

transition to CMRS reclassification. We note that in filing a short form application (FCC Form 175), an applicant must certify that it is qualified for the license and that it is in compliance with the foreign ownership provisions of Section 310 of the Act.¹¹³ However, regarding its second request, we do not believe the foreign ownership waiver provision in Section 332(c)(6) extends as far as Geotek argues. Section 332(c)(6) provides an opportunity for a limited waiver of Section 310(b) for private land mobile radio service providers ("PLMRS") that now are reclassified as common carriers. Common carrier licenses, including microwave licenses used to link base station facilities, always have been subject to Section 310(b)¹¹⁴ and could not be considered grandfathered simply because the licenses are used in conjunction with an SMR operation. In essence, Geotek's request to expand its waiver to apply to common carrier services in which it did not hold a license prior to May 24, 1993, does not comport with the statute. However, we note that Geotek may file for a declaratory ruling under Section 310(b)(4).¹¹⁵ While Geotek argues that existing precedent supports its request to extend the Section 332(c)(6) waiver to common carrier licenses, it does not cite any specific Commission precedent, and we believe that this is not the appropriate proceeding in which to assess its request under Section 310(b)(4).

V. SEVENTH REPORT AND ORDER

A. Competitive Bidding Issues

1. Competitive Bidding Design

60. Background. We tentatively concluded in the *Second R&O and Second Further Notice* that we would use simultaneous multiple round auctions for the 900 MHz SMR service.¹¹⁶ We based our proposal on the factors established in the *Competitive Bidding Second Report & Order*.¹¹⁷ for selecting from among auction methodologies to use for each

¹¹³ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Memorandum Opinion & Order*, PP Docket No. 93-253, 9 FCC Rcd 7345 (1994) (*Competitive Bidding Second Memorandum Opinion & Order*) at ¶ 47, 47 C.F.R. 1.2105(a)(2)(v) and (vi).

¹¹⁴ See, e.g., Catherine L. Waddill, *Memorandum Opinion and Order and Notice of Apparent Liability*, 8 FCC Rcd 2169 (1993).

¹¹⁵ Section 310(b)(4) of the Communications Act authorizes the Commission to refuse to grant a license to any corporation directly or indirectly controlled by any other corporation which is foreign owned or controlled, if it is in the public interest. The Commission may act if an officer or more than 25% of the directors are aliens, if more than 25% of the capital stock is owned or voted by aliens, or if the corporation is organized under foreign law.

¹¹⁶ *Second R&O and Second Further Notice* at ¶ 74.

¹¹⁷ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second Report & Order*).

particular auctionable service.¹¹⁸ In that Order, we concluded that awarding licenses to those parties who value 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 highest 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 stated 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.¹¹⁹ Thus, 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.¹²⁰

61. We noted that, like PCS,¹²¹ the 900 MHz SMR licenses are interdependent, and licensees are likely to aggregate and substitute across spectrum blocks and geographic regions. Therefore, simultaneous multiple round bidding is likely to generate the most information about license values during the course of the auction and facilitate efficient aggregation of licenses across spectrum bands.¹²²

62. Comments. Most commenters agree with the Commission's proposal to use simultaneous multiple round auctions for selecting among mutually exclusive 900 MHz SMR applicants. According to AMTA, such a design is a means to facilitate spectrum aggregation in a single geographic area, as well as to consolidate other regions.¹²³ Nextel reasons that the opportunity to purchase a block of channels in all 51 MTAs, or a combination thereof, is essential to the ability of wide-area SMR operators to compete with other CMRS providers.¹²⁴ SCE agrees with the Commission's proposal, but suggests that the Commission provide the broadest possible information to potential bidders about the incumbents occupying each

¹¹⁸ *Second R&O and Second Further Notice* at ¶ 73.

¹¹⁹ *Id.* at ¶ 69.

¹²⁰ *Id.* at ¶¶ 109-111.

¹²¹ We adopted simultaneous multiple round auctions as the auction methodology for both broadband and narrowband PCS licenses. See *Competitive Bidding Fifth Report & Order* at ¶¶ 27-32 (broadband PCS); *Competitive Bidding Third Report & Order* at ¶¶ 17-21 (narrowband PCS).

¹²² *Second R&O and Second Further Notice* at ¶ 74.

¹²³ AMTA Comments at 2-3.

¹²⁴ Nextel Comments at 5.

block.¹²⁵ SCE, AMTA, and The Council of Independent Communications Suppliers ("CICS") suggest that the Bidder Information Package provide the incumbent licensee's name, frequencies, block numbers, geographic coordinates for each site, and a narrative site description including its address, city, county, and state.¹²⁶ Both SCE and AMTA maintain that, without such information, the Commission may be inclined to award a license to overly enthusiastic bidders who win a block without taking into consideration the location and number of incumbent licensees, only to find that construction requirements cannot be met.¹²⁷ According to CICS, a small business will have an uphill battle to develop an incumbent block even if it does obtain bidding credits.¹²⁸ RAM, however, reiterates its opposition to auctioning of 900 MHz frequency blocks on which there are existing operations, and contends that auctioning of licenses for those areas is contrary to legislative intent, because RAM believes that Congress intended to allow incumbent licensees to expand their systems without subjecting them to mutually exclusive applications.¹²⁹ Contrary to RAM's assertion, the Commission did not base its decision to auction encumbered licenses solely or predominantly on the possibility of deriving auction revenues. Prior to receiving auction authority, the Commission noted that its goal was to encourage the growth of wide-area SMR service.¹³⁰

63. Discussion. Based on the record in this proceeding and our successful experience conducting simultaneous multiple round auctions for narrowband and broadband PCS, we believe a simultaneous multiple round auction design is the most appropriate for the 900 MHz SMR service. First, for certain bidders, the value of these licenses will be significantly interdependent because of the desirability of aggregation across geographic regions. Under these circumstances, simultaneous multiple round bidding will generate more information about license values during the course of the auction and provide bidders with more flexibility to pursue back-up strategies, than if the licenses were auctioned separately. Simultaneous multiple round bidding therefore is most likely to award licenses to the bidders who value them the most highly and to provide bidders with the greatest likelihood of obtaining the license combinations that best satisfy their service needs. Finally, we expect the value of these licenses to be sufficiently high to warrant simultaneous multiple round bidding.

¹²⁵ SCE Comments at 6.

¹²⁶ *Id.* at 8; AMTA Reply Comments at 3; CICS Reply Comments at 7.

¹²⁷ SCE Comments at 6; AMTA Comments at 4.

¹²⁸ CICS Comments at 6.

¹²⁹ RAM Comments at n.1

¹³⁰ Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553. *First Report and Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 1469 (1993) at ¶ 13, 19.

64. The Bidder Information Package will provide all the information about incumbent licensees that is available in our licensing records.

65. RAM's argument that incumbent blocks should not be auctioned has been addressed fully in the *CMRS Third Report and Order*¹³¹ and the *Second R&O and Second Further Notice*,¹³² and RAM has not raised new arguments which would warrant reconsideration of our decision. Since there are no alternative channels suitable for relocation, the Commission will require MTA licensees to afford protection to incumbent SMR systems. These protections will protect incumbent operators adequately without interfering with MTA licensees' operations.

2. License Grouping

66. Discussion. In the *Second R&O and Second Further Notice*, we tentatively concluded that all 51 MTAs in the 900 MHz SMR band should be auctioned simultaneously.¹³³ We noted that, even if holding a single auction proves to be more costly than breaking the licenses into groups, the added cost would be outweighed by the informational and bidding flexibility advantages afforded by a single auction.¹³⁴ We received no comments on this issue. As the 1,020 licenses to be auctioned in this service all are for the same amount of spectrum and will use a single service definition, we have determined that holding a single auction for all 51 MTAs in the 900 MHz SMR band will be the fairest, fastest, and most efficient means of distributing these licenses.

B. Bidding Issues

1. Bidding Procedures

67. Bidders will be able to submit bids on-site, via personal computers using remote bidding software, or via telephone. Given the space limitations for on-site bidding and the uncertainty as to the exact number of prospective bidders, however, the Commission reserves the right to have only remote bidding -- by personal computers and by telephone -- for the 900 MHz SMR auction.¹³⁵ The Commission will hold a seminar for prospective bidders to

¹³¹ *CMRS Third Report and Order* at ¶ 118-119.

¹³² *Second R&O and Second Further Notice* at ¶ 44-47.

¹³³ *Second R&O and Second Further Notice* at ¶ 78.

¹³⁴ *Id.*

¹³⁵ The Commission recently adopted a fee schedule for obtaining access to the Commission's database and remote bidding software packages. The remote access bidding software package is available for \$175. The charge for on-line remote access via a 900 number is \$2.30 per minute. See *Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Service Charges, and*

acquaint them with this bidding design and all alternative bid submission methods.

68. Telephonic bidding, for example, is a simple and inexpensive method for bidders to submit bids. When submitting bids by telephone, bidders may utilize the Internet to learn of the round-by-round results of the auction. Online services such as CompuServe, Prodigy and America Online provide Internet access at a reasonable cost. Bidders also may, at negligible cost, use a computerized bulletin board service, accessible by telephone lines, from which auction results can be downloaded to a personal computer.¹³⁶

2. Bid Increments and Tie Bids

69. Background. In the *Second R&O and Second Further Notice*, we proposed to establish minimum bid increments for bidding in each round of the auction,¹³⁷ as we have done in previous multiple round auctions.¹³⁸ The 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 valid in the current bidding round. The application of a minimum bid increment speeds the auction process and, along with activity and stopping rules, helps to ensure that the auction closes within a reasonable period of time. Establishing an appropriate minimum bid increment is important in a simultaneous auction with a simultaneous closing rule, because 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.

70. Specifically, we proposed to start the 900 MHz auction with relatively large bid increments, and to adjust the increments as bidding activity indicates.¹³⁹ The minimum bid increment in Stage I of the auction generally would be five percent of the high bid in the previous round or \$.02 per MHz-pop whichever is greater. In Stage II, we proposed to reduce the minimum bid increment to the greater of five percent or \$.01 per MHz-pop, and in Stage III, the bid increment would remain at the greater of five percent or \$.01 per MHz-pop. We proposed to retain the discretion to vary the minimum bid increments for individual license or groups of licenses at any time before or during the course of the auction, based on

Bidder's Information Packages in Connection With Connection With Auctionable Services, WT Docket No. 95-69, *Report and Order*, FCC 95-308, released July 21, 1995. Bidders may also bid via telephone for no additional charge.

¹³⁶ See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, PP Docket No. 93-253, *Report and Order*, FCC 95-230, released June 30, 1995 at ¶ 107 and n.77.

¹³⁷ *Second R&O and Second Further Notice* at ¶ 79.

¹³⁸ See, e.g., *Competitive Bidding Third Report & Order* at ¶¶ 30-32.

¹³⁹ *Id.* at ¶ 80.

the number of bidders, bidding activity, and the aggregate high bid amounts. We also proposed to retain the discretion to keep an auction open if there is a round in which no bids or "proactive" waivers (*i.e.*, waivers submitted by the bidder, as explained at ¶¶ 85-87) are submitted.¹⁴⁰

71. Comments. Both AMTA and Nextel support the Commission's proposals to impose bid increments.¹⁴¹ Pro Tec Communications, Inc. ("Pro Tec"), however, suggests that the Commission's proposed bid increment system may work a hardship on incumbent licensees who also are designated entities that plan to participate in the auction, because the proposed \$0.02 per MHz-pop may cause untenable jumps in bidding prices.¹⁴² Pro Tec explains that the value of sparsely populated areas and a widely distributed population base, which represents that portion not covered by Pro Tec's current service, is not equal to the per pop value of an urban, densely populated market.¹⁴³ Thus, Pro Tec suggests that the Commission reject the per pop system and simply adopt the proposed five percent criterion.¹⁴⁴

72. Discussion. We will announce by Public Notice prior to the auction the general guidelines for bid increments.¹⁴⁵ The Commission retains the discretion to set and, by announcement before or during the auction, vary the minimum bid increments for individual licenses or groups of licenses over the course of the auction. Where a tie bid occurs, we will determine the high bidder by the order in which the Commission receives the bids.¹⁴⁶ We have considered Pro Tec's argument that there will be differences in the per pop values of licenses across MTAs and even for different blocks within the same MTA, depending on the status of incumbents on the different blocks. To allow for the flexibility to deal with these differences, the Commission retains the discretion to vary both absolute and percentage bid increments for specific licenses. We do not believe that the possibility of value differences leads to the conclusion that we should eliminate absolute bid increments, as this might unduly prolong the auction.

3. Stopping Rules

¹⁴⁰ *Id.*

¹⁴¹ AMTA Comments at 4; Nextel Comments at 3

¹⁴² Pro Tec Comments at 8

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 9.

¹⁴⁵ In an *Ex Parte* Letter filed on August 17, 1995, Geotek requested that the Commission retain discretion to lower the bid increments. We have adopted Geotek's suggestion to the extent that we have retained the discretion to set, raise or lower the bid increments by announcement before or during the auction.

¹⁴⁶ See *Competitive Bidding Second Report and Order* at ¶¶ 124-126.

73. Background. In multiple round auctions, a stopping rule must be established for determining when the auction is over.¹⁴⁷ In simultaneous multiple round auctions, bidding may close separately on individual licenses, simultaneously on all licenses, or a hybrid approach may be used. Under a license-by-license approach, bidding closes on each license after a certain number of rounds pass in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding generally remains open on all licenses until there is no new acceptable bid for any license. This approach provides 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. Under a hybrid approach, we may use a simultaneous stopping rule (along with an activity rule designed to expedite closure for licenses subject to the simultaneous stopping rule) for the higher value licenses. For lower value licenses, where the loss from eliminating some back-up strategies is less, we may use the license-by-license approach.

74. For 900 MHz SMR, we proposed to adopt a simultaneous stopping rule.¹⁴⁸ We noted that MTA licenses are expected to have relatively high values because of the substantial amount of clear spectrum that remains available and the high valuation of SMR spectrum in secondary market transactions.¹⁴⁹ AMTA and Nextel support the Commission's proposal.¹⁵⁰

75. Discussion. We will adopt a simultaneous stopping rule for the 900 MHz SMR auction. The substitutability between licenses within the same MTA, and the ability to pursue back-up strategies support the use of a simultaneous stopping rule. Bidding will remain open on all licenses in an auction until bidding stops on every license. The auction will close after one round passes in which no new valid bids or proactive activity rule waivers (as defined in ¶¶ 85-86, *infra*) are submitted. We retain the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round.¹⁵¹ In the event that we exercise this discretion, the effect will be the same as if a bidder has submitted a proactive waiver. We also retain the discretion to announce license-by-license closings.

76. We retain the discretion to declare after 40 rounds that the auction will end after some specified number of additional rounds. We believe this number of rounds will assure that the auction will not close prematurely, while providing bidders with fair assurance that

¹⁴⁷ *Id.* at ¶ 128.

¹⁴⁸ *Second R&O and Second Further Notice* at ¶ 82.

¹⁴⁹ *Id.*

¹⁵⁰ AMTA Comments at 4; Nextel Comments at 3.

¹⁵¹ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7684 (1994) at ¶ 3.

the auction will be conducted as intended.¹⁵² Bids will be accepted only on licenses where the high bid has increased in the last three rounds.¹⁵³ This will deter bidders from continuing to bid on a few low value licenses solely to delay the closing of the auction. It also will enable the Commission to end the auction when it determines that the benefits of terminating the auction and issuing licenses exceed the likely benefits of continuing to allow bidding. The Commission will announce by Public Notice the number of remaining rounds and other final bidding procedures.

77. The disadvantage of declaring an imminent end to an auction, however, is that the procedure may result in less efficient allocation of licenses than if the auction remained open as long as new bids were received.¹⁵⁴ Therefore, we will declare the imminent end of the auction only in the case of extremely dilatory bidding, as we favor other methods to hasten the end of an auction -- shortening the bidding rounds, raising the minimum bid increments, and proceeding to a later auction stage.¹⁵⁵ This will facilitate the rapid completion of the auction by permitting the Commission to use larger bid increments, thereby speeding the auction pace without risking a premature auction close.¹⁵⁶

4. Duration of Bidding Rounds

78. Background. We proposed in the *Second R&O and Second Further Notice* to reserve the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted. AMTA and Nextel support the Commission's proposals.¹⁵⁷

79. Discussion. In simultaneous multiple round auctions, bidders may need a significant amount of time to evaluate back-up strategies and develop their bidding plans. We delegate to the Wireless Telecommunications Bureau the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted (*e.g.*, run more than one round per day) in order to move the auction toward closure more quickly. The Bureau will 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.

¹⁵² See *Competitive Bidding Fifth Report and Order* at ¶ 48.

¹⁵³ *Competitive Bidding Fifth Report & Order* at ¶ 49.

¹⁵⁴ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 6858 (1994) (*Competitive Bidding Fourth Memorandum Opinion & Order*) at ¶ 20.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at ¶ 5.

¹⁵⁷ AMTA Comments at 4; Nextel Comments at 3.

5. Activity Rules

80. Background. To ensure that simultaneous auctions with simultaneous stopping rules close within a reasonable period of time and to increase the information conveyed by bid prices during the auction, it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. In the *Competitive Bidding Second Report & Order*, we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used.¹⁵⁸ The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of MHz-pops, and to make an upfront payment proportional to that eligibility level.¹⁵⁹ (See discussion of upfront payments at ¶¶ 111-113, *infra*) In each round, bidders are 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 at the end of the withdrawal period in the previous round, as well as licenses on which a new valid bid is placed, count toward this bidding limit. Under this approach, bidders have the flexibility to shift their bids among any license for which they have applied so long as, within each round, the total MHz-pops encompassed by those licenses does not exceed the total number of MHz-pops on which they are eligible to bid

81. In the *Second R&O and Second Further Notice*, we tentatively concluded that the Milgrom-Wilson activity rule should be used in conjunction with the proposed simultaneous stopping rule to award 900 MHz SMR licenses. We noted that it would best achieve the Commission's goals of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time. AMTA and Nextel support the Commission's proposals.¹⁶⁰

82. Discussion. We will employ the Milgrom-Wilson activity rule in conjunction with the simultaneous stopping rule. Under the Milgrom-Wilson procedure, the minimum activity level, measured as a fraction of the bidder's eligibility in the current round, increases during the course of the auction. Absent waivers (discussed *infra*), a bidder's eligibility (in terms of MHz-pops) in the current round is determined by the bidder's activity level and eligibility in the previous round. In the first round, however, eligibility is determined by the bidder's upfront payment and is equal to the upfront payment divided by \$.02 per MHz-pop.

83. In each round of Stage I, a bidder who wishes to maintain its current eligibility must be active on licenses encompassing at least one-half of the MHz-pops for which it

¹⁵⁸ *Competitive Bidding Second Report & Order* at ¶¶ 144-145

¹⁵⁹ The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license.

¹⁶⁰ AMTA Comments at 4; Nextel Comments at 3

currently is eligible. Failure to maintain the requisite activity level will result in a reduction in the amount of MHz-pops upon which a bidder will be eligible to bid in the next round of bidding (unless an activity rule waiver, as defined in ¶ 85, *infra*, is used). During Stage I, if bidding activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by two (2). Eligibility for each applicant in the first round of the auction is determined by the amount of the upfront payment received and the licenses identified in its auction application. In each round of Stage II, a bidder who wishes to maintain its current eligibility is required to be active on at least 75 percent of the MHz-pops for which it is eligible in the current round. During Stage II, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by four thirds (4/3). In each round of Stage III, a bidder who wishes to maintain its current eligibility must be active on licenses encompassing at least 95 percent of the MHz-pops for which it is eligible in the current round. In Stage III, if activity in the current round is below 95 percent of current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by twenty nineteenth (20/19). We reserve the discretion to set and, by announcement before or during the auction, vary the requisite minimum activity levels (and associated eligibility calculations) for each auction stage. Retaining this flexibility will improve the Commission's ability to control the pace of the auction and help ensure that the auction is completed within a reasonable period of time.

84. As in prior auctions, we will determine the transition from one stage to the next in the 900 MHz SMR auction by the aggregate level of bidding activity, subject to our discretion. The transition rule also may be defined in terms of the "auction activity level" -- the sum of the MHz-pops of those licenses whose high bid increased in the current round, as a percentage of the total MHz-pops of all licenses in that auction. The auction will start in Stage I and move to Stage II when the auction activity level is below ten percent for three consecutive rounds in Stage I. The auction will move from Stage II to Stage III when the auction activity level is below five percent for three consecutive rounds in Stage II. In no case can the auction revert to an earlier stage. However, we retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next. These determinations will be based on a variety of measures of bidder activity including, but not limited to, the auction activity level defined above, the percentage of licenses (measured in terms of MHz-pops) on which there are new bids, the number of new bids, and the percentage increase in revenue

85. 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 will provide bidders with five activity rule waivers that may be used in any round during the course of the auction. If a bidder's activity level is below the required activity level a waiver automatically will be applied. That is, if a bidder fails to submit a bid in a round, and its activity level from any standing high bids (high bids at the end of the bid withdrawal period in the previous round) falls below its required activity level, a waiver automatically will be applied. A waiver will preserve current eligibility in the next round, but cannot be used to correct an error in the amount bid. An activity rule waiver applies to an entire round

of bidding and not to a particular MTA service area.

86. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid, if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level.¹⁶¹ If a bidder overrides the automatic waiver mechanism, its eligibility permanently will be reduced (according to the formulas specified above), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no valid bids will not keep the auction open. Bidders will have the option to proactively enter an activity rule waiver during the bid submission period. Thus, a "proactive" waiver, as distinguished from an automatic waiver, is one requested by the bidder. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

87. The Bureau retains the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. The Bureau also retains the flexibility to adjust, by Public Notice prior to an auction, the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction.¹⁶²

6. Rules Prohibiting Collusion

88. Background. In the *Competitive Bidding Second Report & Order*, we adopted a special rule prohibiting collusive conduct in the context of competitive bidding.¹⁶³ We observed that such a rule 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.¹⁶⁴ In the *Second R&O and Second Further Notice*, we tentatively concluded that Section 1.2105(c) of the Commission's Rules would apply to 900 MHz SMR auctions.¹⁶⁵ We also proposed that winning bidders in 900 MHz SMR auctions be subject to Section 1.2107(d) of the Commission's Rules.

89. Comments. AMTA suggests that the Commission modify the collusion rules to

¹⁶¹ See *Competitive Bidding Fourth Memorandum Opinion and Order* at ¶ 15.

¹⁶² See *Competitive Bidding Second Report and Order* at ¶ 145.

¹⁶³ See 47 C.F.R. § 1.2105(c); see also *Competitive Bidding Second Memorandum Opinion & Order* at ¶¶ 50-53 and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Erratum*, PP Docket No. 93-253, rel. Oct. 19, 1994 (*Competitive Bidding 2nd MO&O Erratum*).

¹⁶⁴ See *Competitive Bidding Second Report & Order* at ¶ 221.

¹⁶⁵ *Second R&O and Second Further Notice* at ¶ 94.

reflect the differences between Section 1.2107(d) and Section 1.2105(c).¹⁶⁶ Specifically, AMTA requests that the Commission clarify that consortia agreements entered into after the filing of the Form 175 are permitted subject to the limitations set out in Section 1.2105(c)(2), which allows modification of the short-form to reflect the formation of consortia, under certain circumstances.¹⁶⁷ RAM requests that the Commission clarify that providing information about existing systems to potential new entrants in the 900 MHz SMR service does not constitute collusion.¹⁶⁸

90. Discussion. We will subject 900 MHz SMR licensees to the reporting requirements and rules prohibiting collusion embodied in Sections 1.2107(d) and 1.2105(c) of the Commission's Rules. In response to AMTA's suggestion, we restate the collusion rules here. Section 1.2107(d) provides that, as an exhibit to the long-form application, the applicant must provide a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior to the time bidding was completed. The rule provides that such agreements must have been entered into prior to the filing of the FCC Form 175. Section 1.2105(c), however, provides an exception to that prohibition for bidders who have not filed Form 175 applications for licenses in any of the *same* geographic license areas.¹⁶⁹ Those bidders may enter into such discussions, consortia, or arrangements, or add equity partners, after the filing of short-form applications.¹⁷⁰ We also will permit communications among bidders concerning matters unrelated to the license auctions, except for communications resulting in a transfer of control of the applicant.¹⁷¹

91. Section 1.2105(c)(4) also provides an exception for non-controlling parties holding an attributable interest in multiple applicants for the same geographic license area. Such parties may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for licenses in the same geographic license area, provided that they have not communicated and will not communicate with any party

¹⁶⁶ AMTA Comments at 4

¹⁶⁷ AMTA Comments at 4-5

¹⁶⁸ RAM Comments at 8

¹⁶⁹ 47 C.F.R. § 1.2105(c); see *Competitive Bidding Second Memorandum Opinion and Order* at ¶ 51 and *Competitive Bidding 2nd MO&O Erratum*..

¹⁷⁰ 47 C.F.R. § 1.2105(c)(3)

¹⁷¹ *Competitive Bidding Fourth Memorandum Opinion & Order* at ¶ 56. *But see Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division*, rel. Dec. 1, 1994 (establishing that discussions that indirectly provide information that affects bidding strategy also are precluded by anti-collusion rules) and *Competitive Bidding Fourth Memorandum Opinion & Order* at note 125 (stating applicants also are subject to existing antitrust laws)

concerning the bids or bidding strategies of more than one of the applicants in which they hold attributable interests, or with which they have a consortium or joint bidding arrangement, and which have applied for licenses in the same geographic license area(s). The arrangements also must not result in any change in control of an applicant.¹⁷²

92. In addition, as discussed at ¶¶ 104-105. *infra*, bidders will be required by Section 1.2105(a)(2) 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. Bidders will 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.

93. We deny RAM's request to modify the collusion rule to exempt communications between MTA bidders and incumbents. First, as we have stated, the Bidder Information Package will contain information about the incumbent licensees. Any communications between MTA bidders and incumbent licensees should take place prior to the deadline for filing Form 175s. We see no reason to create a special exemption for this situation, particularly because the MTA bidder and the incumbent licensee may be competing for the same MTA license.

94. We note that where specific instances of collusion in the competitive bidding process are alleged during 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 penalties under antitrust laws, forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions.¹⁷³

C. Procedural and Payment Issues

1. Pre-auction Application Procedures

95. Background. In the *Competitive Bidding Second Report & Order*, the Commission established general competitive bidding rules and procedures, which we noted may be modified on a service-specific basis.¹⁷⁴ In the *Second R&O and Second Further Notice*, we proposed to follow generally the processing and procedural rules established in the

¹⁷² 47 C.F.R. § 1.2105(c)(4); see *Competitive Bidding Second Memorandum Opinion and Order* at ¶ 52.

¹⁷³ *Second Report & Order & Further Notice* at ¶ 96.

¹⁷⁴ *Competitive Bidding Second Report and Order* at ¶ 6. 47 C.F.R. Part 1. Subpart Q.

Competitive Bidding Second Report & Order, with certain modifications designed to address the particular characteristics of the 900 MHz SMR service. AMTA generally agrees with our proposals.¹⁷⁵ Therefore, we will adopt such modified rules. 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. By ensuring that bidders and license winners are serious, qualified applicants, these proposed rules will minimize the need to re-auction licenses and prevent delays in the provision of 900 MHz SMR service to the public.

96. As MTA licensees will gain use of a large geographic area and the freedom to locate base stations anywhere within that larger geographic region, they differ from the existing 900 MHz licensees that essentially are confined to the smaller DFA region. Accordingly, we will treat all MTA applicants as initial applicants for public notice, application processing, and auction purposes, regardless of whether they are already incumbent operators.

97. Section 309(j)(5) provides that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing."¹⁷⁶ Moreover, "[n]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to Section 309(a), Section 308(b), and Section 310" of the Communications Act.¹⁷⁷ As the legislative history of Section 309(j) makes clear, the Commission may require that bidders' applications contain all information and documentation sufficient to demonstrate that the application is not in violation of Commission rules, and we will dismiss applications not meeting those requirements prior to the competitive bidding.¹⁷⁸

98. In the *Competitive Bidding Second Report & Order*, we determined that we should require only a short-form application (FCC Form 175) prior to competitive bidding, and that only winning bidders should be required to submit a long-form license application (FCC Form 600) after the auction. As we determined that such a procedure would fulfill the statutory requirements and objectives and adequately protect the public interest, we incorporated these requirements into the rules adopted in the *Competitive Bidding Second Report & Order*.¹⁷⁹ Accordingly, we will extend the application of these rules to the competitive bidding process for 900 MHz SMR.

¹⁷⁵ AMTA Comments at 5.

¹⁷⁶ 47 U.S.C. § 309(j)(5).

¹⁷⁷ *Id.*

¹⁷⁸ See H.R. Rep. No. 111, 103rd Cong., 1st Sess. 258 (1993) (House Report).

¹⁷⁹ See 47 C.F.R. §§ 1.2104 and 1.2107.

99. Prior to the start of the 900 MHz SMR auction, the Wireless Telecommunications Bureau will release an initial Public Notice announcing the auction. The initial Public Notice will specify the licenses to be auctioned and the time and place of the auction in the event that mutually exclusive applications are filed. The Public Notice will specify the method of competitive bidding to be used, applicable bid submission procedures, stopping rules, activity rules, and the deadline by which short-form applications must be filed and the amounts and deadlines for submitting the upfront payment.¹⁸⁰ We will not accept applications filed before or after the dates specified in the Public Notice. Applications submitted before the release of the Public Notice will be returned as premature. Likewise, applications submitted *after* the deadline specified by Public Notice will be dismissed, with prejudice, as untimely.

100. Soon after the release of the initial Public Notice, a Bidder Information Package will be made available to prospective bidders. As discussed at ¶ 64, *supra*, the bidders' package will contain information on the incumbents occupying blocks on which bidding will be available.

101. All bidders will be required to submit short-form applications on FCC Form 175 (and FCC Form 175-S, if applicable), by the date specified in the initial Public Notice. Applicants are encouraged to file Form 175 electronically. Detailed instructions regarding electronic filing will be contained in the Bidder Information Package. Those applicants filing manually will be required to submit one paper original and one diskette original of their application, as well as two diskette copies. The short-form applications will require applicants to provide the information required by Section 1.2105(a)(2) of the Commission's Rules.¹⁸¹ Specifically, each applicant will be required to specify on its Form 175 applications certain identifying information, including its status as a designated entity (if applicable), its classification (*i.e.*, individual, corporation, partnership, trust, or other), the MTAs and frequency blocks for which it is applying, and, assuming that the licenses will be auctioned, the names of persons authorized to place or withdraw a bid on its behalf.

102. As we indicated in the *Competitive Bidding Second Report & Order*, if we receive only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, we will issue a Public Notice cancelling the auction for this license and establishing a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny (as discussed at ¶ 127, *infra*).¹⁸² If no petitions to deny are filed, the application will be grantable after 30 days.

2. Amendments and Modifications

¹⁸⁰ See *Competitive Bidding Second Report & Order* at ¶ 164

¹⁸¹ 47 C.F.R. § 1.2105(a)(2)

¹⁸² See *Competitive Bidding Second Report & Order* at ¶ 165

103. Background. To encourage maximum bidder participation, we proposed in the *Second R&O and Second Further Notice* to provide applicants with an opportunity to correct minor defects in their short-form applications prior to the auction.¹⁸³ We received no comments on this proposal.

104. Discussion. 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, etc.) will be permitted to file corrected applications. We also will waive the *ex parte* rules as they apply to the submission of amended short-form applications for the 900 MHz SMR auctions, to maximize applicants' opportunities to seek Commission staff advice on making such amendments.¹⁸⁴ Applicants will not be permitted to make any major modifications to their applications, including, but not limited to, changes in license areas and changes in control of the applicant, or additions of other bidders into the bidding consortia, until after the auction.¹⁸⁵ Applicants may 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 will 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.¹⁸⁶ In addition, applications that are not signed will be dismissed as unacceptable, as will applications in which no market designations are made.

105. In addition, a single member of a bidding consortium may withdraw from a consortia only in a particular MTA(s), but otherwise remain in the consortium for purposes of bidding on all other markets specified on the short-form application. However, such arrangements to assign the member's interests in particular licenses to other consortium members after the auction must be disclosed on an original or amended short-form application, and a request to transfer or assign the license also must be filed in conjunction with the long-form application.¹⁸⁷

106. Upon reviewing the short-form applications, we will issue a Public Notice listing

¹⁸³ *Second R&O and Second Further Notice* at ¶ 105.

¹⁸⁴ The Commission also waived the *ex parte* rules as they applied to the A and B blocks of the broadband PCS auctions. See 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, *Public Notice*, 9 FCC Rcd 6760 (1994).

¹⁸⁵ Bidders who have not filed Form 175 applications for licenses in any of the same geographic license areas may enter into bidding consortia, joint ventures, partnerships or other agreements. See ¶ 90, *infra*.

¹⁸⁶ See *Competitive Bidding Second Memorandum Opinion & Order* at ¶ 52.

¹⁸⁷ See *Letter to Leonard J. Kennedy, Esq. from Rosalind K. Allen, Acting Chief, Commercial Radio Division*, rel. Dec. 14, 1994.

all defective applications, and applicants with minor defects will be given an opportunity to cure and resubmit a corrected version. By the resubmission date, all applicants will be required to submit an upfront payment to the Commission, as discussed below, to the Commission's lock-box 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 will issue a second Public Notice announcing the names of all applicants that have been determined as 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 Public Notice will be issued a bidder identification number and further information and instructions regarding auction procedures.

3. Upfront Payments

107. Background. In the *Competitive Bidding Second Report & Order*, we concluded that a substantial upfront payment prior to the beginning of an auction is necessary to ensure that only serious and qualified bidders participate.¹⁸⁸ By requiring such a payment, we also help to ensure that any bid withdrawal or default assessments are paid. We tentatively concluded to use the standard upfront payment formula of \$0.02 per MHz-pop, based on the number of 10-channel blocks in each MTA identified by an applicant on its Form 175, and to allow bidders to bid on any combination of licenses, as long as the total MHz-pops combination would not exceed the amount covered by the upfront payment.¹⁸⁹

108. Comments. Four commenters addressed the Commission's proposal to require an upfront payment equal to \$0.02 per MHz-pop. RAM supports the Commission's proposal.¹⁹⁰ Geotek does not support the Commission's proposal, reasoning that such a formula, as opposed to a per-license upfront payment, may encourage bidders to bid in every block, including encumbered blocks in which they have no particular interest.¹⁹¹ Nextel contends that an upfront payment of \$0.02 per MHz-pop may be insufficient to discourage insincere bidders, because the capital outlay is significantly different from PCS.¹⁹² CICS disagrees with Nextel, stating that the nature of the auction process will deter speculators and that, in any event, the imposition of strict penalties is a better safeguard.¹⁹³

¹⁸⁸ *Competitive Bidding Second Report & Order* at ¶ 171.

¹⁸⁹ Each 10-channel block accounts for .25 MHz.

¹⁹⁰ RAM Comments at 7-8.

¹⁹¹ Geotek Comments at 6-7.

¹⁹² Nextel Comments at 3-4.

¹⁹³ CICS Reply Comments at 6.

109. Both Geotek and RAM urge the Commission to require upfront payments for each frequency block for which an applicant designates an interest on its FCC Form 175, and that bidding eligibility should be limited to those designated blocks.¹⁹⁴ RAM disagrees with the Commission's proposal to allow bidding on any combination of licenses for which the total MHz-pop does not exceed the amount covered by the upfront payment, because a single upfront payment should not make a bidder eligible for multiple licenses.¹⁹⁵ RAM comments that to do otherwise would not follow the congressional directive to avoid mutual exclusivity.¹⁹⁶

110. Discussion. We reject both Geotek's and RAM's arguments that we should limit a bidder's eligibility to the specific blocks designated on the applicant's Form 175, or that we should adopt a per-license upfront payment. The simultaneous multiple round auction design combined with the standard bid withdrawal payments is designed to allow bidders to have flexibility to substitute bidding on various licenses during the course of the auction. The flexibility to respond to information during the course of the auction is one of the major beneficial features of the auction. If we were to adopt the Geotek/RAM limitation, this flexibility would be lost. For example, bidders can change their strategy during an auction and bid on a larger number of smaller licenses (*i.e.* MTAs with fewer pops), or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed the amount covered by the upfront payment. Bidders would be forced to bid on more licenses than they ultimately wish to obtain under the Geotek/RAM proposal. They would be forced to risk an amount that would have little correspondence with the value of the licenses ultimately won. We believe that preserving the bidder's flexibility outweighs the small amount of speculation that might be deterred with a stricter rule, particularly in light of the deterrent effect of the bid withdrawal payment (as discussed at ¶¶ 120-122, *infra*).

111. We will adopt the standard \$0.02 per Mhz-pop formula to calculate the upfront payment. We disagree with Nextel that the \$0.02 per MHz-pop formula is too insignificant to deter speculation in the 900 MHz SMR service. The upfront payment for PCS was calculated to be approximately five percent of the final price to approximate one bid increment. In both the narrowband and broadband PCS auctions, in which we used the \$0.02 per MHz-pop upfront payment, all bid withdrawal payments were paid in full and all winning bidders have paid all amounts due. Thus, our experience demonstrates that the upfront payment will be sufficient to deter speculation in this auction as well.¹⁹⁷

¹⁹⁴ Geotek Comments at 5; RAM Comments at 7-8.

¹⁹⁵ RAM Comments at 7-8.

¹⁹⁶ RAM Comments at 7-8.

¹⁹⁷ In an *Ex Parte* Letter filed August 17, 1995, Geotek claimed that, based on its 900 MHz SMR acquisitions, the \$0.02 per MHz-pop formula overestimates the value of an MTA license. On the other hand, RAM, in an *Ex Parte* Letter filed August 23, 1995, based on its 900 MHz SMR acquisitions, agreed with the proposed \$0.02 per MHz-pop formula. Since there is disagreement as to the licenses' valuation, we will retain

112. In the initial Public Notice issued prior to the auction, we will announce population information corresponding to each license and the upfront payment amount for each MTA license. In general, population coverage for each channel block in each MTA will be based on a formula that takes into account the presence of incumbent licensees.

113. Upfront payments will be due by a date specified by Public Notice, but generally no later than 14 days before a scheduled auction. Each qualified bidder will be issued a bidder identification number and further information and instructions regarding the auction procedures. During the auction, bidders will be required to provide their bidder identification numbers when submitting bids.

4. Down Payment and Full Payment

114. Background. In the *Competitive Bidding Second Report & 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 default assessment if such default occurs.¹⁹⁸ 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.¹⁹⁹ We also determined that this amount was appropriate for the broadband PCS auctions.²⁰⁰ Using the same reasoning in the *Second R&O and Second Further Notice*, we tentatively concluded that, with the exception of designated entities eligible for installment payments, winning bidders in 900 MHz SMR auctions would have to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). AMTA generally supports this proposal.²⁰¹

115. Discussion. With the exception of designated entities eligible for installment payments (as discussed at ¶¶ 169-170, *infra*), winning bidders must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid

the standard \$0.02 formula.

¹⁹⁸ *Competitive Bidding Second Report & Order* at ¶ 190.

¹⁹⁹ *Id.*

²⁰⁰ *See Competitive Bidding Fifth Report & Order* at ¶ 73.

²⁰¹ AMTA Comments at 5.

withdrawal and default payments due, the additional monies will be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the payment cannot yet be determined, the bidder will be required to make a deposit of 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the payment, any excess deposit will be refunded. Upfront payments will be applied to such deposits, and to bid withdrawal and default assessments due, before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.

116. Winning bidders must submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date and time to be specified by Public Notice, generally within five business days following the close of bidding. All auction winners generally will be required to make full payment of the balance of their winning bids within five (5) business days following Public Notice that the Commission is prepared to award the license. The Commission generally will grant uncontested licenses within ten (10) business days after receiving full payment.

117. We also will subject an auction winner that is eligible to make payments through an installment plan (*i.e.*, designated entities, as discussed at ¶¶ 152-156, *infra*) to different payment requirements. Such an entity will be required to bring its deposit with the Commission up to five percent of its winning bid after the bidding closes, and will have to pay an additional five percent of its winning bid to the Commission within five (5) business days following Public Notice that the Commission is prepared to award the license. The Commission then will grant the license generally within ten (10) business days after receiving the five percent payment.

5. Bid Withdrawal, Default, and Disqualification

118. Background. We determined in the *Competitive Bidding Second Report & Order* that there must be a substantial payment assessed to bidders if they withdraw a high bid, are found not to be qualified to hold licenses, or default on payment of a balance due. Although we concluded that payment of *all* amounts that a bidder has on deposit may be too severe in many cases, we devised alternative disincentives for withdrawal, default, or disqualification.²⁰² In the *Second R&O and Second Further Notice*, we tentatively concluded that these procedures, found in Sections 1.2104(g) and 1.2109 of the Commission's Rules, would be appropriate for the 900 MHz SMR auction as well.²⁰³ Accordingly, we proposed that any bidder that withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.

²⁰² See *Competitive Bidding Second Report & Order* at ¶ 197.

²⁰³ *Second R&O and Second Further Notice* at ¶ 111.

119. Comments. The only commenter on this issue, Nextel, favors stricter payments on bid withdrawal.²⁰⁴ Nextel maintains that the Commission should impose forfeiture of the upfront payment for withdrawal of a high bid, due to the high potential for abuse in the 900 MHz SMR auctions.²⁰⁵ Nextel, however, fails to explain why the 900 MHz SMR auction would be especially prone to abuse.

120. Discussion. We disagree with Nextel's recommendation, because we believe that forfeiture of the entire upfront payment is too draconian for the bidder who withdraws only one bid. Since commenters have not stated why the 900 MHz SMR service differs in this respect from the narrowband and broadband PCS services, there is no justification for departing from the already tested narrowband and broadband PCS withdrawal, default, and disqualification assessments. Therefore, we believe our proposal to apply Section 1.2104(g)(1) to the 900 MHz SMR auction is more equitable and is consistent with our practice in prior auctions. Section 1.2104(g)(1) provides that any bidder that withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.

121. 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 is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay an assessment equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission.²⁰⁶ If a license which is the subject of withdrawal or default is not re-auctioned, but instead is offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders will not be required to accept the offer, *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 we will 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.

122. After bidding closes, we will apply Section 1.2104(g)(2) to assess a defaulting auction winner an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less.²⁰⁷ The additional three percent

²⁰⁴ Nextel Comments at 4-5.

²⁰⁵ *Id.* at 4-5.

²⁰⁶ See 47 C.F.R. § 1.2104(g)(1).

²⁰⁷ See 47 C.F.R. §§ 1.2104(g) and 1.2109.

payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We will hold deposits made by defaulting or disqualified auction winners until full payment is made.

123. These payment requirements will discourage default and ensure that bidders meet all eligibility and qualification requirements. If a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.²⁰⁸

124. If the MTA winner defaults, is otherwise disqualified after having made the required down payment, or the license is terminated or revoked, then the Commission will re-auction the license.²⁰⁹ If the default occurs within five business days after the bidding has closed, the Commission retains 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 the final bid levels. If only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidders if the cost of running another auction exceeds the benefits.

6. Long-Form Applications

125. Discussion. We proposed in the *Second R&O and Second Further Notice* to apply the general procedures for filing long-form applications²¹⁰ to the 900 MHz SMR auctions.²¹¹ We received no comments on this proposal. Therefore, we will follow these procedures if the winning bidder makes the down payment in a timely manner: A long-form application filed on FCC Form 600 must be filed by a date specified by Public Notice, generally within ten business days after the close of bidding. After the Commission receives the winning bidder's down payment and long-form application, we will review the long-form application to determine if it is acceptable for filing. In addition to the information required in the Form 600, designated entities will be required to submit evidence to support their claim to any special provision available for designated entities described in this Order. This information may be included in an exhibit to FCC Form 600. This information will enable the Commission, and other interested parties, to ensure the validity of the applicant's certification of eligibility for bidding credits, installment payment options, and other special

²⁰⁸ See *Competitive Bidding Second Report & Order* at ¶ 198, citing Character Qualifications Policy Statement, 102 FCC 2d 1179 (1986).

²⁰⁹ See *id.* at ¶ 204; 47 C.F.R. § 1.2109(c).

²¹⁰ See 47 C.F.R. § 1.2107.

²¹¹ *Second R&O and Second Further Notice* at ¶ 116.

provisions. Upon acceptance for filing of the long-form application, the Commission will issue 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, the license(s) will be granted to the auction winner.²¹²

7. Petitions to Deny and Limitations on Settlements

126. Discussion. We determined in the *CMRS Third Report & Order* that the petition to deny procedures in Section 90.163 of the Commission's Rules will apply to the processing of applications for the 900 MHz SMR service.²¹³ Although we did not request comment on this issue, AMTA expressed its support for the Commission's adoption of a limitation on settlements.²¹⁴ AMTA expresses its concern that, due to the small size of the spectrum blocks that will be auctioned in 900 MHz and the presence of incumbents, the auctions offer an opportunity to "greenmail" current licensees.²¹⁵ A party filing a petition to deny against a 900 MHz SMR application will be required to demonstrate standing and meet all other applicable filing requirements. The "greenmail" restrictions in Section 90.162 were established to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from 900 MHz SMR applicants. Thus, we will limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner.

127. With respect to petitions to deny, the Commission need not conduct a hearing before denying an application if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination.²¹⁶ In the event the Commission identifies substantial and material issues of fact, Section 309(i)(2) of the Communications Act permits the submission of all or part of evidence in written form in any hearing and allows employees other than administrative law judges to preside over the taking of written evidence.

8. Transfer Disclosure Requirement

128. Background. In Section 309(j), Congress directed 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 methods employed to issue licenses

²¹² See generally 47 C.F.R. §§ 90.163-90.166.

²¹³ *CMRS Third Report and Order* at ¶¶ 21, 337, 347.

²¹⁴ AMTA Comments at 5.

²¹⁵ AMTA Comments at 5-6.

²¹⁶ *Competitive Bidding Second Report & Order* at ¶ 202.

and permits."²¹⁷ In the *Competitive Bidding Second Report & Order*, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied.²¹⁸ We decided that it was important to monitor transfers of licenses awarded by competitive bidding to accumulate the necessary data to evaluate our auction designs and to judge whether "licenses [have been] issued for bids that fall short of the true market value of the license."²¹⁹ Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by a designated entity or not.²²⁰ We tentatively concluded in the *Second R&O and Second Further Notice* that the transfer disclosure requirements of Section 1.2111(a) should apply to all 900 MHz SMR licenses obtained through the competitive bidding process.²²¹

129. Discussion. We received no comments on this proposal. Therefore, we will apply Section 1.2111(a) to all 900 MHz SMR licenses obtained through the competitive bidding process. Generally, licensees transferring their licenses within three years after the initial license grant will be required to file, together with their transfer applications, 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. As we indicated in the *Second R&O and Second Further Notice*, we will give 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 within three years after the initial license grant, so that we may determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context.²²²

9. Performance Requirements

130. Discussion. 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."²²³ In the *Competitive Bidding Second Report*

²¹⁷ 47 U.S.C. § 309(j)(4)(E).

²¹⁸ *Competitive Bidding Second Report & Order* at ¶¶ 210-226, 258-265.

²¹⁹ See House Report at 257, *Competitive Bidding Second Report & Order* at ¶ 214.

²²⁰ See 47 C.F.R. § 1.2111(a).

²²¹ *Second R&O and Second Further Notice* at ¶ 120.

²²² *Id.* See also *Competitive Bidding Second Report & Order* at ¶ 214. These particular transfer disclosure requirements are in addition to the unjust enrichment provisions discussed in this Order at ¶¶ 173-174, *infra*.

²²³ 47 U.S.C. § 309(j)(4)(B).

& Order, we decided it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services.²²⁴ In the *Second R&O and Second Further Notice*, we tentatively concluded that the coverage requirements that we adopted there would be sufficient to address the spectrum warehousing concern.²²⁵ We received no comment on this issue. Therefore, we will not adopt any performance requirements for the 900 MHz SMR service beyond that required by Section 90.665. Because the failure to meet those coverage requirements will result in automatic cancellation of license, we believe that is sufficient incentive to promote prompt service and prevent spectrum warehousing.²²⁶

D. Treatment of Designated Entities

1. Overview, Objectives, and the Impact of *Adarand Constructors v. Peña*

131. **Background.** The Communications Act provides that, in developing competitive bidding procedures, the Commission shall consider various statutory objectives and consider several alternative methods for achieving them. Specifically, the statute provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."²²⁷ Small businesses, rural telephone companies and businesses owned by minorities and/or women are collectively referred to as "designated entities."²²⁸ Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."²²⁹ The statute also requires the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."²³⁰

²²⁴ *Competitive Bidding Second Report and Order* at ¶ 219. See also 47 C.F.R. §§ 24.103; 24.206.

²²⁵ *Second R&O and Second Further Notice* at ¶ 121. 47 C.F.R. § 90.665.

²²⁶ See discussion at ¶¶ 31-33, *supra*.

²²⁷ 47 U.S.C. § 309(j)(3)(B).

²²⁸ *Competitive Bidding Second Report and Order* at ¶ 227.

²²⁹ 47 U.S.C. § 309(j)(4)(A).

²³⁰ 47 U.S.C. § 309(j)(4)(D).