

4. New sections consisting of §§ 22.960 through 22.967 are added to Part 22, Subpart H, to read as follows:

Section 22.960 Cellular unserved area radiotelephone licenses subject to competitive bidding.

Mutually exclusive initial applications for cellular unserved area Phase I and Phase II licenses filed after July 26, 1993, are subject to competitive bidding procedures. The general competitive bidding procedures found in 47 CFR part 1, subpart Q, will apply unless otherwise provided in this part.

Section 22.961 Competitive bidding design for cellular unserved area radiotelephone licensing.

The Commission will employ a simultaneous multiple round auction design when choosing from among mutually exclusive initial applications to provide cellular unserved area radiotelephone service, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

Section 22.962 Competitive bidding mechanisms.

(a) Grouping. All cellular unserved area Phase I and Phase II licenses will be auctioned simultaneously, unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative auction scheme.

(b) Minimum Bid Increments. The Wireless Telecommunications Bureau will, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(c) Stopping Rules. The Wireless Telecommunications Bureau will establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(d) Activity Rules. The Wireless Telecommunications Bureau will establish activity rules which require a minimum amount of bidding activity. In the event that the Wireless Telecommunications Bureau establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted a certain number of waivers of such rule during the auction.

Section 22.963 Withdrawal, default and disqualification payments.

(a) During the course of an auction conducted pursuant to § 22.961, the Commission will impose payments on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction closes, or who are disqualified.

(b) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment would be assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(c) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (a) of this section plus an additional penalty equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

Section 22.964 Bidding application (FCC Form 175).

All applicants who wish to participate in competitive bidding for cellular unserved area radiotelephone licenses must submit applications on FCC Form 175 pursuant to § 1.2105 of this chapter. The Wireless Telecommunications Bureau will issue a Public Notice announcing the availability of cellular unserved area Phase I and Phase II licenses and, in the event that mutually exclusive applications are filed, the date of the auction for those licenses. This Public Notice will specify the date on or before which applicants intending to participate in a cellular unserved area radiotelephone service auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the short form, any upfront payment that will need to be submitted, and the location where the application must be filed.

Section 22.965 Submission of upfront payments and down payments.

(a) Each bidder in the cellular unserved radiotelephone service auction(s) will be required to pay the Commission, immediately prior to the auction, by cashier's check or by wire, at least \$5,000 in order to get a bidder identification number. The upfront money will later be counted toward the full payment of the license.

(b) Each winning bidder in the cellular unserved radiotelephone service auction(s) will be required to make a down payment to the Commission's lock-box bank in an amount sufficient to bring its total deposits up to 20 percent of its winning bid within five business days after the close of the auction, or by a date specified by Public Notice. The remainder of the full payment for the license shall be paid within 5 days following the release of a Public Notice that will indicate that the Commission is prepared to award the license(s). The Commission will grant the license generally within ten (10) business days after receiving full payment.

Section 22.966 Long-form applications.

Each winning bidder will be required to submit a long-form application on FCC Form 600 within ten (10) business days after being notified by Public Notice that it is the winning bidder. Applications on FCC Form 600 shall be submitted pursuant to the procedures set forth in § 1.2107 of this chapter and any associated Public Notices.

Section 22.967 License grant, denial, default, and disqualification.

(a) Each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following Public Notice that the Commission is prepared to award the license. The Commission will grant the license generally within ten (10) business days after receipt of full and timely payment of the winning bid amount.

(b) A bidder who withdraws its bid subsequent to the close of bidding, defaults on a payment due, or is disqualified, will be subject to the payments specified in § 22.963 or §§ 1.2104(g) and 1.2109 of this chapter, as applicable.

APPENDIX B

I. Final Regulatory Flexibility Analysis

Ninth Report and Order

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making* in the FCC's Competitive Bidding docket, 8 FCC Rcd 7635 (1993) (Auctions NPRM). The Commission sought written public comments on the proposals in the Auctions NPRM including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Order conforms to the RA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-131, 110 Stat. 847 (1996).¹⁰⁹

A. Need for and Objective of the Rules

This Report and Order adopts final auction rules that will enable the Commission to complete the licensing of unserved areas in the cellular radiotelephonic service. Initial cellular operators were given a five-year period during which to expand their systems within Metropolitan Service Areas (MSAs) and Rural Statistical Areas (RSAs) in which they are licensees. The Commission adopted an application processing approach that has two phases for all cellular markets in which the five-year period has expired or will expire in the future. The Commission now adopts competitive bidding as the appropriate method to award licenses from among mutually exclusive applications for unserved areas filed after July 26, 1993, in light of the competitive bidding authority contained in the Omnibus Budget Reconciliation Act of 1993. In adopting these rules for the provision of cellular service in unserved areas, the Commission's objectives are to: (1) foster the creation of a seamless and integrated nationwide cellular service, so that subscribers can receive high quality cellular service throughout the nation, and (2) make cellular service available to the public as expeditiously as possible.

B. Summary of Issues Raised by Public Comment on the Initial Regulatory Flexibility Analysis

The Commission included an Initial Regulatory Flexibility Analysis (IRFA) within the *Notice of Proposed Rule Making* in PP Docket 93-253 and published a Final Regulatory

¹⁰⁹ Subtitle II of the CWAAA is the "Small Business Regulatory Enforcement Act of 1996" (SBREFA), codified at 5 U.S.C. § 601, *et seq.*

Flexibility Analysis (FRFA) in the *Competitive Bidding Second Report and Order*,¹¹⁰ the initiating document for this item. There were no specific comments in response to the IRFA or the FRFA. With respect to comments received in response to the *Notice of Proposed Rule Making* from the initiating proceeding, the majority of comments that related to cellular unserved areas focused on whether auctions should be used for pending applications or whether the Commission should use lotteries to award those licenses.¹¹¹ This issue was resolved in the *Competitive Bidding Second Report and Order* in which the Commission determined that unless specifically excluded, licenses for the Public Mobile Radio Service, including unserved area licenses, should be awarded through competitive bidding. The *Competitive Bidding Second Report and Order* also prescribed general rules and procedures, including and a broad menu of competitive bidding methods, to be used for all auctionable services.¹¹²

C. Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rules

Authorizing use of simultaneous multiple round auctions

The Commission is adopting a rule which will permit cellular unserved areas to be auctioned using a simultaneous multiple round auction. This type of auction has the advantage of providing bidders full flexibility to bid for any license as more information becomes available during the course of the auction. A simultaneous multiple round auction will allow remote access to bidding software, auction information, bid submission and results. This will make it easier for small business operators to participate in an auction without leaving their places of business. Also, it will make information concerning the status of the auction easier to access, which will reduce the administrative burden on participants in the auction.

Short Form Applications Required

Applicants for Phase I licenses were required to file an FCC Form 464 within 31 days after the expiration of the five-year build-out period of the authorized system(s) on the channel block requested in the market containing the unserved area. The adopted auction

¹¹⁰ 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 and Order*").

¹¹¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2359, ¶ 60.

¹¹² See generally, *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2360-75, ¶¶ 68-157.

rules require all Phase I auction applicants to file a short-form application (FCC Form 175) prior to the filing deadline announced by Public Notice. The short-form applications require applicants to provide information required by Section 1.2105(a)(2) of the Commission's Rules.¹¹³ The Commission uses short-form applications to determine if there is mutual exclusivity for a license.

Also, potential bidders who currently have long-form applications (FCC Form 401 or FCC Form 600) on file for the cellular unserved area licenses will be required to submit a short-form application (FCC Form 175) by a date specified in the initial Public Notice to participate in the cellular unserved auction.

The Commission does not believe requiring applicants to file a short-form application is burdensome because the information requirement is not substantial. Submitting a short-form application may be beneficial by providing the applicants with the opportunity to file their short-forms electronically. Those applicants who file their applications electronically will have the option of bidding in the auction either electronically or telephonically. The Commission is moving toward electronic filing of short-forms applications to streamline the administrative process for auction participants.

Upfront Payment

The Commission is adopting a rule requiring each auction participant to make an upfront payment in the amount of \$5,000 per license prior to the beginning of an auction. An upfront payment provides some degree of assurance that only serious, qualified bidders will participate in the auction and serves as a deterrent to the filing of speculative applications which would delay the provision of cellular service to the public. Upfront payments will be due by a date specified by Public Notice. The upfront money will later be counted toward the down payment for the license. Bidders who do not make the winning bid will be refunded their upfront payment minus any applicable bid withdrawal or default payments. The upfront payment procedures should keep the auction process simple and keep the costs down for entrepreneurs who wish to bid on only a few licenses.

D. Description and Estimate of Small Entities Subject to the Rules

The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing fewer than 1,500

¹¹³ 47 C.F.R. § 1.2105(a)(2).

persons.¹¹⁴ Since the Regulatory Flexibility Act amendments were not enacted until after the record in this proceeding was closed, the Commission was unable to request information regarding the number of small cellular businesses and is unable at this time to determine the precise number of cellular firms which are small businesses.

The size data provided by the SBA does not enable the Commission to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees.¹¹⁵ We therefore used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.¹¹⁶ Therefore, even if all 12 of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. We assume, for purposes of our evaluations and conclusions in this FRFA, that all of the current cellular licensees are small entities, as that term is defined by the SBA. Although there are 1,758 cellular licenses, we do not know the exact number of cellular licensees because a cellular licensee may own several licenses.

E. Steps Taken to Minimize the Burdens on Small Entities

The rules adopted in the *Ninth Report and Order* are designed to minimize burdens on small businesses who may participate in the competitive bidding process. By adopting a simultaneous multiple round design for cellular unserved area auctions, but reserving discretion to use an alternative competitive bidding design, the Commission adds flexibility to its process for awarding licenses. The Commission intends to allow only remote bidding. Bidders will be able to submit bids from remote locations electronically using special bidding software, or via telephone. One advantage of simultaneous multiple round auctions is that they can make it possible for bidders to participate from their own places of business.

F. Significant Alternatives Considered and Rejected

In 1994, the Commission established procedures to ensure that licenses awarded by

¹¹⁴ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

¹¹⁵ U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

¹¹⁶ U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC 92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

auction were disseminated to a wide variety of applicants, including small businesses, but left the decision whether and how to use special provisions to the subsequent Reports and Orders designating specific competitive bidding rules for a particular service.¹¹⁷ For cellular unserved area radiotelephone licenses, the Commission considered and rejected creating special provisions for designated entities such as small businesses. The Commission believed that creating special provisions was unnecessary. Unlike licenses for new wireless telecommunications services such as PCS which attract numerous entrepreneurs and existing licensees from other services, cellular unserved area licenses are highly specialized licenses within limited geographic boundaries that are valued mainly by a discrete group of entities (most of whom are already providing cellular service in adjacent areas). In addition, the Commission anticipates that few markets will attract significant bids.¹¹⁸ Cellular unserved areas typically are small geographic areas, which most likely would entail smaller build-out costs as compared to other wireless telecommunications services. As a result, the Commission expects that small businesses who are interested in participating in provision of this service may more easily access the capital needed to participate in the auction.¹¹⁹

G. Commission's Outreach Efforts to Learn of and Respond to the Views of Small Entities Pursuant to 5 U.S.C. § 609

Because the petitions and comments were filed in this proceeding prior to the enactment of the 1996 Regulatory Flexibility Act amendments, the Commission did not seek specific comments regarding small entities' views of these rules being adopted. In the overall proceeding in which this item was adopted, however, the Commission sought comment on how the Commission could achieve the objectives of the Omnibus Budget Reconciliation Act of 1993 related to designated entities such as small businesses.¹²⁰

H. Report to Congress

¹¹⁷ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388-9, ¶ 229.

¹¹⁸ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Memorandum Opinion and Order, PP Docket No. 93-253*, 9 FCC Rcd 7387, 7392, ¶ 15 (1994).

¹¹⁹ The Commission's Small Business Advisory Committee identified capital formation as a major barrier to full participation by small businesses in the telecommunications arena. *See Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen Docket 90-314*, 8 FCC Rcd 7826 (1993).

¹²⁰ *See e.g., Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388-2400, ¶¶ 227-297.

The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Report and Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 4 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.