will rely on existing case law for making control determinations. The following equity investments are counted: voting stock, nonvoting stock, and limited partnership interests.[7]

Second, the percentage of ownership interest attributed to a limited partner will be based on the partner's economic interest in the partnership. The FCC will assess the percentage of the partner's capital contribution as well as the percentage of profits and losses allocated to the partner. General partnership interests are deemed attributable regardless of equity percentage because of the control conferred on general partners by the nature of their interest.

Third, the 20 percent attribution rule applies on a cumulative basis to all parties with ownership interests in cellular operations. Any parties that are participants in a particular PCS venture and that also have ownership interests in any single cellular operation will have their cellular ownership interests in the cellular operator aggregated for the purposes of determining whether the 20 percent cognizable interest threshold has been exceeded. Also, there is no exemption for minority investors in companies controlled by a single majority shareholder. The interests of these minority shareholders are subject to all the attribution rules.

Fourth, investments not attributable for the PCS spectrum limitation or the cellular/PCS cross-ownership include debt interests, such as loans secured by the equipment used in the licensed system, and equity interests below the 5 percent (PCS) and 20 percent

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[7] Under some limited circumstances, insulated limited partners may acquire up to a 10 percent interest that is not attributable. *See* Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, FCC 95-92 (Mar. 3, 1995).

(cellular) thresholds. Convertible debt instruments or options with rights of conversion to equity interests shall not be attributed unless and until conversion is effected.

Fifth, the interests of a cellular or PCS licensee, or entity in control of such a licensee, are attributed to the officers and directors of that entity. If an officer of a company wishes to invest in a PCS market, he or she may only do so if the company itself could make the same investment in compliance with the attribution rules.

Finally, the FCC has adopted rules that can result in a management company being attributed the spectrum licensed to the managed company. The attribution of a management agreement can occur even if a licensee and the management company are in compliance with the FCC's *de facto* transfer of control rules. Because the FCC's regulations on attribution of management agreements are complex and involve many interpretive issues, entities entering into management agreements are strongly advised to seek guidance from the FCC or counsel to assure compliance with the Commission's rules.

b. Attribution Rules for Certain Designated Entities

The FCC has relaxed the attribution rules for certain cellular investments involving designated entities (small businesses, rural telephone companies, and women and/or minority owned businesses). Designated entities shall not have their non-controlling ownership interests in cellular licensees attributed unless those interests amount to 40 percent or more of the cellular licensee. Similarly, entities that hold up to a 40 percent non-controlling interest in a cellular licensee covering 10 percent or more of the population in a PCS service area

may make non-controlling investments in that PCS licensee if the PCS licensee is controlled by a women or minority owned business.

c. *Cellular Divestiture*

The FCC will allow cellular operators serving less than 20 percent of the PCS service area to divest their attributable cellular interests that do not comply with the cross-ownership restrictions if they win more than 10 MHz of PCS spectrum in an auction. In this case, the applicant, prior to the auction, must commit to divestiture within 90 days of the PCS license grant. Failure to do so will result in automatic cancellation of the PCS license.

Procedurally, a divesting cellular operator must submit with its short form application a statement that, if successful in obtaining more than 10 MHz of spectrum, it will come into complete compliance with the cellular/PCS cross-ownership restrictions within 90 days of the PCS license grant. If successful, the cellular operator must include with its long form application a statement describing its efforts to date and a statement of its future plans to come into compliance with the limitations on common ownership of cellular and PCS licenses. Licensees must comply with the requirements within 90 days of the license grant, which means that a licensee must have submitted to the Commission an application for assignment or transfer of control of the cellular licensee proposing to bring the licensee into compliance. Additionally, the licensee may divest its interest to an interim independent trustee that in turn would sell the interest to a third party.

4. Limit On Entrepreneurs' Blocks Acquired Through Competitive Bidding

The FCC has reserved a portion of the broadband PCS spectrum available at auction for small entrepreneurial entities. Blocks C (30 MHz) and F (10 MHz) are the restricted entrepreneurs' blocks, both licensed on a BTA service area basis, in which only qualified entrepreneurs may bid for the licenses. However, the FCC has limited the number of licenses that any qualified entity may win in the auctions to 10 percent of the entrepreneurs' block licenses. Since blocks C and F contain a total of 986 licenses, 98 licenses is therefore the maximum number permitted to be won at auction. Any combination of C and F block licenses may be won, so long as the 10 percent limit is not exceeded. Moreover, the 10 percent limitation is not an ownership cap, but merely limits the number of licenses that may be won at the auction. Through post-auction purchases, a party may own more than 98 entrepreneurs' block licenses.

5. Non-U.S. Ownership Restrictions

The FCC has several restrictions on nondomestic ownership of broadcast, common carrier, and certain aeronautical licenses. These restrictions have been extended to broadband PCS licenses. Under 47 U.S.C. § 310(b), no license may be granted to or held by: (1) any alien or the representative of any alien, or (2) any corporation organized under the laws of any foreign government. In addition to bans on direct licensing of nondomestic entities, there are limitations on license grants to entities in which non-U.S. citizens have an ownership interest or exert control. Similarly, no license shall be granted or held by: (1) an

entity that has any alien officer or director, or (2) an entity in which more than 20 percent of the equity is owned or voted by aliens, their representatives, a foreign government or representatives thereof, or by any corporation organized under the laws of a foreign country. These restrictions, imposed by Section 310(b)(3), are absolute and may not be waived by the FCC.

The restrictions on licenses also extend to ownership or positional interests of aliens in entities that directly or indirectly control a PCS licensee. "[I]f the Commission finds that the public interest will be served by the refusal or revocation of such license," parent companies that directly or indirectly control a licensee are barred from having:

(1) an alien officer;

(2) a board of directors in which alien membership exceeds 25 percent; or

(3) more than 25 percent of the capital stock (or equity interest) owned of record or voted by aliens, their representatives, a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country.

Section 310(b)(4) is more flexible than Section 310(b)(3) in allowing the FCC to make a public interest determination, on a case-by-case basis, that the public interest would not be harmed by ownership interests in excess of these limits. Section 310(b)(3)-(4) restrictions also apply to partnerships, as tailored to accommodate differences in the respective rights and obligations of partners and corporate shareholders.

III. 2 GHz BROADBAND PCS LICENSING RULES AND PROCEDURES

A. Pre-Auction Application Procedures

1. Initial FCC Public Notice

The FCC will release an initial public notice announcing that it will accept applications for specific broadband PCS licenses. This notice will specify the following five important elements: (1) the licenses to be auctioned; (2) the time and place of an auction, should mutually exclusive applications be filed; (3) the method of competitive bidding to be used, including applicable bid submission procedures and auction rules; (4) the deadline for filing short form applications; and (5) the amounts and deadlines for submitting the upfront payment. Soon after the filing of the initial public notice, the FCC will provide prospective bidders with an auction information package.

2. Short Form Application

All bidders will be required to submit one paper original, one microfiche original, and two microfiche copies of their short form application on FCC Form 175 (and FCC Form 175-S if applicable), together with any applicable filing fee by the date specified in the initial public notice. The short form application requires that a bidder specify certain identifying and ownership information and disclose all bidding agreements.

For example, the applicant must specify its status as a designated entity, if applicable; its classification (*i.e.*, individual, corporation, partnership, trust, or other); the markets and

frequency blocks for which it is applying; and the name of persons authorized to place or withdraw a bid. Applicants must also provide detailed ownership information and identify all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships, or other agreements or understandings that relate to the competitive bidding process. Furthermore, applicants must certify that they have not entered and will not enter 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 properties on which they will or will not bid. Finally, applicants for licenses in the entrepreneurs' blocks will be required to certify that they are eligible to bid on the licenses in those blocks.[8]

3. Second and Third FCC Public Notices

After reviewing the short form applications, the FCC will issue a second public notice listing all defective applications, and applicants whose applications contain minor defects will be given an opportunity to cure their applications by submitting a corrected version. After reviewing the corrected applications, the FCC will release a third public notice announcing the names of all applicants whose applications have been accepted for filing. These applicants will be required to submit an upfront payment to the FCC in order to participate in the auction.

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[8] *See* Section III(E)(1)(a) (discussing eligibility for bidding on the entrepreneurs' block licenses).

4. Upfront Payment

The upfront payment will be based upon a standard payment formula of $0.02 per MHz per each member of the population within the service area ("MHz/POP") for the largest combination of MHz/POPs a bidder anticipates bidding on in any single round of bidding for broadband PCS.[9] In the initial public notice, the FCC will announce population information corresponding to each license to enable bidders to calculate their upfront payments. For example, upfront payments for the largest MTA (New York) and the largest BTA (also New York) would be $16 million and $3.46 million, respectively. The smallest MTA upfront payment (Tulsa) would be approximately $600,000, while the smallest BTA upfront payment (Williston, ND) would be $5,500. Although the FCC will specify a final deadline for submission of the upfront payment before each auction, applicants generally will be required to submit the full amount of their upfront payment to the FCC lock-box bank no later than 14 days before the scheduled auction. Payment must 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 payable to the Federal Communications Commission.

5. Fourth FCC Public Notice

After receipt of timely upfront payments, the FCC will issue a fourth public notice announcing the names of all applicants who are qualified to bid. The FCC will provide each

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[9] The upfront payment for designated entities is $0.015/MHz/POP. *See* Section III(E)(3)(a).

qualified bidder with further instructions and information regarding the auctions. Additionally, the FCC will issue each bidder a "bidder identification number" to be used when submitting auction bids.

B. Conduct of the Broadband PCS Auctions

As discussed in Part II, the FCC has divided the 120 MHz of spectrum allocated to licensed broadband PCS into three 30 MHz blocks (Blocks A, B, and C) and three 10 MHz blocks (D, E, and F). The FCC has also established two different service areas: the licenses in frequency blocks A and B will be awarded on an MTA basis, and the licenses in frequency blocks C, D, E, and F will be awarded on a BTA basis. In order to conduct the auctions effectively, the FCC has combined interrelated license blocks into three groups. The FCC will sequentially conduct separate simultaneous multiple round auctions for each of the following groups:

- Large unrestricted blocks — Blocks A & B (99 licenses)
- Entrepreneurs' block - Block C (493 licenses)
- Entrepreneurs' block — Block F (493 licenses)
- Small unrestricted blocks — Blocks D & E (986 licenses)

The FCC will conduct the broadband PCS auctions using a simultaneous multiple round auction format. It has developed identical auction procedures for each of the four auctions, while retaining discretion to modify the auction procedures based upon experience it may gain in the earlier auctions. In each simultaneous multiple round auction, the FCC

will accept bids on all of the licenses in the group up for bid, and bidders will submit their bids through multiple rounds of bidding. The FCC will conduct the auction in three stages, with the auction beginning in stage I and proceeding to subsequent stages as bidding activity decreases. After declaring their maximum bidding eligibility through an upfront payment, bidders will be required to comply with established minimum bid increments and bidding activity for each auction stage in order to retain their bidding eligibility in subsequent rounds. The auction will remain open until there are no new acceptable bids on any license. In addition, penalties may apply to high bids withdrawn either before or after the close of bidding. These rules are discussed in more detail below and summarized in the flowcharts attached as Figures 5 and 6.

1. Bidding Rounds

The FCC will conduct one round of bidding each business day, and bidders will have a single business day to submit bids. The FCC, however, reserves the right to vary the duration of bidding rounds or the interval at which bids are accepted and has indicated that it is more likely to conduct more than one round per day early in an auction than towards the end of the auction. The FCC will indicate either by public notice, prior to an auction, or by announcement during an auction, any changes to the duration of and intervals between bidding rounds.

Simultaneous Multiple-Round Broadband PCS Auction Rules

BIDDERS ESTABLISH ELIGIBILITY

- FCC initiates auction process through public notice
- Bidders must first meet pre-auction application procedures
- Bidders are then required to establish their eligibility in terms of MHz/POPs and make an upfront payment equal to $.02/MHz/POP (designated entities will be subject to an upfront payment requirement of $.015/MHz/POP)

Auction Begins

	STAGE I	STAGE II	STAGE III
Minimum Bid Increment	• Greater of: 5% of previous round's high bid *OR* $.02/MHz/POP	• Greater of: 2% of previous round's high bid *OR* $.01/MHz/POP	• Greater of: 1% of previous round's high bid *OR* $.005/MHz/POP
Activity Rule	• A bidder must remain active on 1/3 of its MHz/POP eligibility	• A bidder must remain active on 2/3 of its MHz/POP eligibility	• A bidder must remain active on ALL of its MHz/POP eligibility*
Penalty	• A bidder shall lose 3 MHz/POPs of eligibility for every 1 MHz/POP below the minimum activity level	• A bidder shall lose 1.5 MHz/POPs of eligibility for every 1 MHz/POP below the minimum activity level	• A bidder shall lose 1.0 MHz/POPs of eligibility for every 1 MHz/POP below the minimum activity level

The auction proceeds to Stage II when in 3 consecutive rounds of Stage I, the bid has increased on 10% or less of total spectrum being auctioned

The auction proceeds to Stage III when in 3 consecutive rounds of Stage II, the bid has increased on 5% or less of total spectrum being auctioned

SIMULTANEOUS STOPPING RULE

- Bidding remains open on all licenses until there is no new bid on any license
- Adopted for MTA and BTA licenses, although the FCC retains discretion to impose a hybrid rule for BTA licenses
- The FCC retains discretion to declare at any point after 40 rounds in a simultaneous multiple-round auction that the auction will end after some specified number of additional rounds or to keep the auction open even if no new acceptable bids and no proactive waivers are submitted in a single round

* The FCC may reduce the required activity level for Stage III to 95% of all MHz/POPs by Public Notice in advance of the auction.

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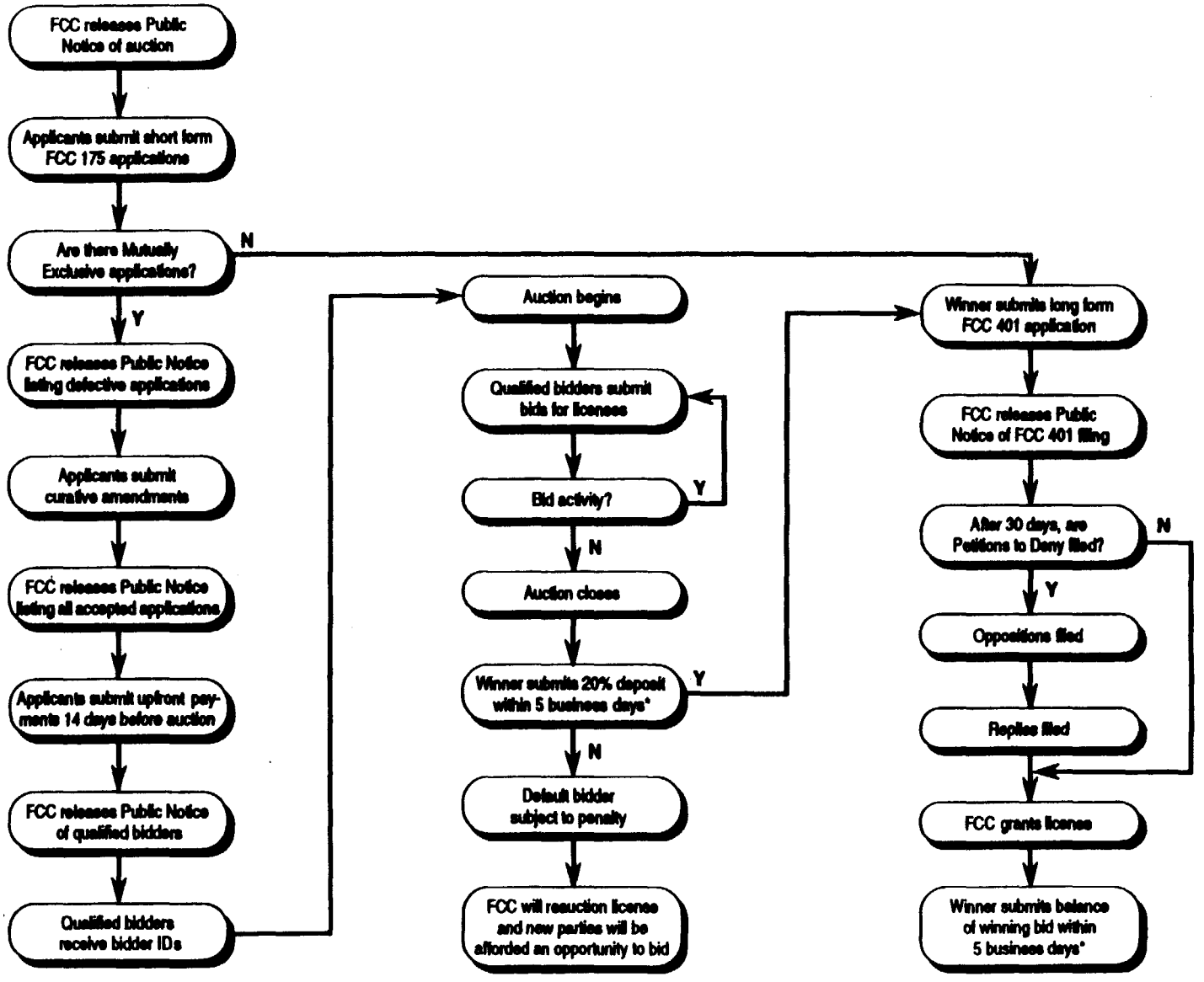
Overview Of Broadband PCS Bidding Procedures



* Different rules apply to auction winners that are eligible for installment payments (5% of winning bid due within 5 business days after auction close with an additional 5% due after license grant).

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2. Auction Stages

The FCC will divide each broadband PCS auction into three separate stages to ensure that the auction will proceed at an appropriate pace. The stage classification is significant because it determines the required minimum bid increment, a bidder's required activity level, and the penalty imposed upon a bidder that falls below the required activity level. The FCC will begin the auction in stage I and proceed to a subsequent stage when the bidding activity is confined to a limited percentage of the total spectrum available for auction (measured in terms of MHz/POPs).

The FCC will advance the auction into a subsequent stage according to the following criteria:

- The auction will proceed from stage I to stage II when, in each of three consecutive rounds of stage I, the high bid has increased on 10 percent or less of the spectrum being auctioned.
- The auction will proceed from stage II to stage III when, in each of three consecutive rounds of stage II, the high bid has increased on 5 percent or less of the spectrum being auctioned.

In order to speed up the auction, the FCC may announce, at any time after the initial 15 rounds, that the next stage of the auction will begin in the next bidding round. Furthermore, by public notice prior to a specific auction, the FCC may increase or decrease the activity levels at which the auction moves between stages.

3. Minimum Bid Increments

The minimum bid increment is the amount or percentage by which a 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. In general, this increment is some percentage of the high bid from the previous round or a fixed dollar amount per MHz/POP, whichever is greater. The FCC will begin the auction with a large bid increment and reduce it during the auction's later stages. Subject to its discretion, the FCC has adopted the following minimum bid increments for each auction stage:

TABLE 2: BROADBAND PCS MINIMUM BID INCREMENTS	
Auction Stage	Minimum Bid Increment
I	Greater of: 5% of the previous round high bid or $0.02/MHz/POP
II	Greater of: 2% of the previous round high bid or $0.01/MHz/POP
III	Greater of: 1% of the previous round high bid or $0.005/MHz/POP

In addition to a minimum bid increment, the FCC will establish a suggested minimum opening bid for each license of no less than $0.05 per MHz/POP and no more than $0.20 MHz/POP. A bidder may place an opening bid below the suggested minimum, although that bid must be above the Stage I minimum bid increment of $0.02 MHz/POP. Any bid below the suggested bid will count as activity under the activity rule only if no bids at or above the suggested minimum bid are received.[10]

[10] *See* Section III(B)(4) (discussing the activity rules).

4. Activity Rules

An activity rule requires that bidders remain active on a certain percentage of their total eligibility throughout each bidding round. A bidder is considered active on a license in the current round if the bidder has submitted an acceptable bid for that license in the current round, or has the high bid for that license from the previous round.

A bidder will be able to secure the option to participate at whatever level it deems appropriate, although it must establish its initial bidding eligibility by submitting its upfront payment. In each round, a bidder is limited to bidding on licenses encompassing no more than the number of MHz/POPs covered by its upfront payment. Licenses on which a bidder is the high bidder from the previous round count against this bidding limit. However, bidders will have flexibility to shift their bids among licenses for which they have applied as long as, within each round, the total MHz/POPs encompassed by those licenses do not exceed an applicant's maximum eligibility.

The penalty for falling below the minimum required activity level is a reduction in eligibility to bid in the subsequent round. Subject to its discretion, the FCC has adopted the following activity rules and penalties:

TABLE 3: REQUIRED BROADBAND PCS AUCTION ACTIVITY LEVELS		
Auction Stage	Minimum Activity Level (per MHz/POPs)	Penalty
I	A bidder must remain active on **1/3** of the MHz/POPs for which it is eligible	3.0 MHz/POPs for each 1 MHz/POP below the required minimum activity level
II	A bidder must remain active on **2/3** of the MHz/POPs for which it is eligible	1.5 MHz/POP for each 1 MHz/POP below the required minimum activity level
III	A bidder must remain active on **all** of the MHz/POPs for which it is eligible	1.0 MHz/POP for each 1 MHz/POP below the required minimum activity level

The FCC will permit bidders one automatic waiver from the activity rule during each stage of the auction. A waiver will permit a bidder to maintain its eligibility at the same level as in the round for which the waiver is submitted. A waiver cannot be used to correct an error in the amount of a bid. A bidder may submit a waiver either in the round in which its bidding falls below the minimum required activity level in that round, or prior to submitting a bid in the next round. If a waiver is entered in a round in which no other bidding activity occurs, the auction will remain open. However, a waiver entered after a round in which no other bidding activity occurs will not reopen the auction.

5. Stopping Rules

The FCC has adopted a simultaneous stopping rule for all MTA licenses, whereby bidding remains open on all licenses until there is no new acceptable bid on any license. The FCC also adopted a simultaneous stopping rule for all BTA licenses, although it retains discretion either to use a hybrid stopping rule or to allow bidding to close on individual

licenses. Moreover, the FCC retains the discretion to declare at any point after 40 rounds in a simultaneous multiple round auction that the auction will end after some specified number of additional rounds.

6. Penalty for High Bid Withdrawn Prior to Auction Close

Any bidder that withdraws a high bid during an auction before the FCC declares bidding closed will be required to reimburse the FCC the amount of the difference between its bid and the amount of the winning bid the next time the license is offered by the FCC, if the subsequent winning bid is lower.

C. Post-Auction Payment And Procedures

1. Down Payment

With the exception of bidders eligible for installment payments in the entrepreneurs' blocks,[11] winning bidders will be required to supplement their upfront payments with a down payment sufficient to bring their total deposit up to 20 percent of the winning bid. This down payment must be submitted to the FCC's lock-box bank by cashier's check or wire transfer by a date specified by public notice, generally within five business days following the close of bidding.

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[11] An auction winner that is eligible for installment payments will be required to bring its deposits with the Commission up to only 5 percent of its winning bid, with an additional 5 percent of the winning bid due after the license is granted. *See* Section III(E)(3)(b) (discussing installment payments).

2. Long Form Application

After making the required down payment, the winning bidder will be required to file a long form application with the Commission on FCC Form 600.[12] In addition, each winning bidder is required to attach as an exhibit to the Form 600 application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding. Winning bidders in the entrepreneurs' blocks will also be required to submit an exhibit to the FCC Form 600 that includes the gross revenues and total assets of the applicant and all attributable investors.[13] Again, the filing date will be specified by public notice, generally within ten business days after the close of bidding. Application filing and content requirements, waiver procedures, procedures for return of defective applications, procedures for modifying applications, and the general application processing rules will be governed by Part 22 of the Commission's Rules.[14]

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[12] If an auction winner proposes to use any portion of the broadband PCS spectrum to offer service on a private mobile radio service basis, it must overcome the presumption that PCS is CMRS. Such an applicant must attach a certification that it will offer service on a private mobile radio basis as an exhibit to the long form application. The certification must include a description of the proposed service sufficient to demonstrate that it is not within the definition of CMRS. *See* 47 C.F.R. § 20.3. A summary of broadband PCS forms and fee requirements is attached as Appendix A.

[13] *See* Section III(E)(1)(c)(1).

[14] *See* 47 C.F.R. §§ 22.0 *et al.*

3. Public Notice and Petition To Deny Procedures

If the Commission determines that the long form application is acceptable for filing, a public notice will be issued announcing this fact. Interested parties will then have thirty days to file petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied the applicant is qualified, the license(s) will be granted to the auction winner, which must then make full payment of the balance of the winning bid within five business days following award of the license. Grant of the license will be conditioned upon receipt of this payment. If, however, the Commission identifies substantial and material issues of fact in need of resolution, a hearing will be held and parties may submit evidence in written form. Alternatively, the agency may deny an application outright if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination.

4. Bid Default Penalties

A winning bidder that subsequently fails to remit the required down payment within the prescribed time, fails to pay for the license, or is otherwise disqualified will be assessed a penalty equal to the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission *plus* an additional penalty of three percent of the subsequent winning bid or three percent of the defaulting bid, whichever is less. Deposits made by defaulting or disqualified auction winners will be held until full payment of the penalty is made. In addition, if a default or disqualification involves gross misconduct, misrepresentation, or bad faith by an applicant, the agency may declare such applicant and its principals ineligible to bid in future proceedings and, if appropriate, may institute

proceedings to revoke any existing licenses held by the applicant. In the event that such default or disqualification occurs, the license(s) will be re-auctioned and new parties will be afforded an opportunity to file applications.

D. Anti-Collusion Regulations

To avoid bidder collusion in the auctions for PCS licenses, the FCC intends to rely both on specific regulations governing the conduct of bidders and on existing Department of Justice ("DoJ") antitrust enforcement mechanisms. Both the FCC and DoJ regulations are based on ensuring the highest level of competition among bidders during the conduct of the auction and among providers in the PCS marketplace after licenses are issued.

1. Limitations on Bidders Prior to Filing an FCC Form 175

As the FCC has noted, agreements (including tacit agreements or "understandings") between two or more actual or potential competitors "to submit collusive, non-competitive or rigged bids;" "to divide or allocate territories horizontally in order to minimize competition;" or to "reserve one market for one [competitor] and another for the other" are *per se* violations of the Sherman Act. At the same time, the FCC has explicitly authorized applicants to enter into bidding consortia, which has the overall effect of lessening competition in bidding for authorizations and requires at least some discussions that, in theory, could constitute evidence of potential antitrust violations. There are no hard and fast rules resolving the tension between these conflicting policies.

Any personnel conducting discussions with other potential bidders thus should be sensitized to the following issues that could raise questions under DoJ guidelines. First, under no circumstances should any personnel engage in any conversations with other potential bidders intended to produce a market allocation or division, whether tacit or explicit. Second, bidders should avoid any discussions of global bidding strategy and any discussions relating to markets other than the specific market for which a consortium is to be formed. Finally, should a bidder encounter any potential partners who have not been sensitized to antitrust considerations and who mention market activities outside of a potential consortium arrangement, the bidder should advise such individuals that they must not discuss any activities outside of designated markets.

2. Limitations on Bidders After Filing an FCC Form 175

In general, the FCC has taken a strong position against allowing discussions that might permit collusive, anticompetitive behavior on the part of applicants. While the FCC has stated its intent to rely primarily on existing antitrust laws and rules, the FCC has established regulations specifically targeted at preventing bidding collusion, including disclosure certifications, limitations on entering into agreements or arrangements subsequent to the filing of the Form 175, and a general prohibition on collusion during the auctions. Under this scheme, formation of bidding consortium prior to the filing of the Form 175 is permitted, subject to disclosure, but generally no discussions are permitted after the filing of the Form 175.

The FCC has, however, relaxed its rules in two respects to permit auction participants to discuss post-short form consortia or equity investments that do not alter control of the bidder under certain circumstances. First, bidders can discuss consortium arrangements and equity investments between applicants if and only if the applicants are not bidding against each other in *any* of the same markets. Thus, if Applicant A is registered to bid only Markets X and Y and Applicant B is registered to bid only on Markets Y and Z, A and B cannot discuss or form a consortium to bid on Markets X, Y, or Z. If Applicant B was registered to bid only on Market Z, however, A and B could discuss the formation of a consortium in Markets X, Y, or Z.

Second, the FCC will permit holders of non-controlling attributable interests in an applicant to form agreements with other applicants if and only if the attributable interest holder certifies to the Commission that it has observed and will observe certain restrictions on communication concerning the applicants in which it holds an attributable interest or with which it has entered into a consortium arrangement. In particular, the attributable interest holder must certify that it has not communicated and will not communicate with the applicant or anyone else, concerning the bids or bidding strategies (including which licenses an applicant will or will not bid on) of more than one applicant for licenses in the same geographic area in which it holds an ownership interest or with which it has a consortium arrangement.

3. Consequences of Failing To Comply With Anti-Collusion Requirements

In the FCC's original competitive bidding order, it indicated that, where allegations of collusion are made in the petition to deny process, 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 be subject to forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions."

E. Special Provisions Relating to Designated Entities

1. Bidding In the Entrepreneurs' Blocks

a. Qualifying as an Entrepreneur

To bid in the entrepreneurs' blocks, the applicant, including its affiliates and attributable investors, must cumulatively have gross revenues of less than $125 million in each of the last two years, as shown by their most recent audited financial statements,[15] and total assets of less than $500 million.[16] The dollar values for gross revenue, total assets,

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[15] For the initial entrepreneurs' block auction, companies may use statements covering the two-year period ending on or after December 31, 1993. A newly-formed company may use the audited statements of its predecessor in interest, or financial statements that are certified by the applicant to be current and accurate at the time of the Form 175 filing.

[16] An earlier restriction limiting the personal net worth of the attributable investors or principals in the applicant to $100 million has been eliminated. *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 10 FCC Rcd 403 (1994).

and personal net worth are calculated on a cumulative, fully-diluted basis.[17] In general, the financial caps on eligibility to bid in the entrepreneurs' blocks are meant to encourage smaller entities to participate in the provision of broadband PCS services.

The gross revenues and total assets of certain investors will not be counted toward the financial caps as long as the applicant has a "control group," identified on the short form application, that consists of one or more individuals or entities that: (1) controls the applicant; (2) holds at least 25 percent of the equity; and (3) for corporations, holds at least 50.1 percent of the voting stock. Women and/or minority owned businesses have an alternative option. Such applicants may sell up to 49.9 percent of their equity, including 25 percent of the voting rights, to a single investor without the gross revenues and assets of such investor being attributed to the women and/or minority owned applicant, provided that the applicant has a control group that: (1) controls the applicant; (2) holds at least 50.1 percent of the equity; and (3) for corporations, holds at least 50.1 percent of the voting stock.

Under the general rule, at least 25 percent of the applicant's equity must be held by the control group. Of that 25 percent equity held by the control group members, at least 15 percent of the company's equity must be held by qualifying investors in the control group. For example, if the applicant seeks minority or women owned status, 15 percent of more of the equity must be owned by control members who are minorities and/or women. If the

[17] As discussed in more detail in Section III(E)(4)(a), "fully-diluted" means that agreements such as stock options, warrants, and convertible debentures will be considered as having a present effect and treated as if the rights thereunder have been exercised.

applicant seeks small business status, at least 15 percent of the equity must be held by control group members who, in the aggregate, qualify as a small business.[18]

The qualifying investors' 15 percent equity may be held outright or in the form of options exercisable at any time, solely at the holder's discretion, at an exercise price equal to or less than the current market valuation of the underlying shares at the time of the short form filing. The remaining 10 percent of the control group's minimum 25 percent equity contribution may be held outright or as either stock options or shares by: (1) investors in the control group that are women, minorities, small businesses or entrepreneurs; (2) individuals who are members of an applicant's management team (who may be non-minorities or men, or have affiliates exceeding the entrepreneurs' block or small business size thresholds; (3) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994;[19] or (4) noncontrolling investors.[20] Three

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[18] For example, if a preexisting company wishes to qualify as a small business control group, its gross revenues and total assets will be added to the gross revenues and assets of each of its controlling shareholders and to those of all affiliates. The resulting sum must be $40 million or less in gross revenues and $500 million in assets. The gross revenues and total assets of the company's preexisting, noncontrolling shareholders, however, will not be considered.

[19] The FCC will not limit who qualifies for such an investor, but will scrutinize any significant (i.e., changes over 5 percent) equity restructuring occurring after adoption of its rules.

[20] The FCC defines institutional investors to include insurance companies, banks holding stock in trust accounts through their trust departments, or investment companies as defined in 15 U.S.C. § 80a-3(a), without reference to, or incorporation of, the exemptions set forth in 15 U.S.C. §§ 80a-3(b) and (c), provided that, if an investment company is owned by other entities, in whole or in part, then such investment company or other entities or affiliates of such other entities, taken as a whole, must be primarily engaged in the business of investing or trading in securities or in distributing or providing investment management services for securities.