competitive bidding rules should be amended so that the levels of available bidding credits are defined, and are uniform for all auctionable services. We believe such an approach will be beneficial because potential bidders will have more information well in advance of the auction than they currently do about how such levels will be set.[94] We believe that, once a small business definition is adopted for a particular service, eligible businesses should be able to refer to our Part 1 rules to determine the level of bidding credit available to them. The following schedule is a possible approach to implementing this concept.

Average Annual Gross Revenues	Bidding Credits
Not to exceed $3 million	25%
Not to exceed $15 million	15%
Not to exceed $40 million	10%

We recognize that these credits may differ from those previously adopted for specific services.[95] Based on our past auction experience, however, we believe that the approach taken here would provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions. In addition, we believe that providing slightly less generous bidding credits for larger businesses (*e.g.*, those businesses with gross revenues not exceeding $40 million) would more specifically tailor the amount of the credit to the needs of the particular applicant. We seek comment on this schedule, and we also ask interested parties to suggest alternatives. For example, does the demand for capital to implement certain services justify including businesses with average annual gross revenues exceeding $40 million on this schedule? We recognize that we have suggested that it might be appropriate in some cases to provide larger bidding credits in lieu of installment payments.[96] We are aware that in developing their auction strategy, bidders make calculations about the net present value of their bids and factor in their ability to obtain financing. Therefore, the same net effect can be achieved by giving either higher bidding credits or more generous installment payment terms. If we limited the use of installment payments, how should that action affect levels of bidding credits?

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[94] *See supra* at ¶ 36-38.

[95] For instance, a business with average gross revenues of not more than $3 million in the 900 MHz SMR auction received a 15% bidding credit rather than a 25% bidding credit as proposed here. *See* 47 C.F.R. § 90.814(b)(2). In contrast, a business with average gross revenues of not more than $15 million in the broadband PCS F block auction will receive a 25% bidding credit rather than the 15% bidding credit proposed here. *See* 47 C.F.R. § 24.717(b).

[96] *See supra* at ¶ 34.

7. Unjust Enrichment

41. Background. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing installment payments is required to pay the remaining principal balance as a condition of the transfer. No payment is required, however, when the proposed transferee or assignee is qualified to obtain the same installment financing and assumes the applicant's installment payment obligations.[97] Many of our service-specific auction rules include similar provisions.[98] However, some service-specific unjust enrichment provisions for installment payments contain certain variations from the general rule set forth in Part 1. The broadband PCS unjust enrichment rule, for example, specifies that applicants seeking to assign or transfer control of a license to an entity not meeting the eligibility standards for installment payments must pay not only unpaid principal as a condition of Commission approval but also any unpaid interest accrued through the date of assignment or transfer.[99] This rule also provides that if a licensee utilizing installment financing seeks to make any change in its ownership structure that would result in the loss of eligibility for installment payments, it must pay the unpaid principal and accrued interest as a condition of Commission approval of the change.[100] Finally, in recognition of the tiered installment payment plans offered to broadband PCS licensees, the rule provides that if a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan, it must seek Commission approval and adjust its payment plan to reflect its new eligibility status.[101] A licensee, under this rule, may not switch its payment plan to a more favorable plan.

42. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing bidding credits, or proposing to take any other action relating to ownership or control that will result in loss of eligibility for such bidding credits, is required to pay the sum of the amount of the bidding credit plus interest as a condition of FCC approval.[102] Under our broadband PCS rules, if, within the original term, a licensee applies to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify must be paid to the United

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[97] 47 C.F.R. § 1.2111(c).

[98] *See, e.g.*, 47 C.F.R. § 90.812(b) (900 MHz SMR).

[99] 47 C.F.R. § 24.716(c)(1).

[100] 47 C.F.R. § 24.716(c)(2).

[101] 47 C.F.R. § 24.716(c)(3).

[102] 47 C.F.R. § 1.2111(d).

States Treasury as a condition of approval of the assignment or transfer.[103]

43. Discussion. We propose to amend our general unjust enrichment rules to conform them to our broadband PCS rules. We believe that these rules are preferable to our current general unjust enrichment rules because they provide greater specificity about funds due at the time of transfer or assignment and specifically address changes in ownership that would result in loss of eligibility for installment payments, which the current general rules do not address. The broadband PCS rules also address assignments and transfers between entities qualifying for different tiers of installment payments or bidding credits, thus supplying clearer guidance for auctions in which tiered installment payment plans or bidding credits are provided. We seek comment on this proposal. Further, we seek comment on whether we should adopt an unjust enrichment provision that provides a scale of decreasing payment liability based on the number of years a license is held as we have recently done for other services.[104] For example, should we adopt a rule that provides that a business that holds a license that it obtained with a bidding credit must pay back 60 percent of its bidding credit if it transfers the license after five years; 50 percent after eight years; 40 percent after nine years; and 20 percent after ten years? We also solicit comment on unjust enrichment rules as they apply to partitioning and disaggregation.[105] If we decide to adopt partitioning and disaggregation for various services, how should the unjust enrichment rules apply when the partitioner or disaggregator is the recipient of a bidding credit or is paying on an installment payment plan? Should we adopt for all auctionable services the same provisions that we adopted for broadband PCS?[106]

C. Application Issues

1. Electronic Filing

44. Background. In recent auctions, we have allowed applicants to file their applications either manually or electronically. Required exhibits to short-form and long-form applications that were filed manually must be submitted on a 3.5 inch diskette in ASCII text (.txt) format. Only applicants in these auctions that have filed their short-form applications electronically have been allowed to bid electronically from remote locations. Those filing manually have been permitted to bid only telephonically.

45. Discussion. We believe that requiring all applications to be filed electronically is

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[103] 47 C.F.R. §§ 24.712(b)(2), 24.717(c)(2).

[104] *See, e.g.*, 47 C.F.R. § 27.209(d)(2) (Wireless Communications Service ("WCS")).

[105] *See* Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, *Report and Order*, 11 FCC Rcd 10187 at 10197, ¶¶ 16-17 (1996).

[106] *Id.*

in the best interest of auction participants as well as members of the public interested in monitoring Commission auctions. The Commission has developed user-friendly electronic filing software and Internet World Wide Web forms to give auction applicants the ability to conveniently file and review applications.[107] This software helps applicants ensure the accuracy of their applications as they are filling them out, and enables them to correct errors and omissions prior to submitting their applications. To assist the public, we provide technical support personnel to answer questions and work with callers installing software and using the electronic auction system. Electronic filing also promotes access to applications by competing bidders as well as the general public by making it possible to review and download applications without travelling to FCC headquarters or arranging with a contractor for photocopying of paper applications. We note that in the recently completed broadband PCS D, E, and F block auction 94 percent (135 of 153) of the qualified bidders filed their short-form applications electronically.[108]

46. We therefore tentatively conclude to amend Sections 1.2105(a) and 1.2107(c) of our rules to require that all short-form and long-form applications be filed electronically beginning January 1, 1998.[109] We recognize that there is a need for a period of time before a comprehensive electronic filing requirement becomes effective in order for bidders to prepare and be completely comfortable with this process. We believe that the effective date proposed here will provide potential bidders with adequate time in which to adapt to electronic filing requirements. We note that a phase-in period is similar to the approach taken by the Securities and Exchange Commission when it eliminated paper financial filings.[110] We seek comment on this tentative conclusion.

2. Short-form Application Amendments

47. Background. Section 1.2105(b) of our rules addresses modifications and

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[107] We assess no fee for filing applications electronically but do charge $2.30 a minute for reviewing or downloading applications of other parties on line. *See* Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, Online Communications Service Charges and Bidder's Information Packages in Connection with Auctionable Services, *Report and Order*, No. 95-308, 60 Fed. Reg. 38276 (July 26, 1995). The public can also download other auctions related documents for no charge from the FCC internet site (\http\www.fcc.gov).

[108] We also note that in response to our recent *Notice of Inquiry* regarding improving the Commission's processes, commenters were in favor of electronic filing. Improving the Commission's Processes, *Notice of Inquiry*, PP Docket No. 96-17, FCC 96-50 (released Feb. 14, 1996). They cited as their reasons ease of filing, increased accuracy, and greater access to the Commission by individuals located outside of Washington. Commenters also praised the FCC's electronic filing system because it eliminates the necessity of having to carry large documents to the Commission. *See, e.g.*, Comments of GTE at 18.

[109] 47 C.F.R. §§ 1.2105(a) and 1.2107(c).

[110] *See* 17 C.F.R. § 232.902(a).

amendments to FCC Form 175. Specifically, Section 1.2105(b)(2) provides that bidders may make minor changes or correct minor errors in the FCC Form 175 application, but major amendments may not be submitted after the initial application deadline.[111] This section further provides that the Commission will classify all amendments as major or minor pursuant to service-specific rules.

48. Discussion. We propose to amend our general auction rules to define major amendments to FCC Form 175 uniformly for all auctionable services. We propose at a minimum to consider any change in ownership that constitutes a change in control to be a major amendment. We also propose to consider application amendments that show a change in an applicant's size which would affect its eligibility for small business provisions to be a major amendment.[112] We also seek comment on which other kinds of changes should be deemed major, and which should be deemed minor. For example, how should we treat changes to the licenses selected in simultaneous multiple round auctions? In previous auctions, applicants have claimed that they made mistakes in their license selection and have requested that the Commission allow them to add or delete license selections during the resubmission period. While the Commission has generally refused to grant these requests in order to prevent collusive conduct or gaming that would reduce the competitiveness of the auction, there may be some circumstances in which the competitiveness of the auction might be enhanced by allowing applicants to add licenses to their FCC Form 175 applications. We therefore ask commenters to consider whether an amendment to add licenses should be permissible as a minor amendment. If so, we also ask whether such an amendment should be permitted only until the deadline for submitting upfront payments, because after that point the risks of gaming in the auction increase due to the availability of information concerning each bidder's eligibility. For example, should an applicant be permitted to add a license designation to its short-form application only if that license already has been designated by two or more applicants? We seek comment on each of these proposals.

3. Ownership Disclosure Requirements

49. Background. Currently, our general competitive bidding rules do not set forth any ownership disclosure requirements for auction applicants on their short-form applications. Our service-specific rules, however, require varying degrees of specific ownership information from applicants. For example, in the 900 MHz SMR auction, applicants claiming small business status were required to disclose on their short-form application the names of each

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[111] 47 C.F.R. § 1.2105(b).

[112] For example, if Company A, an applicant that qualified for special provisions as a small business, merges with Company B during the course of an auction, and if, as a result of this merger, the merged company would not qualify as a small business, the amendment reflecting the change in ownership of Company A would be considered a major amendment. Treatment of such an ownership change as a minor amendment would enable the new entity to receive small business bidding credits and installment payments when it does not qualify for them.

affiliate and a gross revenues calculation. On their long-form application, they were required to disclose an additional gross revenues calculation, any agreements that support small business status, and any investor protection agreements.[113]

50. Both our narrowband PCS and broadband PCS rules require detailed ownership disclosure from all auction applicants that differ from each other and from the 900 MHz SMR requirement. Rules for narrowband and broadband PCS also state additional requirements for applicants claiming designated entity status. On both the short- and long-form applications for narrowband PCS, applicants must submit a list of (1) any business five percent or more whose stock, warrants, options, or debt securities are owned by the applicant, (2) any business which holds a five percent or more interest in the applicant or any business in which a five percent or more interest is held by another company which holds a five percent interest in the applicant, (3) entities holding a five percent or more interest in the applicant, and (4) partners in a partnership.[114] Short-form applicants claiming designated entity status also are required to list all control group members and provide a calculation of gross revenues and personal net worth.[115] Although the broadband PCS requirements are very similar to those for narrowband PCS, we have recently amended the broadband PCS application requirements to make them less burdensome on applicants. Thus, broadband PCS applicants are required to disclose on both short-form and long-form applications a list of (1) any business, holding or applying for CMRS or PMRS licenses, five percent or more of whose stock, warrants, options or debt securities are owned by the applicant, (2) any party which holds a five percent or more interest in the applicant, or any entity holding or applying for CMRS or PMRS licenses in which a five percent or more interest is held by another party which holds a five percent or more interest in the applicant, (3) any person holding five percent or more of each class of stock, warrants, options, or debt securities, and (4) in the case of partnerships, the name and address of each partner.[116] Broadband PCS applicants that claim designated entity status must also identify control group members and provide net asset and gross revenues figures.[117] This information was necessary at the short-form stage for the C and F blocks because participation in these blocks was limited to entities below a net asset and gross revenue threshold.

51. Discussion. We continue to believe that detailed ownership information is necessary to ensure that applicants claiming designated entity status in fact qualify for such status, and to ensure compliance with spectrum caps and other ownership limits. Disclosure of ownership information also aids bidders by providing them with information about their auction competitors and alerting them to entities subject to our anti-collusion rules. A

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[113] 47 C.F.R. § 90.815(b).

[114] 47 C.F.R. § 24.413(a)(1)-(4).

[115] 47 C.F.R. § 24.309(c).

[116] 47 C.F.R. § 24.813.

[117] 47 C.F.R. § 24.709(c).

standard disclosure requirement, however, would avoid the variation and possible inconsistency found in our current service-specific ownership disclosure requirement. Thus, we seek comment on whether we should adopt standard ownership disclosure requirements for all auctionable services that are similar to our current rules for broadband PCS. We also seek comment on what ownership information should be required. Finally, we ask commenters to address whether ownership disclosure should vary depending on whether an applicant is applying for special provisions, such as bidding credits or installment payments.

52. In addition, we also propose to adopt a uniform reporting requirement for all applicants claiming designated entity status. Specifically, we propose to adopt a reporting requirement similar to that in the 900 MHz SMR rules.[118] That rule, unlike the broadband PCS rule, focuses on affiliates and their gross revenues rather than more complex control group equity structures.[119] In keeping with our proposal to adopt the simpler controlling principals and affiliates test, we propose an analogous reporting requirement. Therefore, we propose that applicants claiming small business status be required to disclose on their short-form application the names of each controlling principal and affiliate and gross revenues calculations for each. On their long-form applications, they would be required to disclose any additional gross revenues calculations, any agreements that support small business status, and any investor protection agreements. We seek comment on this proposal.

4. Ownership Disclosure Filings

53. Background. Currently, the Commission's ownership disclosure rules require applicants to file specific ownership information, in conjunction with their FCC Form 175, prior to each auction.[120] Similarly, at the close of each auction, winning bidders are required to file ownership information on each long-form application.[121]

54. Discussion. We believe that by requiring these ownership disclosure filings, we ensure that we receive all the information necessary to evaluate an applicant's qualifications. We note, however, that these requirements could result in duplicative filings. For example, where licenses for a service are offered in a series of blocks, as in the case of broadband PCS, an entity may wish to participate in several auctions. Under our rules, such an entity would

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[118] 900 MHz SMR *Report and Order*; Bidder Information Package for 900 MHz SMR (November 28, 1995).

[119] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Order on Reconsideration and Seventh Report and Order*, PR Docket No. 89-553, PP Docket No. 93-253, GN Docket No. 93-252, 11 FCC Rcd 2639 (1995).

[120] *See* 47 C.F.R. § 1.2105(a)(2). *See also* FCC Form 175 ¶¶ 1-5, 8-10, certification and exhibit requirements [October 1995].

[121] *See* 47 C.F.R. § 1.2107(c) - (d). *See also* FCC Form 600 ¶¶ 1-16, 29-33, and 39 [January 1995].

be required to disclose the same information a number of times.[122] In order to streamline the application procedure at both the short-form and long-form stage, we request comment on whether we should create a central database of licensee and bidder data, which would allow bidders to avoid repeating ownership information in each application in each auction. We tentatively conclude that applicants should be able to file ownership information to apply for the first auction in which they participate and that this information should then be stored in a central database which subsequently would be updated each time applicants participate in another auction. After applying for its first auction, an applicant filing for a subsequent auction would either update the ownership information in the database, or rely on the information in the database and certify that there have been no changes. We believe this approach would benefit auction applicants by reducing the time spent preparing auction applications, and it would benefit the Commission by eliminating the need to review and analyze duplicative filings. We seek comment on this approach to ownership disclosure.

5. Audits

55. Under our broadband PCS rules, we have reserved the right to conduct random audits of applicants and licensees in order to verify information provided regarding their eligibility for certain special provisions.[123] Such entities certify their consent to audits on their short-form applications. We propose to explicitly reserve this right for all auctionable services. We seek comment on this proposal.

D. Payment Issues

1. Refund of Upfront Payments

56. Background. Section 309(j)(8)(C) of the Communications Act as amended by the Telecommunications Act of 1996, requires that any deposits the Commission may require for the qualification of any person to bid in an auction shall be deposited into an interest bearing account.[124] The Communications Act further requires that within 45 days of the auction's conclusion, the deposits of successful bidders shall be paid to the Treasury, the deposits of unsuccessful bidders shall be returned, and all accrued interest shall be transferred to the Telecommunications Development Fund.[125] Prior to the enactment of this provision, auction deposits were submitted to a non-interest bearing account with the Department of Treasury. Bidders who completely withdrew prior to the close of the auction could, upon written request, receive a refund of their upfront payments prior to the close of the auction.

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[122] 47 C.F.R. §§ 24.413, 24.709(c) and 24.813.

[123] 47 C.F.R. § 24.709(d).

[124] 47 U.S.C. § 309(j)(8)(C).

[125] *Id.*

57. Discussion. It is unclear whether Congress intended, by enacting this new law, to require the Commission to change its practice of refunding upfront payments to bidders who withdraw during the course of an auction. We believe that our current practice of returning the upfront payments of bidders who have completely withdrawn prior to the conclusion of competitive bidding is in the public interest as it prevents unnecessary encumbrances on the funds of auction bidders, many of whom may be small businesses, after they have withdrawn from the auction. We seek comment on this practice and whether it is consistent with the Communications Act.

2. Down Payments

a. Levels of Payments

58. Background. We determined in the *Competitive Bidding Second Report and Order* that, upon the conclusion of the auction, a bidder must tender a significant and non-refundable down payment to the Commission over and above its upfront payment in order to provide further assurance that the winning bidder will be able to pay the full amount of its winning bid.[126] We thus required that, within five business days after being notified that it is a high bidder on a particular license, a high bidder must submit to the Commission additional funds as are necessary to bring its total deposits up to 20 percent of its high bid(s).[127]

59. Discussion. In the *Order* accompanying this *Notice*, we modified the due date for down payments to ten business days after the issuance of a Public Notice announcing winning bidders.[128] Also we note that Bureau practice is to mail this Public Notice to winning bidders but that this does not relieve bidders of their obligation to obtain relevant public notices. In this *Notice*, we propose to retain discretion to determine the down payment amount required for each service and delegate authority to the Bureau to announce this amount in a Public Notice to be issued prior to the start of the auction. In exercising this authority, as discussed above, the Bureau will seek input from the public.[129] We continue to believe that a substantial down payment is needed to ensure that licensees have the financial capability to attract the capital necessary to deploy and operate their systems, and to protect against default. We believe that giving the Bureau the discretion to determine the level of down payments for each auction would be the best way to ensure that such levels remain appropriate for developing and evolving industries. We seek comment on this proposal. We also seek comment on whether the level of down payments which we have used in the past should be raised for some services.

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[126] *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2381, ¶¶ 189-92.

[127] 47 C.F.R. § 1.2107(b).

[128] *See supra* at ¶ 14.

[129] *See supra* at ¶ 16.

b. Late Fee

60. Background. Section 1.2109(a) of the Commission's rules provides that auction winners not eligible for installment payments are generally required to make final payment on their license(s) within a certain time following award of the license(s). Section 1.2110(e) of the Commission's rules provides that all winning bidders eligible for installment payments are required to submit a second down payment within a certain time of the license grant. These payment deadlines are announced by public notice when the Commission has granted or is prepared to grant the license(s). Where a winning bidder fails to make its final auction payment for the balance of its winning bid or fails to make the second down payment in a timely manner, it is considered in default on its license(s) and subject to the applicable default payments.[130] In past auctions, there have been cases where a winning bidder applicant missed the applicable second down payment deadline but subsequently made its down payment and filed a request seeking a waiver of the deadline. In some of these cases, the Bureau granted the waivers, subject to payment of a five percent late fee. In granting the waivers, the Bureau recognized the licensee's good faith and ability to pay as evidenced by it timely remittance of all earlier payments and prompt action to cure the delinquency.[131]

61. Discussion. We continue to believe that the strict enforcement of payment deadlines preserves the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications. In this connection, we believe that the *bona fide* ability to pay demonstrated by a timely first down payment is essential to a fair and efficient auction process and, thus, we do not propose to modify our approach of requiring timely submission of first down payments. We nonetheless recognize that applicants may encounter certain difficulties when trying to arrange financing and make substantial payments under strict deadlines. In circumstances which may warrant favorable consideration of a waiver request or an extension of the payment date, we must also evaluate the fairness to other licensees who made their payment in a timely fashion. Accordingly, we propose to allow winning bidders to make their final payments or second down payments within a short period after the applicable deadline, provided that they also pay a late fee. We believe that, by committing substantial capital to their license acquisition in the form of an initial down payment, winning bidders have demonstrated a *bona fide* interest in becoming a licensee, but have also incurred a substantial debt to the federal government. We, therefore, seek comment on the appropriate time period to allow late second down payments and final payments. We believe that the late payment period should be short (*e.g.*, no longer than 10 business days). We tentatively conclude that, if a winning bidder misses the final payment or second down payment deadline and also fails to remit the required payment (plus the applicable late fee) by

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[130] 47 C.F.R. §§ 1.2104(g), 1.2107(c).

[131] *See, e.g.*, In the Matter of Roberts-Roberts & Associates, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets, DA 97-252, Released February 4, 1997; In the Matter of Longstreet Communications International, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market B012, DA 97-251, Released February 4, 1997.

the end of the late payment period, it would be declared in default and subject to the applicable default payments. We seek comment on this tentative conclusion.

62. Additionally, we seek comment on the appropriate fee to impose for late payment. Because we believe that the late payment fee should be large enough to deter winning bidders from making late payments and yet small enough so as not to be punitive, we tentatively conclude that a late payment of five percent of the amount due is consistent with general commercial practice and provides some recompense to the federal government for the delay and administrative or other costs incurred.[132] We seek comment on this proposal and ask that commenters proposing alternative late payment fee(s) provide a rationale for the alternative fee amount(s).

63. This proposal to allow late payments is limited to payments owed by winning bidders that have had their licenses conditionally granted or where the license grant is imminent. As indicated above, we do not propose to adopt a late payment period for initial down payments that are due soon after the close of the auction. We believe it is reasonable to expect that winning bidders timely remit their initial down payments, given that is their first opportunity to demonstrate to the Commission their ability to make payments towards the licenses of interest to them. Further, if a winning bidder defaults on its initial down payment on a license, the Commission can take action under Section 1.2109(b) relatively soon after the auction has closed, by, for example, re-auctioning the license or offering it to the other highest bidders (in descending order) at their final bids. Similarly, we do not propose to allow any late submission of upfront payments. Allowing late submission of upfront payments would slow down the licensing process by delaying the start of an auction.

c. Second Down Payments

64. Background. Under our current rules, winning bidders that are designated entities are not required to pay their second down payment until petitions to deny filed against them are dismissed or denied. In the interim, designated entity winning bidders for the same auction with no petitions filed against them are required to submit their second down payments earlier because their licenses are ready for grant.

65. Discussion. We seek comment on whether we should require all designated entities that win licenses to make their second down payments at the same time. If so, one way to implement this would be for winning bidders who have petitions to deny pending against them to submit their second down payments to the Commission to be deposited into an escrow account. If the petitions to deny are granted, the bidder would be refunded the amount of the second down payment subject to any default payments owed the Commission. If the petitions to deny are dismissed or denied, the funds would be transferred from the escrow account and applied to the balance owed by the licensee. This procedure would have

[132] *See, e.g.*, Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

the effect of ensuring that all designated entities pay their down payments in a uniform fashion, thus, reducing any potential inequities that could result from differing payment dates. It would also avoid requiring a bidder with petitioned and non-petitioned licenses to make several payments to the Commission. We seek comment, however, on whether this procedure would affect the ability of bidders that are subject to petitions to deny to access capital to make their down payments. We also seek comment on whether all non-designated entities should be required to make payment in full at the same time for the same reasons discussed in connection with designated entities.

3. Default Payments

66. Background. Section 1.2104(g) of our rules provides that when a bidder withdraws, defaults, or is otherwise disqualified from a simultaneous multiple round auction, upfront and/or down payment amounts that the bidder has on deposit with the Commission will be applied first to the bid withdrawal and default payments owed the Commission.[133] This rule has been interpreted to encompass upfront and/or down payment funds a bidder has

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[133] *See* 47 C.F.R. §§ 1.2104 (g)(2); 1.2106(d),(e); 1.2107(b). Specifically, Section 1.2106(e) states:

(e) In accordance with the provisions of paragraph (d), in the event a penalty is assessed pursuant to § 1.2104 for bid withdrawal or default, upfront payments or down payments *on deposit with the Commission* will be used to satisfy the bid withdrawal or default penalty before being applied toward *any* additional payment obligations that the high bidder may have.

Section 1.2106(d), cross-referenced above, states:

(d) The upfront payment(s) of a bidder will be credited toward any down payment required for licenses on which the bidder is the high bidder. Where the upfront payment amount exceeds the required deposit of a winning bidder, the Commission may refund the excess amount *after determining that no bid withdrawal penalties are owed by that bidder.*

Section 1.2104, also cross-referenced above, at paragraph (g)(2) states:

If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in subsection (1) plus an additional penalty equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty 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.

Finally, Section 1.2107(b) talks of applying upfront and down payments to satisfy penalties. *See* §§ 1.2107(b) ("a high bidder must submit to the Commission's lockbox bank such additional funds (the 'down payment') as are necessary to bring its total deposits (*not including upfront payments applied to satisfy penalties*) up to twenty (20) percent of its high bid(s). . . . Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, *less applicable penalties*.").

on deposit for licenses won at the same auction.[134]

67. Discussion. We propose to delete the language "simultaneous multiple round" from Section 1.2104(g) of our rules because we believe that it should apply to other auction designs with equal force as it does to a simultaneous multiple round auction. We believe strict rules regarding default payments will discourage insincere bidding, maintain the integrity of the auction and ensure that licenses end up in the hands of those parties that value them the most and have the financial capacity to provide service. We seek comment on this proposal.

68. In the *Competitive Bidding Fifth Report and Order*, the Commission provided that, where the default payment cannot be determined at the time of default by a broadband PCS licensee (*e.g.* because the license has not yet been reauctioned), the Commission can obtain a deposit on the default payment to be held on deposit until such time as the final default obligation can be determined. This deposit is held by the Commission until the final default payment can be established and is paid.[135] The purpose of this provision is to maintain the integrity of the auction by discouraging defaults on the part of bidders, encouraging bidders to make secondary or back-up financial arrangements, and ensuring that default payments are made in a timely manner. We propose to modify our rules to provide for a similar default deposit for all auctionable services of at least three percent (3%) of the defaulted bid amount.[136] We seek comment on this proposal.

4. Installment Payments

a. Late Payments

69. Background. For the broadband PCS F block auction, we amended the terms of the installment payment plans to provide for late payment fees. Thus, when licensees are late in their scheduled installment payments, the Commission will charge a late payment fee equal to five percent (5%) of the amount of the past due payment.[137] We instituted this fee because we concluded that, without it, licensees may not have adequate financial incentives to make installment payments on time and may attempt to maximize their cash flow at the

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[134] *Public Notice*, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481, April 6, 1996. *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2382 ¶ 195. *See also*, In the Matter of CH PCS, Inc, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, DA 96-1273 (rel. August 9, 1996.)

[135] *See D, E, F Block Report and Order*, 11 FCC Rcd at 7860-61, ¶ 78; *Second Memorandum and Order, Third Notice of Proposed Rulemaking*, 11 FCC Rcd at 2860, ¶ 108.

[136] *See* C. H. PCS, Inc., BTA No. B347 Frequency Block C, *Order*, DA 96-1825 (rel. November 4, 1996).

[137] 47 C.F.R. § 24.716(c).

government's expense by paying late.[138]

70. Discussion. We seek comment on whether we should adopt, for all auctionable services, a late payment fee on any installment payment that is overdue. The late fee could be set, for example, at a rate that is equal to five percent (5%) of the overdue payment. Thus, if a $50,000 payment were due on June 30, an additional $2,500 late payment fee would be due on July 1. Such payment would accrue on the next business day following the payment due date and would be payable with the next quarterly installment payment obligation. This fee would be assessed for each quarterly payment submitted late. Payments would be applied in the following order: late charges, interest charges, principal payments. Thus, a licensee who makes payment after the due date but does not make payment sufficient to pay the late fee, interest, and principal, will be deemed to have failed to make full payment and will be subject to license cancellation pursuant to the Commission's rules. We tentatively conclude that such a late payment provision is necessary to ensure that licensees have an adequate financial incentive to make installment payments on time. We seek comment on this tentative conclusion. We note that licensees would continue to have 90 days before a payment is deemed delinquent but a late payment fee would be assessed during this period.

b. Grace Periods

71. Background. Section 1.2110(e)(4)(ii) of the Commission's rules provides that interest that accrues during a grace period will be amortized over the remaining term of the license.[139] Amortizing interest in this way has the effect of changing the amount of all future payments and requiring the Commission, or its designee, to generate a new payment schedule for the license. Changing the amount of the installment payment has, in turn, created uncertainty about the interest schedule, and increased the administrative burden by requiring formulation of a new amortization schedule.

72. Section 1.2110(e)(4)(ii) also states that in considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. Under this rule, licensees are required to come before the Commission with a filing as well as financial information such as an income statement or balance sheet, in the case of financial distress, to provide the necessary information for the Commission to make its ruling. Licensees are then required to wait for a ruling by the Commission before knowing whether a grace period has been granted or denied. This could place licensees in a position of uncertainty if they are seeking to restructure other

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[138] *D. E. F Block Report and Order*, 11 FCC Rcd at 7846, ¶ 48.

[139] 47 C.F.R. § 1.2110(e)(4)(ii).

debt contingent upon the results of the Commission's grace period ruling.

73. Discussion. In order to avoid the potential problems associated with changing the amount of installment payments, we propose to amend Section 1.2110(e)(4)(ii) to require all current licensees who avail themselves of the grace period to pay all fees, all interest accrued during the grace period, and the appropriate scheduled payment with the first payment made following the conclusion of the grace period. We seek comment on this proposal.

74. Further, to simplify the grace period procedures, we propose to revise the method by which grace periods are provided. The Commission or its designee may not have the necessary resources to evaluate a licensee's financial condition, business plans, and capital structure proposals. Therefore, instead of considering grace period requests, we could institute the following system: if a licensee did not make payment on an installment obligation within 90 days of its due date, then the licensee would automatically receive an additional 90 days to make that payment contingent upon receipt of the 5 percent late payment fee proposed above[140] plus an additional late payment fee of 10 percent. The late payment fee that we propose here is greater than the 5 percent late payment fee that we propose for non-grace-period late installment payments because we envision the grace period as an extraordinary remedy and wish to encourage licensee to seek private market solutions to their capital problems before the payment due date or, at a minimum, within 90 days of the due date. Under this proposal licensees would not be required to submit a filing to receive a grace period; however, licensees would be expected to resume payments after the 90 day grace period is over. This approach would also be consistent with the standard commercial practice[141] of establishing late payment fees and developing financial incentives for licensees to resolve capital issues before payment due dates. Payments from the licensee would be applied to late fees, interest, and principal, in that order. Any licensee that did not make full payment of all amounts, including a total late payment fee of 15 percent, within 180 days of the payment due date would have its license automatically cancelled as provided in Section 1.2110(e)(4)(ii). We seek comment on this method of providing for an automatic grace period.

c. Default on Installment Payments

75. Background. We also seek comment on whether licensees that default on installment payment obligations should be subject to the default payment provisions outlined in Section 1.2104(g), *i.e.*, the difference between the defaulting winner's bid and the subsequent winning bid plus 3 percent of the lesser of these amounts. Sections 1.2110(e)(1) and 1.2110(e)(2) provide that applicants eligible for installment payments will be liable for

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[140] *See supra* at ¶ 70.

[141] *See, e.g.*, Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

such a payment if they fail to remit either their initial or final down payment.[142] Section 1.2110(e)(4)(iii) provides that following the expiration of any grace period without successful resumption of payment, or upon denial of a grace period request, or upon default with no such request submitted, the license of an entity paying on an installment basis will be cancelled automatically.[143] This section does not state, however, that under these circumstances the licensee will be liable for the default payment set forth in Section 1.2104(g).

76. Furthermore, we have been asked to address the issue of cross default in the context of installment payments.[144] A cross-default provision would specify that if a licensee defaults on one installment payment loan, it would also default on any other installment payment loans it holds. These provision are standard in credit-related agreements.[145]

77. Discussion. We tentatively conclude that a licensee that makes the necessary down payments but defaults on installment payments should not be exempt from the default payment provisions of Section 1.2104(g). Licensees that default at any point in the auction process, either before licenses are issued or during the installment payment period, reduce the efficiency of the licensing process. A default, regardless of when it occurs, makes it necessary for the Commission to incur the costs of reauctioning the license, and the default delays the deployment or continuation of service in the affected market. We believe that imposing the default payment of Section 1.2104(g) on all defaulting licensees would serve to discourage defaults and encourage licensees to find private market solutions for default situations in addition to covering the cost the government must incur to reauction the license. We seek comment on this tentative conclusion and on the appropriate method for calculating default payments when defaults occur during the license term.

78. We seek comment on whether the Commission should cross default its installment payment plan loans with other installment payment plan loans to the same licensee. If adopted, should a cross default provision apply across services? For example, if a licensee, with both SMR and broadband PCS licenses, defaults on one of its PCS licenses, should the Commission consider pursuing default remedies against all PCS and SMR licenses? Instead, should we pursue default remedies against the single license only? What factors should influence our decision to pursue cross-defaults? Should cross-defaults be applied automatically or on a case-by-case basis? We also seek comment, in general, on what remedies are appropriate when licensees default.

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[142] 47 C.F.R. §§ 1.1220(e)(i) and 1.2110(e)(2).

[143] 47 C.F.R.§ 1.2110(e)(4)(iii).

[144] *See. e.g.*, Letter to Michele C. Farquhar from Jay P. Urwitz, August 2, 1996.

[145] *See* Stephen R. Kruft *Cross-Default Provisions in Financing and Derivatives Transactions*, 113 Banking L.J. 216 (1996).

E. Competitive Bidding Design, Procedure, and Timing Issues

1. "Real time" Bidding

79. Background. Congress has directed the Commission to "design and test multiple alternative methodologies for auction designs."[146] In the *Order* accompanying this *Notice*, we amend our general auction rules to specify a menu of auction designs that we can choose from.[147] These designs include: (1) simultaneous multiple round auctions, using remote and/or on-site electronic bidding; (2) sequential multiple round auctions, using either oral ascending or remote or on-site electronic bidding; and (3) sequential or simultaneous single round auctions, using either remote or on-site electronic bidding, or sealed bids. The simultaneous multiple round auction methodology with discrete rounds has been used in most auctions thus far because it provides bidders with valuable information regarding the value others place on licenses and allows bidders to pursue backup strategies as more information becomes available during the auction. The Commission is interested in reducing the length of the auction without sacrificing the economic efficiency of the assignment process.

80. Discussion. We seek comment, in general, on how we can speed our auctions (and in particular our simultaneous multiple round auctions). For example, how could our current procedural rules for simultaneous multiple round auctions be modified to meet this objective, or what new designs might be used to efficiently allocate numerous licenses?

81. We believe that one way complex auctions of multiple licenses could proceed more quickly would be to modify our current simultaneous multiple round auction to allow bidding on a continuous basis within a combined bid submission/bid withdrawal period. This would give bidders immediate feedback on new high bids, withdrawn high bids and minimum accepted bids, and provide them with the opportunity to move the auction along more quickly. Under the current simultaneous multiple round auction rules, each round of bidding contains a discrete bid submission period and a bid withdrawal period. The rules permit bidders to place bids once within the submission period of the round on licenses that they are eligible to bid on, and they may withdraw high bids only during the bid withdrawal period. This requires bidders to wait until the end of the round to determine their status. An open, continuous bidding round -- in which bidders would know when their bid has been exceeded and would be free to bid again -- could reduce the delay inherent in our current design. Therefore, we propose to amend our general rules to provide for such "real time" bidding as another design feature for electronic multiple round auctions.

82. We recognize, however, that it may be difficult for bidders to react quickly enough to ensure that in each bidding round they make new high bids on the necessary

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[146] 47 U.S.C. § 309(j)(3).

[147] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373, ¶¶ 146-153.

percentage of their bidding eligibility to meet their activity requirement.[148] Therefore, we propose that after each fixed period of real time bidding (when only standing high bids from the previous round and new high bids from the current round count in determining the bidder's activity level) we would open a discrete closed bidding period, when bidders would be able to submit valid bids (bids that meet or exceed the minimum accepted bid) at the end of the "real time" bidding to ensure that they have the opportunity to meet their activity requirements for the round. Following the discrete closed bidding period, the Commission would post the final round results for the period and make all bids available to the public. By allowing a discrete period of time for bidders to make valid bids at the end of the round, we would reduce the risks associated with real time electronic bidding.

83. Because "real time" auctions are a variation of the simultaneous multiple round auction design established in our rules, we tentatively conclude that many of the same procedures should apply.[149] These include: upfront payments to determine eligibility, activity requirements that apply to each round, minimum bid increments, and a stopping rule. However, we believe that separate rules would be required on certain issues. We seek comment on issues that arise when the bid submission and bid withdrawal periods are combined, such as how withdrawn bids should be treated when calculating current activity. For example, whether a bid that is placed and withdrawn in one round should count as activity, and whether a withdrawn bid will negate the status of that bid as activity in the current round as well as the status as standing high bid.

84. In addition, we seek comment on the appropriate length for the real time bidding rounds. We seek comment on what measures we can take to assure bidders that they will have enough time to determine their bidding strategies with "real time" bidding. In particular, we seek comment on the impact of "real time" bidding on small businesses, generally, and particularly on their ability to process bid information during the course of a single round.

2. Minimum Opening Bids

85. Background. Currently, Section 1.2104(d) of our rules states that the Commission may establish *suggested* minimum opening bids.[150] In the *Competitive Bidding Second Report and Order*, we noted that if only two or three applicants applied to bid for a valuable license, the Commission might set a reservation price.[151] A reservation price is a price below which a

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[148] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd 2371, ¶¶ 133-37 (1994), for an explanation and description of the Commission's activity rules.

[149] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2367-68, ¶¶ 116-21 (1994). *See also Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532, ¶¶ 24-26.

[150] 47 C.F.R. § 1.2104(d).

[151] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2384, ¶ 207.

license subject to auction will not be awarded.[152] We provided the option of setting a reservation price in order to prevent a license from being awarded under circumstances where there would be little competition among bidders and significant incentives to collude.[153]

86. Discussion. We propose to amend Section 1.2104 to specify that the Commission may establish minimum opening bids, rather than suggested minimum opening bids. Such a rule has been adopted in service-specific rules.[154] We propose to amend our general competitive bidding rules to allow us to establish a minimum opening bid because we believe that a minimum opening bid can serve some of the same purposes as a reservation price. A minimum opening bid increases the likelihood that the public receives fair market value for the spectrum being auctioned and can also help an auction move more swiftly. We seek comment on this proposal.

3. Maximum Bid Increments

87 Background. A bid increment is the amount or percentage by which a bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round.[155] We determined in the *Competitive Bidding Second Report and Order* that the Commission would reserve the right to specify minimum bid increments in dollar terms as well as in percentage terms. We reasoned that imposing a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction comes to closure within a reasonable period of time.[156] We did not reserve the discretion to specify maximum bid increments.

88. Discussion. Whereas the minimum bid increment speeds the auction process, a maximum bid increment could prevent bidders from placing bids that are significantly higher than the minimum acceptable bid. This type of bidding is known as "jump bidding." Some theoretical literature suggests that bidders could use jump bidding to manipulate the auction process and potentially reduce efficiency of the auction.[157] Jump bidding complicates bidding strategy and denies bidders information about the number of bidders who would be willing to

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[152] 47 C.F.R. § 1.2104(c).

[153] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2384, ¶ 207.

[154] *See, e.g.*, 47 C.F.R. § 101.71 (DBS).

[155] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2369, ¶¶ 124-26.

[156] *Id.*

[157] Lawrence M. Ausubel, "Open-Outcry Auctions for FCC Licenses," Comments for MCI Telecommunications Corp. in IB Docket No. 95-168, PP Docket No. 93-253 (Nov. 17, 1995) (citing Christopher Avery, "Strategic Jump Bidding in English Auctions," Working Paper, Kennedy School of Government, Harvard University, Mar. 15, 1994).

pay prices between the minimum acceptable bid and the jump bid. In the absence of information about the bidders who would be willing to participate at intermediate bids, other bidders might feel compelled to shade their bids more than they otherwise would. This behavior is an attempt to avoid the "winner's curse," -- the phenomenon of a bidder winning only because he or she has overestimated the value of the license. A general principle of auction theory has it that the auction mechanisms which perform the best are those which are able to induce bidders to reveal the most information. To the extent that jump bids enable bidders to conceal information, the phenomenon moves us away from the informational advantages of an ascending bid (multiple round) auction in the direction of a first-price sealed bid (single round) auction. We seek comment on whether the Commission should retain the discretion to employ a maximum bid increment if it finds that jump bidding is impairing the auction process.

4. Bid Withdrawal Payments

89. Background. Under our current rules, if a high bid is withdrawn prior to the close of a simultaneous multiple round auction, the Commission will impose a payment equal to the difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. If a winning bidder defaults after the close of an auction, the defaulting bidder will be required to pay the foregoing payment plus an additional payment of 3 percent of the subsequent winning bid or its own withdrawn bid, whichever is lower.[158]

90. To help bidders avoid mistaken bids that could expose them to liability for bid withdrawal payments, the Commission has enhanced its electronic bidding software. The software now displays a warning screen to bidders when they try to place a bid that is far in excess of the minimum accepted bid. Bidders must affirmatively override this mistaken bid warning if they wish to place the bid. For example, if the minimum accepted bid for a license is $10,000, an excessive bid warning will appear if a bidder attempts to place a bid of $100,000 or more.

91. Discussion. When we adopted our provisions governing bid withdrawals, we determined that these rules would discourage insincere bidding without causing bidders to be too cautious in attempting to aggregate licenses.[159] We have also recently addressed the issue of how our bid withdrawal payment rules apply to bids that are mistakenly placed and

[158] 47 C.F.R. § 1.2104(g).

[159] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-74, ¶¶ 146-153.

subsequently withdrawn.[160] In *Atlanta Trunking*, we stated that, while we believe that in some cases full application of the bid withdrawal payment provisions could impose an extreme and unnecessary hardship on bidders, it may be extremely difficult for the Commission to distinguish between "honest" erroneous bids and "strategic" erroneous bids. We held that in cases of erroneous bids, some relief from the bid withdrawal payment requirement appears necessary. Thus, we waived our bid withdrawal rules as they apply to 900 MHz SMR and broadband PCS and applied the following guidelines: If at any point during an auction a mistaken bid is withdrawn in the same round in which it was submitted, the bid withdrawal payment should be the greater of (a) the minimum bid increment for that license and round, or (b) the standard bid withdrawal payment calculated as if the bidder had made a bid at the minimum accepted bid. If a mistaken bid is withdrawn in the round immediately following the round in which it was submitted, and the auction is in Stage I or Stage II, the withdrawal payment should be the greater of (a) two times the minimum bid increment during the round in which the mistaken bid was submitted or (b) the standard withdrawal payment calculated as if the bidder had made a bid at one bid increment above the minimum accepted bid. If the mistaken bid is withdrawn two or more rounds following the round in which it was submitted, the bidder should not be eligible for any reduction in the bid withdrawal payment. Similarly, during Stage III of an auction, if a mistaken bid is not withdrawn during the round in which it was submitted, the bidder should not be eligible for any reduction in the bid withdrawal payment.

92. In response to a commenter's request, we recently modified the broadband PCS rules for the D, E, and F blocks to establish provisions governing the withdrawal of erroneous bids.[161] We thus incorporated the guidelines fashioned in *Atlanta Trunking* into these rules.[162] We determined that under this approach, the required bid withdrawal payment would be substantial enough to discourage strategic placement of erroneous bids without being disproportionately punitive. We now propose to change Sections 1.2104 and 1.2109 of our rules such that similar provisions adopted for the broadband PCS D, E, and F block auction will apply to all auctions. We seek comment on this proposal.

5. Misuse of Bid Withdrawals

93. The current auction rules allow a high bidder on a license to withdraw its bid at any point during the auction, subject to a bid withdrawal payment.[163] We have recognized

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[160] *See* Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, *Order*, FCC 96-203 (May 3, 1996) ("*Atlantic Trunking*"), *recon. pending*. *See also* Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, *Order*, DA 96-706 (May 6, 1996), *app. rev. pending*.

[161] *D, E, F Block Report and Order*, 11 FCC Rcd at 7896, ¶¶ 152-54.

[162] *Id.*

[163] 47 C.F.R. § 1.2104(g)

that allowing bid withdrawals facilitates efficient aggregation of licenses and pursuit of efficient backup strategies as information becomes available during the course of an auction. We also are cognizant that allowing withdrawals also risks encouraging insincere bidding and allowing the use of withdrawals for anti-competitive strategic purposes, such as signaling other bidders.[164] To guard against such abuses, the Commission put in place a withdrawal payment equal to the difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. We seek comment on whether we should exercise our authority to limit withdrawals, and if so, under what circumstances. Should we consider limiting the number of withdrawals that a bidder is permitted to make in an auction, the number of rounds in which withdrawals can be made, or the number of withdrawals permitted with respect to a particular license? Are there other ways to address our concern about strategic withdrawals without unduly affecting bidders' ability to efficiently aggregate licenses? For example, should we consider increasing the withdrawal payment or changing its structure?

6. Reauction Versus Offering to Second Highest Bidder

94. Background. Under Section 1.2109(b) of our rules, if a winning bidder withdraws its bid after the auction has closed or fails to remit the required down payment within the requisite period after the Commission has announced high bidders, the bidder will be deemed to have defaulted. This rule also provides that, in such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids.[165] In the *Order* accompanying this *Notice*, we modified the down payment due date to ten business days after the Commission has issued a Public Notice announcing winning bidders, and accordingly adjusted the period within which the Commission has discretion to offer the defaulted license to bidders in the original auction to the same ten-day period.[166]

95. Discussion. When we first adopted rules governing the licensing of defaulted licenses, we stated that "[i]n the event that a winning bidder in a simultaneous multiple round auction defaults on its down payment obligations, the Commission will generally re-auction the license either to existing or new applicants."[167] Noting that in some circumstances the costs of conducting a re-auction may not always be justified, we reserved the discretion in cases in which the winning bidder defaults on its down payment obligation to offer a defaulted license to the highest losing bidders (in descending order of their bids) at their final

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[164] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-74, ¶¶ 146-153.

[165] 47 C.F.R. § 1.2109(b). If a winning bidder defaults on a license or is disqualified after having made the required down payment, the Commission will conduct another auction for the license, affording new parties and opportunity to file applications. *Id.*

[166] *See supra* at ¶ 14.

[167] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2374, ¶ 154 n.115.

bids if "only a small number of relatively low value licenses are to be re-auctioned . . . ."[168]

96. Having now developed a computerized auction system and conducted numerous auctions, we believe that the costs of a re-auction, even for a small number of relatively low value licenses, would be minimal. Use of regularly scheduled quarterly auctions will also ensure rapid reauction. Further, re-offering a defaulted license to the next highest bidder (in descending order) at their final bids may not ensure that the license will be awarded to the bidder that values it the most highly. When more than one license is being auctioned, aggregation strategies may shift during the course of the auction, affecting interest of individual bidders.

97. We ask commenters to address whether the Commission should (1) retain Section 1.2109(b) in its current form, (2) modify the rule so that the Commission retains the discretion regardless of when a default occurs to offer the license only to the second highest bidder at its bid price (3) modify the rule so that the Commission retains discretion to offer a license on which the winning bidder has defaulted on its down payment obligation only to the second highest bidder, (4) modify the rule so that the Commission retains discretion to offer a defaulted license to the highest losing bidders (in descending order of their bids), but only at the final bid level of the second highest bidder, (5) modify the rule to require re-auction of defaulted licenses regardless of when a default occurs. Moreover, we seek comment on whether we should modify the rule to codify our statement in the *Competitive Bidding Fifth Report and Order* that where there are a relatively small number of low value licenses, and only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidder because the cost of conducting another auction may exceed the benefits.[169] Commenters favoring this should indicate the parameters that the Commission should employ in determining which licenses might be re-offered to bidders in the original auction.

F. Rules Prohibiting Collusion

98. Background. We adopted rules to prohibit collusion in the *Competitive Bidding Second Report and Order* because we were concerned that collusive conduct by bidders prior to or during an auction could undermine the competitiveness of the bidding process and prevent the formation of a competitive post-auction market structure.[170] In general, bidders are required to identify on their short-form applications any 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. With certain exceptions, all such arrangements must have been entered into prior to the filing of short-form applications.

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[168] *Id.*

[169] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5537, n. 55.

[170] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2387, ¶ 225.

After such applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders are 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.[171]

99. As our auction process has evolved, we have clarified the rules prohibiting collusion. Early on in the auction process, for example, we established exceptions to the anti-collusion rules in an attempt to allow applicants greater flexibility to form agreements with other applicants and thereby acquire the capital necessary to bid successfully for licenses.[172] Specifically, we amended the anti-collusion rules to permit a holder of a non-controlling attributable interest in an applicant to obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area, provided that the attributable interest holder certifies to the Commission that it has not communicated and will not communicate with the applicant or any one else information concerning the bids or bidding strategies (including which licenses an applicant will or will not bid on) of more than one applicant for licenses in the same geographic area in which it holds an ownership interest or with which it has a consortium arrangement.[173] Additionally, Commission staff has issued public notices and letters that seek to interpret and clarify these rules.[174]

100. Discussion. The exception outlined above was adopted in order to facilitate the flow of capital to applicants by enabling parties to make investments in multiple applicants for licenses in the same geographic license areas.[175] Having gained experience with implementing our anti-collusion rules, we now believe that this exception is difficult to apply in a business setting. Entities are reluctant to invest in multiple applicants if they cannot obtain information about business plans and strategies, which often necessarily reflect bidding strategies or bids.

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[171] 47 C.F.R. § 1.2105(c)(1).

[172] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd 7684 at 7687-89 ¶¶ 8-12 (1994) ("*Collusion MO&O*").

[173] 47 C.F.R. § 1.2105(c)(4). *See also Collusion MO&O*, 9 FCC Rcd at 7688-89, ¶ 11.

[174] *See Public Notice*, "FCC Staff Clarifies Application of Anti-Collusion Rule to Broadband PCS 'C' Block Reauction," DA 96-929 (June 10, 1996); *Public Notice*, "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules, DA 95-2244 (Oct. 26, 1995); *News Release*, "Staff Adopts Order and Releases Letters Clarifying Issues on Broadband PCS Auctions" (Oct. 26, 1994); Letter from William E. Kennard, FCC, to Gary M. Epstein & James H. Barker, Oct. 25, 1994; Letter from Rosalind K. Allen, FCC, to R. Michael Senkowski, Dec. 1, 1994; Letter from Rosalind K. Allen, FCC, to Leonard J. Kennedy, Dec. 14, 1994; Letter from Kathleen O'Brien Ham, FCC, to Mark Grady, Apr. 16, 1996; Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996.

[175] *Collusion MO&O*, 9 FCC Rcd at 7689, ¶ 12.

101. We therefore propose to modify this provision of the anti-collusion rule to permit entities to invest in multiple applicants if the original applicant withdraws from the auction. Under our proposal, a holder of a non-controlling attributable interest in an applicant would be permitted to obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area, provided that the original applicant has dropped out of the auction and is no longer placing bids, and the attributable interest holder certifies to the Commission that it did not communicate with the new applicant prior to the date that the original applicant withdrew from the auction. We believe that this proposal will encourage entities to invest in bidders if their original applicant fails to complete the auction and will give such entities the flexibility needed to do so. Furthermore, we believe that prohibiting any communication with other applicants prior to when the original applicant withdraws from the auction will prevent investors from exerting pressure on smaller bidders to withdraw in exchange for teaming up with other larger bidders. We seek comment on this proposal.

102. In the proceeding involving service-specific auction rules for paging services, several commenters requested that we establish rules that do not have a chilling effect on ongoing business acquisitions and transactions. Under the current rules, they contended, discussions between bidders for the same license area regarding a business merger or acquisition may be construed as discussions of bidding or bidding strategy -- thus violating the anti-collusion rules. They proposed that we grant a "safe harbor" for certain situations, such as in services where there are incumbent operators, permitting ongoing discussions among bidders concerning mergers, acquisitions or intercarrier arrangements to proceed during the period in which the anti-collusion rules are applicable.[176] Some suggested a system in which respective bidder personnel certify that persons involved in such discussions are not discussing bidding strategy or otherwise divulging bidder information to each other in violation of the anti-collusion rules. Absent a showing that a certification is false, necessary discussions in the ordinary course of business would be permitted during the course of the auction. We seek comment on this proposal concerning a safe harbor for discussions of certain non-auction business matters and we seek comment on any other changes to our rules prohibiting collusion they believe are warranted. Finally, we seek comment on the public notices and letters issued by Commission staff seeking to interpret and clarify these rules.

G. Pre-grant Construction

103. Background. In 1989, we adopted rules permitting certain license applicants.

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[176] *See* AirTouch Comments at 37-40 and Arch Comments at 19-20 filed in Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act --Competitive Bidding Second Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-18; PP Docket No. 93-253 (February 24, 1997).. *See also* MobileMedia Comments at 26 and Metrocall Comments at 21-22 filed in the same proceeding.