## D. APPLICATION PROCEDURES

**100.** In the *CMRS Third Report and Order,* we adopted rules to govern the filing and processing of applications for Part 90 services reclassified as CMRS that are comparable to our rules and procedures for Part 22 services. In the *CMRS Third Report and Order*, however, we declined to consider definitions of initial applications and major or minor modifications and amendments until we more fully examined the 220 MHz service in this rulemaking proceeding. We address those definitions and other application issues below.

### 1. Initial Applications

**101.** The Budget Act directs the Commission to take steps to revise our rules to make mobile services subject to comparable regulatory requirements.[153] We therefore propose a definition of initial applications in the 220 MHz service that is similar to that adopted in the *CMRS Third Report and Order* for other mobile services. There, CMRS applicants that are licensed on a market or geographically-defined basis are "those that propose to construct and operate a new system in the relevant service."[154] The definition extends to existing licensees if they are applying for a geographic area that encompasses their existing facilities and would thus be able to extend existing services to other parts of the same market. Therefore, we propose to define an initial application for a 220 MHz license as an application for an EA, Regional, or nationwide license, regardless of whether the applicant is an incumbent 220 MHz licensee in the geographic area covered by the requested license. We seek comment on this proposal.

### 2. Amendment of Applications and Modification of Authorizations

**102.** With respect to Phase II initial applications and licenses, we propose to adopt rules consistent with other reclassified Part 90 services to govern amendments to applications and modification of Phase II licenses. As with the rules governing PCS service and proposed for 800 SMR service, applicants for the area-based licenses to be issued in Phase II would have a limited opportunity to cure minor defects in their short-form applications and are not allowed major amendments after the expiration of the short-form filing window.[155] As for modifications of the nationwide, EA, or Regional licenses, we have noted that because such licensing is based on blocks of spectrum rather than site-specific facilities, licensees generally

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[153] Budget Act, § 6002(d)(3).

[154] *CMRS Third Report and Order*, 9 FCC Rcd at 8145 (para. 355).

[155] Sections 24.422 and 24 822 of the Commission's Rules, 47 C.F.R. §§ 24.422 and 24.822.

would not seek major modification other than in the case of assignments or transfers of control.[156] We seek comment on these proposals.

**103.** With respect to Phase I licenses, no procedures exist under the current Part 90 rules to enable them to seek modification of their authorization to relocate their currently-authorized base stations. Because of the filing freeze established on May 24, 1991, on 220 MHz applications, licensees who have relocated their 220 MHz stations have done so under Special Temporary Authority (STA). Also, various commenters in the CMRS proceeding asked that they be permitted to file modification applications to cover existing operations under STAs before we accept initial applications in order to avoid mutual exclusivity situations with initial applicants.[157] We will propose, in separate proceeding, procedures for the expedited modification of Phase I licenses that addresses the needs of commenters to cover their STA-authorized services.

### 3. Special Temporary Authority

**104.** Under the *CMRS Second Report and Order*, we stated that all paging services and all private mobile licensees reclassified as CMRS and licensed to provide service as of August 10, 1993 were provided a three-year grandfathering period under the Part 90 PMRS rules.[158] In the *CMRS Third Report and Order*, we concluded that "licensee status before the August 10, 1993 deadline is the sole factor in determining whether the licensee will be treated as being in the PMRS until August 10, 1996."[159] We also noted that some reclassified PMRS providers had Part 90 STAs or conditional grants that were in effect. However, we concluded that such STAs or conditional grants would be extended only until August 10, 1996, when their reclassification as CMRS becomes effective.[160] Additionally, reclassified PMRS that were not grandfathered under the Part 90 rules and that had STAs or conditional grants only possessed such grants until the grants' scheduled expiration, or 60 days from the effective date of the *CMRS Third Report and Order*.[161] Such STAs could not

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[156] Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, and Implementation of Section 309(j) of the Communications Act - Competitive Bidding: 800 MHz SMR, PP Docket No. 93-253, Further Notice of Proposed Rule Making, 9 FCC Rcd 1647 (1994) *(800 MHz Further Notice)*.

[157] *CMRS Third Report and Order*, 9 FCC Rcd at 8141, 8148 (paras. 344, 362).

[158] *CMRS Second Report and Order*, 9 FCC Rcd at 1512-14 (paras. 280-284).

[159] *CMRS Third Report and Order*, 9 FCC Rcd at 8166 (para. 409).

[160] *Id.* at 8156 (para 384)

[161] *Id.*

be extended, and the non-grandfathered reclassified licensees could only apply for STAs and conditional grants under Part 22 rules.

**105.** We believe that such reasoning should also be applied to the 220 MHz service. We tentatively conclude that non-grandfathered 220 MHz CMRS licensees with STAs should only be allowed to apply for STAs or conditional grants, or extensions to existing STAs or conditional grants, under Part 22 rules. We observe that while in most services, STAs are rare and only granted in extreme circumstances, they have been more prevalent in the 220 MHz service due to the apparent delay in constructing at authorized sites and due to the existence of the freeze on the acceptance of modification applications. However, we believe that the need for STAs on the part of 220 MHz licensees will only be temporary, and will be eliminated by our proposals for 220 MHz license minor modifications to be proposed in the separate rulemaking. Additionally, we believe that we must follow Section 309(f) of the Communications Act, which states that STAs should be granted to CMRS providers only in "extraordinary circumstances involving particular applications."[162] We seek comment on these proposals.

### 4. Renewal Expectancy

**106.** In the *CMRS Third Report and Order*, we adopted a 10-year license term for all CMRS service.[163] We further provided that every Part 90 licensee that is reclassified and treated as a CMRS carrier when its current license term expires would have a 10-year license term and be afforded a renewal expectancy. We adopted our proposal in the *CMRS Further Notice* to extend our existing rules for Part 22 services regarding renewal expectancy to all Part 90 CMRS licensees.[164] Section 22.941 of our rules provides that a cellular renewal applicant will receive a preference in a comparative renewal proceeding by demonstrating that it: (1) has provided substantial service during the license term; and (2) has complied with applicable Commission rules and policies, and the Act.[165] Substantial service is defined in the rule as service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal. We noted that although Part 22 does not expressly provide for preferences in the case of non-cellular licensees, we have applied to

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[162] *Id.* at 8155 (para. 383).

[163] *Id.* at 8156-8157 (paras. 385-386).

[164] *CMRS Further Notice*, 9 FCC Rcd at 2892 (paras. 139-140).

[165] Section 22.941 of the Commission's Rules, 47 C.F.R. § 22.941

other Part 22 licensees, by case law, renewal expectancy principles that are similar to the standards applied to cellular licensees.[166]

**107.** We propose to apply these provisions to all Phase I and Phase II 220 MHz licensees, rather than only to those providing CMRS services as currently required. In this proceeding, we have adopted the 10-year license term for all licenses issued in Phase II regardless of whether the service is CMRS or PMRS. Moreover, the new framework for the 220 MHz service proposed here significantly alters the service by, for example, allowing fixed and paging operations on a primary basis for both Phase I and Phase II licensees. In these circumstances, we believe that it would be appropriate to apply the more stringent renewal standards to non-CMRS as well as CMRS licensees as part of the overall changes to the 220 MHz framework. We seek comment on this proposal.

## E. AUCTION RULES

### 1. Background and Auction Eligibility

**108.** Section 309(j) of the Communications Act, as amended,[167] gives the Commission express authority to employ competitive bidding procedures where (1) mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission, (2) the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals, and (3) the objectives set forth in Section 309(j)(3) would be promoted. In this Third Notice, we tentatively conclude that 220 MHz service as a class of service will satisfy the Section 309(j) criteria for auctionability. Specifically, we believe that the nationwide 220 MHz spectrum will principally be used by carriers to provide for-profit services.[168] We additionally anticipate that the regional and EA 220 MHz spectrum will principally be used by carriers to provide for-profit services.[169] We also tentatively conclude that competitive bidding for 220 MHz licenses will promote the objectives set forth in 309(j)(3). We believe that the use of competitive bidding to award 220 MHz licenses as compared to other licensing methods will speed the development and deployment of new services to the public with minimal administrative or judicial delays, and encourage efficient use of the spectrum as required by Section 309(j)(3)(A) and (D). In this regard we note that auctions will award licenses

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[166] *CMRS Further Notice*, 9 FCC Rcd at 2892 n. 244 (para. 139); *citing*, as an example of the case law, In re Applications of Baker Protective Services, Inc., 59 Rad. Reg. 2d 1141 (1986).

[167] Communications Act, § 309(j)(3)(B).

[168] *See* para. 36, *supra*

[169] *See* para. 71, *supra*

quickly to those parties who value them most highly and who are thus most likely to introduce service rapidly to the public. Additionally, competitive bidding will recover for the public a portion of the value of the spectrum, as envisioned in Section 309(j)(3)(C), because the only direct monetary compensation the public currently receives for use of the spectrum is, with few exceptions, the application fee paid by most Commission applicants. Finally, in accordance with Section 309(j)(3)(B), we tentatively conclude that competitive bidding, in conjunction with our allocation and service rules, will promote access to new 220 MHz services and technologies, and disseminate licenses among a wide variety of applicants by encouraging participation by all qualified bidders. In this regard, we propose a set of open competitive bidding procedures, a wide variety of license types and sizes, and a menu of preferences designed to increase opportunities for small businesses who might otherwise face entry barriers.

**109.** We propose resolving mutually exclusive initial license applications for 220 MHz licenses of three different sizes: nationwide, regional, and EA. We propose to issue three nationwide licenses, each for 10 channels. We propose to issue 20 regional licenses covering 65 channels for regions that are similar to the five geographic regions that we adopted for narrowband PCS. We propose four different channel blocks: one twenty-channel block, one fifteen-channel block, and three ten-channel blocks. We additionally propose to issue 1,376 EA licenses, covering eight licenses in each of the 172 EAs. We propose to award eight licenses, four of which will be ten-channel licenses, and the remainder will be five-channel licenses. Under our auction authority at Section 309(j)(3), if mutually exclusive applications for a national, regional, or EA channel block are accepted for filing, we will award that license through competitive bidding. We request comment on specific bidding procedures, as set forth below. Commenters who oppose our proposal to use competitive bidding to assign licenses in this spectrum should suggest other assignment methods.

### 2. Competitive Bidding Design for 220 MHz

#### a. General Competitive Bidding Rules

**110.** In the *Competitive Bidding Second Report and Order* and its progeny, we established the criteria to be used in selecting from among auction methodologies to use for each particular auctionable service and prescribed rules and procedures for general and specific use.[170] Generally, we concluded that awarding licenses to those parties who value

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[170] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second Report and Order*); *recon.* Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994) (*Competitive Bidding Second Memorandum Opinion and Order*); Third Report and Order, 9 FCC Rcd 2941 (1994) (*Competitive Bidding Third Report and Order*) (establishing rules for narrowband PCS); *recon.*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC

them most highly would foster Congress's policy objectives. We noted there that, since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the greatest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum. We also found that: (1) licenses with strong value interdependencies should be auctioned simultaneously, and (2) multiple round auctions generally will yield more efficient allocations of licenses and higher revenues by providing bidders with information regarding other bidders' valuations of licenses, especially where there is substantial uncertainty as to value.[171] Thus, we concluded, where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding.[172]

### b. Competitive Bidding Design for 220 MHz Licenses

**111.** Simultaneous Multiple Round Competitive Bidding. Based on the factors identified in the *Competitive Bidding Second Report and Order* and our prior auction experiences, we tentatively conclude that simultaneous multiple round auctions are appropriate for the 220 MHz service. Compared with other bidding mechanisms, simultaneous multiple round bidding will generate the most information about license values during the course of the auction and provide bidders with the most flexibility to pursue back-up strategies. As in the case of PCS,[173] the 220 MHz licenses are interdependent, and licensees likely will aggregate and substitute across spectrum blocks and geographic regions. Our experience to date is that simultaneous multiple round bidding is efficient and cost-effective. Additionally, simultaneous multiple round bidding is likely to generate the most information about license values during the course of the auction and facilitate efficient

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Rcd 175 (1995) (*Competitive Bidding Third Memorandum Opinion and Order)*; *recon.*, Order On Reconsideration, 9 FCC Rcd 5306 (1994); Fourth Report and Order, 9 FCC Rec 2330 (1994) (establishing rules for Interactive Video and Data Service); Fifth Report and Order, 9 FCC Rcd 5532 (1994) (*Competitive Bidding Fifth Report and Order*) (establishing rules for broadband PCS); *recon.* Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858 (1994) (*Competitive Bidding Fourth Memorandum Opinion and Order*); *recon.* Memorandum Opinion and Order, 9 FCC Rcd 7684 (1994); *recon.* Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1995) (*Competitive Bidding Fifth Memorandum Opinion and Order)*.

[171] *Competitive Bidding Second Report and Order,* 9 FCC Rcd at 2360 (para. 69).

[172] *Id.* at 2366 (paras. 109-111).

[173] We adopted simultaneous multiple round auctions as the auction methodology for both broadband and narrowband licenses. *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5544 (paras. 31-32) (broadband PCS) and *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2947-2949 (paras. 17-21) (narrowband PCS).

aggregation of licenses across spectrum bands.[174] We seek comments on this tentative conclusion and on its impact on competitive bidding in the 220 MHz service.

**112.** Circumstances Leading to Choice of Other Designs. We propose to tailor the auction design to fit the characteristics of the licenses to be awarded.[175] While we tentatively conclude that simultaneous multiple round bidding is the most effective and efficient bidding design for the 220 MHz service, it is possible that another bidding method may be more appropriate for all licenses. Where there is less interdependence among licenses, there is also less benefit to auctioning them simultaneously.[176] When the values of particular licenses to be auctioned are low relative to the costs of conducting a simultaneous multiple round auction, we may need to consider auction designs that are relatively simple, with low administrative costs and minimal costs to auction participants. For example, with large numbers of low value licenses, we may decide that it is preferable to implement a low cost auction method such as single round sealed bidding to minimize cost and expedite the licensing process.[177] We may also wish to consider a single round of bidding in certain auctions where eligibility requirements limit participation to few bidders.[178] We additionally note that the presence of incumbents on certain channels could affect the relative desirability and value of otherwise identical licenses in ways we do not anticipate. We seek comments on any alternative bidding designs and their applicability as a competitive bidding method in the 220 MHz service.

**113.** Combinatorial Bidding. In general terms, combinatorial bidding allows bidders to bid for multiple licenses as "all or nothing" packages.[179] Combinatorial bidding can be implemented with either simultaneous or sequential auction designs.[180] While there are significant benefits associated with combinatorial bidding, especially in terms of efficient aggregation of licenses, we previously concluded that simultaneous multiple round auctions offer many of these same advantages without the same degree of administrative and

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[174] *See, e.g., Competitive Bidding Third Report and Order,* 9 FCC Rcd at 2946 (para. 13).

[175] *Id.* at 2947 (para. 15).

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] In combinatorial bidding, if a bid for a group of licenses exceeds the sum of the highest bids for the individual licenses that comprise the package, then the package bid would win. We may wish to institute a premium so that the combinatorial bid would win only if it exceeded the sum of the bids for individual licenses by a set amount.

[180] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2949-2950 (paras. 23-24).

operational complexity and without biasing auction outcomes in favor of combination bids.[181] However, since simultaneous multiple round bidding may potentially prove to be our preferred auction method for awarding 220 MHz licenses, we tentatively conclude that combinatorial bidding will be unnecessary in most 220 MHz auctions. While 220 MHz licenses are likely to be worth more to some bidders as a part of a package, we believe that simultaneous multiple round bidding will provide these bidders with ample opportunity to express the value of interdependent licenses. Moreover, we tentatively conclude that there will not be any extreme discontinuity in value if some licenses in a package are not obtained.[182] We believe that the opportunity to acquire licenses in post-auction transactions and the ability to withdraw bids (upon payment of the bid withdrawal penalty) will limit the risks associated with failing to successfully acquire all of the licenses in a desired package.[183] In circumstances where we do not use simultaneous multiple round bidding, however, we may permit combinatorial bidding. We seek comment on these proposals and tentative conclusions.

### c. Bidding Procedures

**114.** Grouping of Licenses. The Commission determined in the *Competitive Bidding Second Report and Order* that in a multiple round auction, highly interdependent licenses should be grouped together and put up for bid at the same time because such grouping provides bidders with the most information about the pieces of complementary and substitutable licenses during the course of an auction.[184] We also determined that the greater the degree of interdependence among the licenses, the greater the benefit of auctioning a group of licenses together in a simultaneous multiple round auction.[185] Whether we use our preferred approach of a sequence of simultaneous multiple round auctions or sequential individual auctions, the Commission must choose which licenses will be auctioned together. The importance of the choice of license groupings increases with the degree of interdependence among the individual licenses or groups of licenses to be auctioned. Grouping interdependent licenses together and putting them up for bid at the same time will facilitate awarding licenses to bidders who value them the most highly by providing bidders with information about the prices of complementary and substitutable licenses during the

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[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2366 (paras. 106-107).

[185] *Id.* at 2363-2364 (paras. 89-94).

course of an auction.[186] Accordingly, we propose grouping 220 MHz licenses into the various simultaneous auctions by aggregating together those licenses exhibiting the greatest degree of interdependence so that there will be limited interdependence across groups.

**115.** Choosing which licenses to auction simultaneously requires a judgment about the degree of interdependence, *i.e.*, the extent to which the amount bidders are willing to pay for one license depends on the price of another.[187] Licenses may be interdependent either because they are substitutes or because they are complements. With substitutes, the lower the price of one license, the less a bidder will be willing to pay for another. With complementary licenses, on the other hand, the lower the price of one license, the more a bidder will be willing to pay for another. This is true because generally complementary licenses are worth more as part of a package than individually.[188] For example, bidders are likely to be willing to pay more for two geographically contiguous 220 MHz licenses than two equivalent non-contiguous licenses, and a single bidder may be willing to pay more for the two licenses than would two separate bidders.[189]

**116.** Based on the foregoing, we tentatively conclude that we will auction all 220 MHz nationwide, regional and EA licenses through a sequential series of simultaneous auctions. In each case, the licenses are complements as well as substitutes, and thus their values are highly interdependent. To maximize the information available to bidders and increase gradually the complexity of the 220 MHz auctions, we propose beginning by auctioning the nationwide licenses and the regional licenses in one simultaneous multiple round auction. After this auction is complete, we propose auctioning the EA licenses in one simultaneous multiple round auction. Our experience with the narrowband regional licenses is that a sizeable portion of auction winners pursued nationwide strategies, aggregating licenses in all regions. This practice would suggest a strong interdependence between nationwide and regional licenses, and the substitutability among licenses with the same amount of spectrum and covering the same geographic area.[190] We therefore believe that grouping the national and regional licenses together would allow bidders to pursue aggregate bidding strategies. We seek comment on these tentative conclusions. Should the nationwide and regional licenses be grouped together? Should the nationwide licenses be auctioned first, and then the regional and EA licenses auctioned together? Should we simply auction each type of license by itself, and then move on to the next size or group - *i.e.* nationwide, then regional, then EA? While we observe that, given the large number of licenses involved, it

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[186] *See, e.g.*, *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2951 (para. 26).

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.* at 2948 (paras. 17-19).

might be administratively impractical to auction nationwide, regional and EA licenses in a single auction, we ask nonetheless whether the interdependencies among all 220 MHz licenses are sufficiently strong that we should make every effort to have a single 220 MHz auction. We also specifically solicit comments on any alternative license groupings that would benefit bidders in ways not suggested by the above-proposed groupings.

**117.** Bid Increments. As with the rules we adopted for previous multiple round auctions for other services, we propose to establish minimum bid increments for bidding in each round of the auction, based on the same considerations in our prior orders.[191] Where we use simultaneous multiple round auctions, 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.[192] 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.[193] Establishing an appropriate minimum bid increment is especially important in a simultaneous auction with a simultaneous closing rule. In that case, all markets remain open until there is no bidding on any license and a delay in closing one market will delay the closing of all markets.[194]

**118.** We propose to start the 220 MHz auction with relatively large bid increments, and adjust the increments as bidding activity indicates.[195] Because we tentatively propose to use simultaneous multiple round auctions for most 220 MHz licenses, we believe that it is necessary to impose a minimum bid increment to ensure that the 220 MHz auctions conclude within a reasonable period. We believe that it is important in establishing the amount of the minimum bid increment to express such increment in both 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.[196] Accordingly, we may impose a minimum bid increment of 5 percent of the high bid in the previous round or $0.01 per pop per MHz, whichever is greater, in 220 MHz auctions where multiple round bidding is used.[197] We believe that applying a $0.01 per pop per MHz minimum bid increment in addition to the percentage calculation is appropriate to provide flexibility for a wide range of different license values and will ensure

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[191] *Id.* at 2953 (paras. 30-32).

[192] *Id.* at 2953 (para. 30).

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.* at 2953 (para. 31).

[197] *Id.*; *see also 900 MHz Second Report and Order*, at para. 80.

timely closure of auctions, even where bidding begins at a very low dollar amount.[198] We also propose to retain the discretion to vary the minimum bid increments for individual licenses or groups of licenses at any time before or during the course of the auction, based on the number of bidders, bidding activity, and the aggregate high bid amounts. We propose to retain the discretion to keep an auction open if there is a round in which no bids or proactive waivers are submitted, as discussed in paragraph 125, *infra*. We seek comment on these proposals.

**119.** Stopping Rules for Multiple Round Auctions. In multiple round auctions, a stopping rule must be established for determining when the auction is over.[199] Three types of stopping rules exist that could be employed in simultaneous multiple round auctions: markets may close individually, simultaneously or a hybrid approach may be used.[200] Under a market-by-market approach, bidding closes on each license after one round passes in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding remains open on all licenses until there is no bidding on any license.[201] Under this approach, all markets will close if a single round passes in which no new acceptable bids are submitted for any license. Using a hybrid approach, we may use a simultaneous stopping rule, along with an activity rule designed to bring the markets subject to the simultaneous stopping rule to a close within a reasonable period of time, for the higher value licenses. And for lower value licenses, where the loss from eliminating some back-up strategies is less, we may use simpler market-by-market closing. Such a hybrid approach might simplify and speed up the auction process without significantly sacrificing efficiency or expected revenue.[202]

**120.** For 220 MHz, we believe that a simultaneous stopping rule is preferable for the nationwide and regional licenses. These types of licenses are expected to have relatively high values and will be fewer in number than the EA licenses, which will reduce the complexity of implementing a simultaneous stopping rule. Since we may impose an activity rule, as discussed below, we believe that allowing simultaneous closings of all markets will

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[198] *900 MHz Second Report and Order*, at para. 81.

[199] *Id.; see also Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5550 (para. 46); *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2954 (para. 33); and *MMDS Report and Order*, at paras. 114-123.

[200] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2954 (para. 33); *see also 900 MHz Second Report and Order*, at para. 81.

[201] This approach has the advantage of providing bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions, unless an activity rule is imposed. Furthermore, such a stopping rule may be vulnerable to strategic delay by bidders seeking to impede closure of the auction.

[202] *See, e.g., Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2954 (para. 33).

afford bidders flexibility to pursue back up strategies without running the risk that bidders will hold back their bidding until the final rounds.[203] Because of the large number of EA licenses, we may use either a hybrid stopping rule or allow markets to close individually in auctions for these licenses.[204] However, if we determine that a simultaneous stopping rule will be simpler to administer than either a hybrid or a market-by-market stopping rule, we may use a simultaneous stopping rule for the EA licenses as well. Conversely, if we conclude that a simultaneous stopping rule is too administratively complex, we may employ a market-by-market or hybrid stopping rule for the higher value 220 MHz licenses. We propose announcing by Public Notice before each auction the stopping rule that we will use. We seek comments on these proposals.

**121.** In the event we adopt a simultaneous stopping rule, we propose to retain the discretion to declare at any point in a simultaneous multiple round auction that the auction will end after one additional round or some other specified number of additional rounds. This will prevent bidders from strategically delaying an auction by bidding on one license in order to delay the closing of bidding on all licenses.[205] This proposal would also ensure ultimate Commission control over the duration of the auction. Moreover, we tentatively reserve the discretion to vary the duration of bidding rounds or the interval at which bids are accepted (*e.g.*, run two or more rounds per day rather than one), in order to move the auction toward closure more quickly.[206] If this mechanism is used, we would most likely shorten the duration and/or intervals between bidding rounds where there are relatively few licenses to be auctioned, where the value of the licenses is relatively low or in early rounds to speed the auction process. Where license values are expected to be high or where large numbers of licenses are being auctioned, we propose increasing the duration and/or intervals between bidding rounds.[207] We would announce by Public Notice, and may vary by announcement during an auction, the duration and intervals between bidding rounds. We seek comment on these proposals.

**122.** Activity Rules. As discussed above, in order to ensure that simultaneous auctions with simultaneous stopping rules close within a reasonable period, we believe that it may be 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 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 and risking payment of a

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[203] *Id.* at 2954 (para. 34) and *900 MHz Second Report and Order*, at para. 82.

[204] *See, e.g., Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2954 n. 15 (para. 34).

[205] *Id.* at 2955 (para. 35).

[206] *Id.*

[207] *Id.*

penalty for withdrawing.[208] As noted above, this could lead to very long auctions. An activity rule is less important when markets close one-by-one because failure to participate in any given round may result in losing the opportunity to bid at all, if that round turns out to be the last.

**123.** In the *Competitive Bidding Second Report and Order,* we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used.[209] We have subsequently adopted or proposed the Milgrom-Wilson rule in each of our simultaneous multiple round auctions.[210] The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level.[211] Bidders are required to declare their maximum eligibility in terms of pops-MHz, and make an upfront payment equal to $0.02 per MHz-pop.[212] That is, bidders will be limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. Licenses on which a bidder is the high bidder from the previous round, as well as licenses on which a new valid bid is place, count toward this MHz-pop limit. Under this approach, bidders will have the flexibility to shift their bids among any licenses for which they have applied so long as the total MHz-pops encompassed by those licenses does not exceed the number for which they made an upfront payment. Moreover, bidders will be able to secure the freedom to participate at whatever level they deem appropriate by making a sufficient upfront payment. To preserve their maximum eligibility, however, bidders would be required to maintain some minimum activity level during each round of the auction.

**124.** Under the Milgrom-Wilson proposal, the minimum activity level, measured as a fraction of the self declared maximum eligibility, will increase during the course of the auction. For this purpose, Milgrom and Wilson divide the auction into three stages.[213] During the first stage of the auction, a bidder is required to be active on licenses

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[208] *Id.* at 2955 (para. 36); *see also 900 MHz Second Report and Order*, at para. 83.

[209] *Competitive Bidding Second Report and Order,* 9 FCC Rcd at 2372-2373 (paras. 144-145).

[210] *900 MHz Second Report and Order*, at para. 88; *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2955-2957 (paras. 36-40); and *MMDS Report and Order*, at paras. 114-123.

[211] *See, e.g., Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2955 (para. 37).

[212] *See* para. 135, *infra*, for discussion of upfront payments.

[213] The auction would move from stage one to stage two when, after three rounds of bidding, the high bid has changed on five percent or fewer of the licenses (measured in terms of MHz-pops) being auctioned. Stage three would begin when the high bid has changed on two percent or fewer licenses (measured in terms of MHz-pops) over three rounds. We retain the discretion to modify this method and announce such modification by Public Notice. *See, e.g., Competitive Bidding Third Report and Order,* 9 FCC Rcd at 2956 n. 16 (para. 38)

encompassing one-third of the MHz-pops for which it is eligible. The penalty for falling below that activity level is a reduction in eligibility.[214] At this stage, bidders would lose three MHz-pops in maximum eligibility for each MHz-pop below the minimum required activity level. In other words, each bidder would retain eligibility for three times the MHz-pops for which it is an active bidder, up to the MHz-pops covered by the bidder's upfront payment.[215] In the second stage, bidders are required to be active on two-thirds of the MHz-pops for which they are eligible. The penalty for falling below that activity level would be a loss of 1.5 MHz-pops in eligibility for each MHz-pop below the minimum required activity level. In the third stage, bidders are required to be active on licenses encompassing all of the MHz-pops for which they are eligible.[216] The penalty for falling below that activity level is a loss of one MHz-pop in eligibility for each MHz-pop below the minimum required activity level. Each bidder thus retains eligibility equal to its current activity level (1 times the MHz-pops for which it is an active bidder). We seek comment on this proposed activity rule.

**125.** Finally, to avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission on a particular day, we propose permitting each bidder to request and automatically receive a waiver of the activity rule once every three rounds.[217] In the *Competitive Bidding Fourth Memorandum Opinion and Order*, we stated that the Commission retained the discretion to modify the method and timing of submitting waivers and to allow for two types of waivers - "proactive" and "automatic."[218] As explained therein, proactive waivers invoked in a round in which there are no new valid bids will keep an auction open, while an automatic waiver submitted in a round in which no other bidding activity occurs will not keep an auction open.[219] Proactive waivers are submitted by the bidder, while automatic waivers would be submitted automatically for a bidder whenever a bidder's eligibility would be reduced because of insufficient bidding activity and a waiver is available unless the bidder specifically chooses not to have the automatic waiver apply.[220] Automatic activity rule waivers would be automatically applied by the bidding system in any round where a bidder's activity is below the requested activity level as long as the bidder has waivers remaining.

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[214] *Id.* at 2956 (para. 38).

[215] *Id.*

[216] *Id.*

[217] *Id.* at 2956 (para. 39).

[218] *Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6861 (para. 15).

[219] *Id.*

[220] *Id.*

**126.** Under this proposal, we would announce by Public Notice how many waivers bidders would receive. A waiver would permit a bidder to maintain its eligibility at the same level as in the round for which the waiver is applied. A waiver, however, could not be used to correct an error in the amount bid. This would ensure that bidders are not arbitrarily penalized by having their eligibility reduced due to an accidental act or circumstances not under the bidder's control. We seek comments on these proposals.

**127.** We tentatively conclude that the Milgrom-Wilson approach will best achieve the Commission's goals of affording bidders flexibility to pursue back up strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time. Accordingly, we propose imposing such an activity rule in conjunction with a simultaneous stopping rule to award higher value 220 MHz licenses. We propose, however, to use a simplified waiver procedure whereby bidders will be permitted five automatic waivers from the activity rule during the course of an auction.[221] With respect to the EA licenses to be awarded by simultaneous auction, we may determine that a market-by-market stopping rule is more appropriate, in which case no activity rule will be necessary. However, if a simultaneous stopping rule is used for these licenses we may select one of the available simpler activity rules. Moreover, we may determine that the Milgrom-Wilson activity rule is too complicated or costly to administer, and then may want to alternatively impose one of these less complex activity rules in auctions for larger 220 MHz licenses as well. Under this proposal, we would announce by Public Notice before each auction the activity rule that will be employed in that particular auction.[222] We seek comment on each of these proposals.

**128.** While we are proposing the adoption of the Milgrom-Wilson activity rule by this Further Notice, we also retain the discretion to use an alternative activity rule for 220 MHz if we determine that the Milgrom-Wilson rule is too complicated or costly to administer, as stated above. Any such change would be announced by Public Notice before commencement of the auction. We seek comment on this proposal.

**129.** Duration of Bidding Rounds. We propose to reserve the discretion to vary the duration of bidding rounds or the interval at which bids are accepted (*e.g.*, run more than

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[221] *Competitive Bidding Third Report and Order,* 9 FCC Rcd at 2956-2957 (para. 40).

[222] Our rules allow the Commission to make any such modifications to activity rules as appropriate for a particular auction. We here propose to retain the discretion to choose among the following other activity rules on a case-by-case basis: (1) a Milgrom-Wilson rule with one or two stages rather than three, (2) a requirement that bidders be active on a single license in each round, (3) a rule that a bidder's activity level remain within a single range throughout the auction (*i.e.*, remain active on some percentage of the total pops-MHz covered by the upfront payment), (4) a rule that replaces the maximum allowed bidding levels in the Milgrom-Wilson rule with a bidding premium for exceeding those maximums, or (5) a combination of the foregoing rules. *Id.* at 2957 n. 17.

one round per day) in order to move the auction toward closure more quickly.[223] Under this proposal, we would announce any changes to the duration of and intervals between bidding rounds either by public notice prior to the auction or by announcement during the auction. We seek comment on this issue.

### 3. Procedural and Payment Issues

#### a. Pre-Auction Application Procedures

**130.** In this section we propose general competitive bidding rules and procedures. These rules are structured to ensure that bidders and licensees are qualified and will be able to construct systems quickly and offer service to the public.[224] By ensuring that bidders and license winners are serious, qualified applicants, these rules will minimize the need to re-auction licenses and prevent delays in the provision of 220 MHz service to the public. In addition, we propose adopting general procedural and processing rules based on the rules governing PCS in Part 24 of the Commission's rules.[225] In the *CMRS Third Report and Order*, we concluded that for purposes of determining whether CMRS services are substantially similar, 220 MHz offerings have the potential to compete with other commercial mobile offerings as technology evolves and the offerings begin to gain commercial acceptance.[226] For purposes of this Notice, we are presumptively treating 220 MHz services as CMRS offerings. We thus believe it is appropriate to propose to base our procedural and processing rules on the Part 24 PCS rules, as PCS is substantially similar to the 220 MHz service.[227]

**131.** In the *Competitive Bidding Second Report and Order*, the Commission established general competitive bidding rules and procedures that may be modified on a service-specific basis.[228] We propose following the procedural and payment rules established in the *Competitive Bidding Second Report and Order* with certain minor modifications designed to address particular characteristics of the 220 MHz service.

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[223] *See, e.g., 900 MHz Second Report and Order*, at para. 86.

[224] *Id.* at para. 97; *see also Competitive Bidding Third Report and Order,* 9 FCC Rcd at 2957 (para. 41).

[225] Subparts F and H of Part 24 of the Commission's Rules, 47 C.F.R Part 24, Subparts F and H.

[226] *CMRS Third Report and Order*, 9 FCC Rcd at 8026 (para. 67).

[227] *See* paras. 32-34, 58-61 and 88-91, *supra*, for comparisons of 220 MHz service with PCS.

[228] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2375-2376 n. 120 (paras. 160-164) (adopting Sections 1.2105-1.2109 of the Commission's Rules, 47 C.F.R. §§ 1.2105-1.2109).

**132.** Short Form Applications. In the *Competitive Bidding Second Report and Order*, we determined that we should require only a short-form application prior to competitive bidding, and that only winning bidders should be required to submit a long-form license application after the auction.[229] We have previously determined that such a procedure would fulfill the statutory requirements and objectives and adequately protect the public interest.[230] Accordingly, we propose to extend the application of these rules to the competitive bidding process for 220 MHz licenses.

**133.** We propose that, before each 220 MHz auction, the Wireless Telecommunications Bureau will release an initial Public Notice announcing the auction. These initial Public Notices would specify the licenses to be auctioned and the time, place and method of competitive bidding to be used, including applicable bid submission procedures, bid withdrawal procedures and penalties, stopping rules and activity rules and other important information.[231] These initial Public Notices will also specify the filing window for short-form applications.

**134.** Amendments and Modifications. Under this proposal, all bidders would be required to submit short-form applications on FCC Form 175 by the date specified in the applicable initial Public Notice. If the Commission receives only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, the Commission would by Public Notice cancel the auction for this license and establish a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny.[232] To encourage maximum bidder participation, we propose to provide applicants with an opportunity to correct minor defects in their short-form applications prior to the auction. On the date set for submission of corrected applications, applicants that on their own discover minor errors in their applications (*e.g.*, typographical errors, incorrect license designations) also would be permitted to file corrected applications. Recently, the Commission waived the *ex parte* rules as they applied to the submission of amended short-form applications for the A and B blocks of the broadband PCS auctions, to maximize applicants' opportunities to seek Commission staff advice on making such amendments.[233] We propose to apply the same principles to the 220 MHz auctions. Under our proposal, applicants would not be permitted to make any major modifications to their

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[229] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2376 (para. 165).

[230] *Id.* at 2375-2376 (paras. 161-164).

[231] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2958 (para. 42).

[232] *Id.* at 2958 (para. 43); *see also 900 MHz Second Report and Order*, at paras. 105-106.

[233] Public Notice, Commission Announces that Mutually Exclusive "Short Form" Applications (Form 175) to Participate in Competitive Bidding Process ("Auctions") Are Treated as Exempt for *Ex Parte* Purposes, 9 FCC Rcd 6760 (1994).

applications, including changes in markets and changes in control of the applicant, or additions of other bidders into the bidding consortia, until after the auction. Applicants could modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes would 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 for licenses in any of the same geographic license areas.[234] In addition, applications that are not signed would be dismissed as unacceptable. After reviewing the corrected applications, a Public Notice would be released, announcing the names of all applicants whose applications have been accepted for filing. Applicants identified in the Public Notice would then be required to submit the full amount of their upfront payment, as defined below, to the Commission's lock-box bank by the date specified in the Public Notice, which generally will be no later than 14 days before the scheduled auction. After the Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission would then issue a Public Notice announcing the names of all applicants that have been determined to be qualified to bid. An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any license being auctioned will not be identified on this Public Notice as a qualified bidder. Each applicant listed on this fourth Public Notice will be issued a bidder identification number and further information and instructions regarding the auction procedures. We seek comments on these proposals.

### b. Upfront Payment

**135.** We propose to require all auction participants to tender in advance to the Commission a substantial upfront payment as a condition of bidding in order to ensure that only serious, qualified bidders participate in auctions and to ensure payment of the penalty[235] in the event of bid withdrawal or default. We propose an upfront payment formula of $2,500 or $0.02 per pop per MHz for the largest combination of MHz-pops, whichever is greater,[236] and seek comment as to whether this upfront payment will discourage frivolous or insincere bidders.[237] This upfront payment calculation will define the upper bound of MHz-pops on which a bidder will be permitted to bid in any round, and so should be calculated by bidders to reflect the maximum MHz-pops from any combination of licenses on which they

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[234] *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7254 (para. 52).

[235] *See* para. 139, *infra*, for discussion of the payment

[236] We specified in the *Competitive Bidding Second Report and Order* that, while generally approving a formula of $0.02 per pop per MHz, we reserved the right to revise or waive the upfront payment in appropriate circumstances. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2378 (para. 172).

[237] *Id.* at 2378 (para. 171)

may want to bid in a single round.[238] We believe that this formula is appropriate for 220 MHz services. Using this formula will provide bidders with the flexibility to change their strategy during an auction and to bid on a larger number of smaller licenses or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed that amount covered by the upfront payment. If licenses covering the nation are being auctioned simultaneously, a bidder would not be required to file an upfront payment representing national coverage unless it intends to bid on licenses covering the entire nation in any single bidding round. Under this proposal, we would announce the upfront payment amount for each license in a Public Notice issued prior to the auction. We seek comments on these proposals.

**136.** Upfront payments generally will be due no later than 14 days before a scheduled auction.[239] This period should be sufficient to allow the Commission sufficient time to process upfront payment data and release a Public Notice listing all qualified bidders. The specific procedures to be followed in the tendering and processing of upfront payments are set forth in Section 1.2106 of the Commission's rules.

### c. Down Payment and Full Payment

**137.** In the *Competitive Bidding Second Report and Order*, we established a 20 percent down payment requirement for winning bidders to discourage default between the auction and licensing and to ensure payment of the penalty if such default occurs.[240] We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while not being so onerous as to hinder growth or diminish access.[241] We also determined that this amount was appropriate for the broadband PCS auctions.[242] We believe that the reasoning employed is equally applicable to the 220 MHz service. Thus, we tentatively conclude that, with the exception of small businesses eligible for installment payments,[243] winning bidders in 220 MHz auctions must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20

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[238] As discussed *infra*, however, we would retain the flexibility to consider using a simpler payment requirement if circumstances warrant. The upfront payment amount would be announced by Public Notice before each auction.

[239] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2380-2381 (para. 188).

[240] *Id.* at 2381 (para. 190).

[241] *Id.*

[242] *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5563 (para. 73).

[243] *See* paras. 166-169, *infra*, for discussion.

percent of their winning bid(s). Under this proposal, if the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default penalties due, amounts to 20 percent or more of its winning bids, no additional deposit would be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default penalties due, the additional monies would be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the penalty cannot yet be determined, the bidder would be required to make a deposit of 20 percent of the amount bid on such licenses.[244] When it becomes possible to calculate and assess the penalty, any excess deposit would be refunded. Upfront payments would be applied to such deposits and to bid withdrawal and default penalties due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.[245] We seek comment on these proposals.

**138.** We propose to require winning bidders to submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date to be specified by Public Notice, generally within five (5) business days following the close of bidding.[246] All auction winners generally would be required to make full payment of the balance of their winning bids within five (5) business days following Public Notice that the license is ready for grant. Under this proposal, the Commission would grant the license within ten (10) business days after receiving full payment.[247] We seek comment on this proposal.

### d. Bid Withdrawal, Default and Disqualification

**139.** In either a sequential or simultaneous auction, it is critically important that potential bidders understand that there will be a substantial payment assessed if they withdraw a high bid, are found not to be qualified to hold licenses or are unable to pay a balance due.[248] We therefore propose the following withdrawal, default and disqualification rules. Any bidder who withdraws a high bid during an auction before the Commission declares bidding closed, or defaults by failing to remit the required down payment within the prescribed time, would 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 license is

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[244] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2960 (para. 48).

[245] *Id.*

[246] Additionally, we propose adopting an installment payment option for small businesses that are winning bidders in the 220 MHz auction in paragraphs 166-169, *infra*.

[247] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2960 (para. 48).

[248] *Id.* at 2960-61 (para. 49).

offered by the Commission, if the subsequent winning bid is lower.[249] After bidding closes, a defaulting auction winner would be assessed an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less.[250] The additional three percent payment is designed to encourage bidders desiring to withdraw their bids, to do so before bidding ceases. This additional payment would also apply if an auction winner were disqualified or failed to remit the balance of its winning bid after having made the required down payment. We would hold deposits made by defaulting or disqualified auction winners until full payment of the additional assessment.[251] We believe that these payments will discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. A defaulting auction winner is ineligible to participate in any reduction which includes the license on which it defaulted. In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission would also retain the ability to declare the applicant and its principals ineligible to bid in future auctions, and would be able to take any other action that it deemed necessary, including institution of proceedings to revoke any existing licenses held by the applicant. We seek comments on these proposed default rules.

**140.** In the event that an auction winner defaults or is otherwise disqualified after an auction is closed, an issue arises as to whether the Commission should hold a new auction or simply offer the license to the second-highest bidder. 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 license either to existing or new applicants.[252] Although we recognize that this may cause a brief delay in the initiation of service to the public, during the time between the original auction and the disqualification circumstances may have changed so significantly as to alter the value of the license to auction

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[249] In the unlikely event that there is more than one bid withdrawal on the same license, we would hold each withdrawing bidder responsible only for the difference between its withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. This procedure would ensure that each bidder who withdraws is responsible for its bid.

[250] Sections 1.2104(g) and 1.2109 of the Commission's Rules, 47 C.F.R. §§ 1.2104(g), 1.2109. If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license which is the subject of withdrawal or default 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 would not be required to accept the offer, *i.e.*, they may decline without penalty. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore would not hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

[251] In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision.

[252] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2962 (paras. 51-52).

participants as well as to parties who did not participate.[253] In this situation, we believe that awarding licenses to the parties that value them most highly can best be assured though a re-auction.[254] However, if the default occurs within five (5) businesses days after bidding has closed, the Commission would retain the discretion to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at their final bid levels. If only a small number of relatively low value licenses are to be re-auctioned, the Commission may choose to offer the license to the highest losing bidders since the cost of running an auction may not exceed the benefits. We invite comments on these proposals.

**141.** If a new auction becomes necessary because of default or disqualification more than five (5) business days after bidding has ended, we propose allowing the Commission to afford new parties an opportunity to file applications because so much time is likely to have passed that different parties may be interested in bidding and existing applicants may have different valuations of the license. 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.[255] We believe that achievement of this goal outweighs the short delay that we recognize may result from allowing new applications in a re-auction. Indeed, if we were not to allow new applicants in a re-auction, interested parties may be forced into a post-auction transaction to obtain the license, which would itself delay service to the public and deny recovery by the government of a reasonable portion of the value of the spectrum. We seek comment on this proposal.

**142.** Under our proposal, if the winning bidder makes the down payment in a timely manner, a long-form application filed on FCC Form 600 (as modified) would be required to be filed by a specified date, generally within ten (10) business days after the close of the auction.[256] After the Commission receives the winning bidder's down payment and the long-form application, we would review the long-form application to determine if it is acceptable for filing.[257] Upon acceptance for filing of the long-form application, the Commission would release a Public Notice announcing this fact, triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, a Public Notice announcing the grants will be issued. Winning bidders would have five (5) business days after the issuance of the Public Notice to complete

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[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.* at 2962 (para. 53)

[257] *Id.*

payment of their licenses. The Commission would then have ten (10) business days to grant the licenses. We seek comment on this proposal.

**143.** We propose to adopt a modified version of the application processing rules contained in Part 22 of the Commission's rules for 220 MHz.[258] These rules would govern application filing and content requirements, waiver procedures, procedures for return of defective applications, regulations regarding modification of applications, and general application processing rules. We also propose adopting petition to deny procedures based on Section 22.30 of the Commission's rules.[259] In addition, we propose to adopt rules similar to Section 22.943 of our existing rules[260] to prevent the filing of speculative applications and pleadings designed to extract money from sincere 220 MHz applicants.[261] In this regard, we would limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw a petition to deny or an application to the legitimate and prudent expenses of the withdrawing applicant or petitioner. We seek comments on these proposals.

**144.** In the *Competitive Bidding Third Report and Order* auction rules, we concluded that the Commission need not conduct a hearing before denial if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination.[262] We propose extending that conclusion to this service. In the event that the Commission identifies substantial and material issues of fact in need of resolution, Section 309(i)(2) of the Communications Act permits in any hearing the submission of all or part of evidence in written form and allows employees other than administrative law judges to preside over the taking of written evidence. We propose incorporating these principles into our 220 MHz procedural rules. We seek comment on these proposals.

### 4. Regulatory Safeguards

#### a. Transfer Disclosures and Anti-Trafficking Provisions

**145.** The Communications Act, as amended by the 1993 Budget Act, directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the

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[258] *Id.* at 2963 (para. 55).

[259] *Id.*

[260] 47 C.F.R. § 22.943.

[261] *Id.*

[262] *Id.* at 2964 (para. 57).

methods employed to issue licenses and permits."[263] In the *Competitive Bidding Second Report and Order*, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied.[264] We propose applying specific rules governing unjust enrichment by small businesses, which are discussed below. In addition, we propose applying the transfer disclosure requirements contained in Section 1.2111 (a) of our rules to all 220 MHz licenses obtained through the competitive bidding process. Generally, applicants transferring their licenses within three years after the initial license grant will be required to file, together with their transfer application, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license. We propose giving particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses after the initial license grant, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the small business context. In addition, this reporting requirement will provide the Commission with valuable information that will enable us to evaluate how well the various auction methods have achieved our objectives. We seek comment on this proposal.

#### b. Performance Requirements

**146.** The Communications Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[265] In this Notice, we are proposing specific performance requirements at Part IV(C)(5), *supra,* and seeking comment on them. We believe these proposed requirements, if adopted, would be sufficient to comply with the performance requirements of the Act. Accordingly, we propose not adopting any additional performance requirements in this section. We seek comment on this proposal.

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[263] 47 C.F.R. § 22.943.

[264] *Competitive Bidding Second Report and Order* 9 FCC Rcd at 2384-2388 (paras. 210-226) and at 2394-2395 (paras 258-265).

[265] Communications Act § 309(j)(4)(B). 47 U.S.C. § 309(j)(4)(B)

### c. Rules Prohibiting Collusion

**147.** In the *Competitive Bidding Second Report and Order* we adopted special rules prohibiting collusive conduct in the context of competitive bidding.[266] We indicated that such rules would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders. We propose applying these rules to all auctionable services, including the 220 MHz service. The rule prohibits bidders from communicating with one another after short-form applications have been filed regarding the substance of their bids or bidding strategies, and also prohibits bidders from entering into consortium arrangements or joint bidding agreements after the deadline for short-form applications has passed.[267] In the *Competitive Bidding Second Report and Order*, we modified the rule so that bidders who have not filed Form 175 applications for licenses in any of the same geographic markets may enter into such discussions, consortia, or arrangements, or add equity partners, during the course of an auction, because of the low risk of anticompetitive conduct among bidders that have not applied for licenses in any of the same geographic areas.[268] Further, in the *Competitive Bidding Fourth Memorandum Opinion and Order*, we noted that communications among bidders concerning matters unrelated to the license auctions would be permitted.[269] We seek comment on this proposal.

**148.** In addition, bidders would be required to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process.[270] Bidders will also be required to 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. After the short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders,

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[266] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-88 (paras. 221-226) (adopting Section 1.2105(c) of the Commission's Rules, 47 C.F.R. § 1.2105(c)).

[267] Section 1.2105(c)(1) of the Commission's Rules, 47 C.F.R. § 1.2015(c)(1).

[268] Section 1.2105(c)(3) of the Commission's Rules, 47 C.F.R. § 1.2105(c)(3).

[269] *Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6869 (para. 59). *See also* Letter from R. Allen, Acting Chief, Commercial Radio Division to R. M. Senkowski (Dec. 1, 1994) (discussions that indirectly provide information that affects bidding strategy are also precluded by anti-collusion rules).

[270] *See., e.g., 900 MHz Second Report and Order*, at para. 95; *see also Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2967 (para. 64)