

applicable to the designated entities.⁵⁶ First, we propose installment payments with interest for all of the designated entities in order to ensure their economic opportunity.⁵⁷ We request specific comment, however, on whether the installment payment benefit should apply to all of the enumerated entities (including eligible consortia with designated entities) in all services, or only certain entities in certain contexts. Further, we seek comment on how we might further Congress's intent by utilizing tax certificates to ensure economic opportunity for the designated entities. Tax certificates might, for example, be used in addition to the installment payment with interest benefit for certain entities or services.⁵⁸ For a more detailed discussion of installment plans, tax certificates and other preferential measures, commenters should refer to the SBAC Report.

80. The SBAC Report addresses special barriers to telecommunications ownership encountered by women and members of minority groups, and we seek comment on its conclusions. Specifically, the SBAC Report recommends that we satisfy spectrum efficiency and economic opportunity objectives, and avoid undue concentration of ownership by affording licensing opportunities to small (i.e., independently owned, non-dominant) bidders.⁵⁹ In addition, it recommends measures to include such businesses through financial certification procedures,⁶⁰ bidding credits,⁶¹ installment payments and royalties,⁶² distress sales,⁶³ and tax certificates.⁶⁴ The

⁵⁶ See discussion of the applicability of 309(j)(4)(D) to PCS in Part IV, *infra*.

⁵⁷ We propose to assess interest at the prime rate (as announced periodically in the Wall Street Journal) plus one percent under the installment plan for such designated entities. The rate could be fixed at the time the installment payment plan begins or could vary with the prime rate. Cf. 47 C.F.R. § 1.1940.

⁵⁸ At this time, we foresee two examples of tax certificates that could apply to a system of competitive bidding. In the first example, an entity not eligible for preferential measures under the statute ("entity X") "wins" an auction and is granted a license, and then transfers the license to a "designated entity." Entity X would be eligible for a tax certificate. The second example involves an investor in a designated entity that "wins" an auction and is granted a license. The investor would be eligible for a tax certificate upon divestiture of its interest. Commenters should address these specific examples or other possible uses of tax certificates in the context of Section 309(j)(4)(D), such as those recommended in the SBAC Report, discussed below.

⁵⁹ SBAC Report at 1-6, 8.

⁶⁰ The SBAC Report recommends that applications from enumerated entities should be allowed to "self-certify" financial qualifications. That is, such applicants could include an investment banker's letter, combined with the applicant's internal funds and bank commitments. In addition, it recommends that SBA chartered Small Business Investment Companies (SBICs) and Specialized Small Business Investment Companies (SSBICs), should be treated as bona fide financial institutions for reasonable assurance purposes. SBAC Report at 12-19.

⁶¹ The SBAC recommended that the Commission protect the public interest in the use of the spectrum by authorizing alternative methods of bidding, bid calculation, and bid payments for bidders with superior service proposals. In particular, alternative bidding calculations would allow technical and non-technical innovators to discount, or amortize, the bid the applicant would otherwise pay based on a qualitative assessment of the applicant's business development proposal. To qualify for the credit, the SBAC Report states that the bidder would have to

SBAC Report, however, does not suggest the same treatment for each group targeted for the economic opportunity provisions. In support of its recommendations, the SBAC Report cites its finding that "entry opportunities for small service providers have been constrained in existing telecommunications markets by undercapitalization, concentration of ownership, and other conditions contributing to the exclusion of businesses owned by minorities and women." The SBAC Report also found that "[c]apital formation is one of the major barriers to full participation by small and minority businesses."⁶⁵ We request comment concerning these measures discussed in the SBAC Report insofar as they relate to spectrum auctions.

81. In a related matter, we seek comment on how we can draft rules to achieve the objectives and requirements of Section 309(j)(3)(B) and (4)(C). These provisions also reflect a Congressional concern for the entities discussed above and direct us to, inter alia, promote competition by avoiding concentration of licenses and to promote an equitable distribution of licenses among geographic areas. For the purpose of avoiding undue concentration, commenters should address whether the Commission needs to adopt specific rules limiting eligibility for licenses, other than those already in existing service rules. Commenters should include in their comments discussion of whether we should take into account the other radio licenses already held by bidders.

D. Safeguards

82. This subsection addresses three types of safeguards for the auction process. Two of them--measures to prevent "unjust enrichment" and performance requirements--are expressly addressed by the statute. The third--rules prohibiting collusion among bidders--is one that we explore on our own motion.

83. Preventing unjust enrichment. The Budget Act directs the Commission to "require such transfer disclosures and antitrafficking restrictions and payment schedules as may be

qualify as (a) a member of a designated entity, or (b) a consortium owned and controlled by firms owned by members of the designated entities. We seek comment on the extent to which members of the preferred groups can be deemed to be "technical innovators," and the extent to which it is feasible to reach such determinations prior to conducting individual auctions.

⁶² Id.

⁶³ The SBAC Report recommends use of distress sale procedures where winners are ineligible, unqualified, or unable to pay.

⁶⁴ The SBAC Report recommends three ways that the Commission could issue tax certificates. The first SBAC recommendation would encourage relocating microwave incumbents that elect tax certificate treatment to satisfy reinvestment requirements by furnishing capital to designated entities. The second SBAC recommendation involves the Commission issuing tax certificates for investments in and by SSBICs in order to facilitate greater reliance on SSBIC financing for start-up and operational finance of licensees. The SBAC's third recommendation would enable owners and investors of minority owned and controlled service facilities subject to competitive bidding to obtain tax certificates upon sale of their stock interests, provided that the entities remain minority owned and controlled. See generally *Kansas State Network, Inc. v. FCC*, 720 F.2d 185 (D.C. Cir. 1983).

⁶⁵ Id. at i (Executive Summary).

necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." See 47 U.S.C. 309(j)(4)(E). The House Report suggests that, while the Commission should keep track of all transfers of licenses issued via auctions, unjust enrichment is likely to be a problem only in auctions where participation is limited in order to ensure designated entities' opportunity to participate.⁶⁶ In an unlimited bidding process, the winner is likely to pay the market price for its license. Hence resale would not involve any unjust enrichment.

84. These considerations lead us to propose that when requests for transfers of designated entity licenses are submitted to the Commission pursuant to Section 310(b), specific provisions be implemented to prevent unjust enrichment for licenses obtained in auctions where members of designated entities have participated pursuant to some specific provision designed to ensure their participation in the provision of spectrum-based services.⁶⁷ The Budget Act mentions antitrafficking restrictions and payment schedules as measures available to prevent unjust enrichment. However, an outright prohibition on transfer, even for a limited time such as one year, may block or delay efficient market transactions needed to attract capital, reduce costs, or otherwise put in place owners capable of bringing service to the public expeditiously. In other words, a prohibition on resale could have the unintended effect of delaying service to the public, contrary to the goals of the Budget Act.⁶⁸ For this reason, while we seek comment on transfer prohibitions, we request comment on a system of financial disincentives to prevent sellers from realizing any windfall profit from premature sale of a license. This procedure appears to be invited by the language of the House Report, which notes, in its commentary on section 309(j)(4), that "[T]his paragraph expressly authorizes the Commission to impose or assess payments in order

⁶⁶ The House Report notes that "[I]n a system of open competitive bidding, trafficking in licenses should be minimal, since the winning bidder would have paid a market price for the license. Nevertheless, the Committee anticipates that the Commission will monitor trafficking in licenses issued pursuant to the provisions of section 309(j), and will impose any necessary regulations and transfer fees as may be necessary to prevent unjust enrichment. In the event that the Commission limits participation in any given competitive bidding procedure, however, there exists a significant possibility that licenses will be issued for bids that fall short of the true market value of the license. To the extent that the Commission is attempting to achieve a justifiable social policy goal--such as the reservation of appropriate licenses for small business applicants--licensees should not be permitted to frustrate that goal by selling their license in the aftermarket. In these instances, antitrafficking restrictions are necessary and appropriate." H. R. Rep. No. 103-111 at 257.

⁶⁷ We seek comment on what information transferees of licenses should be required to furnish to the Commission and, in particular, whether transferees must submit special or additional information when a premature transfer is requested. We also seek comment on the time interval during which transfers should be considered "premature" and thus subject to any special or additional information requirements that we may adopt. Finally, we recognize that there may be situations where such transfers, even if considered "premature" in some contexts, should not be considered "unjust enrichment." If, for example, the Commission issued a tax certificate to permit an investor in a licensee controlled or composed of one or more of the designated entities to sell his or her interest and not recognize the gain on the sale of that interest, we might not consider this gain to be unjust enrichment: the tax certificate would serve as an incentive to invest in the economic opportunity enterprise in the first instance, and any attempt to recapture this profit would work at cross purposes with the purpose of the tax certificate policy, which is to encourage such investment.

⁶⁸ See 47 U.S.C. §§ 309(j)(3)(A) and (4)(C).

to prevent unjust enrichment resulting from trafficking in licenses."⁶⁹

85. We seek comment on this general approach and on the particular form of payment that we should impose on early transfers of licenses granted under preferences and on the interval of time after initial grant during which transfer payments would be imposed. With respect to the amount of the payment, if the preference took the form of deferred payments, perhaps we should provide that all future payments become due to the government when the license is prematurely transferred to a licensee not eligible for the preference. If the preference were a set-aside, the payment could be based on the estimated difference between the price paid at the auction and the price that would have been paid without the set-aside. If both preferences were used, then both types of payments would apply.

86. Implementing this scheme of payments would require estimation of the price that would have been paid in the absence of a set-aside. Where there are clearly comparable licenses awarded by an open auction, this should not be difficult to do. We seek comment on the likelihood that such "comparable" prices will be available. In the event that comparables are not available, we seek comment on how to calculate the payment. One approach would be to permit the seller to recover only the price it paid for the license plus any out-of-pocket expenses it incurred in building facilities or otherwise preparing to provide service. The seller would be required to remit to the government any proceeds received from the transfer in excess of this amount. This would preserve licensee incentives to make the necessary investments in providing service.

87. We also seek comment on whether any interest charges should be included in the payment calculations. For example, if a comparable price is available, the difference between the comparable price and the set-aside price could be viewed as a loan from the government to the preferred licensee. A payment equal to the difference between the comparable and set-aside prices would then constitute recovery of the principal, but it may also be appropriate to collect interest on this "loan." If a comparable price is not readily available, and the amount of proceeds that the set-aside licensee may retain is calculated based on its outlays, in order to preserve investment incentives, it may be appropriate to allow the set-aside licensee to earn some return on its investment outlay. Commenters favoring the use of interest charges of one kind or another should address the issue of the magnitude of these charges. See also para. 79, supra.

88. All of these proposals leave open the possibility of disagreement regarding the magnitude of the payment to be imposed for premature transfer of a set-aside license. This is a consequence of attempting to preserve licensee investment incentives prior to any transfer. We seek comment on the following alternative, which has the advantage of being unambiguous but may attenuate investment incentives. Licenses granted pursuant to a set-aside could have a condition attached to them to the effect that, in the event of a premature transfer, the initial licensee would pay the amount equal to a certain percentage of the difference between the initial bid price and the transfer price. Commenters favoring this option are requested to propose an appropriate percentage for calculating the payment. We note that even the transfer price may be difficult to determine for deals that are not pure cash transactions. We seek comment on how to calculate a "cash-equivalent" price for calculation of payments. We also seek comment on the simpler procedure of calculating the payment as a fixed percentage of the purchase price and on what the appropriate percentage would be, if we were to adopt this procedure. Finally, we propose as an alternative conditioning designated entities' licenses on there being no premature

⁶⁹ H.R. Rep. No. 103-111 at 257.

transfer of those licenses. A forbidden transfer would cause the license to cancel automatically.⁷⁰ While drastic, this remedy is self-enforcing and simple to administer.

89. The Budget Act also amends Section 309(i) of the Communications Act to require the Commission, within 180 days of the date of enactment, to "prescribe such transfer disclosures and antitrafficking restrictions and payment schedules as are necessary to prevent the unjust enrichment of recipients of licenses or permits as a result of the methods employed to issue licenses under this subsection" (i.e., lotteries).⁷¹ The language of this provision mirrors that of Section 309(j)(4)(E), the subsection requiring the Commission to prevent unjust enrichment from resale of licenses obtained via auctions. The legislative history of that section indicates that the Commission may "impose or assess payments in order to prevent unjust enrichment resulting from trafficking in licenses."⁷² We tentatively conclude that we may assess payments to prevent unjust enrichment in the case of lotteries as well. We seek comment on this tentative conclusion and generally on how to implement the new Section 309(i)(1)(C). What antitrafficking restrictions, if any, are appropriate in addition to the payments that we might impose? What should the time period be for any such restrictions, e.g., three years or less? How should the payments be calculated?

90. Performance Requirements. The Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."⁷³ The House Report provides a specific example of the warehousing concern, suggesting that "an incumbent service provider could submit a bid for a license in a service that would compete with an existing business, and engage in behavior that would prevent competition from occurring. This would deny the public both the benefit of having access to the new service, and the benefits of competition."⁷⁴

91. As long as transfer of licenses is permitted, valuable spectrum licenses are unlikely to be warehoused, that is, held out of use even though it would be profitable for a firm without market power to provide service using that spectrum. The cost of warehousing is the value of the foregone uses that could be made of the license, either by the licensee itself or by others who could purchase the license from the initial licensee. When the license is purchased by auction, the out-of-pocket expenditure by the licensee makes the cost of not exploiting the license more obvious and explicit, which may be particularly effective in deterring warehousing.

92. We therefore seek comment on the extent to which warehousing might take place and the circumstances, if any, in which it is particularly likely to occur. Additionally, although the

⁷⁰ P and R Temmer v. FCC, 743 F.2d 918 (D.C. Cir. 1984).

⁷¹ See Section 309(i)(1)(C) of the Communications Act, as amended. This provision was adopted from the House bill without change. The legislative history suggests that Congress intended to limit "the ability of lottery winners to sell their license, so as to prevent the churning and profiteering that has characterized lotteries." H.R. Rep. No. 103-111 at 259.

⁷² H.R. Rep. No 103-111 at 257.

⁷³ 47 U.S.C. § 309(j)(4)(B).

⁷⁴ H.R. Rep. No. 103-111 at 256.

statute requires performance requirements, we seek comment on whether we must impose performance requirements for all licenses awarded by auction. Are there circumstances in which the likelihood of warehousing is sufficiently low that requirements are not needed? Are suitable alternatives available, such as restricting ownership of licenses to non-incumbents?⁷⁵ We note that for many existing services, Commission rules already include performance requirements (e.g., regulations that specify the time interval within which facilities must be constructed). We seek comment on whether these performance requirements by themselves would be sufficient, whether additional ones are required, or whether any existing performance requirements may be relaxed for licenses to be auctioned.⁷⁶ See also paras. 102-109, *infra*, which address deposit and other requirements.

93. Prohibition of collusion. Although not required by statute, we seek comment on whether the Commission should adopt rules specifically prohibiting collusive conduct. For example, the Commission could prohibit all potential bidders from collaborating, sharing information, or otherwise discussing with one another any information regarding the substance of bids or bidding strategies prior to the completion of the auction. Such rules would serve the objectives of the Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their particular interests and disadvantage other bidders. Moreover, anticollusion rules might strengthen confidence in oral bidding mechanisms⁷⁷ and would help ensure that the government receives a fair market price for the use of the spectrum.⁷⁸ On the other hand, if anticollusion rules are too tightly drawn, they could prevent the formation of efficiency enhancing bidding consortia that pool capital and expertise of small firms in order to compete against bigger firms, especially for wide area or nationwide licenses. We request comment on how such bidding consortia should be treated. Further, we seek comment on how to deter collusive efforts that could undermine participation by small business entities in a variety of markets, either as part of consortia or as independent entities.

94. We also seek comment on enforcement mechanisms and penalties for violation of anticollusion rules. Does the Commission have adequate resources to investigate and adjudicate collusion allegations? Should the penalty be a forfeiture, license denial, license revocation, prohibition on participation in future auctions, or something else? To what extent is conduct of this nature already prohibited by criminal law provisions outlawing bid rigging,⁷⁹ or by the antitrust laws? If current law is adequate to address collusion, should the Commission disqualify

⁷⁵ In this context, an incumbent is an entity already licensed to provide a service equivalent to the service that could be provided using the license to be auctioned. Commenters favoring this option should specify which classes of licensee might, for purposes of competitive bidding, be regarded as "incumbents" and what criteria should be used to identify these classes of licensee. Commenters should also address the appropriateness of this approach in the absence of specific limits in existing rules governing multiple ownership or other existing ownership restrictions.

⁷⁶ For new services, we would have the opportunity to propose any necessary performance requirements when we propose other rules for those services.

⁷⁷ See para 38, *supra*, for a discussion of collusion concerns in oral auctions.

⁷⁸ In this regard, we seek comment on whether post-application, pre-auction settlement agreements should be banned. See para. 160, *infra*.

⁷⁹ See, e.g., *U.S. v. Guthrie*, 814 F.Supp. 942 (E.D. Wash. 1993).

from auction participation anyone convicted of an antitrust or similar criminal violation in connection with an FCC auction?

E. Application, Bidding, and Licensing Requirements

95. This subsection seeks comment on what requirements, in addition to existing service-specific qualifications for all applicants, we should impose on prospective bidders and on auction winners with respect to their eligibility and qualifications to hold a license, on how to structure the expedited procedures for "resolution of any substantial and material issues of fact concerning qualifications,"⁸⁰ and on procedures to follow in the event that the tentative winner is ineligible, unqualified, or unable to pay the amount bid.

96. **Application processing requirements.** The statute requires that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing." Moreover, "[N]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) and sections 308(b) and 310."⁸¹ The House Report comments separately on these two requirements. With respect to the first, it notes that the Commission may require "that bidder's applications contain all information and documentation sufficient to document that the application is not in violation of Commission rules," and states that "applications not meeting those requirements may be dismissed prior to the competitive bidding."⁸² With respect to the second requirement, the House Report makes it clear that the statute gives the Commission "the discretion to make this determination only with respect to the winning bid, and does not require the Commission to make this determination for all applicants prior to the competitive bidding procedure."⁸³

97. Therefore, in order to reduce the administrative burdens of the initial stages of the auction process, avoid unnecessary delay in the availability of service, and encourage applicants to participate in the process, we propose that, in response to a Commission Public Notice of a filing window or cut-off date in services that are subject to auctions, all applicants interested in participating must file a short-form application (modeled on the Commission's "Transmittal Sheet for Cellular Applications"). We propose that applicants also submit a long-form application at the same time (which, for existing services, will be the application form currently in use)⁸⁴, and

⁸⁰ 47 U.S.C. § 309(j)(5).

⁸¹ Id.

⁸² H.R. Rep. No. 103-111 at 258.

⁸³ Id.

⁸⁴ In the case of an application for an SMR or IVDS license, for example, the second part of the application would be FCC Form 574. In the case of a cellular applicant, the second part would be FCC Form 401. No additional fee would have to be paid upon submission of the second part of the application. We propose that PCS applicants seeking a license would file on FCC Form 574 if they wished to provide service that is not classified as Commercial Mobile Service under our Section 332 Rule Making and on FCC Form 401 if they seek to provide Commercial Mobile Service. If they seek to provide both types of service, they should file both forms.

an application fee,⁸⁵ but we tentatively conclude that, prior to the auction, we will review only the short-form applications to determine acceptability for filing. However, we also seek comment on the possibility of reviewing both the long and short form applications prior to the auction, or on requiring submission of the long-form application subsequent to the auction.

98. We seek comment on the information that we should require to be included on the short-form application, but we tentatively conclude that at least the following shall be required: the license for which the applicant wishes to bid, the applicant's name,⁸⁶ the identity of the person who will be making the bid (in the case of an oral auction),⁸⁷ certification that the applicant is qualified pursuant to Sections 309(a), 308(b), and 310 of the Communications Act and any other service-specific qualification rules that the Commission might adopt or has already adopted for the particular service,⁸⁸ and certification that the applicant satisfies any financial qualifications requirements that the Commission has adopted or might adopt for the service in question.⁸⁹ If the applicant wishes to take advantage of any special provisions for the designated entities, the short-form application must contain a statement to that effect and certification that the applicant is, in fact, a member of the group claimed.

99. An application without certification of compliance with Commission rules would be dismissed. We seek comment on procedures for applicants seeking waivers of the rules. Commenters should address in particular the relative advantages and disadvantages of ruling on such waiver requests prior to the auction, rather than after the auction was completed. Denial of any waiver request would preclude participation in an auction. We also request comment on whether we should require different information from different services and expressly ask for comment on information to be filed by PCS applicants.

⁸⁵ This fee would be the applicable Section 8 fee for the service in question. See 47 U.S.C. § 158(g). As discussed below in Section IV, we propose Section 8 fees for PCS services.

⁸⁶ If the applicant is a corporation, then the short form application should include the name and address of the corporate office and the name and title of a responsible officer or director. If the applicant is a partnership, then the application should include the name, citizenship and address of all partners, and if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee should be included.

⁸⁷ In sealed bid auctions, we would need the identity of the person qualified to withdraw the bid prior to the opening of any bids. See para. 169, *infra*.

⁸⁸ See, e.g., the restriction in Section 90.603(c) of our Rules barring wire line telephone common carriers from eligibility in the SMR service and the restrictions in Section 22.901 of our Rules governing the participation of the regional Bell holding companies in the cellular radio service.

⁸⁹ We also seek comment, however, on the SBAC's proposal to allow certification of financial qualifications to build and construct based on "highly confident" letters from qualified investment banking firms, venture capital funds, and SBA chartered Specialized Small Business Investment Companies (SSBICs). See, e.g., Advanced Mobile Phone Service, Inc., 91 FCC 2d 512, 517 (1982). We also ask that commenters address the SBAC's proposal to treat SSBICs as financial institutions for purposes of certifying financial qualifications. SBAC Report at 12, 13.

100. We tentatively conclude that the short-form application should be judged by a letter-perfect standard. In light of the minimal information required, use of a letter perfect standard should not unduly burden or affect applicants. Applications that do not contain all requested information or that otherwise violate the requirements in the rules would be dismissed with no opportunity for resubmission.⁹⁰ As we gain more experience with the auction process, we might entertain a more liberal standard in order to encourage qualified bidders. At present, however, considerations of time and simplicity appear to require a letter-perfect standard of some sort, although we solicit comment on this matter. With regard to the long-form application, we propose to rely to the extent possible on existing service rules. With that in mind, we seek comment on appropriate standards for evaluating long-form applications. In addressing evaluation standards, commenters should make clear their assumptions about when the long-form application is to be filed and reviewed (i.e., before or after the auction).

101. After we have received applications and conducted an initial review, we propose to issue a Public Notice prior to the auction listing the qualified bidders and would also notify all applicants of whether their applications were acceptable for filing.⁹¹ We seek comment on the appropriate interval of time between this notification and the actual auction, but think it should be at least 45 days. In order to meet our statutory deadline to commence issuing PCS licenses and permits, we may adopt an expedited schedule for our initial PCS auctions. We seek comment on the minimum necessary notice of an upcoming auction. If an auction is to be held, we seek comment on whether we should permit amendments or modifications to the application after it has been submitted. We tentatively conclude that, in order to reduce administrative burdens, no modifications of any kind should be permitted to be filed until after the auction. We seek comment, however, on whether to permit minor, but not major ownership modifications prior to the auction. We also seek comment on the appropriate time period in which we should allow submission of any such amendments and on what would constitute a minor modification in these circumstances, especially if only a short-form application is filed prior to auction. To enforce the purposes of our cut-off rules, we tentatively conclude that major modifications to applications, especially major changes in ownership, should not be permitted.⁹²

102. Deposit and other requirements for entering bids. In order to realize the Act's goals of ensuring prompt delivery of service to rural areas and promoting rapid deployment of new

⁹⁰ We propose to apply existing rules governing submission of fees. See 47 C.F.R. § 1.1101 et seq. These rules provide for dismissal of an application if the application fee is not paid, is insufficient, is in improper form, is returned for insufficient funds or is otherwise not in compliance with our rules. We seek comment on extending these procedures to new services.

⁹¹ Should only one application be acceptable for filing, we shall issue a Public Notice to that effect and, if required, implement the relevant procedures permitting petitions to deny. See paras. 110-112, infra. We would, however, not hold an auction inasmuch as there would be no mutually exclusive applications.

⁹² We specifically request comment, however, on how to process the application of an auction winner who is in violation of our ownership restrictions only by virtue of the fact that an affiliated entity has won another auction held after the first auction's filing deadline. Should we permit such auction winners to modify their applications to come into compliance with our ownership rules?

technology,⁹³ it is important to limit bidding to serious qualified bidders, and to minimize the probability that, after the auction is over (and the participants have dispersed), the Commission finds that it cannot award a license to the auction winner.⁹⁴ To ensure that only serious, qualified bidders participate in our auctions, we propose to require that each participant in an oral or sealed bid auction tender in advance to the Commission a substantial sum (an "upfront payment"), by cashier's check⁹⁵ or, perhaps in the future, by electronic funds transfer as a condition of entry to the portion of the auction premises reserved exclusively for bidders.⁹⁶ We also seek comment on a proposal that, if a party bids simultaneously on a group of licenses and individual licenses in the group, the upfront payment would be the greater of the sum of the individual upfront payments or the upfront payment for the group. The upfront payment and any additional deposit (see related discussion, *infra*) would operate as a financial qualification in those services for which no other demonstration of financial qualification is required.⁹⁷ In those services where financial qualifications are required, it would operate as an additional financial qualification requirement.

103. We propose to calculate the magnitude of the upfront payment based on the amount of spectrum and population, *i.e.*, "pops", covered by the license, and announce it in a Public Notice issued prior to the auction. We seek comment on parameters for this calculation that would yield upfront payments large enough to accomplish the Act's goals as described in the previous paragraph. For example, if we used a figure of 2 cents per megahertz per pop,⁹⁸ each bidder for a 20 megahertz license for a market with a population of 20 million would need to tender an upfront payment of \$8 million in order to be able to bid. For narrowband channels in sparsely populated areas (*e.g.*, public coast stations in the Pacific Northwest region), our proposed formula could yield a very small upfront payment. Even in a market with a population of one million, for some narrowband channels, the payment could be as low as \$200. We seek comment on whether such low payments are sufficient to ensure participation by only serious, qualified bidders. Commenters who judge these payments insufficient are requested to comment on alternative formulas. For example, would it be useful to impose a minimum upfront payment of

⁹³ See paras. 12-13, *supra*. See also para 18, *supra*, where we tentatively conclude that the Act's purposes would be served by an administratively simple auction procedure.

⁹⁴ The auction winner is the party with the highest bid that also tenders to the Commission the requisite deposit within the specified time period.

⁹⁵ We further propose that the cashier's checks be drawn in U.S. dollars on a United States bank with assets in excess of one billion dollars and be payable to the Federal Communications Commission. This requirement would make it easier to assure the validity of the cashier's check if the need to do so arose.

⁹⁶ We seek comment on the alternative procedure of only requiring auction participants to exhibit the upfront payment as a condition of entry to the portion of the auction premises reserved exclusively for bidders.

⁹⁷ In many services, we require licensees to demonstrate that they have sufficient funds to build and operate the facilities to be licensed for a period of time.

⁹⁸ The Congressional Budget Office estimates the auction value of a 25 megahertz PCS license to be approximately \$15 per pop or about 60 cents per pop per megahertz. Congressional Budget Office, AUCTIONING RADIO SPECTRUM LICENSES 15 (March 1992). Our proposed up-front payment of 2 cents per pop per megahertz for such a license would thus equal only about 3 percent of the winning bid.

\$1,000, \$5,000, or some other specific figure?⁹⁹

104. While the requirement to tender (or perhaps only to exhibit) a substantial upfront payment should exclude frivolous or manifestly unqualified bidders from participating in auctions, we are also eager to minimize the probability that, after we examine an auction winner's application and call for the balance of its bid, we find that we cannot award a license to the auction winner. To minimize this probability, we tentatively conclude that, before a bidder is declared the auction winner and the auction is terminated, that bidder must tender a significant and non-refundable sum to the Commission.¹⁰⁰ We therefore propose that the high bidder tender its upfront payment to the Commission immediately, if that payment has not already been tendered to the Commission. However, we question whether the prospect of losing an upfront payment of the magnitude described above provides sufficient incentive to applicants to ensure that they meet all qualifications and financial requirements for grant of the license. We therefore propose that, if the upfront payment were less than 20 percent of the high bid,¹⁰¹ the bidder would also have to pay the difference promptly.¹⁰²

105. We seek comment on when the 20 percent deposit should be due to the Commission. One option is to require immediate payment by the high bidder. Once the deposit payment is made, the high bidder is declared the auction winner, thus completing the auction, after which the participants disperse. This option makes it possible to continue the auction if the high bidder cannot tender the necessary deposit. It is our preferred option in the case of sealed bids, where bidders would know in advance the exact amount needed to make a 20 percent deposit. However, because collecting an additional payment of uncertain size, as would be necessary under this procedure in an oral auction, may be difficult to accomplish immediately, we seek comment on the method of payment for this amount (cashier's check, or perhaps in the future, electronic funds transfer, etc.) and on whether it is practical to keep an oral auction open while the high bidder provides that additional payment.

106. We also seek comment on the advantages and disadvantages of providing additional time, say one or two business days, for oral auction bidders to tender to the Commission the balance of the 20 percent deposit. This option has the advantage of reducing the administrative burden on winners, and it could still be sufficient to prevent the delay in service to the public that

⁹⁹ We also seek comment on whether upfront payments for licenses in higher frequency ranges, e.g., above 10 GHz, should be reduced to reflect the generally lower per MHz value of spectrum in such ranges.

¹⁰⁰ We propose to return the upfront payments of bidders that are not auction winners as soon as we have verified receipt of the full deposit of the auction winner. Because the Commission does not maintain interest bearing accounts with the U.S. Treasury, we would be unable to pay interest on any monies received, and therefore, we can not now pay interest on such deposits. We seek comment on whether we should take the necessary steps to open interest bearing accounts.

¹⁰¹ A 20 percent downpayment is required for bids on offshore oil and gas leases. New Zealand required a 25 percent deposit be submitted with bids for spectrum licenses.

¹⁰² The upfront payment and any additional deposit payments are part of the applicant's bid. They are separate from any additional financial qualification requirements for licensing (i.e., requirements to show that the applicant has sufficient additional funds to build and operate the facilities to be licensed).

would result if we processed the winner's application, with attendant petition to deny pleading cycles, only to find that the winner does not have the requisite funds. However, if the high bidder fails to provide the balance of its deposit within the next few days after the auction, it would be necessary to conduct another auction, or alternatively, to offer the award to the second highest bidder. We request comment on this option.

107. Another option on which we seek comment is to treat the upfront payment alone as the deposit. Were we to do so, it might be advisable to alter the formula to yield larger upfront payments. This option has the advantage of administrative simplicity, but in cases where the Commission significantly underestimates the value of the license in question and therefore specifies an upfront payment that is very low relative to that value, the upfront payment may be too small to provide the necessary incentives to applicants that are outlined in paras. 102 and 104. We seek comment on which of these procedures (or some other alternative) would effectively preclude frivolous or fraudulent bidding while not unduly burdening serious, qualified applicants.

108. In the case of sealed bid auctions, we propose to permit bidders to withdraw prior to the opening of any bids. This procedure would also allow bidders to take into account the licenses previously won and accepted and thus facilitate efficient aggregations.¹⁰³ As described below (see paras. 167-171), an interval of 60 days or more may elapse between the application submission deadline and the auction. Market and technological conditions may change within that time period. If participants in sealed bid auctions are required to submit their bids along with their applications, then they could be at disadvantage, particularly in cases of combinatorial bidding. Therefore, we propose that sealed bids be submitted five days prior to the auction. We seek comment on whether this is an appropriate interval.

109. We also specifically seek comment on the Commission's authority to retain the upfront payment or deposit in the event that an auction winner subsequently is found ineligible or unqualified or is unable to pay the balance of its bid at the appropriate time. Section 309(j) requires the Commission's auction procedures to promote "efficient and intensive use of the electromagnetic spectrum" and directs the Commission to "promote investment in and rapid deployment of new technologies and services." Moreover, we have concluded above at para. 18 that Section 309(j)'s purposes would be furthered by an administratively simple auction process. In order to accomplish these goals, we tentatively conclude that some strong incentives must be in place to deter frivolous bids or unqualified bidders that could leave the Commission without an auction winner that is qualified and eligible to receive a license. We note that the new law specifically directs the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures ... to promote investment in and rapid deployment of new technologies and services."¹⁰⁴ We also seek comment on alternative approaches, such as barring such applicants from future auctions, in the event that we do not have authority to keep deposits. Additionally, we seek comment on other methods the Commission might use to ensure that only serious and otherwise qualified bidders participate in any type of auction we might hold.

110. Resolution of substantial and material issues of fact concerning qualifications. The

¹⁰³ See paras. 63-65.

¹⁰⁴ 47 U.S.C. § 309(j)(4)(B). See also H. R. Rep. No. 103-111 at 257 (Commission authorized to impose payments to prevent unjust enrichment from trafficking; House Committee on the Budget anticipates Commission will use this authority to deter participation in licensing process by those who have no intention of offering service to the public).

statute directs the Commission to adopt expedited procedures consistent with the provisions of section 309(i)(2) to resolve substantial and material issues of fact concerning qualifications.¹⁰⁵ This provision requires us to entertain petitions to deny the application of the auction winner if petitions to deny are otherwise provided for under the Communications Act or our Rules. We also seek comment on whether we must adopt petition to deny procedures for services in which we propose to auction licenses but which do not now have petition to deny procedures.¹⁰⁶ Should we decide to permit petitions to deny for such services, we would utilize existing procedures where appropriate. If petitions to deny are required for any new services, we shall adopt specific procedures on a service-by-service basis.

111. We seek comment on two possible schedules for entertaining petitions to deny in cases where such petitions are required. In order to expedite the auction process and attenuate incentives for auction losers to "gang up" on the winner, we could put all applications on Public Notice upon receipt, even though we might have reviewed only the short-form applications (see para. 97, *supra*), and allow 30 days for petitions to deny. This procedure would elicit all petitions prior to the auction (see para. above). We seek comment on whether we would be required to accept at a later date supplements to petitions to deny from petitioners claiming to have acquired new information. How would a requirement to accept such supplements affect the advisability of this particular petition to deny schedule? An alternative petition to deny schedule would place only the auction winner's application on Public Notice for 30 days following the auction. Interested parties could then file petitions and the auction winner will reply. We seek comment on this tentative procedure and on when the application should be placed on public notice.

112. We also seek comment on what procedures consistent with section 309(i)(2) we should adopt in the event that the Commission identifies substantial and material issues of fact in need of resolution.¹⁰⁷ We tentatively conclude that the Commission need not conduct a hearing before denial if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination. We also note that, notwithstanding any other provision of law, section 309(i)(2) permits in any hearing the submission of all or part of evidence in written form and allows employees other than administrative law judges to conduct hearings. Commenters should thus address both the use of written proceedings and the participation of employees other than administrative law judges (or the Commission itself) in these proceedings.

113. Procedures when tentative winner is ineligible, unqualified, or unable to pay. As explained at para. 102, *supra*, we have concluded that, to prevent undue delay in the auction process, measures and procedures must be in place to reduce the risk that auction winners are later found to be unqualified, ineligible, or unable to pay the balance of their bid. We have proposed that the Commission would retain the auction winner's deposit (20 percent of its winning bid)¹⁰⁸

¹⁰⁵ 47 U.S.C. § 309(j)(5) forbids the granting of licenses as a result of competitive bidding unless the Commission determines that the applicant is qualified.

¹⁰⁶ The application procedures for certain private radio applications do not contemplate the filing of petitions to deny. See 47 U.S.C. §§ 309(b) and (d)(1).

¹⁰⁷ Among the procedural models on which we seek comment are those for mutually exclusive cellular applications in the top 30 markets (see 47 C.F.R. § 22.916(b)) and those for certain lotteries (see 47 C.F.R. § 1.822(b)).

¹⁰⁸ If we only require an upfront payment (and do not require a 20 percent deposit), then, in these circumstances, the Commission would retain the upfront payment.

in the event that the winner is found to be unqualified, ineligible, or unable to pay the balance of its bid. We believe that the prospect of losing such a significant deposit will provide a strong incentive to bidders to ensure that they have adequate financing and that they meet all eligibility and qualification requirements. If an auction winner is later disqualified for any of the reasons mentioned in this paragraph (an event that we expect to happen rarely), we propose that the Commission would hold a new auction. We seek comment on this analysis and suggested procedure. We expressly seek comment on whether, or in what circumstances, such auctions should be open to new bidders, as well as those who participated previously.

IV. Specific Services

114. We focus now on those classes of licenses and permits that should be included within or excluded from competitive bidding. We propose, for this purpose, to divide the licenses and permits issued by the Commission into two broad groups. The first group, such as PCS licenses, consists of classes of licenses or permits for which it is imperative to decide quickly whether and how those licenses should be subjected to competitive bidding. The second group consists of licenses and permits for which a decision on competitive bidding, while important, is not required as quickly for the first class.

A. Personal Communications Services (PCS)

115. The Budget Act requires us to conclude the various dockets collectively known and commonly referred to as the PCS proceedings¹⁰⁹ within 180 days after enactment of that Act. We are further required to commence licensing within 270 days after enactment of the Budget Act. It is, therefore, imperative to resolve quickly the question of whether and how PCS would be the subject of competitive bidding.

116. In the Narrowband PCS Order, ET Docket No. 92-100 and GEN Docket No. 90-314, FCC 93-329 (released July 23, 1993) we defined PCS broadly as composed of a "wide array of mobile, portable and ancillary communications services to individuals and businesses," Order at paras. 13-14. Judging from the nature of the comments and the identity of the commenters that we have received to date in the PCS proceedings, we anticipate that many PCS licensees will operate in the manner contemplated by new Section 309(j)(2)(A). Specifically, we expect the principal use of PCS spectrum, considered as a class, is reasonably likely to involve the licensee receiving compensation from subscribers in return for enabling those subscribers to transmit or receive communications on frequencies on which the PCS licensee is authorized to operate.¹¹⁰ We request comment on our tentative conclusion.

117. Turning next to whether the criteria of Section 309(j)(3) would be satisfied by competitive bidding for PCS licenses (assuming that the criteria in Section 309(j)(2)(A) are satisfied), we address each of the criteria individually. First, we believe that the use of competitive bidding will speed the development and rapid deployment of PCS service to the public, including those residing in rural areas, with minimal administrative or judicial delays as required by Section 309(j)(3)(A). For some time now, our experience with the comparative

¹⁰⁹ See n. 1, *supra*.

¹¹⁰ We anticipate that this would be the case with both "wideband" and "narrowband" PCS services. We have provided that some PCS services would be unlicensed, and do not propose to apply competitive bidding to that class of PCS service.

hearing process has been less than satisfactory in terms of both administrative and judicial delay.¹¹¹ We anticipate that competitive bidding will ensure that PCS licenses end up more quickly in the hands of those who will provide service to the public without the delays attendant to the comparative hearings: competitive bidding should avoid some of the vigorous and time consuming litigation over admittedly fine points of fact and law that can make the difference in a comparative hearing.¹¹²

118. With respect to promoting the objectives of Section 309(j)(3)(C), competitive bidding will recover for the public a portion of the value of the spectrum made available for commercial use. We believe that competitive bidding is much more likely to recover a greater proportion of the value of the spectrum for the public than existing methods of awarding licenses.¹¹³ Currently, the only direct monetary compensation the public receives for use of the spectrum is, with few exceptions, the application fees paid by most Commission applicants. Further, as made clear by the Conference Report, the new fees established by Congress in Section 9 are intended to recover the costs of the Commission's activities with respect to those licensees. Thus, any relationship that these fees may bear to the intrinsic value of the license would likely be coincidental. We also discuss above our general proposals, applicable to PCS, which are designed to avoid unjust enrichment as well as our proposals concerning PCS bidders that are eligible for preferential measures.¹¹⁴

119. Finally, in accordance with subsection (j)(3)(D), we ask whether competitive bidding will promote efficient and intensive use of the spectrum. We believe that it will, both in general and in the particular case of PCS. Even without performance requirements, licensees have an incentive to use spectrum efficiently and intensively in the provision of a service if that spectrum can be put to some other valuable use by themselves or others. The broader the service definition and the fewer restrictions on the transfer of licenses, the greater the forgone earnings from using spectrum wastefully. Auctions are likely to reinforce the desire of licensees to make efficient and intensive use of the spectrum. Auctions make explicit what others are willing to pay to use the spectrum, and the licensees' need to recoup the out-of-pocket expenditure for a license may provide additional motivation to get the most value out of the spectrum.

120. We tentatively conclude that bidding for groups of licenses should be given a significant test in licensing broadband, but not narrowband, PCS (GEN Docket No. 93-314).

¹¹¹ See, e.g., Kwerel and Felker, "Using Auctions to Select FCC Licensees," OPP Working Paper Series No. 16, May 1985. In our experience, most comparative hearings for licenses in rural areas do not proceed appreciably faster than comparative hearings for licenses in most urban areas.

¹¹² See, e.g., Judge Leventhal's dissent in *Star Television v. FCC*, 416 F.2d 1086 (D.C. Cir. 1969), cert. denied 396 U.S. 888 (1969).

¹¹³ Kwerel and Felker, *supra*, at 16-20.

¹¹⁴ We do not believe that comparative hearings to issue PCS licenses are a realistic alternative given the statutory mandate for the rapid deployment of new technologies and services and specifically the short deadline within which Congress has required us to begin issuing PCS licenses. We believe that the use of lotteries is similarly precluded given the likelihood that PCS is likely to have subscribers and in light of Congress's direct intent that lotteries be employed only when the Commission determines what services are not for a use described in Section 309(j)(2)(A). We nevertheless request comment on these conclusions.

Specifically, we propose this combinatorial bidding for awarding the 51 MTA licenses on each of two 30 MHz spectrum blocks (blocks A and B).¹¹⁵ We would accept sealed bids for all 51 licenses on block A as a group. Then we would conduct oral auctions sequentially for individual MTA licenses on block A. The sealed bids would be opened only after the 51 oral auctions have been completed. If the winning nationwide (sealed) bid on block A is greater than the total of the winning regional (oral) bids for block A, all the licenses on block A would be awarded as a group. The same procedure would then be repeated for block B. We seek comment on this tentative proposal. We also seek comment on providing a second round of sealed bidding limited to the winners of the first round if combinatorial bidding is used. See *infra* at para. 60.

121. We sought comment above on our general proposals to disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minorities and women ("designated entities") in order to promote the objectives of Section 309(j)(4)(D). In the specific case of broadband PCS, we propose to set aside two blocks of spectrum nationwide, one of 20 MHz (Block C) and one of 10 MHz (Block D), in the broadband PCS service, reserved for bidding purposes to the designated entities. See PCS Report and Order, GEN Docket 90-314, 8 FCC Rcd ____ (1993). In this manner, the designated entities for which the Commission is required to ensure economic opportunity would only bid against one another for this service, and thereby be safeguarded from having to bid against other entities that, under Section 309(j)(4)(D), do not need special measures. In addition, we propose to allow the designated entities to use installment payment plans with interest for bids within the set-aside blocks.¹¹⁶ Because this proposal provides access to capital to facilitate bids for specific, set-aside blocks of PCS broadband spectrum, we believe it would ensure economic opportunity for the designated entities identified in Section 309(j)(4)(D). We seek specific comment on this proposal concerning the designated entities for broadband PCS. We also seek comment on whether to afford this installment plan preference to the designated entities when they bid for non-set-aside blocks of broadband PCS spectrum, and whether tax certificates should be provided to the designated entities that bid either within or without the set-aside spectrum blocks. Finally, we ask whether consortia that include among its members certain designated entities should be eligible for preferential measures when they bid for spectrum generally. If such consortia are eligible, we propose to make available the same investment incentives (e.g., deferred payment plan with interest) as would be available to other eligible designated entities.

122. In the case of narrowband PCS, we believe that our general scheme of preferential measures, discussed above, is appropriate. That is, because we expect to auction thousands of narrowband PCS licenses, we do not propose a specific block of spectrum set-aside for bidding purposes. Rather, we propose to allow all designated entities to use installment payments with interest for payment of their bids. We believe that this proposal would help ensure the economic opportunity of such entities to promote the objectives of Section 309(j)(4)(D). In addition, we seek comment on whether, and if so, how, we should apply tax certificates to the designated entities that seek to bid for narrowband PCS. We request comment on this proposal for

¹¹⁵ Should we be concerned, and if so to what extent, that combinatorial bidding to provide national service would result in anticompetitive behavior?

¹¹⁶ We propose to assess interest at the prime rate (as announced periodically in the Wall Street Journal) plus one percent under the installment plan for such designated entities. The rate could be fixed at the time the installment payment plan begins or could vary with the prime rate. Cf. 47 C.F.R. § 1.1940. A license would be conditioned on timely payment of these sums. Default would cause the license to cancel automatically and the spectrum would be subject to re-auction.

narrowband PCS.

123. We also seek comment on whether combinatorial bidding should be used to facilitate grouping of broadband PCS licenses with BTA service areas. Specifically we request comment on whether the Commission should accept sealed bids for all BTA licenses within each MTA and conduct oral auctions sequentially for individual BTA licenses. If a winning bid for all the licenses within a MTA is greater than the total of winning BTA bids, all the BTA licenses within the MTA would be awarded as a group. Commenters should address whether combinatorial bidding should be permitted on the two blocks we propose to set aside for designated groups. Allowing combinatorial bidding might, on the one hand, enhance the ability of the designated groups to compete with other licensees, but on the other hand, it might exclude participation by the individual small business applicants.

124. We also seek comment on the use of this approach to aggregate 10 MHz broadband PCS licenses into 20 MHz or 30 MHz blocks. Finally, we request comment on using this technique to permit aggregation across both geographic areas and spectrum blocks. For example, the Commission could accept a group bid on all BTA licenses on two 10 MHz spectrum blocks within each MTA.

125. We also propose that within each spectrum block we would auction the biggest markets first in both narrowband and broadband PCS. Auction winners of licenses for large cities might well seek to cluster smaller markets around a large market "hub" in order to achieve economies of scale and scope. We note that the cellular industry has generally developed in this manner, indicating that this may be an economical and efficient business strategy. We also seek comment on the sequence of auctioning PCS licenses across spectrum blocks.

126. We also plan to utilize our earlier proposal of 2 cents per pop per MHz for the upfront payment in both narrowband and broadband PCS auctions. By our calculation, for example, the upfront payment for a 50 KHz nationwide unpaired narrowband PCS license # would be approximately \$260,000 (260 million pops multiplied by 1/20 of a MHz multiplied by 2 cents).¹¹⁷

127. We have incorporated certain performance requirements into our requirements for licensees in both the narrowband and wideband PCS services with which auction winners will be required to comply. See generally, PCS Reports and Orders. As noted above, auction winners will, of course, also have to comply with restrictions on incumbents already promulgated in those dockets.

128. We propose that all PCS applicants seeking a license would file on FCC Form 574 if they wished to provide service that would not be classified as Commercial Mobile Service under our Section 332 Rule Making and on FCC Form 401 if they seek to provide Commercial Mobile Service. If they seek to provide both types of service, they should file both forms and pay both fees.¹¹⁸ For Commercial Mobile Service providers, we propose that the standard for

¹¹⁷ Pops would be determined based on 1990 Census data.

¹¹⁸ We propose to exempt from competitive bidding entities forcibly relocated by our orders in ET Docket No. 92-9: First Report and Order, 7 FCC Rcd 6886 (1992); Second Report and Order, FCC 93-350, released August 13, 1993; Second Report and Order, FCC 93-351, released August 15, 1993, in order to safeguard the public interest. The only reason these entities would fall under the statute's criteria for "initial licenses" is because they have been

filing FCC Form 401 be similar to the one applied to cellular applications for new stations proposing to provide service to Rural Service Areas (RSAs). Under this standard, applicants would be required to demonstrate that they have the available financial resources to meet the realistic and prudent estimated costs of constructing and operating their facilities for one year. The application of the RSA standard has provided the Commission with sufficient information to afford a preliminary determination regarding the applicant's general qualifications without imposing a disproportionate administrative burden upon either the applicant or the Commission's processing staff.¹¹⁹ In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45 and 22.917(f), and 22.918-22.945, 47 C.F.R. §§ 22.3-22.45 22.917(f), and 22.918-22.945. For those PCS applicants who file on Form 574, we believe that sections 90.113-90.159 of our rules, 47 C.F.R. §§ 90.113-90.159, could be used to process those applications with appropriate modifications. We seek comment on what those modifications should be.

129. We will shortly develop a PCS short form application/ transmittal sheet along with instructions on how and where to send the application along with the appropriate fee. We propose that for PCS applications, no modifications of any kind be permitted until after a winning bidder has emerged, and propose to charge a \$230 fee for commercial mobile service PCS applications and a \$35 fee for private mobile PCS applications.¹²⁰

130. Consistent with our general proposals discussed earlier, we would use competitive bidding where we receive two or more mutually exclusive PCS applications for the same frequency or frequency block in the same market (e.g., BTA, MTA). We further propose to utilize a one day filing window similar to the procedures used in other services such as the Cellular Radio service.¹²¹ The one day filing window has worked well in other services, has allowed the Commission to process large volumes of applications expeditiously and, at the same time, kept applicants' filing expenses to a minimum.

B. Private Radio Services.

Part 90 - Private Land Mobile Services.

131. The 220-222 MHz Land Mobile Systems (Subpart T of Part 90). The 220-222 MHz Land Mobile Systems licensed under Subpart T (hereafter 220 MHz) are a new service consisting of three categories of licensees: Commercial Nationwide providers, who we anticipate will provide service to subscribers for compensation; Noncommercial Nationwide providers, who we anticipate will provide service principally for internal use; and Local providers, who may do either. Although we might consider all 220 MHz licenses as a single class of service, we propose instead to subdivide them into several subservice categories, some of which would be eligible for competitive bidding.

forced to relocate. In fairness to such relocated licensees, we believe this proposed action is consistent with the requirement in Section 309(j)(3) that the Commission safeguard the public interest. We request comment on our tentative conclusion.

¹¹⁹ See 47 C.F.R. §§ 22.12 and 22.923.

¹²⁰ See 47 U.S.C. § 158(g).

¹²¹ See, e.g., First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 6185 (1991).

132. The 220 MHz Local licensees may, at their discretion, provide communications service either for internal purposes or to subscribers for compensation without seeking advance permission from the Commission. Because most such licensees have not begun providing service, it is too early to determine whether it is reasonably likely that 220 MHz Local licenses will be used primarily for the provision of service to subscribers for compensation.¹²²

133. For future reference, however, we request specific comment on whether it is reasonably likely that initial mutually exclusive applications for 220 MHz Local licenses generally should be subject to competitive bidding under the criteria in Section 309(j).¹²³ If the principal use of all 220 MHz licenses or 220 MHz Local licenses as a class is for the provision of service to subscribers for compensation, we might find that all mutually exclusive 220 MHz or all mutually exclusive 220 MHz Local applications (with the exception of those frequencies reserved exclusively for public safety purposes)¹²⁴ should be subject to competitive bidding.

134. For 220 MHz Noncommercial Nationwide systems, our rules require that these systems be used for the internal business communications of the licensee although they are permitted to make excess capacity available.¹²⁵ Therefore, because it is not "reasonably likely" for purposes of section 309(j) that the principal use of such licenses will involve the receipt of compensation from subscribers for communications services rendered, it appears that the 220 MHz Noncommercial Nationwide systems should not be subject to competitive bidding.

135. On the other hand, mutually exclusive applications for the 220 MHz Commercial Nationwide band are reasonably likely to involve primarily a subscriber-based service.¹²⁶

¹²² Although lotteries for the issuance of 220 MHz Local licenses and, as discussed below, Commercial Nationwide licenses have already been held and licenses are being issued, it is possible that some licenses may not be awarded or will be canceled. In that event, we do not wish to incur substantial delays while we determine on the applicability of Section 309(j) to this class of service before accepting applications for and granting additional 220 MHz licenses. It is because of the uncertainty with respect to how 220 MHz Local licensees will actually conduct their businesses that we have not proposed to use competitive bidding immediately to award these licenses. By contrast, unserved area cellular applicants will utilize their licenses in the provision of service to subscribers for compensation.

¹²³ Both those who seek to provide services to subscribers for compensation as well as those who would use these channels purely for internal purposes are eligible to apply for 220 MHz licenses. See 47 C.F.R. § 90.703. Certain 220 MHz frequencies are reserved for public safety eligibles. These frequencies would not appear to be subject to competitive bidding in any event because they would not be principally used for the provision of service to subscribers for compensation and are specifically referenced in the legislative history, discussed above, as providers of "private services" that should not be subject to competitive bidding under the subject statute. See 47 C.F.R. § 90.720.

¹²⁴ Under this scenario, frequencies reserved for public safety purposes would be "private" for purposes of applying Section 309(j) and therefore would not be subject to competitive bidding. *Id.*

¹²⁵ 8 FCC Rcd at 4161-4162.

¹²⁶ See note (122), *supra*.

Therefore, in the event the Commission is unable to complete licensing in the 220 MHz Commercial Nationwide band from among those applicants who had filed prior to the July 26, 1993 deadline established by Congress, we propose to subject any future mutually exclusive applications for the 220 MHz Commercial Nationwide licenses to competitive bidding. We seek comment on whether subjecting the 220 MHz Commercial Nationwide band to competitive bidding would promote the objectives of 47 U.S.C. § 309(j)(3). Consistent with our discussion of IVDS below, however, we believe that "private service" applicants that are mutually exclusive with subscriber-based applicants for the 220 MHz Commercial Nationwide band should be subject to competitive bidding because these frequencies have been designated for use principally to provide for-profit service to subscribers.¹²⁷

136. 800 MHz and 900 MHz Specialized Mobile Radio Systems (SMRs) (Subpart S of Part 90). SMRs are radio systems in which licensees provide private land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz bands for compensation to subscribers who are themselves eligible to be licensed under Part 90 of the Commission's Rules, Federal Government entities, and individuals.¹²⁸ They are currently classified under a separate subpart (Subpart S) of Part 90 of the Commission's Rules. Part 90, in turn, treats Private Land Mobile Radio Services (in the sense used by the Commission) generally. We believe that SMRs are different from most other licensees regulated under Part 90 because they are one of the few classes of licensees regulated by the Private Radio Bureau where it is explicitly contemplated and expected that licensees will provide service to subscribers for compensation.¹²⁹ We therefore analyze SMRs separately with respect to competitive bidding.

137. We believe it necessary to focus on the SMR industry now because it is an important industry that is currently undergoing significant change and development: the Commission has received many applications for wide area, high capacity SMR systems and is likely to receive more applications after the conclusion of certain ongoing Commission proceedings that could fundamentally alter the nature of the SMR regulatory climate.¹³⁰ Inasmuch as these decisions are imminent, it is imperative to the progress of the SMR industry that we determine quickly whether SMR licenses should be subject to competitive bidding.

138. Channels allotted for use by SMRs are intended to be used primarily for the purpose of offering service to subscribers.¹³¹ SMR licensees usually are authorized exclusive use of

¹²⁷ See Report and Order, Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 6 FCC Rcd 2356 (1991). See also discussion of Interactive Video and Data Service, supra.

¹²⁸ 47 C.F.R. § 90.15.

¹²⁹ See Subparts M and S, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988), recon. den., 4 FCC Rcd 356, 359 (1989).

¹³⁰ See, e.g., Notice of Proposed Rule Making, PR Docket No. 93-144, 8 FCC Rcd 3950 (1993); further Notice of Proposed Rule Making, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993). We will incorporate into the dockets of these proceedings any comments that are germane to competitive bidding.

¹³¹ See Memorandum and Opinion, Docket No. 18262, supra.

channels, and thus SMR licensing in these bands may involve mutually exclusive applications.¹³² Inasmuch as it is overwhelmingly likely that SMRs will provide service to subscribers for compensation, we propose to subject the 280 channel pairs at 800 MHz and the 200 channel pairs at 900 MHz available to SMRs under Part 90¹³³ of the Commission's Rules to competitive bidding.¹³⁴ We believe that applying a system of competitive bidding to SMRs would promote the objectives of Section 309(j)(3).¹³⁵

139. General Category Channels and Intercategory Sharing In addition to channels set aside for SMRs, a substantial number of frequencies at 800 MHz have been allocated to eligibles for their internal use. Of these channels, 150 channel pairs in the 800 MHz band may be licensed for internal "private service" use as well as for use by SMRs. These frequencies are commonly referred to as General Category channels. Similarly, both SMRs and entities that provide public safety and other "private services," within the meaning of Section 309(j), may, under some circumstances, access frequencies normally allocated to other classes of users through intercategory sharing.¹³⁶ Mutually exclusive applications from such entities could conceivably be accepted for filing because the subject spectrum is usable by both the providers of "private services" and SMRs.¹³⁷ The legislative history of Section 309(j) states that most "private services" should not be subject to competitive bidding. Therefore, we do not believe it was Congress's intent that General Category frequencies or frequencies subject to intercategory sharing be subject to competitive bidding.¹³⁸ Furthermore, because this spectrum is not allocated principally for subscriber-based services (unlike the 220 MHz Commercial Nationwide band), the result here is

¹³² We note that the current Commission practice of utilizing waiting lists for SMRs almost always avoids potential mutually exclusive conflicts between applications for SMRs. Because nothing in Section 309(j) requires us to discontinue practices that avoid mutual exclusivity, this Notice does not reach the issue of waiting lists for SMRs. See 47 U.S.C. § 309(j)(6)(E); see also H. R. Rep. No. 103-111 at 258-259. We note, however, that the Commission has proposed to eliminate waiting lists in a separate proceeding. See Notice of Proposed Rule Making, PR Docket 93-144, 8 FCC Rcd 3950, para. 34 (1993).

¹³³ 47 C.F.R. § 90.617(d).

¹³⁴ We note that in PR Docket Nos. 93-144 and 89-553, we proposed changes that will increase the potential for mutually exclusive applications. In addition, we propose new types of licenses operating on SMR frequencies that, under Section 309(j) appear to be subject to competitive bidding. We request commenters to address whether a system of competitive bidding should be used to license wide-area SMRs in the 800 MHz and 900 MHz bands, and if so, how particular auction rules should be applied to those services.

¹³⁵ See para. 12. See also, e.g., discussion of PCS, *supra*. We tentatively conclude that this analysis is applicable to the wide-area SMR systems proposed in PR Docket Nos. 93-144 and 89-553. We request specific comment on this conclusion that will be incorporated into the dockets of those proceedings.

¹³⁶ See, e.g., 47 C.F.R. §§ 90.179 and 90.603 (eligibility of non-SMR Part 90 eligibles for licensing in the 806-824/851-869 MHz and 896-901/935-940 MHz bands); 47 C.F.R. § 90.621(g) (intercategory sharing of frequencies in the 806-821/851-866 MHz bands).

¹³⁷ In our experience, however, this has been a rare occurrence.

¹³⁸ H.R. Rep. No. 103-111 at 254.

distinguishable from the approach taken with some other services. In addition, we seek specific comment on whether competitive bidding should apply to mutually exclusive "finder's preference" applications.¹³⁹

140. We also believe that requiring competitive bidding for all 800 MHz frequencies that could conceivably be used by SMRs through intercategory sharing or for all General Category channels would disserve the public interest. Such a result could see police departments, for example, having to bid against SMRs for access to 800 MHz frequencies. We do not believe that Congress contemplated this result. See H.R. Rep. No. 103-111 at 254. In addition, Section 309(j) requires the Commission to include safeguards to protect the public interest when identifying classes of licensees that are to be subject to competitive bidding.¹⁴⁰ Therefore, where licensees who use their spectrum for private purposes and SMRs are both authorized to operate in certain segments of the 800 MHz band (either by applying for General Category frequencies or through intercategory sharing), we think that Section 309(j) contemplates the exclusion of those frequencies from competitive bidding in order to safeguard the public interest. Accordingly, we propose that, where mutually exclusive applications are accepted for filing from an SMR and a provider of private services, within the meaning of Section 309(j), lotteries, rather than competitive bidding, would apply.

141. As discussed above, Section 309(j)(4)(D) directs the Commission to ensure that certain designated entities are ensured the opportunity to participate in the provision of spectrum under a system of competitive bidding. In the context of 800 MHz and 900 MHz SMRs, we propose to apply the general scheme of preferences discussed above for services other than broadband PCS. We request that commenters specifically address such proposals in the specific context of SMRs. In addition, commenters should also specifically address our proposed auction methodologies in the context of SMRs.¹⁴¹

¹³⁹ See 47 C.F.R. § 90.611(d). Under those rules, members of the public may submit to the Commission information that results in the takeback of SMR channels. Should those channels be taken back, the finder receives a dispositive preference with respect to those channels. We tentatively conclude that since a successful finder's preference is dispositive, there is no mutual exclusivity between the finder and the existing licensee and thus competitive bidding is inapplicable. We request comment, however, on the use of competitive bidding to resolve two or more finder's preference requests for the same channel or channels. We believe that our analysis for General Category frequencies and intercategory sharing would also apply to finder's preference applicants that operate in such spectrum (e.g., if a public safety entity is one of two or more finder's preference requests for the same channel or channels, then under the above analysis the conflict (assuming *arguendo* that such a conflict would constitute mutual exclusivity) would be resolved by lottery rather than auction).

¹⁴⁰ 47 U.S.C. § 309(j)(3).

¹⁴¹ Because we tentatively conclude that our analysis for SMRs would apply to the wide-area SMRs proposed in PR Docket Nos. 93-144 and 89-553, commenters should also specifically address preferential measures and auction methodologies for the proposed systems that would be incorporated into the dockets of such proceedings.

Part 95 - Personal Radio Services.

142. Interactive Video and Data Service (IVDS) (Subpart F of Part 95). IVDS is a new radio service that provides the capability for two-way interaction with commercial and educational television programming as well as with informational and data services that may be delivered by broadcast television, cable television, wireless cable, direct broadcast satellite, or any future television or data delivery methods. The IVDS licensee is, therefore, a private short distance communications service provider for subscribers located at fixed locations in a service area.¹⁴²

143. Under the IVDS rules, only two IVDS licensees may serve a particular service area or market.¹⁴³ The use of the IVDS spectrum may involve mutually exclusive applications because an IVDS licensee is assigned the exclusive right to use one specific frequency segment in a particular market.¹⁴⁴ Because IVDS was expressly established as a subscriber-based commercial service,¹⁴⁵ the principal use of IVDS-allocated spectrum is reasonably likely to involve the licensee receiving compensation from subscribers for communications services.¹⁴⁶ Therefore, as a subscriber-based commercial service, IVDS is not a "private" service within the meaning of Section 309(j). While governmental and educational entities are eligible under the IVDS rules and policies,¹⁴⁷ their participation as licensees does not affect the substantive pecuniary character of the service.¹⁴⁸ When Congress enacted the exception that permits lotteries for applications accepted for filing prior to July 26, 1993, the legislative history stated that this provision was

¹⁴² 47 C.F.R. § 95.803(a).

¹⁴³ 47 C.F.R. § 95.803(b).

¹⁴⁴ In response to the opening of three filing windows for nine service areas, we received approximately 4,100 IVDS applications for licenses.

¹⁴⁵ See 47 C.F.R. §§ 95.803(a) and 95.805(d). See also Report and Order, GEN Docket 91-2, 7 FCC Rcd 1630 (1992).

¹⁴⁶ See, e.g., 47 C.F.R. § 95.805(d) (noting that "[t]he licensee may use the IVDS system to interact with its subscribers concerning products and services offered, polls conducted, educational classes taught, and other activities in conjunction with video and data delivery systems.") (Emphasis added).

¹⁴⁷ See Second Memorandum Opinion and Order, PR Docket 91-2, 8 FCC Rcd 2787 (1993) (clarifying that governmental and educational entities are eligible for IVDS licenses).

¹⁴⁸ The eligibility of governmental and educational entities for IVDS is analogous to the ability of such entities to invest in other commercial ventures, such as real estate or the stock market. The participation of such entities in a commercial venture does not transform the substantive character of the commercial venture. With this in mind, we note that Congress rejected a provision in the Senate Bill that would have exempted state and local governmental entities from competitive bidding generally. See Conf. Rep. at 481. Therefore, we do not believe that Congress intended to exempt any IVDS licensees from competitive bidding on the basis of such status.

enacted in order to allow the first nine IVDS markets to go to lottery.¹⁴⁹ Congress thus clearly envisioned that, absent the exception for grandfathered IVDS applicants, competitive bidding would apply to IVDS. Consistent with this evidence of Congressional intent, we also believe that applying a system of competitive bidding to IVDS would promote the objectives described in 47 U.S.C. § 309(j)(3). Accordingly, we propose to subject IVDS to competitive bidding.^{150 151}

144. In addition, in order to ensure that certain designated entities are ensured the opportunity to participate in the provision of IVDS spectrum under a system of competitive bidding, we propose to apply the general scheme of preferences discussed above for services other than broadband PCS. Commenters should specifically address such proposals discussed above in the specific context of IVDS. Further, commenters should also specifically address our proposed auction methodologies in the context of IVDS.

Other Private Radio Services or Subservice Categories.

145. Although not as pressing as with SMRs and IVDS, we seek service-specific comments concerning whether mutually exclusive applications seeking to provide service to subscribers for compensation in the following private radio services or subservice classifications should be subject to competitive bidding under Section 309(j). Comments that narrowly focus on this issue may serve as a record for future Commission actions concerning the application of competitive bidding to such services. These private radio services would include the following:

¹⁴⁹ See Conference Report at 498 (stating that the exception that allows the Commission to proceed with a system of random selection for applications accepted for filing prior to July 26, 1993, was enacted to "permit the Commission to conduct lotteries for the nine [IVDS] markets for which applications have already been accepted").

¹⁵⁰ This proposal does not apply to the first nine IVDS markets. Applications for the first nine IVDS markets were accepted for filing prior to July 26, 1993, and the Commission conducted a lottery for those markets on September 15, 1993.

¹⁵¹ In light of the above analysis, we propose that because it is "reasonably likely" that IVDS would involve licensees providing communications services to subscribers for Section 309(j)(A) purposes, IVDS would be subject to competitive bidding even if some individual licensees, at their option, choose not to receive compensation from their own subscribers.

(1) Private Carrier Paging,¹⁵² (2) Automatic Vehicle Monitoring¹⁵³ (3) Public Coast and Alaska-Public Fixed Stations, (4) Aeronautical En Route and Fixed Stations, (5) Private Land Mobile Radio Service (PLMRS) entities operating at 470-512 MHz,¹⁵⁴ and (6) the following Private Operational-Fixed Microwave Services: (a) the Multiple Address Service, (b) Digital Termination Systems, (c) 18 GHz Video Entertainment Channels, and (d) the Digital Message service. We request comment on whether other private radio services or categories of services should be subject to competitive bidding.

146. In addition, we propose to exclude all other private radio services from competitive bidding because they do not meet the criteria established by Section 309(j). Because aircraft and ship radio stations, for example, operate on shared spectrum, there can be no mutual exclusivity. Similarly, private land mobile stations below 800 MHz operate on shared spectrum as well.¹⁵⁵ Therefore, we propose to also exclude such private land mobile spectrum as well as aircraft and ship stations from competitive bidding. The classes of services that would be excluded from competitive bidding under our proposal because, *inter alia*, they do not appear to be primarily providers of communications services to subscribers appears to include: (1) Microwave Stations

¹⁵² As a subscriber-based service, PCP appears to meet the statutory criteria for competitive bidding. At present, however, PCP frequencies are assigned on a non-exclusive basis, and therefore do not give rise to mutually exclusive applications. We nevertheless seek comment on whether competitive bidding could be required in the future if we end non-exclusive assignment of PCP frequencies. In a pending proceeding, we have proposed to allow exclusive frequency assignments for qualified systems on 35 of the 40 private paging frequencies at 929-930 MHz. See Notice of Proposed Rule Making, PR Docket No. 93-35, 8 FCC Rcd 2227 (1993). With this in mind, we tentatively conclude that if mutually exclusive applications occur, we would use competitive bidding to select a licensee. We seek comment on what procedures would best facilitate the licensing process.

¹⁵³ We will delay action on the applicability of competitive bidding to this service because certain fundamental questions about the nature of this service are now being considered in a separate proceeding. See Notice of Proposed Rule Making, Amendment of Part 90 of the Commission's Rules to Adopt Regulations for the Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, 8 FCC Rcd 2502 (1993). A decision on some of these issues (e.g., whether exclusive AVM channels will be prescribed) could moot the issue of whether these channels should be subject to competitive bidding. In addition, it appears that because AVM frequencies are shared with the government, which is primary in this band, the principal use of these frequencies might not be for the provision of service to subscribers for compensation, as contemplated by Section 309(j). We request comment on our tentative conclusion.

¹⁵⁴ Mutually exclusive applications by entities offering service to subscribers for compensation could occur because assignments in this band can be exclusive. Because the primary use of these frequencies at 470-512 MHz is by licensees who must share them, we do not believe that this band would be primarily used for the provision of service to subscribers. Cf. Notice of Proposed Rule Making, PR Docket No. 92-235, 7 FCC Rcd 8105 ("Refarming") (1992). We request comment on our tentative conclusion.

¹⁵⁵ As noted above, however, a limited number of private land mobile radio licensees at 470-512 MHz have achieved channel exclusivity by loading sufficient mobiles on their channels.