

FCC MAIL SECTION

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DISPATCHED BY Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Amendment of Part 1 of the ) WT Docket No. 97-82  
Commission's Rules -- )  
Competitive Bidding Proceeding, )

**ORDER, MEMORANDUM OPINION and ORDER  
and NOTICE OF PROPOSED RULE MAKING**

**Adopted: February 20, 1997**

**Released: February 28, 1997**

**Comments Due: March 27, 1997**

**Reply Comments Due: April 16, 1997**

By the Commission:

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## I. INTRODUCTION

1. In this *Order and Memorandum Opinion and Order (Order)* and *Notice of Proposed Rule Making (Notice)*, we undertake a comprehensive examination of our general competitive bidding rules for all auctionable services. In the *Second Report and Order* in PP Docket No. 93-253, we stated that we would "issue further Reports and Orders . . . to adopt auction rules for each auctionable service or class of service."<sup>1</sup> and we identified criteria that would govern our choice of service-specific auction rules and procedures, which may be found in Subpart Q of Part 1 of our rules.<sup>2</sup> Since adoption of the *Competitive Bidding Second Report and Order*, the Commission has completed over ten auctions, adopting service-specific competitive bidding rules for each one.<sup>3</sup> Based on the experience we have gained from the completed auctions and the feedback we have received from bidders, we believe that our general auction rules should be streamlined or amended so as to make our licensing process more efficient.

2. In this *Order*, we amend Subpart Q of Part 1 of the Commission's rules to reflect procedural changes that we believe will benefit bidders and the auction process generally and, in so doing, address some issues raised in petitions for reconsideration of our *Competitive Bidding Fifth Memorandum Opinion and Order*.<sup>4</sup> In the *Notice*, we propose additional changes to our general competitive bidding rules that are intended to simplify our regulations and eliminate unnecessary rules wherever possible, increase the efficiency of the competitive bidding process, and provide more specific guidance to auction participants while also giving them more flexibility.

## II. EXECUTIVE SUMMARY

3. Many of the rule changes in the *Order* mirror provisions adopted in certain service-specific rules. It also addresses issues raised in some of the petitions for reconsideration and *ex parte* communications concerning financial provisions adopted in the

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<sup>1</sup> *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2360, ¶ 68 (1994) ("*Competitive Bidding Second Report and Order*"), recon., *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) ("*Competitive Bidding Second Memorandum Opinion and Order*")

<sup>2</sup> 47 C.F.R. §§ 1.2101 *et seq.*

<sup>3</sup> *See, e.g.*, 47 C.F.R. §§ 24.301-24.320 (narrowband Personal Communications Service (PCS)); 47 C.F.R. §§ 24.701-720 (broadband PCS); 47 C.F.R. §§ 90.901-90.913 (Specialized Mobile Radio (SMR)); 47 C.F.R. § 95.816 (Interactive Video and Data Service (IVDS)); 47 C.F.R. §§ 100.71-100.80 (Direct Broadcast Satellite (DBS)); 47 C.F.R. §§ 21.921-21.961 (Multipoint Distribution Service (MDS)).

<sup>4</sup> *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order*, PP Docket No. 93-253, 10 FCC Rcd 403 (1994), *erratum*, 60 Fed. Reg. 5333 (Jan. 27, 1995) ("*Competitive Bidding Fifth Memorandum Opinion and Order*").

*Competitive Bidding Fifth Memorandum Opinion and Order.* The *Order* also clarifies the extent of authority delegated to the Chief of the Wireless Telecommunications Bureau to implement regulations pertaining to competitive bidding. In addition, the *Order* modifies the short-form application (FCC Form 175) to include a certification indicating that an applicant seeking installment payment eligibility is not in default on any payment for Commission licenses or delinquent on any non-tax debt owed to any federal agency.

4. In the past, we have tailored auction procedures for different services as we gained experience with the process. As a result, certain procedures vary across auctionable services. In this proceeding, we seek to establish a uniform set of provisions that would incorporate our experience to date and allow us to conduct future auctions in a more consistent, efficient, and effective manner. More specifically, the *Notice* seeks comment on the following issues:

- Whether to adopt, for all auctions in which special provisions are made for "designated entities"<sup>5</sup> of a certain business size, a definition of "gross revenues" and a uniform approach for financial size attribution, using an affiliate and controlling interest attribution standard; and whether to change our definition of affiliate.
- Whether to modify our installment payment rule, Section 1.2110(e), for future auctions in the following respect: (1) establish a maximum interest-only period of two years, while retaining the authority to increase this period on a service specific basis; (2) provide for slightly higher interest rates; (3) set the interest rate for such payment plans on the date that the Public Notice is issued announcing the close of the auction; and (4) make other changes in our rules regarding late payments, default payments, and grace periods.
- Whether to adopt "schedules" of installment payment plans and bidding credits for which designated entities qualify (in service-specific rule making proceedings we would continue to establish the appropriate size standards for each auctionable service).
- Whether to modify the unjust enrichment rule, Section 1.2111(c), which governs the payment of unpaid principal and accrued interest by licensees utilizing installment payments and seeking to transfer or assign their licenses, to conform with the broadband PCS rules.<sup>6</sup>
- Whether to amend Sections 1.2105(a) and 1.2107(c) to require that all short-form and long-form applications be filed electronically beginning January 1, 1998.

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<sup>5</sup> See 47 C.F.R. § 24.720(f). The Commission's rules previously defined designated entities as small businesses, businesses owned by women or members of minority groups, and rural telephone companies. 47 C.F.R. § 1.2110(a).

<sup>6</sup> See 47 C.F.R. § 24.716(c).

- Whether to amend Section 1.2105(b)(2) to provide a uniform definition of major amendments to FCC Form 175.
- Whether to adopt general ownership disclosure requirements and allow auction applicants to submit ownership information for one auction that would then be stored in a central database and updated as necessary for subsequent auctions rather than requiring resubmission of ownership information on each short-form and long-form application.
- Whether to modify the practice of refunding upfront payments before the end of the auction to bidders that lose eligibility to continue in the auction.
- Whether to require that winning bidders against whom petitions to deny are filed make their second down payments at the same time as those against whom no petitions are filed.
- Whether to amend Section 1.2104(g) to apply uniform default rules to all auctionable services and all auction designs.
- Whether to allow for "real time" bidding in simultaneous multiple round auctions.
- Whether to amend Section 1.2104 to specify that the Commission may establish minimum opening bids, rather than only suggested minimum opening bids.
- Whether to adopt for all auctionable services our broadband PCS rules governing bid withdrawal payments in the event of erroneous bids.
- Whether to retain or modify Section 1.2109(b), which concerns the Commission's options in the event a winning bidder defaults on its down payment.
- Whether to modify the anti-collusion rules set forth in Section 1.2105(c)(1) to permit an entity that has invested in an applicant that withdraws from an auction to invest in other applicants.
- Whether to permit all auction winners to begin construction of their systems, at their own risk, upon issuance of a Public Notice announcing auction winners.

### **III. ORDER and MEMORANDUM OPINION AND ORDER**

5. This *Order* amends Subpart Q of Part 1 of the Commission's rules to reflect certain clarifications and procedural changes that we have found to be warranted based on our experience in conducting auctions. The amendments adopted herein pertain to agency procedure and practice. Consequently, the requirement of notice and comment rule making

contained in 5 U.S.C. § 553(b) and the effective date provisions of 5 U.S.C. § 553(d) do not apply.<sup>7</sup> Authority for the amendments adopted herein is contained in Sections 4(i), 5(b), 5(c)(1), 303(r), 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(b), 155(c)(1), 303(r) and 309(j). These amendments are as follows:

6. Auction designs and procedures. In Section 1.2103(a) of our rules, we list the types of auction designs from which we may choose to award licenses for services or classes of services subject to competitive bidding. (1) single round sealed bid auctions (either sequential or simultaneous); (2) sequential oral auctions; and (3) simultaneous multiple round auctions.<sup>8</sup> Based on our experience in conducting auctions to date, we believe that we should modify the menu of auction design options from which we may choose to better reflect the range of auction design methodologies that are available. Thus, we are amending Section 1.2103(a) of our rules to specify the auction designs more explicitly and to include the methods of submitting bids from which the Commission will generally choose. Specifically, the menu of competitive bidding designs provided in Section 1.2103(a) is revised to include: (1) simultaneous multiple round auctions, using remote and/or on-site electronic bidding<sup>9</sup>; (2) sequential multiple round auctions, using either oral ascending, remote or on-site electronic bidding<sup>10</sup>; and (3) sequential or simultaneous single round auctions, using either remote and/or on-site electronic bidding, or sealed bids.<sup>11</sup> We also note that under Section 309(j) of the Communications Act, as amended, we continue to have the authority to design and test other auction methodologies such as combinatorial bidding.<sup>12</sup>

7. Timing of auctions. We believe that the public interest would be served by

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<sup>7</sup> See *JEM Broadcasting v. FCC*, 22 F.3d 320, 326-28 (D.C. Cir. 1994).

<sup>8</sup> 47 C.F.R. § 1.2103(a).

<sup>9</sup> In a simultaneous multiple round auction, groups of interdependent licenses are auctioned in a single auction. Bidders bid through a series of rounds and information on the winners of each round is transmitted to bidders, who, in the next round, may attempt to top the bids submitted in the previous round. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2363, ¶ 87.

<sup>10</sup> A sequential multiple round auction differs from a simultaneous multiple round auction in that each license is auctioned individually, with the bidding ending on one license before bids are accepted for another license. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2363, ¶ 86.

<sup>11</sup> In sequential or simultaneous single round auctions, licenses are auctioned either one at a time or in groups. Bidders submit a single bid for each license; the highest bidder is awarded the license. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2362, ¶ 80.

<sup>12</sup> 47 U.S.C. § 309(j)(3). Combinatorial bid techniques permit bidding for multiple licenses as all or nothing packages. They may be implemented with either simultaneous or sequential auction designs. If a package bid were to exceed the sum of the highest bids for the licenses that comprise the package (individually or in smaller packages), then the package bid wins. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2365-66, ¶ 98-104.

establishing regular quarterly auctions for defaulted licenses or unsold licenses that were previously auctioned and for which there are mutually exclusive applications, services with a small number of licenses, and services in which licenses are expected to have low values. Regular quarterly auctions will ensure the timely award of these licenses by holding a number of small separate auctions at the same time, thus reducing preparation time. In addition, quarterly auctions of defaulted or unsold licenses, in particular, will provide potential bidders with clear guidance regarding when such licenses will be available for bidding by providing a more definite timetable for offering them. We therefore will conduct quarterly auctions in the future, while retaining the discretion to decide in any quarter that an auction will not be held.

8. Application procedures. Section 1.2105(a) of our rules is amended to indicate that an applicant's signature on FCC Form 175 or its electronic submission of this form will serve to certify that the applicant is not in default on any payment for Commission licenses (including down payments) and that it is not delinquent on any non-tax debt owed to any federal agency. In the *Competitive Bidding Second Report and Order*, we decided that we should require sufficient information on the short-form application to make a determination that "the application is not in violation of Commission rules and that applications not meeting those requirements may be dismissed prior to the competitive bidding."<sup>13</sup> Part of this documentation includes certification that the bidder has the legal, technical, financial, and other qualifications to bid in the auction. The certification we henceforth will require regarding defaulted licenses and delinquent debts to federal agencies will afford additional assurance that the applicant will be able to meet its future obligations by indicating whether it may later be subject to a monetary judgment or collection procedures that may impair its ability to provide service. Bidders who cannot make this certification may be ineligible for installment payment plans.<sup>14</sup>

9. Payment procedures. Section 1.2106(b) of our rules addresses the submission of upfront payments by bidders in an auction. Section 1.2107(b) of our rules addresses submission of down payments by high bidders at the end of the auction. Section 1.2110(e)(1) of our rules addresses down payments made by entities eligible for installment payments. These rules currently allow for submission of payments to the Commission by either wire transfer or cashier's check. Our experience has shown that verification of payments remitted to us by cashier's check is difficult for the FCC to track and reconcile rapidly prior to our auction deadlines. With respect to upfront payments, permitting submission of payment by cashier's ~~check~~ requires the dedication of significant processing time prior to the start of an auction. Delays in verification of down payments slows both the ultimate award of licenses and the eventual delivery of service to the public. Thus, we are amending these rules to require that bidders make their upfront payments and down payments to the Commission by

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<sup>13</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2375, ¶ 161.

<sup>14</sup> Under the Debt Collection Improvement Act ("DCIA"), no person may obtain any federal financial assistance if the person has an outstanding debt with any federal agency which is in a delinquent status. Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3720B.

wire transfer, thereby eliminating the option of making payments by cashier's check. We believe that this change will benefit bidders by streamlining administration of the auctions and the ultimate award of licenses. A requirement that bidders remit upfront payments and down payments by wire transfer will result in minimal, if any, extra cost to auction applicants, and any such cost will be far outweighed by the benefit of speeding the auction process and the award of licenses through more rapid and accurate verification of payments. We note that wire transfers are already commonly used by most of our bidders and that this service is widely available to businesses and individuals functioning in the marketplace.

10. To implement Section 1.2110(e)(3) of our rules, the Wireless Telecommunications Bureau (Bureau) has required winning bidders to execute a promissory note and security agreement to participate in installment payment plans. For example, these procedures were used in licensing the Multipoint Distribution Service ("MDS"), 900 MHz Specialized Mobile Radio ("SMR") service, and broadband PCS C block.<sup>15</sup> Consistent with normal commercial and government lending practices,<sup>16</sup> these lending documents memorialize the terms of the installment payment plan and specify government and licensee rights and remedies under the installment payment plan. Section 1.2110(e)(3) is amended to codify this procedure under which all applicants eligible to utilize installment payments execute a promissory note and security agreement as a condition of participating in any installment payment plan that is offered by the FCC.

11. On a related matter, bidders and financial institutions have indicated that our auction rules may prevent commercial lenders and equipment vendors from adequately protecting the loans they make or the credit they extend to auction winners who avail themselves of the installment payment plans.<sup>17</sup> Specifically, parties have requested that we

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<sup>15</sup> See FCC Announces Grant of 900 MHz Specialized Mobile Radio Licenses, *Public Notice* No. 96-1282 (Aug. 12, 1996); Mass Media Bureau Prepared to Issue Multipoint Distribution Service BTA Authorizations, *Public Notice* No. D-868 (Aug. 2, 1996); FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas, *Public Notice* No. 96-716 (May 8, 1996).

<sup>16</sup> See, e.g., Reiley, Eldon H., *Guidebook to Security Interests in Personal Property* (1989), § 4-17.

<sup>17</sup> We received the following submissions addressing this topic on reconsideration of the *Competitive Bidding Fifth Memorandum Opinion and Order* in Docket No. 93-253: (1) Request to the FCC to Reconsider, on its Own Motion, Certain Aspects of the PCS Designated Entity Rules filed by National Telecom, Inc. ("NatTel") (December 15, 1994); (2) Petition for Limited Reconsideration of NationsBank (December 19, 1994); (3) Petition for Reconsideration of NatTel (January 6, 1995); (4) *Ex Parte* Comments of NTFC Capital Corporation ("NTFC") (February 9, 1995); (5) *Ex Parte* Comments of Mellon Bank ("Mellon") (February 24, 1995); (6) *Ex Parte* Comments of First National Bank of Maryland ("FNBM") (March 3, 1995); (7) *Ex Parte* Sureply of NatTel (March 9, 1995); (8) *Ex Parte* Comments of NationsBank (April 19, 1995); and (9) *Ex Parte* Comments of Toronto-Dominion Bank ("TDB") (May 23, 1995). Since these parties raise issues that apply to all auctionable services that utilize installment payment plans, we choose to resolve these petitions and address the *ex parte* filings in the instant *Order* under docket number WT 97-82. Several other Petitions for Reconsideration of the *Competitive Bidding Fifth Memorandum Opinion and Order* address issues specific to Broadband PCS and will be considered in a separate *Order*. Any filings in response to our resolution of these

provide automatic grace periods in the event of default under the installment payment plan;<sup>18</sup> implement installment payment plan terms consisting of interest-only payments for the entire term of the license, with a balloon payment at the end of the license term;<sup>19</sup> enter into intercreditor or collateral sharing agreements with other creditors of licensees and/or make the auction payment to the Commission subordinate to the debt of the licensee's financial lenders;<sup>20</sup> not cancel licenses where the licensees are in default of their installment payments and instead allow the license to remain part of the assets to be sold as a "going concern" in a pre-bankruptcy workout;<sup>21</sup> and ease license transfer restrictions to allow for voluntary transfer of licenses to non-designated entities in cases of financial distress.<sup>22</sup> In the *Notice of Proposed Rule Making* portion of this document, we seek comment on changes to our Part 1 rules with regard to grace periods (*see infra* Section IV.D.4.b) and installment payment plan terms (*see infra* Section IV.B.5), and will incorporate these parties' suggestions into the record generated by the *Notice*. With regard to the remaining concerns, we believe that our auction rules balance in a reasonable, commercial fashion the government's interest in protecting the public's rights to receive full payment for the spectrum bid upon, while granting qualifying entities the ability to pay for licenses through installment payments more generous in terms than any type of loan otherwise available in the marketplace. Our rules and policies are designed to promote private market solutions to capital problems (*i.e.*, licensees and lenders working together toward a satisfactory resolution), and therefore provide adequate mechanisms for entities to attain sufficient debt financing under general market conditions.<sup>23</sup> To the extent that the petitioning parties seek relief outside of what is already provided by the Commission's rules, these requests are denied for the following reasons.

12. First, under current Commission policy, lenders may not be granted direct security

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petitions should be filed under the new docket number.

<sup>18</sup> NatTel Request at 5 (automatic 90 day grace period); NatTel Petition at 7 (same); TDB Comments at 2-3 (365 day "standstill" period).

<sup>19</sup> NatTel Request at 4, 5; NatTel Petition at 5, 7; TDB Comments at 3.

<sup>20</sup> NationsBank Petition at 9; NatTel Request at 3, 5; NatTel Petition at 3-4, 6; NTFC Comments at 8-10; Mellon Bank Comments at 3; NatTel Surreply at 5; TDB Comments at 2.

<sup>21</sup> NationsBank Petition at 7-8; NTFC Comments at 3-4, 6-8; Mellon Bank Comments at 2-3; FNBM Comments at 1-2; NationsBank Comments at 6.

<sup>22</sup> NationsBank Petition at 4-7; NTFC Comments at 5-6; Mellon Bank Comments at 1-2; FNBM Comments at 1, NatTel Surreply at 2-4; NationsBank Comments at 4-5; TDB Comments at 2.

<sup>23</sup> See Letter from William E. Kennard and Michele C. Farquhar to Leonard J. Kennedy and Richard J. Denning, DA 96-2123 (December 17, 1996).

interests in FCC licenses.<sup>24</sup> In the auctions context, the Commission has established a first security interest in licenses being financed by it through installment payment plans. Accordingly, Section 1.2110(e)(4)(iii) of our rules provides for cancellation of a license upon default of installment payment obligations. We understand that it is customary in commercial financing to grant lenders security interests in the *proceeds* of the sale of FCC licenses and Section 1.2110(e) is not intended to impede or adversely affect a licensee's ability to obtain bank or other financing. Accordingly, debtors may grant to other parties a subordinated security interest in the proceeds of an authorized assignment or transfer of the license to a third party, provided however that any such security interest shall be subordinated to and in no way inconsistent with the Commission's security interest in the license.<sup>25</sup>

13. We note, however, that reclaiming a license pursuant to Section 1.2110(e)(4)(iii) is the Commission's remedy of last resort after conclusion of the regulatory processes set forth in Section 1.2110(e).<sup>26</sup> The Commission firmly believes that "[m]arket-oriented solutions to problems of financial distress will often be preferable to the FCC reclaiming and reauctioning licenses."<sup>27</sup> This is particularly true when reclaiming a license would deprive or interrupt service to ongoing end users. Lenders and licensees are free to agree contractually to their own terms regarding situations where the licensee fails to make timely payments under the Commission's installment payment program. As long as there is no transfer of control, we would not become involved in the particulars of a voluntary workout arrangement between licensees and third-party lenders, including lenders' assumption of the licensee's payments to the Commission.<sup>28</sup> Our policies also provide that in the event an installment payment licensee is in default to a third-party lender such that the lender accelerates its loan, the lender can seek a new buyer to replace the defaulted licensee, subject to Commission approval of the transfer.<sup>29</sup> While certain FCC rules contain restrictions on the transfer of licenses acquired through the use of designated entity provisions for the statutory purposes of assuring license dissemination among a wide variety of applicants including designated

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<sup>24</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389-2390, n. 177, ¶ 233, citing, *Radio KDAN, Inc.*, 11 FCC 2d 934 (1968), *recon. denied*, 13 RR 2d 100 (1968), *aff'd on other grounds sub nom Hanson v. FCC*, 413 F 2d 374 (D.C. Cir. 1969), and *Kirk v. Merkley*, 94 FCC 2d 829 (1983).

<sup>25</sup> See Letter from William E. Kennard and Michele C. Farquhar to Leonard J. Kennedy and Richard J. Denning, at p.1.

<sup>26</sup> See *infra* ¶ 78 where we seek comment on appropriate default remedies.

<sup>27</sup> Amendment of Parts 20 and 24 of the Commission's Rules, *Report and Order*, WT Docket No. 96-59, 11 FCC Rcd 7824, 7864, ¶ 85 (1996) (*D, E, F Block Report and Order*).

<sup>28</sup> See *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 471.

<sup>29</sup> See *Public Notice*, Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction, at p.6 (June 8, 1995) (*C Block Q&A*); See also *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 471, ¶ 134.

entities.<sup>30</sup> licensees may request a waiver of such rules. For example, upon a showing, supported by an affidavit, that the licensee is in financial distress, the Commission will consider granting a waiver of the transfer restrictions provided that such transaction is otherwise in the public interest.<sup>31</sup> Under these circumstances, if a license is transferred to an entity that would not qualify for designated entity provisions, or that would qualify for less favorable designated entity provisions, the unjust enrichment provisions set forth in Section 1.2111 of the Commission's rules or service-specific rules would apply.<sup>32</sup> In summary, commercial lenders and equipment vendors have adequate assurances from the Commission that in most situations of financial distress, licenses can be transferred as a "going concern," subject, of course, to the rights of the Commission to the payments of obligations created under the Commission's rules (including unjust enrichment payments), the license conditions, the promissory note, and the security agreement.<sup>33</sup>

14. Payment Dates. Sections 1.2107(b), 1.2109(a), and 1.2110(e) of our rules identify the dates by which each winning bidder is required to make the down payment and final payment on a license. Under these rules, a winning bidder must make its down payment within five (5) business days after being notified that it is a high bidder on a license, and make payment of the balance of its winning bid within five (5) business days following the award of the license.<sup>34</sup> We amend these rules to change the applicable payment period from five (5) business days to ten (10) business days and, consistent with our SMR rules, to change the event triggering the final payment obligation (or in the case of entities eligible for installment payments, the second down payment obligation) from the award of the license to the issuance of a public notice indicating that the Commission is prepared to award the license

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<sup>30</sup> See, e.g., 47 C.F.R. § 24.839(d) (as amended by the *D, E, F Block Report and Order*, 11 FCC Rcd at 7863-64, which eliminated the 3-year absolute bar to transfer of entrepreneurs' block licenses and established a 5-year period in which entrepreneurs' block licenses could be assigned or transferred only to qualifying entrepreneurs).

<sup>31</sup> See, e.g., *C Block Q&A* at p.6; *W.A.V., Inc.*, 8 FCC Rcd 3133 (MMB 1993); *King Kable, Inc.*, 8 FCC Rcd 1515 (MMB 1993); *Turner Communications Corp.*, 33 F.C.C.2d 843 (1972); *Voice of the Caverns, Inc.*, 4 F.C.C.2d 946, 948 n.5 (1966).

<sup>32</sup> See, e.g., *C Block Q&A* at p.6. The unjust enrichment rule generally requires repayment to the government of bidding credits or full payment of principal subject to installment payments when licenses are transferred to entities ineligible for these provisions.

<sup>33</sup> See Letter from William E. Kennard and Michele C. Farquhar to Leonard J. Kennedy and Richard J. Denning, DA 96-2123, at p.3 (December 17, 1996).

<sup>34</sup> 47 C.F.R. §§ 1.2107(b), 1.2109(a) and 1.2110(e)(2). Section 1.2107(b) also specifies reduced payment obligations for winning bidders that are qualified as designated entities eligible for installment payments under Section 1.2110(d).

or authorization.<sup>35</sup> These changes will facilitate a more orderly licensing process and ensure that successful bidders have adequate time to fulfill their payment obligations. Section 1.2109(b) of our rules, which addresses the circumstances in which a bidder will be deemed to have defaulted on its down payment obligations, is also amended to specify ten (10) business days instead of five (5) business days.<sup>36</sup>

15. Definition of "minority". Section 1.2110(b)(2) of our rules defines the term "minority" as "individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction."<sup>37</sup> In the *Competitive Bidding Fifth Memorandum Opinion and Order*, we revised this definition, for purposes of the broadband PCS rules, to conform with the definition of "minority" used in other contexts.<sup>38</sup> At that time, we noted that the same definitional correction would be made to Section 1.2110(b)(2).<sup>39</sup> To date, we have not made such a correction. Thus, we now revise the definition of "minority" in Section 1.2110(b)(2) to read as follows: "Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders." With regard to the meaning of particular categories in the definition, we shall use the same category descriptions the Commission has relied on in other contexts.<sup>40</sup>

16. Delegated authority. We also clarify that pursuant to Section 0.131 of our rules, the Chief, Wireless Telecommunications Bureau, has delegated authority to implement all of the Commission's rules pertaining to auctions procedures.<sup>41</sup> This includes the authority to choose competitive bidding designs and methodologies, such as simultaneous multiple round auctions or oral outcry auctions and remote electronic bidding or on-site bidding; conduct auctions; administer application, payment, license grant and denial procedures; and determine

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<sup>35</sup> See In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, ¶ 116 (1995) ("*Competitive Bidding Second Order on Recon./Seventh Report and Order*").

<sup>36</sup> We note that in the *Notice of Proposed Rule Making*, we seek comment on possible modifications to the provision in Section 1.2109(b) that addresses the Commission's discretion to offer defaulted licenses to other bidders in the original auction. See *infra* at ¶¶ 95-97.

<sup>37</sup> 47 C.F.R. § 1.2110(b)(2).

<sup>38</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 432 ¶ 52 (1994) (revising 47 C.F.R. § 24.720(i) to conform with the definition of "minority" found at, *inter alia*, 47 U.S.C. § 309(i)(3)(c)(ii) and 47 C.F.R. § 1.1621(b)). See also *Broadcast Equal Employment Opportunity Rules and FCC Form 395*, 70 FCC 2d 1466, 1473 (1979); Race and Ethnic Standards for Federal Statistics and Administration Reporting, OMB Statistical Policy Directive No. 15 (1977).

<sup>39</sup> See *id.* at n.123.

<sup>40</sup> See *id.* at 433.

<sup>41</sup> 47 C.F.R. § 0.131.

upfront and down payment amounts. We note that the Bureau should, to the extent possible, carry out its duties under this authority through the use of orders, public notices, bidder packages, notices disseminated through the electronic bidding system, and by other reasonable means and with the benefit of public comment where appropriate.<sup>42</sup> We further note that such Bureau actions are subject to review by the full Commission.<sup>43</sup>

#### IV. NOTICE OF PROPOSED RULE MAKING

17. We seek comment on a variety of proposals and tentative conclusions set forth below. In addition, Attachment A consists of a list of the competitive bidding provisions that have been adopted in specific services but not included in our Part 1 rules. We seek comment on whether these provisions should be included in the Part 1 rules and, if so, whether any amendments to these provisions are needed in light of our proposal, discussed below, to apply these general competitive bidding rules to future auctions.

##### A. Applicability of General Competitive Bidding Rules

18. As we have gained experience in conducting auctions, we have found that much of the auction process can be standardized and that establishing service-specific rules for many aspects of the competitive bidding process is unnecessary. We also find that conducting rule makings for each individual service slows down the delivery of service to the public because it may result in regulatory delays before the licensing process begins. Thus, we propose that, to the extent possible, all future auctions be governed by the general competitive bidding rules adopted in this proceeding. We envision that only a limited number of competitive bidding regulations would need to be adopted on a service-specific basis. We seek comment on whether the rules adopted in this proceeding should supersede all existing, service-specific competitive bidding rules for future auctions. We propose that this action would affect all services that are subject to pending proceedings<sup>44</sup> and any services that have existing competitive bidding rules that might apply to licenses that have not yet been auctioned or that must be reaucted. We seek comment on whether, alternatively, we should phase in the

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<sup>42</sup> See, e.g., *Public Notice*, FCC Issues Procedures, Terms and Conditions for January 13, 1997 Auction of Cellular Unreserved Phase I and Phase II Service Areas, DA 96-1850 (Nov. 8, 1996); *Public Notice*, FCC Announces Auction of 900 Mhz Specialized Mobile Radio Service, No. AUC-95-07 (Sept. 15, 1995); *Public Notice*, FCC Announces Auction of Multipoint Distribution Service, No. AUC-95-06 (Sept. 5, 1995).

<sup>43</sup> See 47 C.F.R. §§ 1.115, 1.117.

<sup>44</sup> See In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding - Tenth Report and Order, FCC 96-447, PP Docket No. 93-253 (November 21, 1996)(Interactive Video and Data Service (IVDS)); Further Development of Paging Systems, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 61 Fed. Reg. 34,375 (Jul. 2, 1996); *Fourth Notice of Proposed Rule Making*, 61 Fed. Reg. 39,425 (Local Multipoint Distribution Service (LMDS)); *Proposed Rule*, 61 Fed. Reg. 2465 (Jan. 26, 1996) (39 GHz); *Proposed Rule*, 61 Fed. Reg. 6212 (Feb. 16, 1996) (800 MHz SMR).

applicability of the revised general competitive bidding rules at a future date, such that, at a minimum, initial auctions may be completed under the existing service-specific rules. In the event we decide not to apply the revised Part 1 rules to supersede existing service-specific auction rules, should we nonetheless subject licenses that are reauctioned (due to defaults or if no winning bidder is otherwise declared) to these revised Part 1 general competitive bidding rules? To the extent that commenters believe that service-specific rules should be maintained, they should explain which ones and why.

## **B. Rules Governing Designated Entities**

### **1. Small Business Size Standards**

19. Background. Section 1.2110(b)(1) of our rules states that the Commission "will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service."<sup>45</sup> To date, we have defined five different categories of businesses which qualify for special provisions such as bidding credits and installment payment plans. Thus, in various services we have adopted small business definitions based on gross revenues ceilings of \$3 million, \$15 million, and \$40 million.<sup>46</sup> We also established a \$75 million gross revenues standard for determining eligibility for installment payment plans in the broadband PCS C and F block auctions.<sup>47</sup> Finally, we established a \$125 million gross revenues threshold for determining entrepreneurs' block eligibility in the broadband PCS C and F block auctions.<sup>48</sup>

20. Discussion. We propose to continue our practice of soliciting comment in service-specific rule making proceedings on the appropriate small business size standard, or tiered standards, for each auctionable service. In such rule makings, we would, as we have done in the past and pursuant to Section 1.2110(b)(1), take into consideration the characteristics and capital requirements of each service. We would in all cases, however, for purposes of future auctions, express the definition of small business purely in terms of gross

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<sup>45</sup> 47 C.F.R. § 1.2110(b)(1).

<sup>46</sup> 47 C.F.R. § 90.814(b)(1)(i) (\$3 and \$5 million definition of small business in 800 MHz and 900 MHz SMR); 47 C.F.R. § 24.720(b)(2) (\$15 million definition of small business in broadband PCS F block); 47 C.F.R. § 24.720(b)(1) (\$40 million definition of small business in broadband PCS for C and F blocks); 47 C.F.R. § 21.961(b)(1) (\$40 million definition of small business in MDS).

<sup>47</sup> 47 C.F.R. § 24.711(b)(1).

<sup>48</sup> 47 C.F.R. § 24.709(a)(1).

revenues.<sup>49</sup> We further propose that, once the small business definition for any particular service is adopted, the special provisions for which such businesses qualify would be determined by schedules set forth in the general competitive bidding rules.<sup>50</sup> We seek comment on this proposal.

21. We note that some of our eligibility requirements are defined in terms of gross revenues of "less than" a certain amount, rather than "not exceeding" a certain amount. We tentatively conclude that a uniform method of measurement is preferable because it is more equitable and administratively simpler. We therefore propose that when we adopt size standards, those standards should be expressed so as to require businesses to have gross revenues "not to exceed" particular amounts, and that all standards already adopted be modified to conform to this method of defining size.<sup>51</sup> We seek comment on this proposal. We also propose to base all small business size standards on the applicant's average gross revenues over the preceding three years, consistent with the Small Business Act, 15 U.S.C. § 632(a). We seek comment on this proposal.

## 2. Definition of Gross Revenues

22. Background. In some services, eligibility criteria are based on the size of the entity as measured by its gross revenues. For instance, eligibility for small business provisions such as bidding credits and installment payments has been determined based on average gross revenues.<sup>52</sup> Each of our revenue-based size standards has required applicants to calculate their average gross revenues over a certain number of years. In adopting these standards, we reasoned that a gross revenues test was consistent with the approach taken by the U.S. Small Business Administration ("SBA").<sup>53</sup> Currently, however, our general competitive bidding rules do not define the terms "gross revenues," nor do they indicate how gross revenues should be calculated for purposes of size standards.

23. Discussion. Although our general competitive bidding rules do not define "gross revenues," we have adopted definitions in various services which are generally the same, but contain some distinction regarding use of audited and unaudited financial statements. For

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<sup>49</sup> We note that the Commission is considering issues surrounding small businesses' participation in the communications industry in a pending proceeding on market entry barriers for small businesses. See Section 257 Proceeding to Identify and eliminate Market Entry Barriers for Small Businesses, *Notice of Inquiry*, GN Docket No. 96-113, FCC 96-216 (rel. May 21, 1996).

<sup>50</sup> See *infra* at Sections IV.B.5 and 6.

<sup>51</sup> Thus, for example, the eligibility rule for the broadband PCS C and F blocks would be modified to read "gross revenues *not to exceed* \$125 million." See 47 C.F.R. § 24.709.

<sup>52</sup> See, e.g., 47 C.F.R. §24.320(b)(1)(i).

<sup>53</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5532, ¶¶ 158, 201-207.

instance, our broadband PCS rules define gross revenues as follows:

all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.<sup>54</sup>

In order to promote uniformity of regulations, we propose to use this definition for all size-based determinations for all auctionable services, with the modification that unaudited financial statements used as a basis for gross revenue calculations must be prepared in accordance with Generally Accepted Accounting Principles. This modification should ensure that all gross revenues calculations, audited and unaudited, are prepared consistently. It should also discourage bidders from manipulating unaudited financial statements to gain a competitive bidding or payment advantage. We seek comment on this proposal.

24. We note that in the *D, E, and F Block Report and Order* we amended our broadband PCS rules to require that an applicant's determination of average gross revenues be based on the three most recently completed fiscal or calendar years.<sup>55</sup> Should we adopt a similar rule for our general auction rules that would extend the same option of using either fiscal or calendar years to applicants in all auctionable services? We also note that prior to the *D, E, and F Block Report and Order*, broadband PCS applicants were required to state their average gross revenues as supported by audited financial statements or seek a waiver to use unaudited financial statements.<sup>56</sup> This requirement was simplified in the *D, E, and F Block Report and Order* to permit the use of unaudited financial statements without seeking a waiver.<sup>57</sup> We seek comment on whether our general definition of gross revenue should similarly allow the use of unaudited financial statements.

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<sup>54</sup> 47 C.F.R. § 24.720(f). See also 47 C.F.R. § 21.961 (MDS); 47 C.F.R. § 24.720 (narrowband PCS); 47 C.F.R. § 90.814 (SMR).

<sup>55</sup> *D, E, F Block Report and Order*, 11 FCC Rcd at 7891, ¶ 141; 47 C.F.R. § 24.720(f).

<sup>56</sup> *Id.* at 7849-50, ¶¶ 56-57, n 181.

<sup>57</sup> *Id.* at 7891, ¶ 140.

### 3. Attribution of Gross Revenues of Investors and Affiliates

25. Background. In determining whether an applicant meets certain size-based eligibility requirements, many of our service-specific competitive bidding rules require us to consider, *inter alia*, the gross revenues of certain investors in the applicant and the affiliates of attributable investors. "Affiliate" is defined by our general auction rules as an individual or entity that directly or indirectly controls or has the power to control the applicant; is directly or indirectly controlled by the applicant; is directly or indirectly controlled by a third person(s) that also controls or has the power to control the applicant; or has an "identity of interest" with the applicant.<sup>58</sup> Some service-specific rules have adopted alternative definitions of "affiliate."<sup>59</sup>

26. An "attributable" investor for purposes of size determinations has been defined differently in the rules for different services. In narrowband PCS, for example, a "control group" standard applies. Under this standard, the gross revenues and affiliations of an investor in the applicant are not considered so long as the investor holds 25 percent or less of the applicant's passive equity and is not a member of the applicant's control group,<sup>60</sup> and the control group holds at least 25 percent of the applicant's equity.<sup>61</sup> Size standards in the broadband PCS entrepreneurs' block auctions include a 25 percent equity option and a 49.9 percent equity option. Under the 25 percent equity option, the gross revenues and total assets of a person or entity that holds an interest in the applicant or licensee, and its affiliates, are not considered so long as such person or entity holds only non-attributable equity equaling no more than 25 percent of the applicant's or licensee's total equity and is not a member of the applicant's or licensee's control group, and the applicant or licensee has a control group that complies with certain minimum equity and ownership requirements.<sup>62</sup> Under the 49.9 percent equity option, the gross revenues and total assets of a person or entity that holds an interest in the applicant or licensee, and its affiliates, are not considered so long as such person or entity holds only non-attributable equity equaling no more than 49.9 percent of the applicant's or licensee's total equity and is not a member of the applicant's or licensee's control group, and the applicant or licensee has a control group that complies with certain minimum equity and ownership requirements.<sup>63</sup>

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<sup>58</sup> 47 C.F.R. § 1.2110(b)(4).

<sup>59</sup> See, e.g., 47 C.F.R. 24.720(l) (broadband PCS).

<sup>60</sup> See 47 C.F.R. § 24.320(h) (a control group is an entity, or a group of individuals or entities, that possesses *de jure* and *de facto* control of an applicant or licensee).

<sup>61</sup> 47 C.F.R. § 24.320(b)(2).

<sup>62</sup> 47 C.F.R. § 24.709(b)(3).

<sup>63</sup> 47 C.F.R. § 24.709(b)(4).

27. In the 900 MHz SMR service, in determining whether an applicant qualifies as a small business, we attribute the revenues of parties holding partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of the applicant in conformance with the spectrum cap attribution standard.<sup>64</sup> Our MDS rules, in contrast, attribute the gross revenues of the applicant and all its affiliates (as defined at 47 C.F.R. § 1.2110(b)(4)) to the applicant.<sup>65</sup> Our general competitive bidding rules do not contain size attribution provisions other than affiliation rules.

28. Discussion. We propose to adopt a uniform approach to financial size attribution for all auctionable services. Rather than the "control group" structure used in broadband and narrowband PCS, we propose to use a controlling interest threshold to determine whether an entity qualifies to bid as a small business. Thus, in calculating gross revenues, we would include the gross revenues of the controlling principals of the applicants and their affiliates, with the term "control" including both *de jure* and *de facto* control of the applicant.<sup>66</sup> We tentatively conclude that this standard, which we recently adopted in our IVDS rules, would simplify our size attribution rules and still enable small businesses to attract adequate financing.<sup>67</sup> We seek comment on this proposal.

29. We also seek comment on whether we should change our definition of affiliate. Should we, for example, amend our definition of affiliate to provide an exception for Indian tribes, Alaska Regional or Village Corporations, as we did for broadband PCS?<sup>68</sup> Also, we note that, earlier this year, the Small Business Administration amended and simplified its regulations governing the small business size standards in 13 C.F.R. Part 121, including amendment of its definition of "affiliate".<sup>69</sup> We seek comment on whether we should amend our rules to provide a similar "affiliate" definition, which would include, for example, the following general principles of affiliation: (1) concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both; and (2) factors such as ownership, management, previous

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<sup>64</sup> 47 C.F.R. § 90.814(g).

<sup>65</sup> 47 C.F.R. § 21.961(b).

<sup>66</sup> See *Ellis Thompson Corp.*, 76 Rad. Reg. (P&F) 1125, 1127-28 (1994) (where the Commission identifies factors used to determine control of a business); see also, *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963).

<sup>67</sup> See *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding - Tenth Report and Order*, PP Docket No. 93-253 (Released November 21, 1996).

<sup>68</sup> 47 C.F.R. § 24.720(l)(11).

<sup>69</sup> See Small Business Administration, Amendment of Small Business Size Standards, *Final Regulations*, 61 Fed. Reg. 3177 (January 31, 1996); *Corrected Final Regulations*, 61 Fed. Reg. 41496 (August 9, 1996).

relationships with or ties to another concern, and contractual relationships, will be considered in determining whether an affiliation exists.<sup>70</sup>

#### 4. Definition of Rural Telephone Company

30. Background. Our current Part 1 rules define "rural telephone company" (or "rural telco") as any local exchange carrier, including affiliates, with 100,000 access lines or fewer.<sup>71</sup> We noted at the time this definition was adopted that it comported with the definition that had been adopted for broadband PCS.<sup>72</sup> More recently, however, the Commission revised the definition of rural telephone company contained in our broadband PCS rules to conform with that contained in the Telecommunications Act of 1996 ("1996 Act").<sup>73</sup> In taking that action, we stated that using the definition contained in the 1996 Act would likely expedite the delivery of advanced services to rural areas.<sup>74</sup> We also noted that adopting the 1996 Act definition would promote uniformity of regulations and is therefore consistent with the mandate of that legislation to ease regulatory burdens and eliminate unnecessary regulation.<sup>75</sup>

31. Discussion. We tentatively conclude that the definition of rural telco set forth in the 1996 Act should apply to all auctionable services as the term is used in Section 309(j) of the Communications Act. Thus, Section 1.2110(b)(3) would be amended so as to define the term "rural telephone company" as a local exchange carrier operating entity to the extent that such entity -- (A) provides common carrier service to any local exchange carrier study area that does not include either (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996. As we noted in the *D. E.*

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<sup>70</sup> 13 C.F.R. §§ 121.103(a)(1) and (2).

<sup>71</sup> 47 C.F.R. § 1.2110(b)(3). The Commission has permitted rural telephone companies to acquire partitioned broadband PCS licenses through either bidding consortia or private negotiations, making it easier for them to participate in auctions and become providers of broadband PCS. See *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532, 5599 (1994).

<sup>72</sup> *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7245, 7257.

<sup>73</sup> Pub. L. No. 104-104, § 3 110 Stat. 56 (1996) ("1996 Act"); codified at 47 U.S.C. § 153 (37). See also 47 C.F.R. § 24.720(e) and *D, E, F Block R&O*, 11 FCC Rcd at 7855, ¶ 62.

<sup>74</sup> See *D, E, F Block Report and Order*, 11 FCC Rcd at 7855, ¶ 66.

<sup>75</sup> *Id.*

and *F Block Report and Order*, we believe adopting this definition in our Part 1 general auction rules will promote uniformity of regulations. We seek comment on this tentative conclusion.

## 5. Installment Payments

32 Background. Since the Commission began conducting spectrum auctions, installment payments have been utilized as a means of assisting small entities that are likely to have difficulty obtaining adequate private financing.<sup>76</sup> Thus, our general competitive bidding rules currently allow small businesses and other entities determined to be eligible on a service-specific basis to pay a substantial amount of their high bids in installments over the term of their licenses.<sup>77</sup> Pursuant to our Part 1 rules, unless otherwise specified, such installment payment plans (1) impose interest based on the rate of U.S. Treasury obligations at the time of licensing, plus a possible premium (2) allow installment payments for the full license term, (3) begin with interest-only payments for the first two years, and (4) amortize principal and interest over the remaining term of the license.<sup>78</sup> Additionally, winning bidders are required to execute a promissory note and security agreement as a condition to participate in the installment payment plan.<sup>79</sup> In the *Second Report and Order*, we determined that this framework for establishing installment payment plans would be an effective way to promote the participation of small businesses in the provision of spectrum-based telecommunications services and an effective tool for efficiently distributing licenses and services among geographic areas.<sup>80</sup>

33. Changes in the basic framework of our installment payment plans have been made in specific services as we have gained experience from implementing our rules. In certain services the Commission has adopted "tiered" installment payment plans, which vary in terms of interest rate and payment terms, depending on the size of the licensee. For 900 MHz SMR, for example, we adopted a two-tiered installment payment plan structure. Entities with average gross revenues of not more than \$3 million over the three preceding years may make interest-only payments for five years, with interest accruing at the Treasury note rate. Entities with average gross revenues of not more than \$15 million over the three preceding years may make interest-only payments for the first two years of the license term, with interest accruing at the Treasury note rate plus an additional 2.5 percent.<sup>81</sup> We also adopted a three-tiered

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<sup>76</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389-91, ¶¶ 231-240.

<sup>77</sup> 47 C.F.R. § 1.2110(e).

<sup>78</sup> *Id.*

<sup>79</sup> See *supra* at ¶ 10.

<sup>80</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391, ¶ 240.

<sup>81</sup> 47 C.F.R. § 90.812(a).

installment payment plan structure for the broadband PCS C and F blocks.<sup>82</sup> We determined that the tiered plans would broaden the scope of opportunities for small businesses.<sup>83</sup>

34. Discussion. Small businesses have been successful in the auctions in which installment payments plans were offered. These plans coupled with bidding credits, we believe, have resulted in new opportunities for small businesses to offer spectrum based services. In broadband PCS, installment payment plans were also provided to benefit entities larger than small businesses, entrepreneurs,<sup>84</sup> because of the capital-intensive nature of the service. While we seek to continue to offer these opportunities to small businesses, and possibly other entities, we seek comment on ways that we could refine our installment payment plans to streamline without reducing their benefit to small businesses. For example, we seek comment on whether the Commission or its designee should seek non-resource intensive means to screen applicants applying for installment payment plans to determine their credit worthiness, and if so, whether all bidders eligible for installment payments should be screened before the start of an auction, or only auction winners. If we were to adopt such screening, what information or standards should serve as criteria for judging a bidder's credit worthiness? Further, we seek comment on whether we should offer higher bidding credits in lieu of installment payments for winning bidders who qualify. We note that substituting a system of larger bidding credits might eliminate the administrative and market concerns associated with installment payments, while nonetheless ensuring opportunities for small businesses to participate in auctions. On the other hand, however, installment payment plans have been a useful tool for small businesses to access capital.

35. As an alternative to offering higher bidding credits in lieu of installment payments, we seek comment on whether we should require larger down payments, such as 30 or 40 percent, to reduce the amount of a bidder's high bid that is financed by the federal government. Increasing the amount of money a bidder has at stake in the event of a default may reduce the likelihood of default and will reduce the government's risk in the event of default. We also seek comment on whether we could achieve the same goal of reducing the likelihood of default by adopting a requirement that bidders increase their upfront payment during the course of the auction once their cumulative high bids exceed their upfront payment by some multiple. For example, once a bidder's cumulative bids were more than twenty-five times its upfront payment, it would be required to deposit additional funds with the Commission. We seek comment on this proposal and how it could be implemented, including

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<sup>82</sup> See 47 C.F.R. § 24.711(b) (C block); 47 C.F.R. § 24.716(b) (F block).

<sup>83</sup> *Competitive Bidding Second Order on Recon./Seventh Report and Order*, 11 FCC Rcd at 2646, ¶ 18. See also *Further Development of Paging Systems, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 61 Fed.Reg. 34,375 (Jul. 2, 1996); *Proposed Rule*, 61 Fed. Reg. 6212 (Feb. 16, 1996)(800 MHz SMR).

<sup>84</sup> Section 24.709(a) defines an entrepreneur as an applicant that, including its affiliates, its owners, and its owners' affiliates has gross revenues of less than \$125 million in each of the last two years, and total assets of less than \$500 million at the time the FCC Form 175 application is filed. 47 C.F.R. § 24.709(a).

the appropriate multiplier used to trigger the supplemental upfront payment obligation.

36. In addition, we propose that our general competitive bidding rules be amended to include a schedule of installment payment plans for designated entities seeking to participate in the provision of spectrum-based services. Defining available installment payment plans in our general competitive bidding rules would give potential bidders more certainty about the special provisions available to small businesses and other entities and promote uniformity of regulation. As discussed above, we believe that once a small business definition is adopted for a particular service, or other entities are identified as qualifying for installment payments, eligible businesses should be able to turn to our Part 1 rules to determine the specific terms available to them.<sup>85</sup> The following schedule of installment payment plans is a possible approach to implementing this concept.

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<sup>85</sup> See *supra* ¶ 20-21.

Average gross revenues	Interest Rate	Payment Terms
Not to exceed \$3 million	T-note rate <sup>86</sup>	2 yrs. interest-only payments; amortize principal and interest over remaining license term
Not to exceed \$15 million	T-note rate + 1.5%	2 yrs. interest-only payments; amortize principal and interest over remaining license term
Not to exceed \$40 million	T-note rate + 2.5%	2 yrs. interest-only payments; amortize principal and interest over remaining license term
*Not to exceed \$75 million	T-note rate + 2.5%	amortize principal and interest over license term
*Not to exceed \$125 million	T-note rate + 3.5%	amortize principal and interest over license term

\*These entities have never been defined as small businesses by our service-specific rules, but for broadband PCS they may have been eligible for installment payments as entrepreneurs.

The schedule set forth above is based in general on the plans adopted for our most recent auctions and, relying on our past auction experience, we believe these plans are appropriate. However, we recognize that plans with more generous terms were previously adopted for specific services.<sup>87</sup> We seek comment on whether we should incorporate a schedule of

<sup>86</sup> The maturity date of the Treasury note would correspond with the license term for the particular service (e.g., a 10-year broadband PCS licensee would calculate its interest rate according to a 10-year T-note).

<sup>87</sup> For instance, our broadband PCS rules confer on businesses with gross revenues of not more than \$75 million installment payment plans with an interest rate at the 10-year T-note rate plus 2.5 percent, with interest-only payments for the first year of the license. 47 C.F.R. § 24.716(b)(2). In comparison, the proposed plan

installment payments into our general auction rules while still retaining the authority to modify payment terms on a service-specific basis. Further, we seek comment on the appropriate schedule of payment terms.

37. Section 1.2110(e)(3)(i) of our rules indicates that the interest rate on installment payments will be the interest rate on Treasury obligations with maturities closest to the duration of the license term at the time of licensing.<sup>88</sup> More precisely, the interest rate is established by using the coupon interest rate for Treasury notes with similar maturities, at the most recent preceding Treasury auction.<sup>89</sup> We note that, in the *Competitive Bidding Second Report and Order*, we indicated both that we agreed with those commenters that suggested that interest on installments should be charged at a rate no higher than the government's cost of money and also that the interest rate imposed for installment payments should be equal to the rate for U.S. Treasury obligations of maturity equal to the license term.<sup>90</sup> We recognize that determining the interest rate for installment payment plans pursuant to Section 1.2110(e)(3)(i) may not always reflect the government's cost of money but it provides an objective benchmark for the interest rate determination. We believe that it would be beneficial to licensees for us to more clearly identify in our rules how the interest rate would be determined for all installment payment plans. We recognize that licensees must prepare business plans in conjunction with seeking capital from investors and lenders, and that a principal component of their total expenses is interest expense. We believe that providing certainty will enhance the ability of licensees to obtain financing by eliminating an investor's concern about fluctuating interest rates. Therefore, we propose to codify our existing policy by specifying that the interest rate for installment payments will be determined by taking the coupon rate of interest offered in the most recent Treasury auction preceding the close of the Commission's auction. We seek comment on this proposal. Further, we seek comment on whether we should adopt some other basis for computing interest. For example, should we establish more market-based interest rates with a cost of funds component and a premium for credit risk? If so, we ask commenters to discuss how we should determine the appropriate interest premium.

38. Where we use installment payment plans, we propose to set the interest rate for such payment plans on the date that the Public Notice is issued announcing the close of the auction and the winning bidders, based on rates established in the most recent Treasury auction with obligation of the appropriate term. Currently, Section 1.2110(e)(3)(i) of the Commission's general competitive bidding rules requires that the Commission impose interest

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for such businesses does not allow a one-year interest-only period.

<sup>88</sup> *Id.*

<sup>89</sup> For example, for C Block licensees who were conditionally granted licenses on September 17, 1996, the most recent auction of 10-year Treasury notes occurred on August 7, 1996, and had a coupon interest rate of 7%. Source: Bureau of the Public Debt, U.S. Treasury Department.

<sup>90</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2390-91, ¶ 239.

based on the rate of U.S. Treasury obligations at the time of licensing.<sup>91</sup> We tentatively conclude, however, that establishing the interest rate on the day that the Public Notice is released announcing the close of the auction is the most appropriate time for both licensees and the Commission. The close of the auction represents the most clearly identifiable time when an obligation to the Commission and the United States Treasury is established. At that time bidders' financial obligations for the license(s) won are confirmed, and there is no need to defer establishment of the interest rate. Establishing the interest rate in this way also provides a uniform date on which the interest rate for all prospective licensees within a particular service is established, regardless of petitions to deny or other delays that may vary among bidders. In addition, we believe that establishing the interest rate at a date earlier than the date of licensing would assist bidders in efforts to obtain financing, as interest expense would be calculable from a specific known date. Furthermore, we believe that establishing the interest rate as we propose would reduce the interest rate risk to the bidder and mitigate this risk to the capital investor. While our review of the rate patterns for 10-year U.S. Treasury obligations indicates that there is minimal volatility in the 10-year Treasury rate, interest rate fluctuations between the close of an auction and the date of licensing are just as likely to adversely impact the Commission as they are to adversely impact the licensees and/or their capital investors. Establishing the interest rate earlier than the point of licensing would also permit the licensee to receive, review, and return the necessary note and security agreement earlier, which would also speed the licensing process. This, in turn, should hasten the development of service to the marketplace. Alternatively, we could establish the interest rate for the installment payment plan in the Public Notice announcing the start of the auction, with the rate based on the most current Treasury rate on that date. This would enable both bidders and potential capital investors to better assess a bidder's prospective financial obligations during the auction. We seek comment on each of our proposals, tentative conclusions, and alternatives.

## 6. Bidding Credits

39. Background. Under the current general competitive bidding rules, the Commission may award bidding credits (*i.e.*, payment discounts) to eligible designated entities. These general rules also provide that service-specific rules will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits, and other procedures.<sup>92</sup> Accordingly, the Commission has adopted separate rules governing bidding credits for various auctionable services.<sup>93</sup>

40. Discussion. As with installment payments, we believe that our general

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<sup>91</sup> 47 C.F.R. § 1.2110(e)(2)(i).

<sup>92</sup> 47 C.F.R. § 1.1110(f).

<sup>93</sup> *See, e.g.* 47 C.F.R § 24.712.