

in the POFS not referenced above,¹⁵⁶ (2) Alaska-Private Fixed Stations, (3) the Citizens Band Service, (4) the Radio Control Service, (5) the General Mobile Radio Service, (6) the Amateur Radio Service, (7) the following Marine Stations: a) Marine Support Stations, (b) Marine Operational Fixed Stations, (c) Marine Stations in the Radiodetermination Service, (8) Non-SMR licensees above 800 MHz,¹⁵⁷ (9) Multiple Licensed Systems below 800 MHz, (10) PLMRS under 470 MHz,¹⁵⁸ and (11) the following aviation stations: (a) Flight Test Stations, (b) Aviation Support Stations, (c) Aeronautical Utility Mobile Stations, (d) Aeronautical Search and Rescue Stations, (e) Emergency Aviation Communications, (f) Airport Control Tower Stations, (g) Aviation and Marine Operational Fixed Stations, (h) Aviation and Marine Stations in the Radiodetermination Service, (i) Civil Air Patrol Stations, (j) Aeronautical Automatic Weather Observation Stations, (k) Aeronautical Advisory Stations (Unicom), and (l) Aeronautical Multicom Stations. We seek comment on whether any of the above services or classes of service¹⁵⁹ are more appropriately included in the competitive bidding process, however.

C. Common Carrier Radio Services

147. We propose to subject each of the common carrier radio services described below to competitive bidding and to employ the auction design procedures proposed in Part III above

¹⁵⁶ We note that in this service's spectrum, there could be both service to subscribers for compensation as well as "private" use (within the meaning of the legislative history of Section 309(j)). In our analysis of 800 MHz General Category channels, we tentatively decided to exclude those channels from competitive bidding because to do so would be contrary to Congress's expectations that virtually all private services would continue to be licensed as before. Therefore, we propose that POFS spectrum would not be subject to competitive bidding. We also believe that the POFS is exempt from competitive bidding because the principal use of the spectrum is for non-subscriber services. We seek specific comment on these matters. There are also a substantial number of mutually exclusive Multiple Address Service applications pending before the Commission which were filed prior to July 26, 1993. A substantial number of these applications were filed by federal government applicants as well as by applicants who would use these frequencies for "private service." Because we cannot be certain that the principal use of these frequencies is reasonably likely to involve the provision of service to subscribers, we tentatively conclude that these particular applications should not be subject to competitive bidding but request comment on our conclusion.

¹⁵⁷ Because our rules only permit not-for-profit cooperative sharing, as, for example, when several power companies share a single 800 MHz trunked system in the Power Radio Service, it appears that such systems do not have subscribers and are ineligible for competitive bidding under Section 309(j). Therefore, these types of frequencies, although exclusively assigned, should not be subject to competitive bidding. See 47 C.F.R. § 90.179, In re Subparts M and S, PR Docket No. 86-404, *supra*. We request comment on our tentative conclusion.

¹⁵⁸ PLMRS entities operating below 470 MHz (with the exception of 220 MHz providers, which are treated separately above) operate on shared spectrum, and therefore, there can be no mutual exclusivity among applications.

¹⁵⁹ We also note that in the majority of cases, the listed stations operate on shared spectrum, and therefore there can be no mutual exclusivity.

in licensing those services.¹⁶⁰ In each case, we believe that a competitive bidding system would promote the objectives of Section 309(j) of the Communications Act. We request that parties provide comment on whether each of these services should be subject to competitive bidding, specifically explaining the reasons for their conclusions with respect to each service. In addition, parties should address the merits of using the general auction procedures proposed in Part III to license each service. We also request parties to comment, on a service-specific basis, on whether other common carrier radio services should be subject to competitive bidding according to the Budget Act's criteria.

148. Multipoint Distribution Service (MDS). MDS is a one-way domestic public radio service rendered on microwave frequencies from a fixed station transmitting (usually in an omnidirectional pattern) to multiple receiving facilities located at fixed points. MDS includes both single-channel and multichannel stations.¹⁶¹

149. We note that MDS applications were accepted for filing prior to July 26, 1993. Therefore, under the Budget Act, such mutually exclusive applications may be resolved by lottery rather than auction. We tentatively conclude that it would better serve the public interest to lottery, the pre-July 26, 1993, MDS applications rather than subject them to competitive bidding to avoid further delay in granting MDS licenses. Those applications have already incurred substantial delays. To auction those licenses would further delay delivery of MDS service to the public because the auction rules will not be in effect for several months. We request comment on whether the Commission should auction, rather than lottery, the MDS applications accepted for filing prior to July 26, 1993.

150. Multichannel Multipoint Distribution Service (MMDS). MMDS consists of those multipoint distribution service channels that use the frequency band 2596 MHz to 2644 MHz (E-group and F-group channels) and associated response channels. MMDS is typically used to provide video entertainment programming to subscribers.¹⁶² See note 5, *supra*.

151. We note that a significant number of MMDS applications were accepted for filing prior to July 26, 1993. Therefore, under the Budget Act, such mutually exclusive applications may be resolved by lottery rather than auction. We tentatively conclude that it would better serve the public interest to lottery the pre-July 26, 1993, MMDS applications, rather than subject them to competitive bidding to avoid further delay in granting MMDS licenses. Those applications already were subject to a freeze, and thus delayed. To auction those licenses would further delay delivery of MMDS service to the public because the auction rules will not be in effect for several months. We request comment on whether the Commission should auction, rather than lottery, the MMDS applications accepted for filing prior to July 26, 1993.

152. Local Multipoint Distribution Service (LMDS). LMDS is a proposed new service in a portion of the Ka-band (27.5-30.0 GHz) to provide a wide array of broadband terrestrial

¹⁶⁰ We recognize that some licensees in these services are permitted to operate on a non-common carrier basis. See, e.g., 47 C.F.R. § 21.900. Nevertheless, all initial applications in such services that satisfy the Budget Act's competitive bidding criteria would be subject to auctions.

¹⁶¹ See 47 C.F.R. §§ 21.900-21.915 of the Commission's Rules concerning Multipoint Distribution Service.

¹⁶² See *id.*

services, including multipoint video programming distribution, video telecommunications, and data services.¹⁶³

153. Fixed Satellite Services. The fixed-satellite service uses radio transmissions between authorized satellite space stations and fixed earth stations for common carrier and non-common carrier communications.¹⁶⁴

154. Mobile Satellite Service (MSS) Above 1 GHz. MSS consists of proposed satellite systems that will offer a range of voice and data mobile services in the 1610-1626.5/ 2483.5-2500 MHz (1.6/2.4 GHz) frequency bands. These services include two-way messaging service with interconnection to the public switched network, paging, facsimile and data messaging, and fleet surveillance and control services.

155. We note that a significant number of MSS applications above 1 GHz were accepted for filing prior to July 26, 1993. Therefore, under the Budget Act, such mutually exclusive applications may be resolved by either auction or lottery. We request comment on whether the Commission should auction, rather than lottery, the MSS applications accepted for filing prior to July 26, 1993.

156. Mobile Satellite Service (MSS) Below 1 GHz. MSS below 1 GHz includes non-voice, non-geo-stationary (NVNG) service. The NVNG service will offer an array of position location and data communication mobile satellite services utilizing non-geostationary satellite constellations. While current NVNG applications do not appear to be mutually exclusive, it is possible that mutually exclusive applications may be filed in the future. In the event that mutually exclusive applications are filed, we propose to subject the NVNG service to competitive bidding.

157. Point-to-Point Microwave Radio Service. Point-to-point microwave radio is a domestic public radio service rendered on microwave frequencies by fixed stations between points that lie within the United States, or between points to its possessions, or to points in Canada or Mexico. Point-to-point microwave has traditionally been used for basic telephone network services (voice, data, and video traffic), but more recently has often been used to interconnect cells of a cellular system.¹⁶⁵

158. Cellular Services. Cellular services, which are governed under Part 22 of the Commissions Rules, operate by dividing a large geographical service area into cells and assigning the same frequencies to multiple, nonadjacent cells. As a subscriber travels across the service area the call is transferred from one cell to another without noticeable interruption. Each cell is served by its own radio telephone and control equipment at a cell-site. All the cells in a system are connected to a Mobile Telephone Switching Office (MTSO) which, in turn, controls the switching between the Public Switched Telephone Network (PSTN) and the cell site.

¹⁶³ See Rule Making to Amend Parts 1 and 22 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, CC Docket No. 92-297, 8 FCC Rcd 557 (1993).

¹⁶⁴ See 47 C.F.R. Part 25 of the Commission's Rules concerning Satellite Communications.

¹⁶⁵ See 47 C.F.R. §§ 21.700-21.711 of the Commission's Rules concerning the Point-to-Point Microwave Radio Service.

159. The U.S. and its possessions were divided into 734 cellular markets: 305 Metropolitan Statistical Areas (MSAs), 428 Rural Service Areas (RSAs), and the Gulf of Mexico Statistical Area (GMSA). Two cellular systems are licensed in each market on separate frequency blocks. Each initial cellular licensee in the MSAs and RSAs was given five years from the date of initial authorization to build and expand its system within its market.¹⁶⁶ The geographic area not covered by the licensee on each frequency block in each market is considered "unserved area." The Commission recently completed rules for accepting and processing applications for these unserved areas.¹⁶⁷

160. Approximately 10,000 unserved area applications were filed between March 10 and May 12, 1993; of these, approximately 9,000 mutually exclusive applications were filed for 83 systems.¹⁶⁸ Given the large number of applications filed prior to July 26, 1993 and the criteria described in Section 309(j), the Commission has the option of allowing these unserved area applications to be resolved by auction rather than by lottery. See Section 6002(c) (Special Rule). We believe that auctions for these pending applications would meet the statutory objectives. For example, the rapid deployment of new service, especially to rural areas, would be accomplished because insincere applicants who do not intend to build out their proposed systems but, rather, assign their authorization for profit, would be discouraged from competing in an auction. In addition, under some of the auction procedures proposed herein, auctions would provide more opportunity for a wider variety of applicants to become cellular licensees. Thus, we propose to auction, rather than lottery, unserved area applications filed prior to July 26, 1993 and seek comment on this proposal. We further propose to limit the opportunity to enter the auction for the unserved areas to those applicants who filed prior to July 26, 1993, and request comment on this approach. We also ask whether the Commission should allow full market settlements in these markets pending the decision of lottery or auction.¹⁶⁹

161. Public Paging Services. Public paging services are radio services in which common carriers are authorized to offer and provide paging service for hire to the general public. Paging service is the transmission of brief coded radio signals for the purpose of activating specific pagers; such transmissions may include brief messages and/or sounds.¹⁷⁰

162. Air-Ground Services. Air-ground services are radio services in which common carriers are authorized to offer and provide radio telecommunications services for hire to

¹⁶⁶ Rules for Rural Cellular Service, Second Report and Order, 2 FCC Rcd 2306 (1987), recon., 4 FCC Rcd 5377 (1989).

¹⁶⁷ Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing Applications for Unserved Areas in the Cellular Service, 6 FCC Rcd 6185 (1991), Second Report and Order, 7 FCC Rcd 2449 (1992), Third Report and Order, 7 FCC Rcd 7183 (1992), recon., 8 FCC Rcd 947 (1993).

¹⁶⁸ The Commission had scheduled two lotteries for some of these applications but subsequently postponed them pending evaluation of the provisions of the Budget Act and competitive bidding. See Lottery Notice, Mimeo No. 34917, Sept. 16, 1993.

¹⁶⁹ See discussion of prohibition of collusion, *supra*, at paras. 93-94.

¹⁷⁰ See 47 C.F.R. §§ 22.500-22.527 of the Commission's Rules governing Public Land Mobile Service.

subscribers in aircraft.¹⁷¹

163. **Public Radiotelephone Services.** Public radiotelephone services are radio services in which common carriers are authorized to offer and provide radiotelephone service for hire to the general public. Radiotelephone service generally is the transmission of sound from one place to another by means of radio, but in this context it refers to interconnection with the public telephone network in order to provide mobile telephone service. Common carrier radiotelephone services are either manual (operator assisted -- provided in the high VHF 152-159 MHz spectrum) or automatic trunked (user-dialed -- provided in the low UHF 454-459 MHz spectrum). The latter is sometimes called Improved Mobile Telephone Service or IMTS.¹⁷²

164. **Offshore Services.** Offshore services are radio services in which common carriers are authorized to offer and provide radio telecommunication services for hire to subscribers on structures in the offshore coastal waters of the Gulf of Mexico.¹⁷³

165. **Rural Radio Services, including Basic Exchange Telephone Radio Systems (BETRS).** Rural services are radio services in which common carriers are authorized to offer and provide radio telecommunication services for hire to subscribers in areas where it is not feasible to provide communication services by wire or other means. Rural services are either conventional rural radio services (provided in the VHF and UHF mobile spectrum), in which subscribers are essentially allowed to install and operate mobile telephone equipment at a fixed location for the purpose of obtaining interconnected service, or Basic Exchange Telephone Radio Systems (BETRS), in which a multiplexed digital radio link is used as the last segment of the local loop.¹⁷⁴

166. We seek comment on whether each of the radio services described above satisfies the criteria of the Budget Act for services subject to competitive bidding,¹⁷⁵ and whether competitive bidding for these services would promote the objectives specified in section 309(j)(3) of the Act.¹⁷⁶ We also seek comment on whether any safeguards to protect the public interest in the use of the spectrum would be appropriate with respect to particular services.¹⁷⁷

¹⁷¹ See 47 C.F.R. §§ 22.1100-22.1121 of the Commission's Rules on 800 MHz Air-Ground Radiotelephone Service. See also 47 C.F.R. §§ 22.521-22.523 of the Commission's Rules governing 454-459 MHz air-ground stations.

¹⁷² See 47 C.F.R. §§ 22.500-22.527 of the Commission's Rules concerning Public Land Mobile Service.

¹⁷³ See 47 C.F.R. §§ 22.1000-22.1008 of the Commission's Rules concerning Offshore Radio Service Telecommunications Service.

¹⁷⁴ See 47 C.F.R. §§ 22.600-22.610. Although we do not anticipate mutually exclusive applications for BETRS, provision of which is limited to local exchange carriers, BETRS uses the same channels as paging services, and therefore, there may be mutually exclusive applications seeking to use spectrum for both BETRS and paging.

¹⁷⁵ See para. 2, *supra*.

¹⁷⁶ See para. 3, *supra*.

¹⁷⁷ See para. 4, *supra*, and Section 309(j)(3).

V. Summary of Proposed Auction Procedures

167. We sketch out below how either an oral or a sealed bid auction might be conducted and seek comment on our proposed procedures. We anticipate that the Commission will engage an outside consultant or consultants to help the Commission conduct the auction process. These persons, who together with required Commission staff (hereinafter jointly referred to as the "Responsible Officials"), would prepare a Public Notice or Notices that would announce the particulars of upcoming auctions. We propose that there be a minimum of 90 days notice of each such auction.¹⁷⁸ The Public Notice would set forth what is to be auctioned, the time, place, and kind (e.g., oral vs. sealed bid) of auction that is to be held, the deposit requirements for that auction or auctions, including the amount of the upfront payment that the bidder must tender in advance to the Commission or bring with him or her to the auction to be allowed to bid, the address to which the application and related materials (including the sealed bid if the auction is a sealed bid auction) should be sent, as well as other identifying documents, the deadline for submission of applications, and any other relevant information.

168. At the same time that the Responsible Officials announce an upcoming filing window for an auction service by Public Notice, they would also indicate the availability of a bid package to interested parties. The bid package would identify the specific steps to be taken if the recipient wished to participate in the upcoming auction, including the filing of short-form and long-form applications with the Commission.¹⁷⁹ If the recipient wished to apply and participate in the auction, we propose that it file the applications (and any applicable fee) as provided in the Public Notice and register to bid at the same time by including written notice of the recipient's intention to bid. The short and long form applications and a proposed Notice of Intention to Bid (NIB)¹⁸⁰ would be sent to an address designated by the Responsible Officials to be received no later than a date indicated in the announcement.¹⁸¹ We propose that date would be at least 60 days prior to the auction date.

169. The NIB should indicate clearly on the top of the first page the auction to which the NIB relates. As suggested above, we propose that only one sealed bid per bidding party would

¹⁷⁸ 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 absolute minimum necessary notice of an upcoming auction.

¹⁷⁹ We seek comment on whether the burden of storing applications might make it appropriate to require long-form applications to be filed on microfiche, as is done in the case of cellular applications.

¹⁸⁰ We propose to permit applicants to submit NIBs in letter form pending adoption and approval of the new form.

¹⁸¹ Applications and NIBs that were received after the deadline would be returned.

be allowed in a sealed bid auction,¹⁸² and each auction should have a separate sealed bid.¹⁸³ As part of the NIB, the prospective bidder would also provide to the Responsible Officials the name of the person who will be bidding on behalf of the applicant, if the applicant did not intend to bid personally.¹⁸⁴

170. The Responsible Officials would review the short-form application and associated documents to ensure that the application was acceptable for filing.¹⁸⁵ Application fee checks would be deposited immediately. We would use existing rules to determine whether to return fees in the event that applications are not acceptable for filing.¹⁸⁶

171. If the Responsible Officials determine after review of the short-form applications that more than one application is acceptable for filing and the prospective bidders are qualified to bid, they would so announce in a Public Notice issued at least 45 days prior to the auction.¹⁸⁷

¹⁸² We propose that anyone found to have submitted more than one bid for a single sealed bid auction be immediately disqualified from that auction and possibly from all future auctions as well. We request comment on this prophylactic measure.

¹⁸³ In the case of a group bid, of course, there could be more than one bid per auction: the group bid and a single sealed or oral bid for each individual license on which the bidder wished to bid.

¹⁸⁴ We propose that information on the identity of the bidder's agents not be made routinely available to the public. See 47 C.F.R. § 0.457(d). Some bidders' strategies may depend on bidding through different agents in different auctions.

¹⁸⁵ We have proposed that short-form applications be required to meet a letter-perfect standard in order to be accepted for filing and qualify the applicant to bid. We recognize that applicants may petition the staff for reconsideration and subsequently seek review of any action returning an application as not acceptable for filing. We propose to rule on all petitions for reconsideration prior to the relevant auction. In the event that the staff's denial of a petition is appealed, unless the full Commission has denied the appeal, the appellant will be permitted to participate conditionally in the auction. If the staff grants a petition for reconsideration, the applicant may participate notwithstanding a pending application for review filed by any other person. We propose to err on the side of leniency and allow, so much as possible, potential bidders to bid. If and when that bidder should win the auction, however, its application would be subject to further Commission review and perhaps to petitions to deny as well. Since we plan to keep the bidder's deposit if the petition to deny is successful or the winning bidder is otherwise found to be unqualified, the incidence of frivolous or ill-considered applications should be minimized. We request comment on this procedure and on any alternative procedures we might use when decisions concerning acceptability of applications are challenged.

¹⁸⁶ See 47 C.F.R. § 1.1101, *et. seq.*, and n. 90, *infra*.

¹⁸⁷ This would provide parties whose applications were not accepted for filing 30 days to file petitions for reconsideration and provide time for these petitions to be processed prior to the auction. We seek comment on whether, in the context of auctions only, we should shorten from 30 to 15 days the period within which such petitions for reconsideration may be filed. If we were to do so, then we would propose to announce auctions 75 days in advance, require applications to be submitted 45 days in advance, and issue the Public Notice listing qualified bidders 30 days in advance. Cf. paras. 167-169 and note 185, *infra*. If only one or no

The Responsible Officials might hold a preauction conference (at which bidder attendance would be voluntary) if they deemed it necessary. On the day of the auction, the bidder or its agent(s)¹⁸⁸ would appear at the auction room at least two hours prior to the auction, exhibit the applicant's notice from the Commission that its application is acceptable for filing and provide photographic identification of the party that will actually be bidding. If satisfied, the Responsible Officials would allow the bidders to enter that section of the auction room reserved for prequalified bidders.¹⁸⁹ Those bidders and those bidders only would receive a bidding paddle so that they could bid.

172. The Responsible Officials would conduct an oral auction in accordance with the procedures proposed earlier. The auction would be videotaped and open to the public, although only prequalified bidders could bid. Under our preferred option, bidders would have already tendered their upfront payments to the Commission. If, however, we do not require bidders to tender their upfront payments in advance, the high bidder would be required to turn over its upfront payment immediately after determination of the high bid for that particular license. # If the Commission concludes that it is appropriate and practical to require immediate tender of an additional payment equal to the difference between 20 percent of the high bid and the upfront payment, the Responsible Officials would collect that payment, declare the high bidder the auction winner, and conclude the auction. We seek comment on the appropriate form of the additional payment. It should be in a form that is quickly transferrable and of high reliability (e.g., an additional cashier's check or checks, or perhaps, in the future, an electronic funds transfer). Failure to provide the full deposit at the auction would result in dismissal of the winner's relevant application(s) and the auctioneer would reopen the bidding to all remaining auction participants. The high bidder determined by this process who tenders the requisite upfront and deposit payments is the auction winner. The winner's payment(s) made at the auction would be immediately deposited. Once the winner's deposit has been verified, the Commission would then refund (without interest) the upfront payments of the other bidders. The Commission would then issue a Public Notice announcing the winner(s) of the auction(s) and would send a letter to the winner announcing its status as tentative winner of the license.

173. A sealed bid auction would function similarly to the oral bidding process described above with the following differences. First, a sealed bid envelope submitted shortly before the auction would contain a written statement of the amount bid for that auction. See para. 108,

applications are acceptable for filing, the auction would be cancelled, absent a subsequent reconsideration action; see note 91, *infra*.

¹⁸⁸ We envision, and propose, that bidders be allowed to bid through multiple bidding agents, although only one agent may bid for a single bidder in each auction. Each bidder or its agent, however, and his or her associated bid, if a sealed bid auction, must have been qualified by the Responsible Officials.

¹⁸⁹ Although our preferred option, as described in paras. 102-109, is for bidders to tender their upfront payments in advance to the Commission, we also seek comment on only requiring bidders to exhibit their upfront payment cashier's checks when they arrive for the auction. Should we adopt this procedure, the Responsible Officials would examine but not collect the upfront payment checks prior to admitting bidders to the auction premises. Because validation of the upfront payment is a critical step in the bidding process, we propose to employ third party auditors to verify the fairness and accuracy of this process, at least in the beginning. If these upfront payments were received and deposited earlier, there would be no need to show these checks.

infra, where we propose to require submission of bids five days prior to the auction. We seek comment on where the sealed bid envelopes should be kept prior to the auction. Second, on the day of the auction, instead of having oral bids, the auctioneer would open the sealed envelopes in public, with the entire proceeding videotaped. Prior to the opening of any bids, bidders would have the opportunity to withdraw from the auction without penalty. At least two witnesses would observe the auctioneer opening the bid envelopes and would verify the amount of the various bids, all of which would be posted publicly.¹⁹⁰ The auctioneer would announce the name of the high bidder and the amount bid. At that point, the high bidder would have to tender its 20 percent deposit to the Commission,¹⁹¹ or suffer dismissal, in which case the Commission would keep the high bidder's upfront payment if it had already been tendered and select the second highest bidder.¹⁹²

174. The Commission would then review the entire application submitted by the auction winner. The application will be processed in accordance with normal rules applicable to the service under which the application was filed.¹⁹³ These would include, where applicable, the filing of petitions to deny against the auction winner.¹⁹⁴ As noted above, if the Commission were unable to grant the auction winner's application, the government would nonetheless retain the winner's deposit.

175. If the Commission granted the application, the grant would be conditioned upon the winning bidder providing, within a short period, such as 41 days,¹⁹⁵ a payment, via cashier's check¹⁹⁶ in an amount equal to the difference between the winning bid and the deposit.¹⁹⁷ Failure to comply with this deadline would result in automatic dismissal of the application with loss of

¹⁹⁰ As an alternative, we seek comment on whether to disclose only the two highest bids outstanding at any given time.

¹⁹¹ As described above, under our preferred option, bidders would have already tendered an upfront payment to the Commission, so the payment due from the high bidder at auction time would be the difference between 20 percent of the high bid and the upfront payment.

¹⁹² See paras. 120, 123-124 for a discussion of procedures for combinatorial bidding.

¹⁹³ See paras. 97, 100, *supra*. We seek comment on whether any of our normal processing rules should be modified in the context of auctions. For example, do any services have letter perfect standards that may be inappropriate for the long-form applications in this context?

¹⁹⁴ See paras. 110-112, *supra* for our discussion of alternative petition to deny filing schedules. We anticipate that this will be the point at which a licensee's qualifications or bona fides would be subject to review and challenge. See also H. R. Rep. No. 103-111 at 258.

¹⁹⁵ Parties may file petitions for reconsideration of a license grant or appeal to the courts or the Commission may on its own motion reconsider the grant of an application within 30 days after grant. See 47 C.F.R. §§ 1.106, 1.108; 47 U.S.C. § 402. If license grants are made under delegated authority, the Commission may review such grants on its own motion, 47 C.F.R. § 1.117, and applications for review may be filed.

¹⁹⁶ In addition, in the future, we may permit electronic funds transfers for such payments.

¹⁹⁷ A smaller or no payment would be due at this time by entities using installment payments.

the deposit.¹⁹⁸ Petitions for reconsideration or applications for review of a license grant would not stay the granting of the license. If on review, however, the court reversed the grant of the license, the bid amount less any upfront payment and deposit would be returned to the applicant. Alternatively, we ask whether there might be circumstances where the Commission would be required to return the full amount of the bid, including the deposit and upfront payment.¹⁹⁹ We seek comment on this procedure.

CONCLUSION

176. With this rule making, we enter new and uncharted territory. We believe that the competitive bidding process has the potential to improve significantly on the ways in which the Commission has formerly awarded licenses, but only if conducted skillfully and well. Due in part to the extremely short time within which the Commission must implement this complex legislation, it is unlikely that we have been able to propose a solution to or even foresee every possible problem or issue that could arise in the competitive bidding process. For that reason, it is more important than usual that commenters give serious and thoughtful consideration to the issues we have raised and to bring to our attention those which we may have overlooked.

Regulatory Flexibility Act

177. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this Notice of Proposed Rule Making. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981).

Ex Parte Rules - Non-Restricted Proceeding

178. This is a non-restricted notice and comment rule making proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates

179. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or

¹⁹⁸ We also seek comment on whether, rather than automatic dismissal of the application, the Commission should retain some discretion in this area.

¹⁹⁹ The Commission currently is unable to pay interest on upfront payments or deposits. See note 100, supra.

before November 10, 1993, and reply comments on or before November 24, 1993.²⁰⁰ To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the F.C.C. Reference Center of the Federal Communications Commission, room 239, 1919 M Street, N.W., Washington, DC 20554. The complete text of the Notice may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, Room 236, Washington, D.C. 20554, telephone (202) 857-3800.

Ordering Clause

180. Issuance of this Notice of Proposed Rule Making is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002, and Sections 4(i), 309(i), 303(j), and 309(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(i), 303(j), and 309(r).

Contact Persons

181. For further information concerning this proceeding, contact Toni Simmons, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

William F. Cason
William F. Cason
Acting Secretary

²⁰⁰ In order to be considered in this proceeding, all previously filed comments # regarding auctions should be resubmitted. In addition, all previously filed petitions for rule making concerning competitive bidding that the petitioners believe have not been mooted by this proceeding should be refiled in order to be considered.

APPENDIX

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals contained in this NPRM. We request written public comment on the IRFA, which follows. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the comment deadlines provided above.

A. Reason for Action.

(i). This rule making proceeding is initiated to obtain comment regarding the implementation of a new Sections 309(i) and 309(j) of the Communications Act, as amended by the Omnibus Budget Reconciliation Act of 1993 (Budget Act).

B. Objectives.

(ii). The Commission seeks to implement changes to the Communications Act that, inter alia, provide the Commission with the authority to conduct auctions of electromagnetic spectrum, limit the Commission's authority to conduct lotteries and require certain anti-trafficking requirements in the context of lotteries. The Budget Act requires the Commission to complete this proceeding within 210 days of its enactment, or March 8, 1993.

C. Legal Basis.

(iii). The NPRM is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002, and Sections 2(a), 4(i), 303(r), 309(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303(r), 309(i) and 309(j).

D. Reporting, Recordkeeping and Other Compliance Requirements.

(iv). The proposals under consideration in this NPRM include the possibility of new reporting and recordkeeping requirements for a number of small business entities.

E. Federal Rules Which Overlap, Duplicate or Conflict With These Rules.

(v). None.

F. Description, Potential Impact, and Number of Small Entities Involved.

(vi). The rule changes proposed in this proceeding could affect small businesses if they have mutually exclusive applications for initial licenses or permits for a particular radio service accepted for filing by the Commission where the Commission has determined that, under Section 309(j), the particular spectrum is subject to competitive bidding. The NPRM proposes that mutually exclusive applications for licenses or permits in such radio services would be resolved by a system of competitive bidding rather than a system of random selection. In addition, the NPRM proposes certain antitrafficking requirements in the context of lotteries. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.

(vii). The NPRM proposes certain mechanisms of preferential treatment for small businesses, among other entities, to ensure economic opportunity, such as favorable financing or tax certificates.

Separate Statement

of

Commissioner Andrew C. Barrett

**Re: Implementation of Section 309(j) of the Communications Act:
Competitive Bidding.**

This comprehensive notice of proposed rulemaking develops a variety of options for licensing commercial mobile services through competitive bidding. By necessity, the item must address the various intricacies and complexities of conducting an auction for various classes of commercial mobile services. I believe this Notice raises the proper questions in order to develop a full record for rules that will govern the competitive bidding of commercial mobile licenses. The questions in this notice highlight the interrelationship between implementing a competitive bidding scheme and fulfilling important public policy objectives under the Communications Act. I write separately to express my concern over the additional overlay of complexity contemplated by this item with respect to Personal Communications Services (PCS). Specifically, I am concerned about two aspects of this Notice as it pertains to PCS.

First, the item contemplates various schemes that are likely to enhance market aggregation schemes through group bidding. I am in favor of group bidding that could aggregate MTA's into nationwide licenses. Whether as a part of a consortia, or as individual entities bidding for an MTA license, the players in this context are likely to be equipped with sufficient resources. Thus my concern with respect to anticompetitive effects from group bidding by a small number of dominant players is mitigated by their ability to fully compete against each other for resources and capital.¹ I am more concerned about the potential abuses from a group bidding process in smaller markets such as the BTAs. This becomes especially problematic when spectrum is reserved for small business and rural telephone company participation. In this

¹ As I noted in my dissent to the PCS Second Report and Order, I would prefer three MTA licenses in this context, in order to ensure that more than the typical large telecommunications companies (i.e. interexchange carriers and the LECs) have an opportunity from the start to provide interoperable, viable competitive choices across the country. Under the current duopoly scheme for MTAs, I continue to be concerned that interexchange carriers and the LECs will be the dominant players in these licenses under a competitive bidding scenario. See In Re: Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, Gen. Dkt. No. 90-314 (September 23, 1993) (Barrett, A. dissenting) at 3.

context, small individual companies may find themselves unable to obtain a license through the competitive bidding process as long as there is a group bid that can always exceed the relative resources of individual small companies. While I understand that aggregation schemes are important, I am not sure that the playing field is necessarily equal where individual small businesses are forced in a "de facto" manner to join consortia in order to have any chance of obtaining a license through competitive bidding. It seems to me that public policy concerns for small business would provide a more equitable playing field in order to ensure a diverse source of participants who can win a competitive bid. By allowing group bids in the spectrum that might be reserved for small businesses, I am concerned that large interexchange carriers could stand behind the scenes, finance their selected small business throughout an area, and control a vast majority if not the entire number of spectrum bids for those licenses. If the intent of any reserved block for small businesses is to provide a variety of bidding opportunities on a relatively "equal playing field", I believe uncontrolled group bidding in these blocks may invite strategies that undermine this goal. Thus, I hope that various small business and rural telephone interests will address this issue thoroughly in the Notice. I do not want to see these groups effectively eliminated from the bidding process simply because they do not form large enough groups with deep pocket financiers. I look forward to reviewing comments on this issue.²

Second, I continue to be concerned about the additional complexity of aggregating several 10 MHz slivers of spectrum in order to get to a point where one can start a viable, economic PCS service. Given the lack of record on the economic viability of the 10 MHz PCS spectrum slivers above 2 GHz, I am concerned that bidders will be required to bid for at least two 10 MHz licenses before they can start any PCS service that will provide at least 70-80% coverage of BTAs in major markets. To the extent some of the individual 10 MHz allocations only provide coverage of 15-30% of an entire like Chicago, Los Angeles or Dallas, I am concerned that we have forced entities to bid for at least 2 licenses before

² I also encourage commenters to provide the Commission with various incentive proposals for including rural telephone companies and small businesses, including minority and women-owned businesses, in the ownership and operational structure of any consortia that bids for MTA licenses. Such incentives could include a percentage of deferred payment on a bid, tax certificates for the consortia investors, or enhanced credits on a bid. Given the likely strength of the broadband MTA licenses relative to the 5 other smaller BTA licenses, I wish to encourage inclusion of a diverse variety of parties in the ownership and operation of these MTA entities.

they can start a viable PCS service.³ Thus, while I am generally supportive of aggregation schemes across geographic areas (i.e. BTA's to MTA's or MTA's to nationwide), I continue to question the merit of requiring entities to aggregate across 10 Mhz spectrum licenses above 2 GHz in order to obtain a viable economic PCS license. This additional level of complexity, even in the auction context, appears to be an additional, unnecessary transaction cost, and creates the potential for uneconomic licenses from the start.⁴ I continue to believe these licenses should be offered in 20 MHz increments in order to provide viable, economic PCS opportunities from the start. Thus, I hope commenters, including small business and rural telephone companies, will address the interrelationship of the PCS order with the spectrum aggregation schemes contemplated by this Notice.⁵

I look forward to comments in this docket. I am interested in reviewing comments on the various issues raised by the Notice. Commenters should address the manner in which the attribution limits adopted in the PCS order for cellular and PCS licenses, effects the ability to bid in group licenses or as individuals. I also am concerned that the Commission receives appropriate consultation and advice on how to correctly conduct competitive bidding for commercial mobile services. Thus, parties who have experience in valuation of spectrum and competitive bidding processes are encouraged to participate in this record.

³ See In Re: Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, Gen. Dkt. No. 90-314 (September 23, 1993) (Commissioner Barrett, Dissenting Statement) at pp. 8, 9, n 15, n 16.

⁴ In addition, equipment availability and service interoperability standards will continue to be a significant dilemma under this scheme.

⁵ In addition, those entities desiring to aggregate 40 MHz should note the equipment and technical interoperability problems of aggregating across bands above and below 2 GHz.