expect that telephone bidding will be available in the 833 Auction.

⁵⁹ The Commission has long required entities interested in participating in an auction for wireless spectrum licenses or broadcast construction permits to submit an upfront payment. See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-78, paras. 169-171 ("...some form of upfront payment is necessary to deter frivolous or insincere bidding.").

⁶⁰ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9292, para. 52 (citing 47 CFR § 1.2106).

⁶¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2378, para. 171.

⁶² *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9284-85, 9287, paras. 25-27, 36.

that such an amount will begin to cover the costs of auctioning the numbers in the event a bidder defaults and, thus, best achieve the Commission's goals in requiring an upfront payment while burdening bidders the least.⁶³ We seek comment on our proposal, and on any other alternative upfront payment amounts or proposals.

47. Applicants for the 833 Auction will need to submit an upfront payment sufficient to be able to bid on the total number of toll free numbers for which they wish to submit bids. Thus, an applicant may select on its auction application more of the available 833 numbers than the total for which it expects to submit bids, but its actual bidding will be limited by the amount of its upfront payment. For example, if an applicant were to select 50 numbers on its application but submits an upfront payment of only \$1,000, it would be able to place bids on only 10 numbers (based on our proposed upfront payment of \$100 per number).

48. Moreover, given that some participants in the 833 Auction may not be familiar with auctions generally, we emphasize that, if a winning bid is less than the bidder's upfront payment, any remaining amount will be refunded to the bidder, minus any default payments that a bidder might owe. Similarly, if a bidder does not have any winning bids, it will be reimbursed the entirety of its upfront payment.

49. Additionally, for applicant RespOrgs who are bidding on behalf of potential subscribers, we propose that all funds that a RespOrg submits as an upfront payment in the auction (regardless of whether the funds came from the RespOrg or a potential subscriber for which the RespOrg is bidding) will be considered the upfront payment of the RespOrg applicant and will be used to offset the final payment obligation for any winning bids of the RespOrg, regardless of which 833 numbers the RespOrg wins. It would be the responsibility of a RespOrg and potential subscriber for which it will bid to work out their financial arrangements. From the perspective of the auction, however, all upfront payments submitted by an applicant RespOrg would be considered to be payments by the applicant RespOrg and will be applied to offset the final payment obligations for all toll free numbers that the RespOrg wins. We seek comment on this proposal.

50. We also propose to require upfront payments of a certain amount be made via wire transfer. Specifically, any upfront payment above \$300 must be made through a wire transfer to Somos (or its payment designee). We propose that any amounts under this threshold (i.e., \$300 or less) can be made using an alternative payment collection process, such as Automated Clearing House (ACH).⁶⁴ Such a process may be easier for individuals or small entities that may be interested in only a few toll free numbers. We seek comment on this proposal and alternative thresholds.

2. Bid Amounts

51. We propose to allow bids only in whole dollar amounts.⁶⁵ We seek comment on this proposal.

E. Auction Default Payments

52. Each bid is a binding commitment. If a bidder fails to make full payment on its bid or otherwise defaults for any reason, it should be subject to a default payment. The Commission explained in the *Toll Free Assignment Modernization Order* that it generally expected the approach to default

⁶³ By the time the upfront payment is due, applicants will have selected, on their auction application, the numbers on which they may wish to bid and should know approximately how many numbers they wish to acquire, and thus will know how much upfront payment will be required.

⁶⁴ We propose to specifically exclude payments via check or credit card, as such payment processes have increased risks associated with them, which may not be conducive to a timely auction.

⁶⁵ Though we (or Somos) will provide more detailed information regarding the bidding process closer to the bidding, we generally expect that qualified bidders will be required to upload their bids into the Somos bidding system.

payments in the 833 Auction to be modeled on those used in the Commission's spectrum auctions.⁶⁶ In spectrum auctions, any winning bidder that defaults or is disqualified after the close of an auction is liable for a default payment that consists of a deficiency payment and an additional payment.⁶⁷ The deficiency payment is generally equal to the difference between the amount of the defaulted bid and the amount of the winning bid in a subsequent auction. The additional payment is a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less. The additional payment percentage is established by the Commission in advance of the auction and is generally between 3% and 20% of the applicable bid. Since the 833 Auction is an experiment, the Commission has not yet decided if there will be a subsequent auction of toll free numbers. Therefore, we propose that the default payment in the 833 Auction will not include a deficiency payment, but rather will be based only on a percentage of the defaulted bid. Because there will be no deficiency payment, we propose to set the default payment requirement in the 833 Auction at a higher percentage of the defaulted bid than the additional payments we require for defaults in our spectrum auctions. We believe that a higher percentage will adequately compensate for the absence of a deficiency payment and sufficiently discourage insincere bidding and default. Accordingly, we propose that the default payment should be 35% of the defaulted bid amount. We seek comment on this proposal, and any alternatives.

VII. POST AUCTION CONSIDERATIONS

A. Final Payments

53. Shortly after the single round of bidding for the 833 Auction is complete, Somos will announce the winning bidders through a public notice. We propose that each winning bidder must submit the full payment for its winning bid(s) within 10 business days following release of the public notice announcing the winning bidders.⁶⁸ Similar to the final payment procedures in our spectrum auctions,⁶⁹ we also propose to allow a winning bidder to make its final payment within five additional business days after the applicable deadline, provided it also pays a late fee of 5% of the winning bid. We propose that, if a winning bidder misses the final payment deadline and also fails to remit the required payment (plus the applicable late fee) by the end of the late payment period, it would be declared in default and subject to the applicable default payment. We seek comment on our proposal.

54. Similar to our proposal for upfront payments, we propose to require final payments of a certain amount be made via wire transfer. Specifically, any final payment above \$300 must be made through a wire transfer to Somos (or its payment designee). We propose that any amounts under this threshold (i.e., \$300 or less) can be made using an alternative payment collection process, such as ACH.⁷⁰ Such a process may be easier for individuals or small entities that may be interested in only a few toll free numbers. We seek comment on this proposal and alternative thresholds.

B. Reserving Toll Free Numbers

55. The *Toll Free Assignment Modernization Order* required any potential subscriber that directly participates in the 833 Auction and is a winning bidder to work with a RespOrg after the auction to reserve a number in the Toll Free Database in accordance with section 52.101 of the Commission's

⁶⁶ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9290, n. 110.

⁶⁷ 47 CFR § 1.2104(g)(2).

⁶⁸ The public notice announcing the winning bidders will provide, for each winning bidder, the full amount of its winning bids and the amount remaining due after the bidder's upfront payment is applied.

⁶⁹ See 47 CFR § 1.2109(a) (allowing final payment within 10 business days after the payment deadline, provided a late fee equal to five percent of the amount due is also submitted).

⁷⁰ We propose to specifically exclude payments via check or credit card, as such payment processes have increased risks associated with them, which may not be conducive to a timely auction.

rules.⁷¹ We propose that, under such circumstances, the potential subscriber must declare which RespOrg it plans to use within 15 business days after the public notice announcing the winning bidders. We further propose that subscribers may report any problems working with RespOrgs after the auction to Somos, which will hold the number while these issues are resolved. We propose to entertain waivers of the 15 business day deadline, consistent with the Commission's existing waiver standard,⁷² where a subscriber's late declaration was due to no fault of its own. We seek comment on these proposals.

C. Secondary Market Considerations

56. In the *Toll Free Assignment Modernization Order*, the Commission adopted an exception to the rules prohibiting the brokering, hoarding, and warehousing of toll free numbers for numbers acquired in an auction.⁷³ Consistent with the goal of the 833 Auction—assigning toll free numbers to those who can put them to their best use—the Commission adopted this exception to promote the development of a secondary market for numbers assigned via competitive bidding. In order to evaluate the operation of this new secondary market, the *Toll Free Assignment Modernization Order* directed Somos “to maintain data on secondary market transactions and make that data available to the Commission.”⁷⁴

57. The *Toll Free Assignment Modernization Order* established that the data collected include “the new subscriber’s name and contact information, and other limited information Somos deems necessary.”⁷⁵ To further our evaluation of the secondary market, we propose that Somos collect additional limited information beyond that identified in the *Toll Free Assignment Modernization Order*.⁷⁶ Specifically, we propose that Somos collect the following information: (a) contact information of both parties to the transaction, including (i) name,⁷⁷ (ii) address, (iii) email address, and (iv) phone number; (b) sale price; and (c) sale date. We believe that this information will allow the Commission to fully evaluate the operation of the secondary market, including the demand for the right to use toll free numbers, the value parties place on the right to use toll free numbers, and how frequently transactions occur on the secondary market. We seek comment on this proposal.

58. The *Toll Free Assignment Modernization Order* also established that RespOrgs are obligated to provide information to Somos to facilitate the collection of data about secondary market transactions.⁷⁸ To incentivize RespOrgs to provide this information promptly, we propose that RespOrgs must submit all required data about post-auction secondary market transactions involving their subscribers to Somos within 60 days of the transaction. We propose that this requirement be included in Somos’s tariff and that, like other violations of RespOrg requirements in the tariff,⁷⁹ noncompliance be penalized by discontinuing access to the Toll Free Database until the required data is reported. We believe that 60 days from the date of a transaction is a reasonable amount of time for a RespOrg to discover and report transaction data to Somos. Even if a subscriber does not inform a RespOrg of a

⁷¹ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9288-89, 9293-94, paras. 39, 57.

⁷² See, e.g., *NetworkIP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008).

⁷³ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9302-05, paras. 79-85.

⁷⁴ *Id.* at 9304-05, para. 85.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ If a party to a transaction is an organization, we propose that this include both the organization’s name and a point of contact in the organization.

⁷⁸ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9304-05, para. 85.

⁷⁹ See, e.g., Toll Free Tariff at 23 (describing penalty of discontinued access and identifying violations which lead to imposition of penalty).

transaction, 60 days provides a RespOrg with two monthly billing cycles during which it should be aware of a subscriber change.⁸⁰ And if a RespOrg discovers a transaction but the subscriber does not provide it with information about the transaction, we propose allowing the RespOrg to withhold service from the subscriber until it receives the necessary information. We also believe that the penalty of discontinued access to the Toll Free Database—until the required data is reported—appropriately balances our dual goals of incentivizing compliance while not discouraging RespOrgs who fail to report transaction data from correcting a good faith oversight. We seek comment on this proposal.

VIII. PROCEDURAL MATTERS

A. Supplemental Initial Regulatory Flexibility Analysis

59. As required by the Regulatory Flexibility Act of 1980 (RFA),⁸¹ the Commission has prepared this Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this Public Notice to supplement the Commission's Initial and Final Regulatory Flexibility Analyses completed in the *Toll Free Assignment Modernization Order* pursuant to which the 833 Auction will be conducted.⁸² Written public comments are requested on this Supplemental IRFA. Comments must be identified as responses to the Supplemental IRFA and must be filed by the same deadline for comments specified on the first page of this Public Notice. The Commission will send a copy of this Public Notice, including this Supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).⁸³ In addition, this Public Notice and Supplemental IRFA (or summaries thereof) will be published in the *Federal Register*.⁸⁴

60. *Need for, and Objectives of, the Proposed Rules.*—To further the goal of an efficient, fair and orderly allocation of toll free numbers to all potential subscribers, including small entities, the Commission added competitive bidding as a method to assign toll free numbers and established the 833 Auction as an experiment in that approach. This Public Notice seeks comment on proposed procedural rules to govern the 833 Auction. This process is intended to provide notice of, and adequate time for, potential applicants to comment on proposed auction procedures. An efficient and fair administration of the competitive bidding process will benefit all 833 Auction participants, including small entities. To that end, the Commission seeks comment on the following proposed procedures:

- allow potential subscribers to participate in the 833 Auction either through a RespOrg that will bid on all the numbers in which the subscriber is interested in acquiring, or by submitting its own application and bidding for all the numbers in which it is interested;
- require each applicant in the 833 Auction to certify that (1) if it is bidding on its own behalf, it is also not participating in the auction through another entity and/or, if it is bidding on behalf of potential subscribers that it is not aware that the potential subscriber(s) are participating through another applicant; and (2) it, or any commonly-controlled entity, is not submitting multiple applications in the 833

⁸⁰ It is our understanding that RespOrgs are billed for administrative fees on a monthly basis and pass those costs through to subscribers on the same basis. See, e.g., Toll Free Tariff at 72-73 (establishing monthly financial obligations of RespOrgs to Somos).

⁸¹ 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁸² *Toll Free Assignment Modernization, Toll Free Service Access Codes*, Notice of Proposed Rulemaking, 32 FCC Rcd 7885, Appx. C (2017); *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9313-22, Appx B.

⁸³ See 5 U.S.C. § 603(a).

⁸⁴ See *id.*

Auction, utilizing the Commission's definitions for control adopted for similar purposes in its spectrum auctions;

- prohibit each applicant in the 833 Auction from cooperating or collaborating with any other applicant with respect to its own, or one another's, or any other competing applicant's bids or bidding strategies, and will be prohibited from communicating with any other applicant in any manner the substance of its own, or one another's, or any other competing applicant's bids or bidding strategies (including the post-auction market for toll free numbers);
- prohibit certain agreements between applicants (whether the applicants are RespOrgs or potential subscribers) in the 833 Auction, and certain auction-related agreements among RespOrgs even where only one of the RespOrgs is an applicant in the 833 Auction;
- require any applicant RespOrg that bids for a potential subscriber to acquire a letter of authorization from the potential subscriber;
- require applicants to first acquire an "Auction ID" from Somos, which will verify the potential applicant's identity, and if any entity cannot be verified through the Somos verification process, it must then participate through a RespOrg;
- require each applicant, on its auction application, (1) identify each number on which it wishes to be able to bid and, for each number, the party (either itself or another entity) for which it is bidding, (2) provide the same level of ownership disclosure required in Commission auctions, (3) disclose any auction-related agreement, and (4) certify that it is not currently in default or delinquent on a non-tax debt to the Federal government;
- for determining the winning bidder on tied bids for a toll free number, use a pseudo-random number assigned to each bid; and for an only bid received for a toll free number, assign the sole bidder the number and require no payment;
- conduct the 833 Auction using procedures for limited information disclosure;
- require potential bidders provide an upfront payment of \$100 per number, and treat all funds that a RespOrg submits as an upfront payment in the auction (regardless of whether the funds came from the RespOrg or a potential subscriber for which the RespOrg is bidding) as the upfront payment of the RespOrg that will be used to offset the final payment obligation for any winning bids of the RespOrg;
- default payment of 35% of the defaulted bid;
- full payment within 10 business days following release of the public notice of the winning bids, or full payment plus a 5% late fee, within five additional business days;
- require any potential subscriber that directly participates in the 833 Auction and is a winning bidder to declare its intent to work with a specific RespOrg within 15 business days following release of the public notice of winning bids; and
- require Somos to collect additional information on secondary markets and require RespOrgs submit all required data about post-auction secondary market transactions within 60 days of a transaction.

61. *Legal Basis.*—The Commission has a statutory obligation under section 251(e)(1)⁸⁵ of the Communications Act of 1934, as amended (the Act), “to ensure that toll free numbers, which are a scarce and valuable national public resource, are allocated in an equitable and orderly manner that serves the public interest.”⁸⁶ Pursuant to this statutory mandate, the Commission has the “authority to set policy with respect to all facets of numbering administration in the United States,”⁸⁷ and a “require[ment] . . . to ensure the efficient, fair, and orderly allocation of toll free numbers.”⁸⁸ The proposed auction procedures and secondary market proposals in this Public Notice further the statutory requirement that numbers be made “available on an equitable basis”⁸⁹—an auction and secondary market are both efficient and orderly, and fair.⁹⁰ These actions benefit all auction participants and toll free number subscribers, including small entities. In addition, the proposed requirements for Somos to follow as the auctioneer for 833 numbers are supported under the Commission’s obligation in section 251(e)(1) to ensure its Toll Free Numbering Administrator administers “telecommunications numbering and to make such numbers available on an equitable basis,”⁹¹ and section 201(b)’s authorization for the Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act].”⁹² These actions will help ensure an efficient and orderly, and fair, assignment of toll free numbers.

62. *Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.*—The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.⁹³ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁹⁴ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁹⁵ A “small

⁸⁵ 47 U.S.C. § 251(e)(1) (ordering the Commission to make “numbers available on an equitable basis,” and providing the Commission with “exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States”).

⁸⁶ *Toll Free Service Access Codes*, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 11612, 11179, para. 22 (1997) (*1997 Toll Free Order*).

⁸⁷ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas, Administration of the North American Numbering Plan, Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19512, para. 271 (1996); *see also* 47 U.S.C. § 251(e)(1) (“The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.”).

⁸⁸ *1997 Toll Free Order*, 12 FCC Rcd at 11176, para. 18 (citing “§ 1 and Title II of the . . . Act” and section 251(e)(1)).

⁸⁹ 47 U.S.C. § 251(e)(1).

⁹⁰ *See Toll Free Assignment Modernization Order*, 33 FC Rcd at 9279-84, paras. 14-24.

⁹¹ 47 U.S.C. § 251(e)(1). *See also Toll Free Service Access Codes*, Order, 28 FCC Rcd 15328, 15330-31, para. 10; *1997 Toll Free Order*, 12 FCC Rcd at 11224-25, para. 103 (seeking comment on who should administer the SMS in light of the requirement of section 251(e) that the Commission create or designate one or more “impartial” entities to administer telecommunications numbering).

business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁹⁶

63. As noted above, a FRFA was incorporated into the *Toll Free Assignment Modernization Order*. In that analysis, we described in detail the small entities that might be significantly affected. In this Public Notice, we hereby incorporate by reference the descriptions and estimates of the number of small entities from the previous FRFA in the *Toll Free Assignment Modernization Order* in WC Docket No. 17-192.⁹⁷

64. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities.*—The Commission designed the auction application process itself to minimize reporting and compliance requirements for applicants, including small business applicants. Parties desiring to participate in the 833 Auction must file an application in which they certify under penalty of perjury as to their qualifications.⁹⁸ Eligibility to participate in bidding is based on an applicant’s auction application and certifications, as well as its upfront payment.⁹⁹ The Commission decided in the *Toll Free Assignment Modernization Order* that it will not require applicants to submit a long-form application after the conclusion of the 833 Auction, given the lack of need to verify winning bidders’ qualifications in this context and to limit the administrative burden on bidders, including small business entities.¹⁰⁰

65. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.*—The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”¹⁰¹

66. In the *Toll Free Assignment Modernization Order*, the Commission concluded that assigning toll free numbers through competitive bidding will benefit smaller entities, particularly when compared with the prior first-come, first-served assignment methodology, which favored larger, more sophisticated entities that had invested in systems that provided enhanced connectivity to the Toll Free
(Continued from previous page)

⁹² 47 U.S.C. § 201(b).

⁹³ 5 U.S.C. § 603(b)(3).

⁹⁴ *Id.* § 601(6).

⁹⁵ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁹⁶ 15 U.S.C. § 632.

⁹⁷ *Toll Free Assignment Modernization, Toll Free Service Access Codes*, Report and Order, 33 FCC Rcd 9274, 9313-22, Appx B. See FCC Launches Experiment to Assign Toll Free Numbers by Auction, <https://www.fcc.gov/document/fcc-launches-experiment-assign-toll-free-numbers-auction-0> (last visited May 9, 2019).

⁹⁸ *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9290, para 43.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 5 U.S.C. § 603(c)(1)-(4).

Database).¹⁰² Moreover, the Commission also elected to allow potential subscribers, many of which may be smaller entities, the choice between participating directly in the auction or indirectly through a RespOrg.

67. We intend that the proposals of this Public Notice to facilitate participation in the 833 Auction will result in both operational and administrative cost savings for small entities and other auction participants. In light of the numerous resources that will be available from the Commission and Somos at no cost, the processes and procedures proposed for the 833 Auction in this Public Notice should result in minimal economic impact on small entities. For example, prior to the auction, small entities and other auction participants may seek clarification of or guidance on complying with competitive bidding rules and procedures, reporting requirements, and the bidding system. Small entities as well as other auction participants will be able to avail themselves of web-based, interactive online tutorials to familiarize themselves with auction procedures, filing requirements, bidding procedures, and other matters related to the 833 Auction and hotlines to assist with issues such as access to or navigation within the electronic auction application system. The Commission also makes copies of Commission decisions available to the public without charge, providing a low-cost mechanism for small businesses to conduct research prior to and throughout the auction. In addition, Somos will post public notices on its website will make this information easily accessible and without charge to benefit all 833 Auction applicants, including small businesses. These steps are made available to facilitate participation in the 833 Auction by all eligible bidders and may result in significant cost savings for small business entities who utilize these alternatives. Moreover, the adoption of bidding procedures in advance of the auctions is designed to ensure that the 833 Auction will be administered predictably and fairly for all participants, including small businesses.

68. These proposed procedures for the conduct of the 833 Auction constitute the more specific implementation of the competitive bidding rules contemplated by Part 1 of the Commission's rules and the underlying rulemaking orders, including the *Toll Free Assignment Modernization Order* and relevant competitive bidding orders, and are fully consistent therewith.¹⁰³

69. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.*—None.

B. Deadlines and Filing Procedures

70. Pursuant to Sections 1.415 and 1.419 of the Commission's rules,¹⁰⁴ interested parties may file comments or reply comments on or before the dates indicated on the first page of this document in AU Docket No. 19-101. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.¹⁰⁵ We strongly encourage interested parties to file comments electronically.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS at <http://www.fcc.gov/cgb/ecfs>.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the captions of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

71. Filings in response to this Public Notice may be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

¹⁰² See *Toll Free Assignment Modernization Order*, 33 FCC Rcd at 9282, para. 21.

¹⁰³ See generally *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360-75, paras. 68-159.

¹⁰⁴ 47 CFR §§ 1.415, 1.419.

¹⁰⁵ See generally *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. Eastern Time (ET). All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

72. *E-mail:* We also request that a copy of all comments and reply comments be submitted electronically to the following address: 833auction@fcc.gov.

73. *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Government Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

74. This proceeding has been designated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.¹⁰⁶ Persons making oral *ex parte* presentations must file a copy of any written presentations or memoranda summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine Period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to the Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

C. Contacts

75. For further information concerning this proceeding, contact the offices listed below:

Competition Policy Division, Wireline Competition Bureau

Toll Free Number questions:

Matthew Collins at (202) 418-7141,
matthew.collins@fcc.gov

Auctions Division, Office of Economics and Analytics

Auction legal questions:

Scott Mackoul at (202) 418-0660,
scott.mackoul@fcc.gov

¹⁰⁶ See 47 CFR §§ 1.1200(a), 1.1206.

Office of Communications Business Opportunities

For questions concerning small business inquiries: John Finnie at (202) 418-0716,
john.finnie@fcc.gov

Action by the Commission on May 9, 2019: By Chairman Ajit Pai, and Commissioners Brendan Carr and Jessica Rosenworcel issuing separate statements.

– FCC –

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Auction of Toll Free Numbers in the 833 Code; Comment Sought on Competitive Bidding Procedures*, AU Docket No. 19-101, WC Docket No. 17-192, CC Docket No. 95-155.

In the second season of *Seinfeld*, Elaine is tired of waiting for one of the few tables at a popular Chinese restaurant to open up. She laments, “It’s not fair that people are seated first-come, first-served. It should be based on who’s hungriest.”¹

While Elaine’s idea may not have taken off in the realm of Chinese cuisine, here at the FCC, we’ve recognized that first-come, first-served may not be the best way to allocate scarce resources, such as toll-free numbers. That’s why we decided last year to experiment with allowing numbers in the recently-opened 833 toll free code to be assigned through an auction. The 833 Auction will make available over 17,000 numbers for which there have been competing requests. It will let us see whether competitive bidding is an equitable and efficient way to distribute toll free numbers, which should be useful as we assign toll free numbers in the future.

Today, we take a critical step toward holding this first-of-its-kind auction by proposing and seeking comment on detailed procedures for conducting and participating in the 833 Auction. Specifically, we seek public input on application requirements, bidding procedures, and post-auction procedures to promote the transparency, efficiency, and integrity of the 833 Auction. We also make clear that non-profit health and safety organizations and government entities can petition the FCC’s Wireline Competition Bureau to exclude 833 numbers from the auction for health and safety purposes.

For their diligent work on this experiment, I’d like to thank Joseph Calascione, Rita Cookmeyer, Scott Mackoul, Eliot Maenner, Giulia McHenry, Gary Michaels, Martha Stancill, and Margie Weiner from the Office of Economics and Analytics; Pamela Arluk, Matthew Collins, Alex Espinoza, Justin Faulb, Heather Hendrickson, Kris Monteith, and Ann Stevens from the Wireline Competition Bureau; Terry Cavanaugh, Rick Mallen, Linda Oliver, Bill Richardson, John Williams, and Chin Yoo from the Office of General Counsel; and Maura McGowan from the Office of Communications Business Opportunities.

¹ “The Chinese Restaurant,” *Seinfeld*, Season 2, Episode 11 (May 23, 1991), available at http://www.criticalcommons.org/Members/Ghent/clips/the%20Chinese%20Restaurant_standing_line.mp4/view.

**STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Auction of Toll Free Numbers in the 833 Code; Comment Sought on Competitive Bidding Procedures*, AU Docket No. 19-101, WC Docket No. 17-192, CC Docket No. 95-155.

We have more ways to communicate than ever before—from messaging apps, to social media, to email. But with all these new forms of communication, it’s an innovation from the 1960s—toll-free calling—that continues to play a key role in our interactions. In fact, there are more than 40 million toll-free numbers in use today, which represents a 40 percent increase over the past decade.

There’s so much value in these numbers that we voted last year to experiment with the first-ever auction of toll-free numbers and to allow those numbers to be transferred on the secondary market. This could be a much more equitable and efficient way of distributing numbers than the first-come, first-served approach of the past. But as today’s Notice recognizes, there’s still a lot we don’t know. How many bidders will show up for this first auction? How much activity will we see in the secondary market? We don’t have all the answers, so we’re starting small with this experiment. And we put rules in place to track the results. The information we gather can be used to inform future auctions.

So I want to thank the Office of Economics and Analytics as well as the team in the Wireline Competition Bureau for your work on these auction procedures. The Notice has my support.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Auction of Toll Free Numbers in the 833 Code; Comment Sought on Competitive Bidding Procedures*, AU Docket No. 19-101, WC Docket No. 17-192, CC Docket No. 95-155.

With this Public Notice, the Federal Communications Commission takes another step in the direction of modernizing our toll free number system. This is the right thing to do. For too long, distribution of toll free numbers has meant a command and control system, through a first- come, first-served approach. As part of this approach, the agency has prohibited a secondary market in toll free numbers. But this method has limitations. If you want to see them, do a simple search online. There is a vibrant marketplace out there where anyone can purchase a toll free number from entities that openly flout our rules.

So we are going to try another way. With the 833 toll free code we are doing a test. We are going to experiment and do things differently. We are going to hold an auction. This is a sandbox effort and it is good news. I am all for it.

Now the not-so-good news. When it comes to toll free numbers, this agency has some housekeeping to do. Late last year, companies who deal in toll free numbers came to the FCC pleading for guidance about the protections that pertain to geolocation call data—among the most sensitive consumer data. They ask for this agency to bless their use of third-party location aggregators so they can know with precision just when and where a wireless caller dials a toll free number.

This request is styled as an emergency petition. But I think the greater emergency is that this agency has been silent on everything involving third-party location aggregators and the black market that exists for the wireless surveillance of each and every one of us with a mobile device. Earlier this year a reporter was able to identify that for a few hundred dollars a range of shady middlemen using these aggregators can tell you where any wireless phone is being used within a few hundred meters. This is unacceptable. This is an issue of personal and national security and this agency—in the toll free context and everywhere else—owes it to the American public to explain just what is going on when it comes to the privacy of our wireless devices.