

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.

46. We tentatively conclude that the Milgrom-Wilson approach will best achieve our 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 seek comment on imposing such an activity rule in conjunction with a simultaneous stopping rule to award 37 GHz licenses. We also seek comment on whether to use a simplified waiver procedure, if we adopt an activity rule for 37 GHz licenses. For example, bidders might be permitted five automatic waivers from the activity rule during the course of an auction.⁸⁷ If we adopt an activity rule of auctioning 37 GHz licenses, we propose to announce by Public Notice before each auction the activity rule that will be employed in that particular auction.⁸⁸ We seek comment on these issues.

47. While we are proposing the adoption of the Milgrom-Wilson activity rule by this Notice, we also retain the discretion to use an alternative activity rule for 37 GHz if we determine that the Milgrom-Wilson rule is too complicated or costly to administer. Any such change would be announced by Public Notice before commencement of the auction. We seek comment on this proposal.

48. 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 one round per day) in order to move the auction toward closure more quickly.⁸⁹ 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.

⁸⁷ Id. at ¶ 40.

⁸⁸ Our rules allow us 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 MHz-pops 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. See Competitive Bidding Third Report and Order at ¶¶ 40-41.

⁸⁹ See, e.g., 900 MHz Second Report and Order at ¶ 86.

2. Procedural and Payment Issues

a. Pre-Auction Application Procedures

49. 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.⁹⁰ By ensuring that bidders and license winners are serious, qualified applicants, these rules will minimize the need to re-auction licenses and will prevent delays in the provision of 37 GHz service and, thus, of PCS service to the public. In addition, we propose adopting general procedural and processing rules based on rules for other auctionable services, such as those contained in Part 24 of the Commission's Rules for PCS.⁹¹

50. In the Competitive Bidding Second Report and Order, we established general competitive bidding rules and procedures that may be modified on a service-specific basis.⁹² 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 37 GHz service.

51. 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.⁹³ We have previously determined that such a procedure would fulfill the statutory requirements and objectives and adequately protect the public interest.⁹⁴ Accordingly, we propose to extend the application of these rules to the competitive bidding process for 37 GHz licenses.

52. We propose that, before each 37 GHz 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 payments, stopping rules and activity rules and other important

⁹⁰ See, e.g., Competitive Bidding Third Report and Order at ¶ 43; see also 900 MHz Second Report and Order at ¶ 97.

⁹¹ See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order, 9 FCC Rcd 7988, 8026 (¶ 67) (1994).

⁹² See 47 C.F.R. Part 1, Subpart Q.

⁹³ Id.

⁹⁴ See, e.g., Competitive Bidding Third Report and Order at ¶ 43.

information.⁹⁵ These initial Public Notices will also specify the filing window for short-form applications.

53. **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 only one application that is acceptable for filing for a particular license is received, and thus there is no mutual exclusivity, we 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.⁹⁶ 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, we 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.⁹⁷ We propose to apply the same principles to the 37 GHz auctions. Under our proposal, applicants would not be permitted to make any major modifications to their 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.⁹⁸ 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 (defined below in ¶¶ 54-55) 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 we receive from our lock-box bank the names of all applicants who have submitted timely upfront payments, we would then issue a Public Notice announcing the names of all applicants that have been determined to be qualified to bid. An

⁹⁵ Id. at ¶ 42.

⁹⁶ Id. at ¶ 43; see also 900 MHz Second Report and Order at ¶¶ 105-106.

⁹⁷ 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).

⁹⁸ Competitive Bidding Second Memorandum Opinion and Order at ¶ 52; Erratum, Mimeo No. 50228 (released: October 19, 1994).

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

54. 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 an additional assessment (discussed at ¶¶ 56-60, *infra*) in the event of bid withdrawal or default. The standard upfront payment formula is \$2,500 or \$0.02 per pop per MHz for the largest combination of MHz-pops, whichever is greater.⁹⁹ 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 may want to bid in a single round.¹⁰⁰ We believe that this formula is appropriate for 37 GHz 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.

55. Upfront payments generally will be due no later than 14 days before a scheduled auction.¹⁰¹ This period should be sufficient to allow us 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.

⁹⁹ Competitive Bidding Second Report and Order at ¶ 171.

¹⁰⁰ 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.

¹⁰¹ Competitive Bidding Second Report and Order at ¶ 171.

c. Down Payment and Full Payment

56. 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 additional assessment if such default occurs.¹⁰² 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.¹⁰³ We also determined that this amount was appropriate for the broadband PCS auctions.¹⁰⁴ We believe that the reasoning employed in those Orders is equally applicable to the 37 GHz service. Thus, we tentatively conclude that, with the exception of small businesses eligible for installment payments (as proposed at ¶¶ 82-86, infra), winning bidders in 37 GHz auctions must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 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 payments 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 payments due, the additional monies would be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the payment cannot yet be determined, the bidder would be required to make a deposit of 20 percent of the amount bid on such licenses.¹⁰⁵ When it becomes possible to calculate and assess the default payment, any excess deposit would be refunded. Upfront payments would be applied to such deposits and to bid withdrawal and default payments due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.¹⁰⁶ We seek comment on these proposals.

57. 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.¹⁰⁷ 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.

¹⁰² Id. at ¶ 190.

¹⁰³ Id.

¹⁰⁴ See Competitive Bidding Fifth Report and Order at ¶ 73.

¹⁰⁵ See, e.g., Competitive Bidding Third Report and Order at ¶ 49.

¹⁰⁶ Id. at ¶ 49.

¹⁰⁷ Additionally, we propose adopting an installment payment option for small businesses that are winning bidders in the 37 GHz auction. See ¶¶ 81-85, infra.

Under this proposal, we would grant the license within ten (10) business days after receiving full payment.¹⁰⁸ We seek comment on this proposal.

d. Bid Withdrawal, Default and Disqualification

58. 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.¹⁰⁹ We therefore propose the following withdrawal, default and disqualification rules. Any bidder who withdraws a high bid during an auction before we declare the bidding closed, or defaults by failing to remit the required down payment within the prescribed time, would be required to reimburse us 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 us, if the subsequent winning bid is lower.¹¹⁰ 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.¹¹¹ 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.¹¹² 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

¹⁰⁸ See, e.g., Competitive Bidding Third Report and Order at ¶ 51.

¹⁰⁹ Id. at ¶ 49.

¹¹⁰ 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 us. This procedure would ensure that each bidder who withdraws is responsible for its bid.

¹¹¹ See 47 C.F.R. §§ 1.2104 (g) and 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.

¹¹² In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision.

includes the license on which it defaulted. In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, we 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.

59. In the event that an auction winner defaults or is otherwise disqualified after an auction is closed, an issue arises as to whether we 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.¹¹³ 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 participants as well as to parties who did not participate.¹¹⁴ In this situation, we believe that awarding licenses to the parties that value them most highly can best be assured through a re-auction.¹¹⁵ However, if the default occurs within five (5) business days after bidding has closed, we 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, we 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.

60. 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 seriously interested bidders are in the pool of qualified bidders at any re-auction.¹¹⁶ 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 an after-market transaction to obtain the license, which would itself delay service to the public and deny

¹¹³ See, e.g., Competitive Bidding Third Report and Order at ¶¶ 51-52.

¹¹⁴ Id.

¹¹⁵ Id.

¹¹⁶ See, e.g., Competitive Bidding Third Report and Order at ¶¶ 51-52.

recovery by the government of a reasonable portion of the value of the spectrum. We seek comment on this proposal.

3. Regulatory Safeguards

a. Transfer Disclosures and Anti-Trafficking Provisions

61. The Communications Act, as amended by the 1993 Budget Act, directs us 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 and permits." 47 U.S.C. § 309(j)(4)(E). In the Competitive Bidding Second Report and Order, we adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied.¹¹⁷ We propose applying specific rules governing unjust enrichment by small businesses, which are discussed below in ¶¶ 91-93. In addition, we propose applying the transfer disclosure requirements contained in Section 1.2111(a) of our rules to all 37 GHz licenses obtained through the competitive bidding process. Generally, any applicant transferring any of its licenses within three years after the initial grant of that license will be required to file, together with its 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 us 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. Rules Prohibiting Collusion

62. In the Competitive Bidding Second Report and Order we adopted special rules prohibiting collusive conduct in the context of competitive bidding.¹¹⁸ 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 the 37 GHz band. 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.¹¹⁹ In the Competitive Bidding Second Memorandum Opinion and Order, we modified the rule so that bidders who have not

¹¹⁷ Competitive Bidding Second Report and Order at ¶¶ 210-226, 258-265.

¹¹⁸ See 47 C.F.R. § 1.2105 (c).

¹¹⁹ See 47 C.F.R. § 1.2015(c)(1).

filed Form 175 applications for licenses in any of the same geographic license areas may enter into such discussions, consortia, or arrangements, or add equity partners, during the course of an auction, because of the relatively low risk of anticompetitive conduct among bidders that have not applied for licenses in any of the same geographic areas.¹²⁰ 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.¹²¹ We seek comment on this proposal.

63. 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.¹²² 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, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.¹²³ We seek comment on this proposal.

64. We also propose requiring winning bidders to attach as an exhibit to the long form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding.¹²⁴ All such arrangements must have been entered into prior to the filing of short-form applications. Where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, we will conduct an investigation or refer such complaints to the

¹²⁰ 47 C.F.R. § 1.2105(c)(3); Competitive Bidding Second Memorandum Opinion and Order, 9 FCC Rcd at 7254, Erratum, 1994 WL 575828 (October 19, 1994).

¹²¹ Competitive Bidding Fourth Memorandum Opinion and Order at ¶ 59. See also Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division, rel. Dec. 1, 1994 (discussions that indirectly provide information that affects bidding strategy are also precluded by anti-collusion rules).

¹²² See, e.g., 900 MHz Second Report and Order at ¶ 95; see also Competitive Bidding Third Report and Order at ¶ 64.

¹²³ Id.

¹²⁴ See, e.g., 900 MHz Second Report and Order at ¶ 96; see also Competitive Bidding Third Report and Order at ¶ 65.

United States Department of Justice for investigation.¹²⁵ Bidders who are found to have violated the antitrust laws, in addition to any penalties they incur under the antitrust laws, or who are found to have violated the Commission's Rules in connection with participation in the auction process may be subject to a variety of sanctions, including forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions. We seek comment on the applicability of these rules to licenses in the 37 GHz band.

4. Designated Entity Provisions

a. Introduction

65. The Communications Act, as amended by the 1993 Budget Act, directs us 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."¹²⁶ The statute requires us to "consider the use of tax certificates, bidding preferences, and other procedures" in order to achieve this congressional goal. In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies we shall promote "economic opportunity and competition . . . 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."¹²⁷ Finally, Section 309(j)(4)(A) provides that to promote these objectives we shall consider alternative payment schedules including lump sums or guaranteed installment payments.

66. In instructing us to ensure the opportunity for these "designated entities" (DEs) to participate in auctions and spectrum-based services, Congress was well aware of the problems that they would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in obtaining capital. For example, the legislative history accompanying our grant of auction authority states generally that the Commission's regulations "must promote economic opportunity and competition," and "[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women."¹²⁸ The House Report states that the House Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in

¹²⁵ Id.

¹²⁶ 47 U.S.C. § 309(j)(4)(D).

¹²⁷ 47 U.S.C. § 309(j)(3)(B).

¹²⁸ House Report at 254.

concentration in the telecommunications industries."¹²⁹ More specifically, the House Committee was concerned that adoption of competitive bidding should not have the effect of "excluding" small businesses from our licensing procedures, and anticipated that we would adopt regulations to ensure that small businesses would "continue to have opportunities to become licensees."¹³⁰

67. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments were clearly intended to assist small businesses. The House Report states that these related provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations."¹³¹ It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups."¹³²

68. In addition, with regard to access to capital, Congress made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."¹³³ As a result of these difficulties, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."¹³⁴

69. In our initial implementation of Section 309(j) of the Communications Act, we established in the Competitive Bidding Second Report and Order eligibility criteria and general rules that would govern the special measures for DEs, including small businesses. We also identified several measures, including installment payments, spectrum set-asides, bidding credits and tax certificates, from which we could choose in establishing rules for auctionable spectrum-based services. We stated that we would decide whether and how to use these special provisions, or others, when we developed specific competitive bidding rules for particular services. In addition, we set forth rules designed to prevent unjust enrichment by

¹²⁹ Id.

¹³⁰ Id. at 255.

¹³¹ Id.

¹³² Id.

¹³³ Small Business Credit and Business Opportunity Enhancement Act of 1992, § 331(a)(3), Pub. Law 102-366, Sept. 4, 1992.

¹³⁴ Id. at § 331(b)(2),(3).

DEs who transfer ownership in licenses obtained through the use of these special measures or who otherwise lose their DE status.

70. We have employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to DEs in other spectrum-based services. For instance, minority-owned and women-owned businesses in the nationwide narrowband PCS auction received a 25 percent bidding credit on certain channels;¹³⁵ in the regional narrowband PCS auction women-owned and minority-owned businesses received a 40 percent bidding credit on certain channels and small businesses were eligible for installment payments on all channels;¹³⁶ in the broadband PCS auction, we established separate entrepreneurs' blocks with varying degrees of installment payments.¹³⁷ In the multi-channel multipoint distribution service (MMDS), we established bidding credits and installment payments for small businesses.¹³⁸ The measures adopted thus far for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of DE opportunities. After examining the record in the competitive bidding proceeding in PP Docket 93-253, we established provisions necessary to enable small businesses to overcome the barriers to accessing capital in each particular service. Moreover, the measures we adopted also were designed to increase the likelihood that small businesses who win licenses in the auctions become strong competitors in the provision of wireless services.

71. In response to many comments explaining how we should implement Congress's mandate, we adopted several rules designed to encourage the participation of women and minorities in broadband PCS by addressing greater difficulties these groups experience in accessing capital. We analyzed these special provisions for minorities and women under the

¹³⁵ Competitive Bidding Third Report and Order at ¶ 72.

¹³⁶ Id. at ¶ 87. See also Competitive Bidding Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking at ¶¶ 58, 92-97.

¹³⁷ Competitive Bidding Fifth Memorandum Opinion and Order at ¶ 103; see also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, and Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, PP Docket No. 93-253, GN Docket No. 90-314, and GN Docket No. 93-252, Further Notice of Proposed Rule Making, FCC 95-263, released June 23, 1995, (Competitive Bidding Further Notice of Proposed Rule Making); Sixth Report and Order, FCC 95-301, released July 18, 1995.

¹³⁸ MMDS Report and Order at ¶¶ 182-189.

"intermediate scrutiny" standard established in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564-565 (1990) and determined that they were constitutional.¹³⁹

72. However, on June 12, 1995, the Supreme Court decided in Adarand Constructors, Inc. v. Peña¹⁴⁰ that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."¹⁴¹ The Court ruled that any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest.¹⁴²

73. The holding in Adarand would apply to any proposal to incorporate race-based measures into our 37 GHz auction rules. At this time, we may not have developed a record sufficient to sustain race-based measures in the 37 GHz band based on the standard established by Adarand.¹⁴³ We therefore propose to limit special provisions initially to small businesses in the 37 GHz band. As discussed below, we propose to define small business in a way that would increase the likelihood of women- and minority-owned businesses establishing eligibility for special provisions. We do, however, believe that race-based measures could survive strict scrutiny from the courts. Moreover, we do not concede that any of our auction rules are unconstitutional. We simply believe that auction rules we develop must now be evaluated under a stricter constitutional standard than had been previously relied upon, and that at a minimum, this requires us to build a record concerning the participation of minorities and women in spectrum-based services before we adopt race- and gender-based measures.

74. Adarand thus introduces an additional level of complexity in implementing Congress' mandate to ensure that businesses owned by minorities and women are provided "the opportunity to participate in the provisions of spectrum-based services."¹⁴⁴ Although Adarand did not address gender-based preferences, we have included them here in an effort to

¹³⁹ See Competitive Bidding Fifth Report and Order at ¶ 9.

¹⁴⁰ 63 U.S.W.L., No. 93-1841 (U.S. June 12, 1995).

¹⁴¹ 63 U.S.W.L. at 4530. The Court overruled Metro Broadcasting to the extent that it held that remedial programs based on racial classifications should be reviewed using an intermediate scrutiny test.

¹⁴² Id. at 4533.

¹⁴³ See, e.g., Competitive Bidding Further Notice of Proposed Rule Making, FCC 95-263 (June 23, 1995).

¹⁴⁴ 47 U.S.C. § 309(j)(4)(D).

seek the broadest possible comment.¹⁴⁵ We welcome comment as to the appropriateness of our approach. Accordingly, we seek comment on how we can best promote opportunities for businesses owned by minorities and women in the 37 GHz band in light of Adarand. We seek the broadest possible comments including, but not limited to, responses to the following questions:

- Do we have a compelling interest in establishing opportunity-enhancing measures in the 37 GHz band specifically for minority- and women-owned businesses? If so, what is that compelling interest? Are there characteristics specific to the 37 GHz band that demonstrate that race- and/or gender-based measures are needed to satisfy the mandate of 47 U.S.C. § 309(j)(3)(A)?
- What evidence (statistical, documentary, anecdotal or otherwise) can be marshalled to support the proposed compelling interest?
- What techniques could we employ that would be narrowly tailored to further the proposed compelling interest? Would such techniques include bidding credits and installment payments? Are race-conscious or gender-conscious measures necessary, or are there race-or gender-neutral measures that would be effective?

Commenters are encouraged to provide us as much evidence as possible with regard to past discrimination, continuing discrimination, discrimination in access to capital, underrepresentation and other significant barriers facing businesses owned by minorities and women in obtaining licenses in the 37 GHz band and in licensed communications services generally.

75. As in other auctionable services, we fully intend in the 37 GHz band to meet the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses. Accordingly, in balancing the congressional objectives set forth in the auction statute, we tentatively conclude that bidding credits, reduced down payments, and installment payments should be made available to small businesses on all 37 GHz channel blocks.

76. Our specific proposals, discussed more fully below, are similar to DE provisions adopted for GWCS in the 4660-4685 MHz band.¹⁴⁶ We believe that the 37 GHz band has several similarities to GWCS, such as relatively small geographic areas, no eligibility limitations, uniform channel blocks, and the potential for a variety of different uses.

¹⁴⁵ See Telephone Electronic Corp. v. FCC, No. 95-1015 (D.C. Cir. March 15, 1995)(discussing Commission's rules establishing both gender- and race-specific preferences for Broadband PCS.) See also Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992).

¹⁴⁶ See GWCS Second Report and Order, 60 Fed. Reg. 40712 (August 9, 1995).

Although the 37 GHz band may be used for backhaul and backbone communications links for broadband PCS, our proposed rules do not require such use. In addition, we have proposed uniform channel blocks and uniformly small geographic areas for the 37 GHz band. Also, many more licenses will be available in the 37 GHz band than were available for broadband PCS. We believe that these factors will reduce the capital costs of obtaining 37 GHz licenses, which should benefit DEs. Therefore, we are proposing moderate special provisions for small business. We seek comment on our proposal to base DE provisions for 37 GHz licenses on those adopted for GWCS. In particular, commenters should address whether DE provisions adopted for broadband PCS would be more appropriate because this spectrum may be used in support of PCS service.

b. Bidding Credits

77. Bidding credits allow eligible small businesses to receive a payment discount for their winning bid in an auction. In the Competitive Bidding Second Report and Order, we determined that competitive bidding rules applicable to individual services would specify the DEs¹⁴⁷ eligible for bidding credits and the amounts of the available bidding credits for that particular service.¹⁴⁸

78. We propose a 10 percent bidding credit for all small businesses. As discussed below, we are also proposing installment payments for small business bidders and the small BTA geographic licensing areas. We believe that these proposals will substantially reduce the capital costs of acquiring 37 GHz licenses and providing service. Such changes should be of particular benefit to small businesses and rural telcos. In our judgment, these and other provisions of the licensing and auction rules should ensure that small businesses will be able to participate effectively in obtaining 37 GHz licenses, whether or not those licenses are auctioned.

79. We remain concerned that small businesses, including those owned by women and minorities, will find it difficult to obtain the capital to compete effectively in 37 GHz auctions against large corporations and small telephone companies, with their potential advantages in incumbency and economies of scale in using existing facilities. To address these inequalities, we propose a 10 percent bidding credit for small businesses. This credit would be smaller than the credits we have adopted for other services, except GWCS. We believe that the magnitude of the credit is reasonable and equitable here, however, in view of other proposals which will benefit DEs, including the relatively small geographic licensing areas and the availability of installment payments. Notwithstanding the foregoing, we seek comment on whether small businesses bidding for 37 GHz licenses should receive a larger bidding credit,

¹⁴⁷ DEs consist of small businesses, minority- and female-owned businesses, and rural telephone companies. Competitive Bidding Second Report and Order at ¶¶ 266-288.

¹⁴⁸ Competitive Bidding Second Report and Order at ¶ 241.

such as 25 percent. We are also proposing a wide scope of the bidding credit by permitting eligible entities to apply the credit to all 37 GHz licenses. We tentatively conclude that these bidding preferences will carry out the Congressional intent and provide DEs, including small businesses owned by women and minorities, with a meaningful opportunity to obtain 37 GHz licenses. We seek comment on these proposals. We also seek comment on whether to offer "tiered" bidding credits scaled according to a small business applicant's financial size.

80. Specifically, we seek comment on whether the above bidding credit proposals satisfy the mandate of Section 309(j)(4)(D) of the Act to ensure that businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services. We ask commenters who believe that the above bidding credit proposals do not satisfy Section 309(j)(4)(D) to make specific alternative proposals. Also, to the extent such proposals are not race- and gender-neutral, we ask such commenters to address how their proposals can be reconciled with Adarand.

c. Installment Payments

81. We additionally propose adopting installment payments for small businesses bidding for any of the 37 GHz licenses. We have previously concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum.¹⁴⁹ Again, we base these proposals on the DE provisions adopted in the 4660-4685 MHz band for GWCS.

82. For the 37 GHz licenses, we tentatively conclude that installment payments are an appropriate preference for small businesses bidding on all license blocks. In this respect, installment payments will provide financial assistance to all small businesses. By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to the auction. Such low cost government financing will promote participation by small businesses, which, because of their size, lack access to capital needed to participate in new spectrum opportunities such as 37 GHz. We seek comments on these proposals.

83. Under our proposal, small business licensees may elect to pay their winning bid amount (less upfront payments) in installments over the ten year term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten year U.S. Treasury obligations plus 2.5 percent. Installment payments would be due quarterly on the anniversary of the day the license was granted. We propose that timely payment of all installments would be a condition of the license grant and failure to make such timely payments would be grounds for revocation of the license.

¹⁴⁹ Id.

84. We also propose additional payment preferences to further reduce the capital needs of small businesses. Under this proposal, small business licensees will be permitted to make interest-only installment payments during the first two years of the license.¹⁵⁰ We also propose to reduce down payments for small businesses to 5 percent of the winning bid due five days after the auction closes and the remaining 5 percent down payment due five days after Public Notice that the license is ready for grant. We seek comments on these proposals. We also seek comment on whether to offer "tiered" installment payments scaled to the financial size of a small business applicant.

85. We seek comment on whether the above installment payment proposals satisfy the mandate of Section 309(j)(4)(D) of the Act to ensure that businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services. We ask commenters who believe that the above installment payment proposals do not satisfy Section 309(j)(4)(D) to make specific alternative proposals. Also, to the extent such proposals are not race- and gender-neutral, we ask such commenters to address how their proposals can be reconciled with Adarand.

d. Eligibility for Bidding Credits, Installment Payments and Reduced Down Payments

86. We propose to limit eligibility for bidding credits, installment payments and reduced down payments to small businesses, including those owned by members of minority groups and women. As discussed below, we propose to define small businesses as those entities with less than \$40 million in average annual gross revenues for the preceding three years. We seek comment, however, on a "tiered" small business definition. Under this proposal there could, for example, be three different sizes of small businesses that are eligible for bidding credits and installment payments in accordance with their size (e.g., tier 1: gross revenues (gr) less than \$6 million (m); tier 2: $\$6m \leq gr < \$15m$; and tier 3: $\$15m \leq gr < \$40m$).

87. Small Business Definition. In the Competitive Bidding Second Memorandum Opinion and Order, we stated we would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.¹⁵¹ There, we stated that a proper threshold for small businesses was \$6 million of average gross income.¹⁵² However, for the broadband PCS auctions, we believed that build-out and operational costs would be much higher than for other services, and therefore modified the small business threshold to be

¹⁵⁰ See, e.g., Competitive Bidding Fifth Report and Order at ¶¶ 138-39.

¹⁵¹ Competitive Bidding Second Memorandum Opinion and Order at ¶ 145.

¹⁵² Competitive Bidding Second Report and Order at ¶¶ 267-271.

\$40 million.¹⁵³ We also adopted this same small business threshold for GWCS as we had previously adopted for broadband PCS, finding that the capital costs of operational GWCS facilities are likely to vary widely because of the likelihood that there will be a range of license sizes and services offered.¹⁵⁴

88. We propose to adopt the same \$40 million small business definition for 37 GHz licenses. We believe that it is likely that 37 GHz licenses will be sought by broadband PCS licensees for use as backhaul and backbone communications links. Therefore, it seems appropriate to adopt a small business definition similar or identical to that adopted for broadband PCS. Our proposals for the 37 GHz band, however, would not mandate that this spectrum be used in conjunction with PCS operations. We believe that our proposals allow enough flexibility that licensees in the 37 GHz band may provide a variety of services, using differing geographic areas. In this respect, our proposal is similar to that adopted for GWCS in the 4660-4685 MHz band. For these reasons, we propose to adopt the small business definition used for both broadband PCS and GWCS. In addition, we propose to apply the same affiliation and attribution rules for calculating revenues that we have previously adopted for broadband PCS and GWCS. We seek comment on these proposals. We recognize, however, that the attribution rules for calculating gross revenues for broadband PCS are quite complex. We therefore seek comment on substituting the "control group" concept for some sort of simpler attribution model. We ask whether the revenues of the small business entity, its affiliates, as well as the revenues of investors in the small business and their affiliates should be counted for purposes of determining eligibility. Should all investors in the small business applicant be attributable, or should only investors that hold ownership interests at a certain threshold have their gross revenues included (e.g., ownership interests of 5 percent would trigger attribution). Another alternative is that we could look to investors that have controlling interests in the small business applicant to determine eligibility. Finally, we question whether there is a need for a personal net worth test, which would be applied to all attributable investors in the applicant. We previously had such a requirement in broadband PCS but decided to eliminate it. See Competitive Bidding Fifth Report and Order, *supra* note 40. We seek comment on whether there is a need to revive this requirement here.

89. Rural Telephone Company Partitioning. Congress directed us to ensure that, together with other small businesses, rural telephone companies have the opportunity to participate in the provision of spectrum-based services. Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas. Therefore, service to these areas may not be a priority or economically feasible for many licensees.¹⁵⁵ Rural telephone companies, however, are well positioned because of their

¹⁵³ Competitive Bidding Fifth Report and Order at ¶¶ 176-180.

¹⁵⁴ See Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use 4600-4685 MHz (Second Report and Order), FCC 95-319, released August 2, 1995, at ¶ 95.

¹⁵⁵ See, e.g., 900 MHz Second Report and Order at ¶¶ 144-145.

existing infrastructure to serve these areas. Therefore, we propose a geographic partitioning scheme similar to that adopted in broadband PCS¹⁵⁶ and GWCS¹⁵⁷ which we believe will encourage participation by rural telephone companies, thereby increasing the likelihood of rapid introduction of service to rural areas.

90. Our proposed partitioning scheme would prevent rural telephone companies from having to bid on the entire BTA or other geographic area covering their wireline service areas. In addition, partitioning would provide rural telephone companies with the flexibility to be able to serve areas in which they already provide service, while the remainder of the service area could be served by other providers.¹⁵⁸ Under this proposal, rural telephone companies would be permitted to acquire partitioned 37 GHz licenses in either of two ways: (1) they may form bidding consortia consisting entirely of rural telephone companies to participate in auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned 37 GHz licenses from other licensees through private negotiation and agreement either before or after the auction.¹⁵⁹ We would also require that partitioned areas conform to established geopolitical boundaries and that each area include all portions of the wireline service area of the rural telephone company applicant that lies within the service area.¹⁶⁰ We also propose to use the definition for rural telephone companies implemented in the Competitive Bidding Fifth Report and Order for broadband PCS.¹⁶¹ Rural telephone companies would be defined as local exchange carriers having 100,000 or fewer access lines, including all affiliates.¹⁶² Finally, we seek comment on whether partitioning should be offered to all applicants (not just rural telephone companies) similar to what we have offered in the context of MMDS. See MMDS Report and Order, *supra* note 66, at ¶¶ 46-47.

e. Transfer Restrictions and Unjust Enrichment Provisions

91. Restrictions on the transfer or assignment of licenses acquired by DEs are intended to promote the Congressional intent that DEs be permitted to participate in the

¹⁵⁶ Competitive Bidding Fifth Report and Order at ¶ 150.

¹⁵⁷ GWCS Second Report and Order at ¶ 107.

¹⁵⁸ Competitive Bidding Fifth Report and Order at ¶ 151.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Id. at ¶ 193.

¹⁶² Id.

provision of spectrum-based services,¹⁶³ not simply to profit from trafficking in licenses acquired with the help of bidding preferences. We seek comment on the appropriate transfer restrictions for small businesses obtaining 37 GHz licenses. For example, in GWCS we adopted a payment requirement on transfers of licenses acquired with the assistance of bidding preferences to entities that are not small businesses. Small businesses seeking to transfer a license to an entity that is not a small business, as defined for GWCS, would be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer would be permitted. The amount of the penalty would be reduced over time so that a transfer in the first two years of the license would result in a payment of 100 percent of the value of the bidding credit; in year three of the license term the payment would be 75 percent; in year four the penalty would be 50 percent and in year five the payment would be 25 percent, after which there would be no payment.¹⁶⁴

92. Another approach was adopted in the Competitive Bidding Fifth Report and Order, where we adopted restrictions on the transfer or assignment of broadband PCS entrepreneur's block licenses to ensure that DEs do not take advantage of special provisions by immediately assigning or transferring control of their licenses.¹⁶⁵ Therefore, broadband PCS licensees in the entrepreneurs' blocks may not voluntarily assign or transfer control of their licenses for a period of three years from the date of the license grant. For years 4 and 5 of the license term, the licensee may assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' block entry criteria. During this five-year period, licensees will continue to be bound by the financial eligibility requirements. In addition, a transferee or assignee who receives an entrepreneurs' block license during the five-year period will remain subject to the transfer restrictions for the balance of the holding period.¹⁶⁶ In addition, a licensee assigning its authorization would be subject to the repayment provisions associated with installment payments and bidding credits.¹⁶⁷

93. We seek comment on which of the described approaches would be more appropriate for small business licensees in the 37 GHz band. We ask commenters to address whether our decision should be influenced by that fact that in the 37 GHz band we are not proposing an entrepreneur's block.

¹⁶³ See 47 U.S.C. § 309(j)(4)(D).

¹⁶⁴ GWCS Second Report and Order at ¶ 110.

¹⁶⁵ Competitive Bidding Fifth Report and Order at ¶ 128.

¹⁶⁶ Id.

¹⁶⁷ Id. at n. 102.

f. Other Provisions

94. Set-aside Spectrum. In the Competitive Bidding Fifth Report and Order we established entrepreneurs' blocks on which only qualified entrepreneurs, including small businesses, could bid.¹⁶⁸ We tentatively conclude not to adopt an entrepreneurs' block for the 37 GHz auction for several reasons. First, the relatively large numbers of licenses available in the 37 GHz band should allow for extensive small business participation. Second, unlike broadband PCS, we do not believe that the effectiveness of bidding credits, reduced down payments and installment payments will be diluted, due to the smaller capital outlay anticipated for this service. We request comment on this proposal. Specifically, are the capital requirements of this service anticipated to be so substantial that we should insulate certain blocks from very large bidders in order to provide meaningful opportunities for small businesses? In addition, is there a need to adopt an entrepreneurs' block to ensure that there will be adequate spectrum available for communications links for broadband PCS entrepreneur block licensees?

5. Conclusion

95. We believe that the competitive bidding rules we adopt for 37 GHz, in conjunction with our spectrum allocation rules, will promote the public policy objectives set forth by Congress. Our rules will encourage economic growth and enhance access to 37 GHz services for consumers, producers, and new entrants. Structuring our rules to promote opportunity and competition should result in the rapid implementation of new PCS services and encourage efficient spectrum use. The preferences we adopt for small businesses will help to promote access to the 37 GHz band and broadband PCS services by ensuring that these groups will have genuine opportunities to participate in the auctions and in provision of service.

F. Eligibility, License Transfer, Buildout and License Term

96. Originally, TIA proposed that applicants be assigned channels in the 37 GHz band only after demonstrating their need for multiple service points or transmission paths within the service area. TIA further proposed to limit each licensee to one channel pair in a service area until it demonstrates that the authorized channel pair is operating at or near expected capacity. In its amendment, TIA proposes that the six 50 MHz channel pairs be reserved for broadband PCS, cellular and SMR licensees until the year 2000.

97. We tentatively conclude that the use of auctions to resolve mutually exclusive applications in this band will reduce the possibility of applicants that are not financially qualified and will deter speculation by parties that do not have specific communications

¹⁶⁸ Id. at ¶¶ 113-123. These rules were further refined in the Competitive Bidding Fifth Memorandum Opinion and Order. See 47 C.F.R. § 24.709.

requirements. Accordingly, we propose open eligibility for these frequencies and do not intend to require applicants to prove that they are financially qualified. We also believe that license transfer restrictions may reduce the ability of licensees to put this spectrum to its highest valued use and therefore are not proposing such requirements, except for small businesses receiving the benefits of our proposed bidding credits and installment payments.¹⁶⁹ Finally, we propose to establish the term of licenses in this band as ten years, with a renewal expectancy similar to that of cellular telephone licenses.¹⁷⁰ We request comment on this proposal.

98. The Communications Act requires us 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."¹⁷¹ In this Notice, we are seeking comment on specific performance requirements. Commenters are requested to address whether these requirements, if adopted, would be sufficient to comply with the performance requirements of the Act. If not, we seek comment on additional performance requirements that we might adopt in order to comply with the Act. We therefore seek comment on the appropriate buildout requirement for the auctioned microwave services. Traditionally, the Commission has licensed individual links for point to point microwave services and thus construction deadlines have involved the building of individual stations. Because we propose to license the 37 GHz and 39 GHz band over Commission-defined geographic service areas, we seek comment on appropriate buildout requirements for such a licensing scheme. As explained above, the Communications Act requires us to include performance requirements 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. We believe that the buildout requirements adopted for mobile services that require the provision of service to a percentage of the population in the service area may be inappropriate for point-to-point microwave services. We seek comment therefore on other methods we might use to ensure that licensees are using their spectrum, servicing rural areas, and enabling the provision of new services to the public. For example, we may require a showing of substantial service in the licensed service area.¹⁷² Commenters should also address the point in the license term that buildout requirements should be measured.

¹⁶⁹ See ¶ 91-93, supra.

¹⁷⁰ See 47 C.F.R. §§ 21.45 and 22.940. We also adopted this same renewal expectancy criteria for broadband PCS licenses.

¹⁷¹ See Section 309(j)(4)(B) of the Communications Act, as amended.

¹⁷² See, e.g., 47 C.F.R. § 24.203(b).

G. Long Form Application and Regulatory Status

99. Under our competitive bidding proposal, if the winning bidder makes the down payment in a timely manner, a long-form application would be required to be filed by a specified date, generally within ten (10) business days after the close of the auction.¹⁷³ Based on the Commission's current rules, we propose that if a winning bidder intends to provide a common carrier service it would file FCC Form 494 and if it intends a private use for the spectrum, the winning bidder would file FCC Form 402. We seek comment on whether a licensee in the 37 GHz band should be allowed to use the spectrum for private use and also to provide a common carrier service. Commenters should address which application form such a winning bidder would file, and whether we should require a licensee to specify over which portion of the spectrum, channels, or geographic area it proposes to provide a common carrier service. 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.¹⁷⁴

100. We propose to adopt the application processing rules contained in Parts 21 and 94 of the Commission's Rules for 37 GHz service. 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 seek comments on these proposals and request that commenters address specifically any modifications to our existing procedures that would be necessary to process applications for our proposed BTA licensing of the 37 GHz band.

101. We also propose adopting petition to deny procedures based on Section 21.30 of the Commission's Rules for winning bidders proposing to use their licenses to provide at least some common carrier service. Upon acceptance for filing of FCC Form 494 to provide a common carrier service at 37 GHz, we would release a Public Notice announcing this fact, triggering the filing window for petitions to deny. If we deny all petitions to deny, and are 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 payment of their licenses. We would then have ten (10) business days to grant the licenses. We seek comment on this proposal.

H. Alternative Licensing Proposal

102. Alternatively, if competitive bidding is not adopted, we solicit comment on licensing the 37 GHz band in the same manner as we currently license the 39 GHz band with the following modifications. Service areas would be based on BTAs. Eligibility for Channel

¹⁷³ See Competitive Bidding Fifth Report and Order at ¶ 81.

¹⁷⁴ Id.

Blocks 15 through 20 would be limited to broadband PCS licensees until three months after the last broadband PCS license is issued. Eligibility for Channel Blocks 21 through 28 would be limited to broadband PCS, cellular, and wide-area SMR licensees for three years, commencing with the effective date of the rules adopted in this proceeding. After the expiration of these restrictions, eligibility would be open to all parties. Eligibility for unpaired Channel Blocks 29 through 32 would be unrestricted.¹⁷⁵ Our intent in proposing to restrict initial eligibility for the paired channel blocks is to ensure that cellular, wide-area SMR and broadband PCS licensees have access to adequate support channels. Parties commenting on alternative licensing proposals should address whether such proposals will ensure participation by new entrants in the 37 GHz band.

103. Further, as part of the alternative licensing scheme, we propose to require that applicants demonstrate a need for each channel requested,¹⁷⁶ that applicants initially be limited to one channel per designated service area (e.g., BTA), that all licensees, except broadband PCS licensees, construct their system within 18 months and that such construction be defined as the ability to pass communications traffic significantly throughout the service area,¹⁷⁷ and that license transfers of unbuilt systems be prohibited.¹⁷⁸ We propose to establish the term of licenses in this band as ten years, with a renewal expectancy similar to that of cellular telephone licenses. Additionally, each licensee would be permitted to apply for an additional channel in its service area only when it is operating its previously authorized channel(s) at or near expected capacity. Furthermore, if auctions are not used, there may be spectrum inefficiencies in using a designated service area such as BTAs. For example, since even BTAs are relatively large areas, there may be areas within each BTA where the licensed spectrum is not needed or used by the licensee, and therefore that spectrum would lie fallow. Accordingly, we request comment on whether we should require licensees at some time in the future, possibly five or seven years after licensing, to provide the Commission with a report of their operations so that we could provide a second licensing opportunity for parties interested in those portions of licensed service areas that are unused. We specifically request comment on what criteria should be applied in determining whether a licensed service area is underused to the point that other applicants should be permitted to propose service in that area. If we allow an additional party to obtain a license in an existing licensee's BTA, we propose to require them to coordinate informally on a link-to-link basis. We solicit comment on this alternative.

¹⁷⁵ Mutually exclusive applications still may be filed, thus necessitating a method to select among licensees.

¹⁷⁶ See note 13, *supra*.

¹⁷⁷ See 47 C.F.R. § 21.43. We are not proposing construction requirements for broadband PCS licensees in any BTA for which they are licensed since these licensees already have a build-out schedule. See 47 C.F.R. § 24.203.

¹⁷⁸ See 47 C.F.R. § 21.39.

I. Revision of the Licensing Rules for the 39 GHz Band

104. We also propose to use auctions in awarding future licenses in the 39 GHz band. We believe that auctions place licenses in the hands of those who value them most and that using auctions would allow us to license the remainder of the 39 GHz band in the most expeditious manner. Accordingly, we propose to use the same auction procedures for the 39 GHz band as are proposed for the 37 GHz band. To do this requires that we clearly define exclusive service areas for the 39 GHz band. Consistent with our proposal for the 37 GHz band, we propose to use BTA service areas. We also propose that all 39 GHz BTA channel blocks not encumbered with previously licensed rectangular service areas be auctioned at the same time as the 37 GHz band. Those 39 GHz BTA channels that are encumbered will be auctioned at a later date to be determined after the resolution of the incumbency issue, as discussed below.

105. In order to accommodate incumbent operations, we propose that licensees of rectangular service areas be given eighteen months from the adoption of a Report and Order in this proceeding to file with the Commission a certification that they have constructed a minimum average of four permanently installed and operating links per hundred square kilometers (approximately one link per ten square miles) of their licensed service area for each licensed channel block. Further, licensees with more than one channel block must certify that each channel block contains at least four permanently installed and operating links per hundred square kilometers that can not be reaccommodated in another channel block. In this regard, we believe it important that, in order to be counted toward the construction threshold, all such links be capable of carrying a reasonable amount of communications traffic. We request comment on what an appropriate test of such capacity or usage should be. For example, should we require that each such link must operate with a minimum equivalent digital efficiency of 1 bps/Hz over the entire channel block? If a licensee meets the threshold construction and filing requirements, then the licensee would retain its entire rectangular service area. However, if a licensee does not meet these requirements, then the license would be automatically canceled nineteen months from the adoption of a Report and Order in this proceeding. Further, licensees of rectangular service areas not meeting the above construction threshold must file a list of permanently installed and operating links that they wish to have grandfathered no later than eighteen months from the adoption of a Report and Order in this proceeding. The Commission would then relicense qualifying links individually. Failure to file timely a list of installed and operating links would result in automatic cancellation of the respective licenses. Also, the right to take advantage of the above eighteen-month build-out provision would apply only to those entities holding valid licenses as of the date of adoption of the Report and Order. In particular, parties whose licenses are forfeit because of failing to meet timely the construction requirements would not have this right. See 47 C.F.R. §§ 21.43, 21.44, and 94.51. In this connection, we wish to clarify that we interpret these rules to apply to rectangular service area licenses as well as to individually licensed stations. We solicit comment on these proposals, including the above interpretation of the cited rules regarding period of construction and forfeiture of license. We also solicit comment on whether licensees should be permitted to request a reduction in the size of their rectangular service