will generate the most information about the value of BTA service areas during the course of the auction. Thus, it is the most likely auction method to award BTA authorizations to the bidders who value them most highly. *See* Comments of PacTel at 3 (simultaneous multiple round bidding provides bidders with equal information and allows bidding to continue until highest value bidder is identified). We also note that an auction method awarding BTA authorizations to the parties who value them most highly should result in the award of authorizations to *bona fide* wireless cable operators, rather than to speculators, because *bona fide* operators will likely value authorizations more highly than, and will therefore outbid, speculators, who may be reluctant to pay up front the amounts necessary to obtain authorizations through competitive bidding.[72] Moreover, given the uncertainty as to the value of the MDS spectrum,[73] the information generated by simultaneous multiple round bidding should prove particularly valuable by giving bidders more flexibility to pursue back-up strategies.[74] Because of the superior information and flexibility it provides, this auction method should also yield more revenue for the MDS spectrum than other auction designs, including open outcry.[75] Although the raising of revenue is not our dominant concern, we note that Congress directed the Commission, in designing auction methodologies, to promote "recovery for the public of a portion of the value of the public spectrum resource."

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[72] Sealed bidding is not generally favored by commenters expressing any opinion on auction design, and is not supported by the Commission for MDS, because this bidding method will generate no information about the value of the BTA service areas during the course of an auction, and thus may not award BTA authorizations to the parties who value them the most. *See Second Report and Order* at 2362; Comments of Association at 43-44; Heartland at 9-10; ACS Enterprises, *et al.* at 18-19. The only commenter recommending sealed bidding presents no substantive arguments to support its position and fails to address the drawbacks inherent in an auction method that provides no information about spectrum value to bidders. *See* Comments of Mitchell at 4.

[73] *See* Comments of Association at 43-44; ACS Enterprises, *et al.* at 18-19.

[74] Commenters recognize the importance of selecting an auction design allowing bidders to pursue back-up strategies. *See* Comments of Association at 44 (opposing sealed bidding because it provides no opportunity to pursue back-up strategies).

[75] A simultaneous auction for MDS will tend to raise more revenue than a sequential oral auction for two reasons. First, it will increase the value of the BTA service areas by facilitating efficient aggregation. Second, because it will provide more information about the value of the BTA service areas, it will reduce the propensity of sophisticated bidders to bid cautiously to avoid the "winner's curse"-- the tendency for the winner to be the bidder who most overestimates the value of the item up for bid.

47 U.S.C. § 309(j)(3)(C).[76] Finally, the employment of simultaneous multiple round bidding for MDS, rather than open outcry, will eliminate the need for the Commission to select the order in which the BTA service areas will be auctioned. *See Second Report and Order* at 2360, 2363, 2366.

106. We conclude that these numerous advantages for MDS of simultaneous multiple round bidding outweigh any remaining disadvantages cited by some commenters. In addition to the objections, as described above, offered against simultaneous bidding based on the assumed high cost and administrative burden for the Commission and the perceived lack of interdependence, some commenters also assert that simultaneous multiple round bidding is complex and expensive for bidders and favor open outcry auctions in part because of their perceived simplicity and relatively low cost for bidders. *See* Comments of Vega at 18; ACS Enterprises, *et al.* at 17. *See also* Comments of Association at 43 (supporting open outcry as less expensive bidding method if national filing window approach is selected).

107. The simultaneous multiple round auction design adopted herein includes several features that should allay the concerns expressed by these commenters as to the perceived burdensome nature of simultaneous bidding. We expect, for example, to have bidding rounds of shorter duration than in other simultaneous multiple round auctions, such as broadband PCS. This measure should shorten the MDS auction substantially so that the length of the auction should not prove burdensome to bidders. In addition, the burden on bidders will be reduced by the variety of methods through which they may participate in the MDS simultaneous multiple round auction. Bidders will be able to submit bids on site, via personal computers using remote bidding software, or via telephone;[77] however, given the space limitations for on site bidding and the uncertainty as to the exact number of prospective bidders, the Commission reserves the right to have only remote bidding -- by personal computer and by telephone -- for the MDS auction. Thus, the expense to the bidders of participating in a simultaneous multiple round auction should be less than in an open outcry auction, where bidders (and/or their representative(s)) would need to travel to and remain in

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[76] We agree with commenters to the extent they suggest that the Commission's primary mandate is not to adopt an application procedure and auction design that maximize revenue. *See* Reply Comments of CAI Wireless at 6-7; Comments of Association at 29-30; Comments of American Telecasting at 4-5. Given the clear language of Section 309(j)(3)(C), we do, however, believe that the Commission has a duty to consider the recovery of the value of the MDS spectrum as a factor in its adoption of an appropriate MDS auction design.

[77] Telephonic bidding should, in particular, be a simple and inexpensive method for bidders to submit bids. If submitting bids by telephone, bidders may utilize the Internet to learn of the round-by-round results of the auction; on-line services such as Compuserve provide Internet access at low cost. Bidders may also, at negligible cost, utilize a bulletin board service, accessible by long distance telephone, from which auction results can be downloaded to a personal computer.

Washington, D.C. for the duration of the auction. Finally, the Commission will hold a seminar for prospective bidders to acquaint them with this bidding design and all alternative bid submission methods.

108. Given the numerous advantages of the generally preferred auction method of simultaneous multiple round bidding, we believe that this methodology will best serve for conducting MDS auctions. We note, however, that the presence of incumbents in the BTA service areas could affect the relative desirability and value of BTA authorizations in ways we do not anticipate. In the event that the filings of short-form applications indicate that the BTA authorizations have relatively little interdependence and lower than expected value, we delegate authority to the Mass Media Bureau and the Wireless Telecommunications Bureau to reconsider the issue of whether another auction design would be more appropriate.

c. MDS Bidding Procedures

109. There will be one authorization offered in each BTA and the BTA authorizations will be awarded by simultaneous multiple round bidding. All BTA service areas will be auctioned at the same time. Bids will be accepted at the same time on all BTA service areas in each round of the auction. High bid amounts will be posted after the end of the bid submission period in each round of bidding. With modifications to take account of the unique characteristics of MDS and to reduce length, MDS auctions will follow the general bidding procedures we have used to date to conduct the narrowband and broadband PCS auctions.

110. ***Bid Increments***. In using simultaneous multiple round bidding to award the BTA authorizations, it is important to specify minimum bid increments. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction comes to closure within a reasonable period of time. Establishing an appropriate minimum bid increment is especially important in a simultaneous auction with a simultaneous stopping rule. In that case, all markets will remain open until there is no bidding on any market, and a delay in closing the bidding on one market will delay the closing of all markets. *Second Report and Order* at 2369.

111. Because we plan to use simultaneous multiple round bidding with a simultaneous stopping rule to award BTA authorizations, we believe that it is necessary to impose a minimum bid increment to ensure that the MDS auction concludes within a reasonable period of time. As we recognized in the *Second Report and Order*, it is important to establish the amount of the minimum bid increment as the greater of a percentage and fixed dollar amount. This will ensure a timely completion of the auction even if bidding begins at a very low dollar amount. *Id.* at 2369. Accordingly, we will impose a minimum bid increment of some percentage of the high bid from the previous round or a fixed dollar amount, whichever is greater, in MDS auctions where simultaneous multiple round bidding is

used. We will announce by public notice prior to the MDS auction the specific bid increment that generally will be utilized.

112. The Commission will also retain the flexibility to vary the minimum bid increment during the course of the MDS auction by announcement. We may, for example, begin the MDS auction with a sizable minimum bid increment and reduce the bid increment as the auction progresses. Starting with a sizable minimum bid increment will move the auction quickly at the beginning, when prices have limited informational content and there is little benefit to either bidders or the Commission of refined price movements, while allowing bidders to express small differences in valuation as the auction nears a close, increasing both efficiency and auction revenues. Small bid increments also reduce the chances of ties. Where a tie occurs, the high bidder will be determined by the order in which the bids were received by the Commission. *See Second Report and Order* at 2369. Adjustments in the bid increment may be based in part on the level of bidding activity.

113. ***Duration of Bidding Rounds.*** To gain the full benefit of the information generated by a simultaneous multiple round auction, bidders will need some time between bidding rounds to evaluate back-up strategies and consult with their principals. Prior to the MDS auction, we will announce by public notice the duration of bidding rounds for the auction. We also reserve the discretion during the course of the auction to vary, by public notice or announcement, the duration of bidding rounds or the interval at which bids are accepted. We expect to allow more time for the initial rounds in the MDS auction, while bidders familiarize themselves with the bidding process, and then increase the frequency of rounds as the auction progresses. Thus, we should be able to move the auction toward closure in a reasonable period of time.[78]

114. ***Activity Rule.*** To ensure that a simultaneous MDS auction with a simultaneous stopping rule closes within a reasonable period of time and to increase the information conveyed by bid prices during the auction, we believe that it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. Because simultaneous stopping rules generally keep all markets open for bidding as long as anyone wishes to bid, they also create an incentive for bidders to hold back until prices approach equilibrium before making a bid. As noted in the *Second Report and Order*, this could lead to very long auctions. *See id.* at 2371. Delaying serious bidding until late in an auction also reduces the information content of prices during the course of the auction. Without an activity rule, bidders cannot know whether a low level of bidding on a particular market means that the market's price is near its final level or if instead many serious bidders are holding back and may bid up the price later in the auction. When bidding closes on a

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[78] Given our estimates of the value of the BTA service areas and the likely number of bidders, we expect to hold more frequent bidding rounds in the MDS auction than we have in certain other simultaneous multiple round auctions, particularly broadband PCS. *See Second Report and Order* at 2368.

market-by-market basis, an activity rule in less important. This is because failure to bid on a given market in any round may result in loss of the opportunity to bid on that market, if that round turns out to be the last one for that market.

115. In the *Second Report and Order*, we adopted the three-stage Milgrom-Wilson activity rule as our preferred activity rule when a simultaneous stopping rule is used. *Id.* at 2372. *See also Fifth Report and Order* at 5553-5556. We plan to employ this activity rule in the MDS auction as well. Under the Milgrom-Wilson activity rule, bidders are required to declare their maximum eligibility in advance of the auction and make an upfront payment proportional to that eligibility level. In the PCS auctions, activity and eligibility are defined in terms of "MHz-pops." *See, e.g., Fifth Report and Order* at 5553-5554. Specifically, the number of MHz-pops associated with a PCS license is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. We chose MHz-pops because we anticipated that PCS license values would be closely related to the number of MHz-pops in the license service areas. This choice ensures that the measure of bidding activity used in the activity rule is highly correlated with license values. In the MDS auction, bidding activity and eligibility will be defined in terms of dollar values. The Commission will assign an "activity unit" value to each BTA service area for the purpose of measuring bidding activity and eligibility. Specifically, the activity unit value for a BTA service area will be equal to the upfront payment associated with that BTA service area. A bidder's maximum eligibility (which is also the bidder's eligibility for the first round of the auction) will be equal to its total upfront payments.[79] Because the upfront payments will be related to the value of the BTA service areas (*see infra* ¶ 136), activity units will fulfill the same function that MHz-pops have fulfilled in the previous PCS auctions.

116. The Milgrom-Wilson activity rule provides that a bidder's minimum activity level, measured as a fraction of eligibility in the current round, will increase during the auction. A bidder will be considered "active" on a BTA service area in the current round if it is either the high bidder at the end of the bid withdrawal period in the previous round, or if it submits a bid in the current round which meets or exceeds the minimum valid bid (*i.e.*, a bid that exceeds the high bid in the previous round by at least the minimum bid increment). A bidder's activity level in a round is the sum of the activity units associated with the BTA service areas on which the bidder is active.

117. The minimum required bidding activity levels for each stage of the MDS auction are as follows. In each round of Stage One of the auction, a bidder who wishes to maintain its current eligibility is required to be active on BTA service areas encompassing at least fifty percent of the activity units for which it is currently eligible. Failure to maintain

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[79] As explained in ¶ 138, however, a small business bidder eligible for a reduction in its upfront payment requirement will not have the number of its activity units decreased as a result of submitting a reduced upfront payment.

the requisite activity level will result in a reduction in the amount of activity units associated with BTAs upon which a bidder will be eligible to be active in the next round of bidding (unless an activity rule waiver, as described below, is used). During the first stage, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by two (2/1). Eligibility for each applicant in the first round of Stage One is determined by the amount of the upfront payment received and the BTAs identified in the applicant's short-form application. In each round of Stage Two, a bidder who wishes to maintain its current eligibility is required to be active on BTA service areas encompassing at least eighty percent of the activity units for which it is eligible in that particular round. During the second stage, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-fourths (5/4). In each round of Stage Three, a bidder who wishes to maintain its current eligibility is required to be active on BTA service areas encompassing ninety-five percent of the activity units for which it is eligible in that particular round. In the final stage, if activity in the current round is below ninety-five percent of current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by twenty-nineteenths (20/19).

118. In the PCS auctions, we specified transition guidelines for deciding when the auction would move from Stage One to Stage Two to Stage Three. Those guidelines are based on the "auction activity level," the sum of the MHz-pops of PCS licenses for which the high bid increased in the current round as a percentage of the total MHz-pops of all licenses offered in the auction. *See, e.g., Fifth Report and Order* at 5555. However, we also retained the discretion to move the PCS auctions from one stage to another at a rate different from that set out in the guidelines. *See Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6860 (1994).

119. For the MDS auction, we shall employ an analogous procedure. The "auction activity level" for a given round of the MDS auction will be defined as the sum of the activity units associated with the BTA service areas for which the high bid increases in that round, divided by the sum of activity units associated with all of the BTAs being auctioned. The following transition guidelines apply. The MDS auction will begin in Stage One and move from Stage One to Stage Two when the auction activity level is below ten percent for three consecutive rounds in Stage One. The auction will move from Stage Two to Stage Three when the auction activity level is below five percent for three consecutive rounds in Stage Two. In no case can the auction revert to an earlier stage. The Commission retains the discretion to determine and announce during the course of an MDS auction when, and if, to move from one auction stage to the next, based on a variety of measures of bidder activity, including, but not limited to, the auction activity level as defined above, the percentage of BTA service areas on which there are new bids, the percentage of activity units on which there are new bids, the number of new bids, and the percentage increase in revenue.

120. To avoid the consequences of clerical errors and to compensate for unusual

circumstances that might delay a bidder's bid preparation or submission in a particular round, we will provide bidders with a limited number of waivers of the above-described activity rule. We believe that some waiver procedure is needed because the Commission does not wish to reduce a bidder's eligibility due to an accidental act or circumstances not under the bidder's control. *See Second Report and Order* at 2372.

121. In MDS auctions, bidders will be provided five activity rule waivers that may be used in any round during the course of the auction. *See Second Report and Order* at 2373. If a bidder's activity level is below the required activity level, a waiver will automatically be applied. That is, if a bidder fails to submit a bid in a round, and its activity level from any standing high bids (high bids at the end of the bid withdrawal period in the previous round) falls below its required activity level, a waiver will be automatically applied. A waiver will preserve current eligibility in the next round. An activity rule waiver applies to an entire round of bidding and not to a particular BTA service area. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level. *See Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6861 (1994). If a bidder overrides the automatic waiver mechanism, its eligibility will be permanently reduced (according to the formulas specified in ¶ 117), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no new valid bids will not keep the auction open. Bidders will have the option of pro-actively entering an activity rule waiver during the bid submission period.[80] If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

122. The Commission retains the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. We also retain the flexibility to adjust prior to an auction the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction. *See Second Report and Order* at 2373. We will announce by public notice before the MDS auction the number of waivers that will be allowed in that particular auction.

123. As with other auctions, we reserve the right to impose for the MDS auction an activity rule less complex than the Milgrom-Wilson rule. *See Second Report and Order* at 2372; *Fifth Report and Order* at 5556. We will announce by public notice before the MDS auction the activity rule that will be employed in that particular auction.

124. ***Stopping Rules.*** We noted in the *Second Report and Order* that, with multiple round auctions, a stopping rule must be established for determining when the auction is over.

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[80] Thus, a "proactive" waiver, as distinguished from the automatic waiver described above, is one requested by the bidder.

Id. at 2369. In an MDS simultaneous multiple round auction, bidding could close separately on individual BTA service areas, simultaneously on all BTA service areas, or a hybrid approach could be used. Under an individual approach, bidding would close on each BTA service area after one round passed in which no new acceptable bids were submitted for that particular service area. With a simultaneous stopping rule, bidding would remain open on all BTA service areas until there was no new acceptable bid on any service area. This approach would have the advantage of providing bidders full flexibility to bid for any BTA service area as more information became available during the course of the MDS auction, but it could lead to a very long auction, unless an activity rule were imposed. *See id.* at 2370. A hybrid approach would combine the individual and the simultaneous approaches.[81]

125. For MDS auctions, we intend to utilize a simultaneous stopping rule, as we have successfully used in previous simultaneous multiple round auctions. Bidding will accordingly remain open on all BTA service areas until bidding stops on every BTA service area. The auction will close after one round passes in which no new valid bids or proactive waivers are submitted. The Commission retains the discretion, however, to keep the MDS auction open even if no new valid bids and no proactive waivers are submitted. In the event that the Commission exercises this discretion, the effect will be the same as if a bidder had submitted a proactive waiver.[82] Since we are also imposing an activity rule (as discussed above), we believe allowing simultaneous closing for all BTA service areas will afford bidders flexibility to pursue back-up strategies without running the risk that bidders will refrain from bidding until the final rounds. We also believe that a simultaneous stopping rule will best enable bidders to take account of any interdependencies that exist between BTA authorizations (especially authorizations for adjacent areas) and will allow bidders to make the most informed bidding decisions. Thus, simultaneously closing bidding on BTA service areas will most likely award licenses to the bidders who value them most highly. *See Second Report and Order* at 2370.

126. Additionally, the Commission may also declare at any time after forty rounds that the MDS auction will end after a specified number of additional rounds. If the Commission invokes this stopping rule, it will accept bids in the final round(s) only for BTA service areas on which the high bid increased in at least one of the preceding three rounds.

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[81] For example, in a hybrid approach, we could use a simultaneous stopping rule (along with an activity rule designed to expedite closure) for higher valued BTA service areas. For lower valued BTA service areas, where the loss from eliminating some back-up strategies would be less, bidding on BTAs could be allowed to close individually. *See Second Report and Order* at 2370.

[82] This will help ensure that the MDS auction is completed within a reasonable period of time, because it will enable the Commission to utilize larger bid increments, which speed the pace of the auction, without risking premature closing of the auction. *See Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7684, 7685 (1994).

See Second Report and Order at 2370 n.106. Stopping the MDS auction after a specified number of additional rounds will ensure ultimate Commission control over the duration of the auction. *See id.* at 2370. Thus, the Commission will have the means to prevent bidders from continuing to bid on a few BTA service areas (or even a single service area) solely to delay the closing of bidding for all BTA service areas in an MDS auction with a simultaneous stopping rule. This will also ensure that the Commission can end the MDS auction if it determines that the benefits from ending the auction, and hence granting BTA authorizations more rapidly, exceed the possible efficiency loss from cutting off bidding on a few BTA service areas. If we exercise this option, we favor the use of three final rounds. Allowing more than one additional round provides some opportunity for counter-offers, thus reducing the risk that a BTA authorization will not be awarded to the party that values it most highly.

127. If this fail-safe mechanism is used in an MDS auction, there are two reasons not to take bids on BTA service areas on which there has been no recent bidding. First, the fact that bidding on an individual BTA service area may close will provide an additional incentive to bid actively and thus speed the conclusion of the MDS auction. If bids are accepted on all BTA service areas in the final round(s) there is less risk to a bidder in holding back. Second, closing bidding on BTA service areas for which activity has ceased ensures high bidders for those service areas that they will not lose a BTA authorization without having an opportunity to make a counter-offer.[83] This reduces the uncertainty associated with aggregating BTA authorizations (such as those for adjacent BTAs) that may be worth more as a group than individually. If final bids are accepted on all BTA service areas, a high bidder on an aggregation of BTA service areas may unexpectedly lose a significant part of the aggregation and have no chance to regain it except in the post-auction market, where bargaining or other transaction costs may be high.

128. The Commission does not intend to exercise this option except in extreme circumstances, such as where the MDS auction is proceeding very slowly, there is minimal overall bidding activity, and it appears unlikely that the auction will close within a reasonable period of time. Before exercising this option, however, the Commission would first attempt to increase the pace of the auction by announcing that the auction will move into the next stage, where bidders would be required to maintain a higher level of bidding activity. Under these circumstances, the Commission may also first increase the number of bidding rounds per day and increase the amount of the minimum bid increments for those limited number of BTA service areas where there is still a high level of bidding activity.

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[83] Either the MDS auction will close only when bidding ceases on all BTA service areas, so the high bidder will have an opportunity to respond to any new bids, or the Commission will call for final bids but not accept new bids on BTA service areas on which there have been no new bids in the previous three rounds, so no other bidder will have the opportunity to outbid the high bidder in a final round.

129. Additionally, because of the large number of BTA service areas to be auctioned at once, we will retain the discretion either to use a hybrid stopping rule or to allow bidding to close individually for these service areas if, as we gain more experience with auctions, we determine that simultaneous stopping rules are too complex to implement for very large numbers of service areas. The specific stopping rule for ending bidding on the BTA service areas will be announced by public notice prior to the MDS auction.

5. Procedural and Payment Issues

a. Pre-Auction Application Procedures

130. The *Second Report and Order* established general rules and procedures for participating in auctions. Again, however, we noted that these might be modified on a service-specific basis. As described below, we have determined that we will follow for new MDS initial applications the procedural and payment rules established in the *Second Report and Order* and set forth at 47 C.F.R. Chapter I, Part 1, Subpart Q, with modifications to fit MDS. Certain procedural details will be supplied later by public notices. Our objective has been to design rules and procedures that will reduce administrative burdens and costs on bidders and the Commission, ensure that bidders and licensees are qualified and able to construct their systems, and minimize the potential for delay of service to the public. *See* 47 U.S.C. § 309(j)(3)(A) (in designing auction rules, Commission should seek to promote development and rapid deployment of products and services for public benefit, without administrative or judicial delays).

131. Before an MDS auction, the Commission, or, pursuant to delegated authority, the Mass Media Bureau, in conjunction with the Wireless Telecommunications Bureau, will release public notices concerning the auction. The public notices will specify the BTA service areas to be auctioned, the filing deadline for short-form applications, and the time, place, and method of competitive bidding to be used, as well as applicable bid submission and payment procedures.

132. Applicants will be required to submit short-form applications by the date specified by public notice. Applicants should file a short-form application identifying all BTA service areas specified by the public notice in which they are interested in bidding.[84] If the Commission receives only one application that is acceptable for filing for the same BTA service area and thus there is no mutual exclusivity,[85] the Commission will by public notice

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[84] As described in detail below, the short-form applications must also include an exhibit identifying any bidding consortia or other arrangements relating to the BTA service areas being auctioned. *See infra* ¶ 164.

[85] Absent mutually exclusive applications, the Commission is prohibited from conducting an auction. *See* 47 U.S.C. § 309(j)(1).

cancel the auction for this BTA service area and establish a date for the filing of either an initial long-form application for an MDS station license or, for a heavily encumbered BTA, a statement of intention with regard to the BTA.[86]

133. To encourage maximum bidder participation, we will provide applicants whose short-form applications are substantially complete, but which contain minor errors or defects, with an opportunity to correct their applications prior to the auction. However, applicants will not be permitted to make any major modifications to their applications; for MDS, we classify all amendments to short-forms as major, except those to correct minor errors or defects, such as typographical errors, or those to reflect ownership changes or formation of bidding consortia specifically permitted under the anti-collusion rules set forth below. *See infra* ¶ 165. We note in particular that a change in control of an applicant or a change in the BTAs upon which an applicant wishes to bid will be regarded as a major amendment to the short-form application. In addition, applications that are not signed in any manner or form, including by electronic means, or that fail to make the requisite certifications will be dismissed and may not be resubmitted. *See Second Report and Order* at 2377; 47 C.F.R. § 1.2105(b).

134. After reviewing the short-form applications, the Commission will issue another public notice listing all applications containing minor defects, and applicants will be given an opportunity to cure and resubmit defective applications. On the date set for submission of corrected applications, applicants who on their own discover minor errors in their applications, such as typographical errors, also will be permitted to file corrected applications. Following a review of the corrected applications, the Commission will release another public notice announcing the names of all applicants whose applications have been accepted for filing. Applicants identified in this public notice will then be required to submit the full amount of their upfront payment. *See Second Report and Order* at 2377.

b. Upfront Payments

135. In the generic auction rules, we described five types of payments: upfront payments, down payments, final payments, bid withdrawal payments, and default and disqualification payments. Given the history of speculators filing MDS applications, we believe a substantial upfront payment is needed for MDS auctions to discourage speculative bidding and increase the likelihood of applicants who intend to provide service to the public obtaining the remaining available MDS channels. Requiring a substantial upfront payment provides some degree of assurance that only serious, qualified bidders will participate and serves as a deterrent to the filing of speculative applications, which may delay the provision of service to the public. The upfront payments will also provide the Commission with a source of funds to satisfy any bid withdrawal or default and disqualification payments

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[86] *See infra* ¶¶ 150-154, for the procedures for filing either a long-form application for a station license or a statement of intention with regard to the BTA.

assessed. *See Second Report and Order* at 2378-2379. Therefore, we will require an upfront payment for the MDS auction.[87]

136. We believe the upfront payment should bear a relation to the value of the BTA authorizations that a bidder hopes to be awarded. We accordingly delegate to the Mass Media Bureau and the Wireless Telecommunications Bureau the authority to determine an appropriate upfront payment for each BTA service area being auctioned, taking into account, at the Bureaus' discretion, such factors as the population and the approximate amount of usable spectrum in each BTA.[88] Bearing in mind the uncertainties associated with valuing the BTA authorizations, we expect that the Bureaus will follow the guidelines laid out in the *Second Report and Order* and establish upfront payments equal to around five percent of the expected amounts of winning bids for the various BTA service areas. *See id.* at 2378-2379. In no event will the upfront payment for any BTA service area be less than $2500, the minimum suggested in the *Second Report and Order*, and we retain the flexibility for the Bureaus to modify this minimum if we find that a higher amount would better deter speculative filings. *Id.* at 2379.

137. Prior to the MDS auction, the Mass Media Bureau, in conjunction with the Wireless Telecommunications Bureau, will publish a public notice listing the upfront payment amounts corresponding to each BTA service area to be auctioned. The number of activity units associated with a BTA service area (*see* ¶ 115) equals the amount of the upfront payment for that BTA. A prospective bidder must submit an upfront payment equal to the largest combination of activity units on which the bidder anticipates being active in any single round. The combination of activity units on which a bidder is active in a round equals the sum of the activity units associated with the BTAs on which the bidder has submitted a bid, or on which the bidder is the standing high bidder. Although a bidder may file applications for every BTA service area being auctioned, the total upfront payment submitted by each applicant will determine the combinations of BTA service areas on which the applicant will actually be permitted to be active in any single round of bidding.[89]

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[87] Commenters addressing this issue agree that upfront payments should be required for MDS to deter insincere or unqualified applicants. *See* Comments of Association at 51; Vega at 17-18; ACS Enterprises, *et al.* at 20-21.

[88] *See* Comments of Association at 51 (if Commission adopts filing approach for MDS based on predetermined geographic areas, formula based on population and megahertz in each service area is appropriate for determining upfront payments).

[89] Consider, for example, an applicant that submits a $100,000 total upfront payment. As explained above at ¶ 115, the maximum number of activity units for that applicant is 100,000. In any single round, the applicant could be active on two BTA service areas with 50,000 activity units each, on five BTAs with 20,000 activity units each, on ten BTAs with 10,000 activity units each, or on any combination of BTA service areas for which the sum of

138. A prospective bidder in the MDS auction that claims status as a small business, as defined in ¶¶ 190-191, will be eligible for a twenty-five percent reduction in its upfront payment requirement. *See infra* ¶¶ 184-185 for a discussion of the reduced upfront payments measure. A small business eligible for this reduction in its upfront payment will not have the number of its activity units decreased as a result of submitting a reduced upfront payment.[90]

139. We do not believe that a very low upfront payment, as one commenter proposes, is sufficient to discourage speculative or insincere bidding. *See* Comments of Vega at 18 (recommending $500 upfront payment per every five market or channel groups). We also feel that a flat fee unrelated to the value of the individual BTA service areas, as another commenter suggests, is inappropriate. *See* ACS Enterprises, *et al.* at 20 (supporting upfront payment of $2000 per channel). Given the Commission's experience with defaults by some winning bidders in the July 1994 IVDS auction, we find that an upfront payment which reflects the value of the BTA service areas being auctioned is preferable to a low flat fee unrelated to BTA service area values. *See* Comments of Association at 52 (stating that upfront payments in excess of $2500 minimum established in *Second Report and Order* and employed in IVDS auction are needed to assure seriousness of MDS applicants and to cover defaults by winning MDS bidders).

140. Applicants identified by public notice as those whose applications have been accepted for filing will be required to submit their upfront payments to the Commission's lock-box bank by the date specified in the public notice, which generally will be no later than fourteen days before the scheduled auction. Upfront payments may be made by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. All payments, including upfront, down and final payments, should be accompanied by FCC Form 159 (remittance advice form). After the

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associated activity units totals 100,000 or less. As set forth above, a bidder is "active" on a BTA service area if it is either the high bidder on that BTA from the previous round (at the end of the bid withdrawal period), or if it submits a bid on that BTA in the current round which exceeds the previous round's high bid by at least the minimum bid increment. *See supra* ¶ 116. Thus, a bidder who begins the auction eligible to bid (based on the magnitude of its upfront payment) on BTA service areas associated with 100,000 activity units and who, in the first round, is the high bidder on a BTA service area associated with 50,000 activity units, may only, in the second round, submit new bids on a combination of BTAs associated with 50,000 or fewer activity units.

[90] For example, if a small business applicant is interested in bidding on a BTA with an upfront payment of $100,000, it would be required, under the reduced upfront payment measure, to submit only $75,000 to qualify to bid on that BTA. This applicant would still, however, receive 100,000 activity units -- the number of activity units equivalent to the full upfront payment amount associated with that BTA.

Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission will issue a public notice announcing the names of all applicants that have been determined to be qualified to bid in the MDS auction. Any applicant who fails to submit a sufficient upfront payment to qualify it to bid on any BTA service area being auctioned will not be identified on this public notice as a qualified bidder, will be prohibited from bidding in the MDS auction, and its application will be dismissed. *See Second Report and Order* at 2377; 47 C.F.R. § 1.2106.

141. The upfront payments submitted by prospective bidders will later be counted toward the down payments that winning bidders must make. The upfront payments of bidders who are not the high bidder on any BTA service area will be refunded as soon as possible after the MDS auction. Prior to refunding the upfront payments of non-winning bidders, however, we will determine whether they are subject to withdrawal or default payments. In some circumstances, it may be appropriate to retain upfront payments until after the winning bidders have tendered their down payments because further rounds of competitive bidding may be held if down payments are not made. No interest will be paid on upfront payments. *See Second Report and Order* at 2380.

c. Down Payments and Full Payments

142. To provide further assurance that winning bidders will be able to pay the full amount of their bids, we decided generally in the *Second Report and Order* that each winning bidder must tender a down payment sufficient to bring the total deposit up to twenty percent of the winning bid. We believe a down payment requirement is appropriate for MDS.[91] Accordingly, winning bidders will be required to supplement their upfront payments to bring their total deposit with the Commission up to at least twenty percent of the final payment due for the BTA authorization(s) won in the MDS auction. If the upfront payment already tendered amounts to twenty percent or more of the winning bid, no additional deposit will be required. To the extent that any upfront payment not only covers, but exceeds, the required down payment, the Commission will refund any excess amount after determining that no bid withdrawal payments are owed by the bidder. To simplify this process administratively, the Commission will not honor requests that this excess amount be retained and applied toward later payments or obligations. The down payment will be due within five business days after the winning bidders have been notified by the Commission, and may be made by cashier's check or by wire transfer to the Commission's lock-box bank. The down payment will be held by the Commission until the winning bidder has been issued its BTA authorization and has paid the remaining balance of its winning bid, or until the winning bidder is found unqualified to be a station licensee or has defaulted, in which case it will be returned, less applicable default payments. During the period that deposits are held pending ultimate award of the BTA authorization, the interest that accrues, if any, will be retained by the

[91] Commenters addressing this issue similarly see no reason to depart from the approach established in the *Second Report and Order*. *See* Comments of Association at 52.

government. *See Second Report and Order* at 2381-2382; 47 C.F.R. § 1.2107(b).

143. Based upon our experience in conducting spectrum auctions, we will require winning bidders to make full payment of the balance of their winning bids prior to the issuance of their BTA authorizations. Specifically, the Commission will, when a BTA authorization is ready to be issued, release a public notice stating that fact. The auction winner for that BTA will be required to make full payment of the balance of its winning bid within five business days following this public notice. The Commission will issue the BTA authorization to the auction winner within ten business days following notification of receipt of full payment. *See Second Report and Order and Second Further Notice of Proposed Rulemaking* in PR Docket No. 89-553, PP Docket No. 93-253, and GN Docket No. 93-252, FCC 95-159 (released April 17, 1995) at ¶ 109.

144. Auction winners that are small businesses eligible for installment financing will be subject to differing payment requirements, however. *See infra* ¶¶ 190-192 for discussion of small business eligibility. Specifically, a small business will be required to bring its total deposit with the Commission up to ten percent of its winning bid within five business days after having been notified by the Commission of its winning bidder status. An additional ten percent will be due within five business days following the public notice that its BTA authorization is ready to be issued. The Commission will then issue the BTA authorization to the small business within ten business days following notification of receipt of this additional ten percent payment.

d. Bid Withdrawal, Default and Disqualification Payments

145. In the *Second Report and Order*, we concluded that strong incentives are needed to ensure that potential bidders are financially and otherwise qualified to participate in auction proceedings, so as to avoid delays in the deployment of new services to the public. *Id.* at 2382. We accordingly stated that we will, in simultaneous multiple round auctions, impose a bid withdrawal payment requirement in instances where a high bid is withdrawn during the course of the auction and an additional default payment if a winning bid is withdrawn after the auction has closed. *Id.* at 2373-2374.

146. In an MDS simultaneous multiple round auction, any bidder who withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the BTA service area is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.[92] No withdrawal payment

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[92] If a BTA service area is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the service area is re-offered. If a BTA service area is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder

will be assessed if the subsequent winning bid exceeds the withdrawn bid. After bidding closes, a defaulting auction winner (*i.e.*, a winner who fails to remit the required down payment within the prescribed time, fails to submit a long-form application or statement of intention, fails to make full payment, or is otherwise disqualified) will be subject to an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. *See* 47 C.F.R. §§ 1.2104(g) and 1.2109; *Second Report and Order* at 2373-2374. The additional three percent payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We will hold deposits made by defaulting or disqualified auction winners until full payment of these amounts. In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision. We believe that these payment requirements will discourage insincere bidding and default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements.[93]

147. In addition, "if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission also may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it may deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant." *Second Report and Order* at 2383. Parties who obtain their BTA authorizations through the auction process are put on notice that if their BTA authorizations are cancelled for any reason they will lose all monies paid to the Commission regarding those authorizations. This loss of monies paid is not intended as an exclusive remedy. Where such BTA holder's conduct so warrants, additional sanctions, including monetary fines and station license revocation, may be imposed.

148. In the event that an MDS auction winner defaults or is otherwise disqualified, the Commission must determine whether to hold a new auction or simply offer the BTA service area to the second-highest bidder. As we stated in the *Second Report and Order*, we believe that, as a general rule, when an auction winner defaults or is otherwise disqualified after having made the required down payment, the best course of action is to re-auction the

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will be required to pay an amount equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the BTA service area is offered by the Commission. If a BTA service area which is the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders will not be required to accept the offer. We wish to encourage losing bidders in MDS simultaneous multiple round auctions to bid on other BTA service areas, and therefore we will not hold them to their losing bids on a service area for which a bidder has withdrawn a bid or on which a bidder has defaulted.

[93] Commenters addressing this issue agree that default payments are needed to deter speculation and insincere bidding. *See* Comments of Association at 54; PacTel at 4-5.

BTA service area. *Id.* at 2383. Although we recognize that this may cause a brief delay in the initiation of service to the public, circumstances may change so significantly during the time between the original auction and the disqualification as to alter the value of the BTA service area to auction participants, as well as to parties who did not participate. In this situation, awarding BTA authorizations to the parties that value them most highly can best be assured through a re-auction. If, however, the default occurs within five business days after the bidding has closed, the Commission retains the discretion to offer the BTA service area to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the BTA service area to other bidders (in descending order of their bid amount) at the final bid levels. Moreover, if only a small number of relatively low value BTA service areas are to be re-auctioned and only a short time has passed since the initial auction, the Commission may choose to offer the BTA service areas to the highest losing bidders because the cost of holding another auction for MDS may not exceed the benefits. *See id.*; 47 C.F.R. § 1.2109(b) and (c).

149. If a new MDS auction becomes necessary because of default or disqualification more than five business days after bidding has ended, the Commission will afford new parties an opportunity to file applications. One of our primary goals in conducting auctions is to assure that all serious interested bidders are in the pool of qualified bidders at any re-auction. We believe that allowing new applications will facilitate achieving this goal, and that the short delay that may result from allowing new applications in a re-auction is warranted. Indeed, if we were not to allow new applicants in a re-auction, interested parties might be forced into an after-market transaction to obtain the BTA authorizations, which would itself delay service to the public and may prevent the public from recovering a reasonable portion of the value of the spectrum resource. *See Second Report and Order* at 2384; 47 C.F.R. § 1.2109(c).

e. Post-Auction Application Procedures

150. Unlike other services where auction winners may file a single long-form application to obtain a single license for the entire geographic area auctioned, the winning bidder for each BTA service area will be required, in accordance with our existing rules, to submit separate long-form applications for each channel group and location within the BTA for which the bidder wants to obtain an MDS station license. The winning bidder for each BTA service area will therefore be required to submit a separate long-form application for each Channel E group, for each Channel F group, and for each Channel 1, 2 (or 2A), H1, H2, and H3 within the BTA for which the winning bidder wishes to receive a license.

151. The long-form application for the initial MDS station license within each BTA service area will be due from the winning bidder for that BTA within thirty business days

after such bidder has been notified of its winning bidder status.[94] After the Commission receives the winning bidder's down payment and the long-form application for the initial MDS station license within the BTA, we will review the long-form application, which must include, among other items, a FCC Form 430 and exhibits concerning the winning bidder's involvement in bidding consortia and status as a designated entity.[95] If the long-form application is found to be acceptable, the Commission will release a public notice announcing this fact, triggering the thirty day filing window for petitions to deny. If the Commission denies or dismisses all petitions to deny (if any are filed), and is otherwise satisfied that the applicant is qualified, the BTA authorization will be issued and the initial conditional MDS station license within the BTA service area of the auction winner will be granted, assuming that the auction winner (except for a small business making installment payments) has made full payment as set forth in ¶ 143. *See Second Report and Order* at 2383; 47 C.F.R. §§ 1.2107(c), 1.2108. Subsequent long-form applications for MDS station licenses within BTA service areas, which auction winners may submit at any time during the five year build-out period, will be reviewed by the Commission and granted in a similar manner, except, of course, that the winning bidders will need to make no further payments.

152. However, we realize that a number of BTA service areas may be so encumbered that the winning bidder for such a BTA may be unable to file a long-form application proposing another MDS station within the BTA while meeting the Commission's interference standards as to all previously authorized or proposed MDS and ITFS facilities. The winning bidder's objective in bidding on such a heavily encumbered BTA would likely be to purchase the previously authorized or proposed MDS stations within the BTA and to maintain full flexibility to make modifications. It also seems likely that a winning bidder for a heavily encumbered BTA may itself possess most or all of the previously authorized or proposed MDS stations within that BTA, and the bidder's goal in obtaining the authorization for the BTA in which it already had MDS stations would similarly be to preserve full flexibility to make modifications. The winning bidder for a BTA service area so heavily encumbered that it believes it cannot file an acceptable long-form application proposing an MDS station with average transmitted power within its BTA should follow the post-auction

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[94] We realize that other services have generally required the filing of long-form applications within ten days of notification of the winning bidders. However, given the need for MDS auction winners to protect all previously authorized or proposed MDS and ITFS facilities within their BTA service areas from harmful interference, we believe that such winning bidders will likely require a longer period of time to complete the requisite engineering studies and interference analyses before filing their initial long-form applications for MDS station licenses.

[95] The content of these exhibits is set forth in Section 21.956(b) of our amended rules, attached as Appendix C. Commenters agree that such information is needed, particularly where an applicant claims status as a designated entity. *See* Comments of U.S. Wireless at 13.

procedures set forth below.

153. After notification of its status as a winning bidder for a heavily encumbered BTA service area, the bidder must make its down payment within five business days in the normal manner. Within thirty business days after notification of its winning bidder status, the winning bidder must file with the Commission, in lieu of a long-form application for an MDS station license, a statement of intention with regard to the BTA service area, showing the encumbered nature of the BTA, identifying the incumbents, and describing in detail its plan for obtaining the previously authorized or proposed MDS stations within the BTA. We do not intend to force winning bidders to file long-form applications for MDS station licenses in BTAs so encumbered that the only proposed station to not cause harmful interference to incumbents would, for example, be a facility with a one watt transmitter and a highly directional antenna, serving no significant population. Winning bidders must, however, document in their statements of intention that additional MDS stations with average transmitted power could not be constructed in their BTAs without causing harmful interference to previously authorized or proposed MDS and ITFS facilities. If a winning bidder fails to file either this statement of intention or a long-form application within the thirty day period, it will be in default and will be subject to the appropriate default payments. The statement of intention should also include a FCC Form 430, a drug certification, and the same exhibits concerning the winning bidder's financial circumstances, involvement in bidding consortia, and status as a designated entity that must be attached to initial long-form applications. *See supra* ¶ 151.

154. The Commission will, following its review of the winning bidder's statement of intention, issue the BTA authorization to the winning bidder. Such issuance of the BTA authorization will, of course, be made only following full payment by the winning bidder as set forth in ¶ 143, except for a small business making installment payments. Parties wishing to comment on or oppose the issuance of a BTA authorization issued in connection with the filing of a statement of intention by a winning bidder must do so prior to the Commission's issuance of the BTA authorization.

f. Period of MDS Station Licenses

155. Under the Commission's rules, licenses for MDS stations are to be "issued for a period not to exceed 10 years." 47 C.F.R. § 21.45(a). "Unless otherwise specified by the Commission," the expiration of MDS station licenses as a class is, however, set on a single date (May 1) "in the year of expiration" (*i.e.*, the year which is ten years from the last expiration date of the class of MDS licenses, which was 1991). *Id.* Thus, the current term for all MDS station licenses as a class will expire on May 1, 2001, regardless of when these licenses are awarded. Because MDS station licenses as a class are due to expire on this set date, an MDS licensee who receives its station license on, for example, May 1, 1996 would in effect have the license for only five years before the licensee must apply for renewal.

156. For the reasons set forth herein, we believe that MDS auction winners should

not be subject to the fixed MDS station license renewal cycle which, under existing rules, will expire on May 1, 2001, only five years or so from the time that any auction winner could expect to receive its initial station license in its BTA service area. We believe all winning bidders in the MDS auction should be assured of receiving station licenses of a duration sufficient so that they may have a reasonable period of time to construct their systems and earn a return on the amounts they invested in acquiring the BTA authorizations and MDS station licenses by competitive bidding. In addition, we realize that bidders who must arrange financing will need to assure lenders that they will have possession of their MDS station licenses for a reasonably lengthy period of time. We therefore determine that all MDS station licenses granted in every BTA service area auctioned should be for a ten year period (the maximum specified in Section 21.45(a)) to run from the date that the Commission declares bidding in the MDS auction to be closed.

157. We conclude that awarding MDS station licenses with definite ten year terms, rather than much briefer, indeterminate terms dependent on when the license is granted, serves both prospective bidders and the Commission well. As described above, the set ten year period is of sufficient certainty and length to be fair to parties who must now pay considerable sums, and perhaps obtain outside financing, in order to acquire BTA authorizations and MDS station licenses. In addition, we note that granting MDS station licenses with set ten year terms will allow small businesses eligible for installment financing to make payments over a period comparable to the length of their initial station licenses.[96] Furthermore, specifying that MDS licenses for stations located in BTA service areas acquired by competitive bidding will be for ten year terms dated from the close of bidding in the MDS auction, rather than from the actual date of issuance of each individual station license, will be administratively convenient for the Commission. Because all MDS station licenses granted within BTA service areas acquired by competitive bidding will expire on the same date, the Commission will be able to easily process those licenses and to deal more expeditiously with their renewal. In accordance with Section 21.45(a), we hereby specify that all MDS station licenses granted in every BTA service area auctioned will have ten year terms from the date that the Commission declares bidding in the MDS auction closed.

6. Regulatory Safeguards

a. Unjust Enrichment and Anti-Trafficking Provisions

158. Congress directed that we take steps to prevent unjust enrichment due to trafficking in licenses that were obtained through competitive bidding. *See* 47 U.S.C.

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[96] *See* Comments of Association at 59 (noting that Commission's general approach of permitting installment payments to be spread over term of license would be inequitable since all MDS station licenses were set to expire on May 1, 2001, regardless of when issued, and advocating that small businesses be allowed to pay for licenses in installments over a ten year period).

§ 309(j)(4)(E). In Section 7 below, we adopt specific rules to prevent designated entities from taking advantage of special provisions for such entities by transferring control of their BTA authorizations immediately following the MDS auction. Moreover, the MDS rules already contain provisions to reduce trafficking. *See* 47 C.F.R. § 21.39 (generally prohibiting assignment or transfer of MDS conditional station licenses prior to completion of construction of facility). These existing anti-trafficking provisions will continue to apply to MDS conditional station licenses granted prior to the institution of competitive bidding procedures. Consistent with the *Second Report and Order*, however, the existing MDS-specific anti-trafficking provisions will not apply to BTA authorizations and MDS conditional station licenses granted within auctioned BTA service areas.

159. With regard to BTA authorizations obtained by auction, an applicant seeking approval for an assignment or transfer of control of a BTA authorization within three years of receipt of such authorization by means of competitive bidding must, together with its assignment or transfer application, file with the Commission a statement indicating that its authorization was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration received in return for the assignment or transfer of the authorization. We will give particular scrutiny to auction winners who have not yet begun commercial service within their BTA service areas and who seek approval for an assignment or transfer of control of their authorizations within three years after the receipt of such authorizations, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context. *See Second Report and Order* at 2385-2386; 47 C.F.R. § 1.2111(a).

160. After consideration, we determine not to adopt any additional restrictions on the assignments or transfers of BTA authorizations, outside of the designated entity context. In our opinion, unjust enrichment is unlikely to be a problem in the MDS competitive bidding process where the auction winners will pay the market price for their BTA authorizations and hence resale of such authorizations should not involve any unjust enrichment. *See Second Report and Order* at 2385. Moreover, prohibitions on assignments or transfers of BTA authorizations, even if for a limited time, might have the unintended effect of delaying service to the public. *See id.* We therefore decline to impose prohibitions on assignments or transfers, such as a prohibition on the resale of MDS "channels for profit until those channels have been operational for one year," as one commenter suggests. *See* Comments of Rural Wireless at 11.

b. Construction Build-out Requirements

161. Congress has directed that the Commission, in implementing auction procedures, "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." 47 U.S.C.

§ 309(j)(4)(B). In the *Second Report and Order*, we decided that it was generally unnecessary to impose additional construction build-out or other performance requirements for auctionable services beyond those already provided in service rules. *Id.* at 2386. However, following a review of our existing MDS rules, we determined to alter the construction requirements that will be applicable to the holders of BTA authorizations obtained by competitive bidding.

162. Our current rules require the completion of construction of MDS stations within twelve months from the date of the conditional station license grant. 47 C.F.R. § 21.43. We will continue to apply this existing requirement to MDS conditional station licenses granted prior to the institution of competitive bidding procedures. We will not, however, apply this twelve month construction requirement to MDS conditional station licenses granted in the future in the BTA service areas of auction winners. Instead, we will require the holders of BTA authorizations to meet the five year build-out requirements set forth at ¶ 43.

163. We believe that this change in our construction requirements is necessitated by our decision to grant BTA-based authorizations to MDS auction winners. Our goal in imposing any construction or other performance requirement is to insure that each auction winner provides service throughout its BTA. We believe that the imposition of a general BTA-wide build-out requirement will better achieve this goal than our continued imposition of a twelve month construction requirement on each particular MDS facility within the BTA.[97]

c. Rules Prohibiting Collusion

164. In the generic auction rules, we adopted special provisions to prevent collusive conduct in the context of competitive bidding. 47 C.F.R. § 1.2105(c). We indicated that such rules would serve the objectives of the Budget Act by preventing parties, especially larger firms, from agreeing in advance to bidding strategies that might divide the market according to their strategic interests and to the disadvantage of other bidders. Such rules could also strengthen confidence in the bidding process. *Second Report and Order* at 2386. These rules apply to all auctionable services, including MDS. Applicants are required to identify in an exhibit to their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the BTA service areas being auctioned. Applicants are also required to certify that they have not entered into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular BTA service areas on which they will

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[97] We also note that imposing such a build-out requirement is consistent with the requirements of other area-based services, such as PCS. *See* 47 C.F.R. §§ 24.103 and 24.203 (requiring building out of narrowband and broadband PCS systems to serve percentage of population, or specified amount of area, within relevant service area).

or will not bid. *See* 47 C.F.R. § 1.2105(a)(2)(viii) and (ix). Except as otherwise provided in ¶ 165, after the short-form applications are filed and prior to the time the winning bidder has made its required down payment, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing settlement agreements, with other applicants, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the applicants' short-form application. *See* 47 C.F.R. § 1.2105(c)(1). Communications among applicants concerning matters unrelated to the MDS auction will, however, be permitted after the filing of short-form applications. *See Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6869 (1994).

165. Despite the restrictions set forth in ¶ 164, applicants may amend their short-form applications to reflect formation of bidding consortia or changes in ownership after the short-form application filing deadline has passed, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied to bid on the same BTA service areas. In addition, after the filing of short-form applications, applicants may make agreements to bid jointly for BTA service areas, provided the parties to the agreement have not applied for the same BTA service areas. A holder of a non-controlling attributable interest in an entity submitting a short-form application may also, following the filing of the short-form application and under certain conditions specified in 47 C.F.R. § 1.2105(c)(4), acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for the same BTA service areas. To reflect these changes in ownership or in the membership of consortia or joint bidding arrangements, applicants must amend their short-form applications by submitting a revised short-form, filed within two business days of any such change; such modifications will not be considered major amendments of the applications. However, any amendment which results in the change of control of an applicant will be considered a major amendment of the short-form. *See supra* ¶ 133; 47 C.F.R. § 1.2105(c)(2), (3) and (4); *Second Memorandum Opinion and Order* at 7254; *Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7684, 7688-7689 (1994). Finally, the winning bidder for each BTA service area must, as an exhibit to its initial long-form application or statement of intention, explain the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement it had entered into relating to the competitive bidding process prior to the time bidding was completed. *See* 47 C.F.R. § 1.2107(d).

166. Where specific instances of collusion in the competitive bidding process are alleged, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may, among other remedies, be subject to the loss of their upfront payment, down payment or their full bid amount, cancellation of their BTA authorizations, and may be prohibited from participating in future auctions. *See Second Report and Order* at 2388; 47 C.F.R. § 1.2109(d).

7. Treatment of Designated Entities

a. General Considerations

167. Section 309(j) of the Communications Act provides that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). To achieve this congressional goal, the statute directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures." *Id.* In addition, Section 309(j)(3)(B) instructs the Commission, in establishing eligibility criteria and bidding methodologies, to promote "economic opportunity and competition . . . by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," which are collectively referred to as "designated entities." 47 U.S.C. § 309(j)(3)(B); 47 C.F.R. § 1.2110. Section 309(j)(4)(A) further provides that to promote these objectives, the Commission shall consider alternative payment schedules, including lump sums or guaranteed installment payments. 47 U.S.C. § 309(j)(4)(A).

168. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was aware of the problems that designated entities would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in accessing capital. For example, the legislative history accompanying our grant of auction authority states generally that the Commission's regulations "must promote economic opportunity and competition," and "[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women. H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993) (House Report). The House Report states that the House Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." *Id.* More specifically, the House Committee was concerned that the adoption of competitive bidding should not have the effect of "excluding small businesses from the Commission's licensing procedures," and anticipated that the Commission would adopt regulations to ensure that small businesses would "continue to have opportunities to become Commission licensees." *Id.* at 255.

169. Consistent with Congress' concern that auctions not operate to exclude small businesses, the provisions relating to installment payments in Section 309(j) were clearly intended to assist small businesses. The House Report states that these provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations, including those owned by members of minority groups and women." *Id.* at 255. It also states that the provisions in Section 309(j)(4)(A) pertaining to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not

inadvertently favor incumbents with "deep pockets" "over new companies or start-ups." *Id.*

170. Moreover, with regard to access to capital, Congress had made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit." Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 331(a)(3), 106 Stat. 986, 1007 (1992). As a result of these difficulties, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns." *Id.* at § 331(b)(2) & (3).

171. In our initial implementation of Section 309(j), the Commission established in the *Second Report and Order* eligibility criteria and general rules that would govern the special measures for small businesses, rural telephone companies, and businesses owned by minorities and women. We also identified several measures, including installment payments, bidding credits and spectrum set-asides, that we could choose from in formulating the rules for auctionable spectrum-based services. In addition, we established rules to prevent unjust enrichment by designated entities seeking to assign or transfer licenses obtained through use of one of these special measures. *See Second Report and Order* at 2388-2400.

172. In adopting provisions to provide designated entities opportunities in MDS, we note that, while Section 309(j) lists the various designated entities together, the statute does not indicate that each group must be afforded the same type of treatment. *See Competitive Bidding Notice* at 7646. We have consistently emphasized that the provisions applicable to particular designated entities would vary depending on the nature of each individual service. In particular, we have evaluated the capital requirements, the nature of the expected pool of bidders, and other characteristics of each service to determine the appropriate measures to achieve the objectives of the auction statute. *See Second Memorandum Opinion and Order* at 7256; *Fourth Report and Order* at 2336.

173. With regard to MDS, we note that this service differs from the other services that have been auctioned to date in several important ways. First, unlike PCS and IVDS, wireless cable is a heavily encumbered service with many of the channels in most major markets already occupied. Given the limited amount of remaining usable spectrum and the need to protect incumbents from harmful interference, we anticipate that the BTA service areas will be auctioned for relatively modest amounts, particularly in comparison to the sums bid in the PCS auctions. Second, it is necessary for MDS channels within a geographic area to be aggregated under the control of a single wireless cable operator, to allow it to compete with wired cable television systems in the same area. *Notice* at 7667. Thus, our goal in this proceeding is not to set the stage for the development of an entirely new industry, such as PCS, but to allow the progression and rationalization of the existing wireless cable industry. Accordingly, we cannot adopt designated entity rules that would hinder the accumulation of MDS channels within BTAs by entities financially capable of operating wireless cable