

(2) Decision

212. AMTA and SMR argue that Phase I licensees should be deemed to have satisfied the extraordinary circumstances criteria for obtaining an STA to the extent that they were unable to modify their licenses due to the freeze that was in existence at the time their comments were filed.⁴⁰⁹ As noted in the *Third Notice*, we have issued a number of STAs to Phase I 220 MHz licensees to operate their base stations at unauthorized locations. We conclude that such STAs should be extended until such time as the applications of such licensees to modify their authorization to relocate their base stations are acted upon by the Commission (*see 220 MHz Second Report and Order*). STAs granted to licensees for any other type of unauthorized operation (*e.g.*, to operate at higher power levels than authorized) shall not be renewed. We conclude further that as of August 10, 1996, all 220 MHz licensees meeting the definition of CMRS are required to seek STAs as common carriers, and that we will apply the standard for granting STAs as prescribed in Section 309(f) of the Communications Act -- *i.e.*, that STAs should be granted to CMRS providers only in "extraordinary circumstances involving particular applications."⁴¹⁰

d. Renewal Expectancy**(1) Proposal**

213. In the *CMRS Third Report and Order*, we decided that every Part 90 licensee that is reclassified and treated as a CMRS carrier when its current license term expires would have a 10-year license term and be afforded a renewal expectancy.⁴¹¹ We also extended our rules for Part 22 services regarding renewal expectancy to all Part 90 CMRS licensees.⁴¹² Specifically, Section 22.940 of our rules provides that a cellular renewal applicant will receive a preference in a comparative renewal proceeding by demonstrating that it: (1) has provided substantial service during the license term; and (2) has complied with applicable Commission rules and policies, and the Act.⁴¹³

⁴⁰⁹ AMTA Comments at 20; SMR Comments at 17-18.

⁴¹⁰ *CMRS Third Report and Order*, 9 FCC Rcd at 8155 (para. 383).

⁴¹¹ *Id.* at 8157 (para. 386).

⁴¹² *CMRS Further Notice*, 9 FCC Rcd at 2892 (paras. 139-140).

⁴¹³ Section 22.940 of the Commission's Rules, 47 C.F.R. § 22.940. Substantial service is defined in the rule as service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal. We noted that although Part 22 does not expressly provide for preferences in the case of non-cellular licensees, we have applied to other Part 22 licensees, by case law, renewal expectancy principles that are similar to the standards applied to cellular licensees. *See CMRS Further Notice*, 9 FCC Rcd at 2892 n.244 (para. 139); (citing, as an example of the case law, *In re Applications of Baker Protective Services, Inc.*, 59 Rad. Reg. 2d 1141 (1986)).

214. In the *Third Notice*, we proposed to apply these provisions to all Phase I and Phase II 220 MHz licensees, rather than only to those providing CMRS services as currently required. We advanced this proposal because: (1) we had proposed a 10-year license term for all Phase II 220 MHz licensees regardless of whether the licensee is CMRS or PMRS; and (2) because the new framework for the 220 MHz service proposed in the *Third Notice* significantly alters the service.⁴¹⁴ We thus believed it was appropriate to apply these more stringent renewal standards to non-CMRS as well as CMRS licensees as part of the overall changes to the 220 MHz framework.

(2) Comments; Decision

215. Pagemart and SMR support the Commission's proposal to provide a renewal expectancy for all Phase I and Phase II 220 MHz licensees that would be consistent with renewal expectancies for other CMRS licensees.⁴¹⁵ We continue to believe that it is appropriate to require all Phase I and Phase II 220 MHz licensees seeking renewal of their authorization to meet the requirements for license renewal similar to those provided in Section 22.940 of our rules. Phase I, non-nationwide licensees will be required to meet these requirements at the end of their 5-year license term; and Phase I nationwide licensees and all Phase II licensees will be required to meet these requirements at the end of their 10-year license term.

E. AUCTION RULES

1. Competitive Bidding Design

a. Proposal

216. In the *Competitive Bidding Second Report and Order*, we found that: (1) licenses with strong value interdependencies should be auctioned simultaneously; and (2) multiple round auctions generally yield more efficient allocations of licenses than single round bidding by providing bidders with information regarding other bidders' valuations of licenses, especially where there is substantial uncertainty as to value.⁴¹⁶ We tentatively concluded in the *Third Notice* that simultaneous multiple round auctions would be appropriate for the Phase II licenses of the 220 MHz service, based on our conclusions in the *Competitive Bidding Second Report and Order* and our auction experience.⁴¹⁷ We also sought comment on any

⁴¹⁴ We indicated, as an example of the changes to the service, our proposal to allow fixed and paging operations on a primary basis for both Phase I and Phase II licensees.

⁴¹⁵ Pagemart Comments at 5, SMR Comments at 17.

⁴¹⁶ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360 (para. 69); *recon. Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) (*Competitive Bidding Second Memorandum Opinion and Order*).

⁴¹⁷ *Third Notice*, 11 FCC Rcd at 243 (para. 111).

alternative bidding designs and their applicability to the 220 MHz service.⁴¹⁸ However, we tentatively concluded that combinatorial bidding, for example, would be unnecessary in most 220 MHz auctions.⁴¹⁹

b. Comments

217. The SMR Advisory Group supports the use of the simultaneous multiple round auction design for all Phase II 220 MHz licenses.⁴²⁰ AMTA, while disagreeing with the Commission's proposal to auction the noncommercial nationwide 220 MHz licenses, otherwise concurs that a simultaneous multiple round auction is an appropriate competitive bidding design for Phase II 220 MHz licenses.⁴²¹ The National Telecommunications and Information Administration (NTIA) urges the Commission to adopt combinatorial bidding for the 220 MHz auction. NTIA contends that this auction design is more efficient because allowing package bidding will result in the award of licenses at their actual value to bidders who value them the highest, will reduce or eliminate the risk for bidders of winning only a part of the package sought, and will likely generate more revenue.⁴²²

c. Decision

218. Based on the record in this proceeding and our successful experience conducting simultaneous multiple round auctions for other CMRS services (*e.g.*, narrowband and broadband PCS and 900 MHz SMR) and the Multipoint Distribution Service (MDS), we conclude that this is the preferable competitive bidding design for all Phase II 220 MHz service licenses. We have developed a computer system capable of handling approximately 1500 licenses in a simultaneous multiple round auction, and it is therefore administratively feasible to use this auction design to award all 220 MHz licenses simultaneously. For certain bidders, these licenses will be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic areas. Simultaneous multiple round bidding will generate more information about license values during the course of the auction and provide bidders with more flexibility to pursue back-up strategies than if the licenses were auctioned separately or through sealed bidding. We also expect the value of these licenses to be sufficiently high to warrant simultaneous multiple round bidding. We currently do not have the operational capability of conducting an auction using combinatorial bidding and therefore will not do so to award 220 MHz licenses. However, we are looking into the possibility of developing this capability for future auctions.

⁴¹⁸ *Id.* at 244 (para. 112).

⁴¹⁹ *Id.* at 244-45 (para. 113).

⁴²⁰ SMR Comments at 19.

⁴²¹ AMTA Comments at 21. *See also* U.S. MobilComm Comments at 6; Roamer Comments at 1-2; Incom Comments at 2.

⁴²² NTIA Reply Comments at 5-6.

2. Bidding Procedures

a. License Grouping

(1) Proposal

219. We proposed in the *Third Notice* to auction the nationwide and Regional licenses in one simultaneous multiple round auction. We stated that grouping the nationwide and Regional licenses together would allow bidders to pursue aggregate bidding strategies.⁴²³ We proposed to auction the EA licenses subsequently in one simultaneous multiple round auction.

(2) Comments

220. The SMR Advisory Group, the sole commenter addressing this issue, supports our proposal to auction the nationwide and regional licenses in a single simultaneous multiple round auction, followed by a simultaneous multiple round auction of the EA licenses.⁴²⁴

(3) Decision

221. After further consideration, we believe that the nationwide, Regional, and EA 220 MHz licenses are all highly interdependent. Grouping interdependent licenses and putting them up for bid at the same time facilitates awarding licenses to bidders who value them most highly by providing bidders with information about the prices of complementary and substitutable licenses during the course of an auction. We therefore plan to hold a single simultaneous multiple round auction for all nationwide, Regional, and EA licenses. We reserve the discretion, however, to auction each of these license groupings (*i.e.*, nationwide, Regional, EA) separately or in different combinations (*e.g.*, nationwide and Regional together) if there are administrative reasons for doing so.

b. Bid Increments and Tie Bids

(1) Proposal

222. A minimum 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 bidding round.⁴²⁵ The application of a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction closes within a reasonable period of time.⁴²⁶

⁴²³ *Third Notice*, 11 FCC Rcd at 246 (para. 116).

⁴²⁴ SMR Comments at 19 n.20.

⁴²⁵ See, *e.g.*, *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2369 (para. 124).

⁴²⁶ *Id.*

223. In the *Third Notice*, we proposed to start the 220 MHz auctions with relatively large minimum bid increments, and to adjust the increments as bidding activity warrants. We stated that it was important when simultaneous multiple round bidding is used, in establishing the amount of the minimum bid increment, to express such an increment as both a percentage and fixed-dollar amount. This ensures a timely completion of the auction even if bidding begins at a very low dollar amount. Accordingly, we suggested a minimum bid increment of five percent of the high bid in a previous round, or \$0.01 per MHz-pop, whichever is greater.⁴²⁷ We also proposed to retain the discretion to vary the minimum bid increments for individual licenses or groups of licenses at any time before or during the course of the auction, based on the number of bidders, bidding activity, and the aggregate high bid amounts.⁴²⁸

(2) Comments

224. Parties commenting on this issue support the establishment of a minimum bid increment.⁴²⁹

(3) Decision

225. The general guidelines for bid increments will be announced by Public Notice prior to the auction. In the case of a tie bid, we will determine the high bidder by the order in which the bids were received by the Commission.⁴³⁰

c. *Stopping Rules*

(1) Proposal

226. In the *Third Notice*, we indicated that, if simultaneous multiple round auctions were used for the Phase II 220 MHz licenses, we preferred using: (1) a simultaneous stopping rule for the nationwide and Regional licenses; and (2) a hybrid stopping rule or a

⁴²⁷ The number of "MHz-pops," or bidding units, is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. 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, 2672 (para. 80 n.159) (1995) (*Competitive Bidding Seventh Report and Order*).

⁴²⁸ *Third Notice*, 11 FCC Rcd at 247 (para. 118).

⁴²⁹ SMR Comments at 20 n.21; AMTA Comments at 21. See also U.S. MobilComm Comments at 6; Roamer Comments at 1-2; Incom Comments at 2.

⁴³⁰ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2369 (para. 125).

market-by-market closing rule for EA licenses.⁴³¹ We proposed to use a simultaneous stopping rule for the EA licenses as well if we determined that a simultaneous stopping rule would be simpler to administer than either a hybrid or a market-by-market stopping rule. Conversely, we proposed using a market-by-market or hybrid stopping rule for the higher value 220 MHz licenses if we concluded that a simultaneous stopping rule is too complex administratively. We proposed announcing by Public Notice before each auction the stopping rule that we would use. In addition, we proposed that if we adopted a simultaneous stopping rule, we would retain the discretion to declare at any point in a simultaneous multiple round auction that the auction would end after one additional round or some other specified number of additional rounds.⁴³²

(2) Comments

227. The SMR Advisory Group notes that our proposal with regard to stopping rules resembles the procedures used in previous auctions and that it therefore seems appropriate for the 220 MHz auction.⁴³³ No other comments on this issue were received.

(3) Decision

228. We will adopt a simultaneous stopping rule for the Phase II 220 MHz service auction, and elect not to employ a hybrid rule or a market-by-market closing rule. Our experience to date demonstrates that the simultaneous stopping rule balances the interests of administrative efficiency and maximum bidder participation. Under a simultaneous stopping rule, bidding will remain open on all licenses in an auction until bidding stops on every license. We conclude that the substitutability between and among licenses in different geographic areas and the importance of preserving bidders' ability to pursue back-up strategies support the use of a simultaneous stopping rule.

229. The Phase II 220 MHz service auction will close after one round passes in which no new valid bids or proactive activity rule waivers (as discussed below) are submitted. We retain the discretion, however, to keep the auction open even if no new acceptable bids and no proactive waivers are submitted in a single round. In the event that we exercise this discretion, the effect will be the same as if a bidder has submitted a proactive waiver. We also retain the discretion to announce market-by-market closings.

230. We further retain the discretion to declare at any point that the auction will end after some specified number of additional rounds. If this option is exercised, bids will be accepted only on licenses where the high bid has increased in the last three rounds. This will deter bidders from continuing to bid on a few low value licenses solely to delay the closing of the auction. It also will enable the Commission to end the auction when it determines that the

⁴³¹ *Third Notice*, 11 FCC Rcd at 248 (para. 120).

⁴³² *Id.* at 249 (para. 121).

⁴³³ SMR Comments at 20 n.21.

benefits of terminating the auction and issuing licenses exceed the likely benefits of continuing to allow bidding.

d. Activity Rules

(1) Proposal

231. In the *Third Notice*, we proposed to employ the Milgrom-Wilson activity rule if simultaneous multiple round auctions were used for the Phase II 220 MHz licenses.⁴³⁴ We proposed a minimum activity level requiring bidders to be active on at least one-third of the MHz-pops for which they are eligible in Stage I, two-thirds of the MHz-pops for which they are eligible in Stage II, and 100 percent of the MHz-pops for which they are eligible in Stage III.⁴³⁵ Finally, to avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission on a particular day, we proposed permitting each bidder to receive a certain number of waivers, to be announced by Public Notice.⁴³⁶

(2) Comments

232. The SMR Advisory Group supports use of the Milgrom-Wilson activity rule for 220 MHz service auctions.⁴³⁷ AMTA likewise favors the Commission's adoption of the same type of activity rules that have proven successful in other auctions.⁴³⁸ In order to increase bidder flexibility, however, NTIA proposes that the activity level for Stage III be reduced from 100 percent to 90 percent.⁴³⁹

(3) Decision

233. We will employ the Milgrom-Wilson activity rule in conjunction with the simultaneous stopping rule in a manner similar to that employed in our prior auctions. Unless a waiver is applied, as discussed below, a bidder's eligibility (in terms of bidding units)⁴⁴⁰ in

⁴³⁴ *Third Notice*, 11 FCC Rcd at 249-51 (paras. 122-124).

⁴³⁵ *Id.* at 250-51 (para. 124).

⁴³⁶ *Id.* at 251-52 (paras. 125-126).

⁴³⁷ SMR Comments at 20 n.21.

⁴³⁸ AMTA Comments at 21. *See also* U.S. MobilComm Comments at 6; Roamer Comments at 1-2; Incom Comments at 2.

⁴³⁹ NTIA Reply Comments at 13-16.

⁴⁴⁰ See note 427, *supra*.

the current round is determined by the bidder's activity level and eligibility in the previous round. In the first round, however, eligibility is determined by the bidder's upfront payment.

234. In each round of Stage I, a bidder that wishes to maintain its current eligibility must be active on licenses encompassing at least 60 percent of the activity units for which it currently is eligible. Failure to maintain the requisite activity level will result in a reduction in the amount of activity units upon which a bidder will be eligible to bid in the next round of bidding (unless an activity rule waiver, as defined below, is used). During Stage I, if bidding activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five thirds ($5/3$). Eligibility for each applicant in the first round of the auction is determined by the amount of the upfront payment received and the licenses identified in its auction application. In each round of Stage II, a bidder that wishes to maintain its current eligibility in the next round is required to be active on at least 80 percent of the activity units for which it is eligible in the current round. During Stage II, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five fourths ($5/4$). In each round of Stage III, a bidder that wishes to maintain its current eligibility must be active on licenses encompassing at least 98 percent of the activity units for which it is eligible in the current round. In Stage III, if activity in the current round is below 98 percent of current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by fifty forty-ninths ($50/49$).

235. We believe that initially establishing required activity at these levels will achieve a proper balance between allowing for bidder flexibility and completing the auction within a reasonable time. We agree with NTIA that requiring a 100 percent level of activity in Stage III may inhibit bidder flexibility and be unduly restrictive. In addition, activity levels of 60, 80 and 98 percent are far easier to administer, both for bidders and for the Commission, than the fractional one-third, two-thirds, and 100 percent activity levels. In addition to easing administrative burdens, the increased activity requirement will require bidders to focus their bidding and will contribute to increasing the pace of the auction.

236. As in prior auctions, we will determine the transition from one stage to the next in the Phase II 220 MHz auction based on a variety of measures of bidder activity including, but not limited to, the auction activity level (*i.e.*, the sum of bidding units of those licenses whose high bid increased in the current round, as a percentage of the total bidding units of all licenses in the auction), the percentage of licenses (measured in terms of bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue.⁴⁴¹ In no case can the auction revert to an earlier stage. The Wireless Telecommunications Bureau will announce when the auction will move from one stage to the next.

237. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission on a particular day, we will provide bidders with five activity rule waivers that may be used in any round during

⁴⁴¹ See "Auction of Broadband Personal Communications Services (D, E and F Blocks)," *Public Notice*, DA 96-1026 (rel. June 25, 1996).

the course of the auction. If a bidder's activity level is below the required activity level, a waiver will be applied automatically. That is, for example, if a bidder fails to submit a bid in a round, and its activity level from any "standing" high bid(s) (*i.e.*, high bid(s) at the end of the bid withdrawal period in the previous round) falls below its required activity level, the bidder will receive an automatic waiver. A waiver will preserve current eligibility in the next round, but cannot be used to correct an error in the bid amount. An activity rule waiver applies to an entire round of bidding and not to a particular nationwide, Regional, or EA service area.

238. Bidders may override the automatic waiver mechanism when they place a bid, if they wish to reduce their bidding eligibility. If a bidder overrides the automatic waiver mechanism, its eligibility will be reduced permanently (according to the formulas specified above), and it will not be permitted to regain its bidding eligibility from a previous round. If an automatic waiver is applied in a round where there are no valid bids, the auction will end. Bidders will have the option to proactively enter an activity rule waiver during the bid submission period. A proactive waiver, as distinguished from an automatic waiver, is one requested by the bidder. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

e. Duration of Bidding Rounds

(1) Proposal

239. In the *Third Notice*, we proposed that if simultaneous multiple round auctions are used for the Phase II 220 MHz licenses, we would use the same or similar procedures regarding duration of bidding rounds as those used in previous simultaneous multiple round auctions.⁴⁴²

(2) Comments

240. No comments were received on this issue.

(3) Decision

241. In simultaneous multiple round auctions, we recognize that bidders may need a significant amount of time to develop their bidding plans and evaluate back-up strategies. The Wireless Telecommunications Bureau will announce the duration of and intervals between bidding rounds, either by Public Notice prior to the auction or by announcement during the auction.

⁴⁴² *Third Notice*, 11 FCC Rcd at 252-53 (para. 129).

3. Procedural and Payment Issues

a. *Pre-Auction Application Procedures*

(1) Proposal

242. In the *Third Notice*, we proposed to follow the procedural and payment rules established in the *Competitive Bidding Second Report and Order*, with certain minor modifications designed to address the particular characteristics of the 220 MHz service.⁴⁴³ In addition, we proposed to adopt general procedural and processing rules based on the rules governing PCS in Part 24 of our rules.⁴⁴⁴

(2) Comments

243. The SMR Advisory Group and AMTA support this approach.⁴⁴⁵

(3) Decision

244. We will generally use the application and payment procedures set forth in Part 1 of our rules, with certain modifications, for the Phase II 220 MHz service. A Public Notice announcing the auction will specify the licenses to be auctioned and the time and place of the auction in the event that mutually exclusive applications are filed. The Public Notice will also specify the method of competitive bidding to be used, applicable bid submission procedures, stopping rules, activity rules, the short-form filing deadline, and the upfront payment amounts.

245. Prior to the auction, the Wireless Telecommunications Bureau will also provide information about how to perform due diligence regarding incumbent licensees for applicants planning to participate in the auction. We encourage all potential bidders to do their own independent investigation regarding existing licensees' operations in each license area on which they intend to bid in order to maximize their success in the auction.

246. We will adopt the same bidding procedures used for MTA-based PCS licenses. Under these procedures, bidders will be able to submit bids from remote locations using special bidding software, or by telephone. We have established a schedule of fees that auction participants will be assessed for certain on-line computer services, bidding software,

⁴⁴³ *Id.* at 253 (para. 131).

⁴⁴⁴ *Id.* at 253 (para. 130).

⁴⁴⁵ SMR Comments at 20 n.21; AMTA Comments at 21. *See also* U.S. MobilComm Comments at 6; Roamer Comments at 1-2; Incom Comments at 2.

and Bidder Information Packages.⁴⁴⁶ In addition, bidders will be permitted to bid electronically only if they have filed a short-form application electronically. Bidders who file their short-form applications manually may bid only telephonically. When submitting bids telephonically, bidders may utilize the Internet to learn the round-by-round results of the auction. Numerous online services provide Internet access at a reasonable cost. Bidders also may, at negligible cost, use a computerized bulletin board service, accessible by telephone lines, from which auction results can be downloaded to a personal computer.⁴⁴⁷ The Commission intends to hold a seminar for prospective bidders to acquaint them with these bidding procedures.

b. Short-Form Applications

(1) Proposal

247. In the *Competitive Bidding Second Report and Order*, we determined that we should require only a short-form application prior to the auction.⁴⁴⁸ In the *Third Notice*, we proposed to require applicants for nationwide, Regional, and EA 220 MHz licenses to file an initial short-form application (FCC Form 175) in order to qualify for competitive bidding.⁴⁴⁹

(2) Comments

248. All comments received on this issue support our proposal.⁴⁵⁰

(3) Decision

249. Section 309(j)(5) provides that no party may participate in an auction “unless such bidder submits such information and assurances as the Commission may require to

⁴⁴⁶ See Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Services Charges, and Bidder’s Information Packages in Connection With Auctionable Services, Report and Order, WT Docket No. 95-69, 10 FCC Rcd 10,769 (1995). Specifically, the Commission has adopted a fee schedule for obtaining access to the Commission’s database and remote bidding software packages. The remote access bidding software package is available for \$175.00. The charge for on-line remote access via a 900 number is \$2.30 per minute. Bidders also may bid via telephone for no charge. There is no charge for the first Bidder Information Package requested, and a \$16.00 fee for each additional package that is subsequently requested by the same party.

⁴⁴⁷ *Id.* at 10,770 (para. 3). See also *MMDS Report and Order*, 10 FCC Rcd at 9640 (para. 107).

⁴⁴⁸ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2376 (para. 165).

⁴⁴⁹ *Third Notice*, 11 FCC Rcd at 254 (para. 132).

⁴⁵⁰ SMR Comments at 20 n.21; AMTA Comments at 21. See also U.S. MobilComm Comments at 6; Roamer Comments at 1-2; Incom Comments at 2.

demonstrate that such bidder's application is acceptable for filing.⁴⁵¹ We adopt our proposal to require all applicants for Phase II 220 MHz licenses to submit FCC Form 175 in order to participate in the auction. As we indicated in the *Competitive Bidding Second Report and Order*, if we receive only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, we will issue a Public Notice cancelling the auction for that license and establish a date for the filing of a long-form application.⁴⁵²

c. Short-Form Application Amendments and Modifications

(1) Proposal

250. In the *Third Notice*, to encourage maximum bidder participation in 220 MHz auctions, we proposed to provide applicants whose short-form applications are substantially complete, but contain minor errors or defects, the opportunity to correct their applications prior to the auction.⁴⁵³ We proposed using procedures similar to those employed in previous auctions.⁴⁵⁴

(2) Comments

251. All comments received support this approach.⁴⁵⁵

(3) Decision

252. We will apply the provisions set forth in Part 1 of our rules governing amendments to and modifications of short-form applications to the 220 MHz service.⁴⁵⁶ Upon reviewing the short-form applications, we will issue a Public Notice listing all defective applications. Applicants with minor defects in their applications will be given an opportunity to cure them and resubmit a corrected version.

⁴⁵¹ 47 U.S.C. § 309(j)(5).

⁴⁵² *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2376 (para. 165).

⁴⁵³ *Third Notice*, 11 FCC Rcd at 254 (para. 134).

⁴⁵⁴ *Id.*; see also Section 1.2105(b)(2) of the Commission's Rules, 47 C.F.R. § 1.2105(b)(2) (modification and dismissal of Form 175).

⁴⁵⁵ SMR Comments at 20 n.21; AMTA Comments at 21. See also U.S. MobilComm Comments at 6; Roamer Comments at 1-2; Incom Comments at 2.

⁴⁵⁶ See Section 1.2105 of the Commission's Rules, 47 C.F.R. § 1.2105.

d. Upfront Payments**(1) Proposal**

253. In the *Third Notice*, we proposed to require 220 MHz auction participants to tender in advance to the Commission an upfront payment of \$2,500 or \$0.02 per MHz-pop, whichever is greater, for the largest combination of MHz-pops (bidding units) on which they anticipate bidding in any round. This upfront payment would define the upper bound of MHz-pops on which a bidder would be permitted to bid in any round.

(2) Comments

254. All responsive commenters support the Commission's proposed upfront payment formula.⁴⁵⁷ Comtech, however, points out that the *Third Notice* is silent on whether all EA or Regional licenses in the same geographic area should command the same MHz-pop upfront payment.⁴⁵⁸ In the rules for the 900 MHz SMR service, Comtech states, different upfront payment amounts were required for different channel blocks in the same geographic area depending upon whether the channels were licensed to an incumbent user. Comtech does not believe this is a sound approach. Instead, Comtech asserts, the same upfront payment amount should be required for all licenses for the same geographic area in order to maximize a bidder's flexibility during the auction.⁴⁵⁹

(3) Decision

255. In the *Competitive Bidding Second Report and Order*, we indicated that upfront payments should equal approximately five percent of the expected amounts of winning bids.⁴⁶⁰ In general the license values in previous auctions have exceeded expectations. We also believe, based upon defaults occurring in the broadband PCS, IVDS, and MDS auctions, that, to guard against default, there is a need to obtain a higher payment upfront than the one proposed. We delegate to the Wireless Telecommunications Bureau the authority and discretion to determine an appropriate upfront payment for each license being auctioned, taking into account such factors as the population in each geographic license area, and the value of similar spectrum. We expect that the Bureau will follow the guidelines laid out in the *Competitive Bidding Second Report and Order* and establish upfront payments equal to approximately five percent of the expected amounts of winning bids for the various

⁴⁵⁷ SMR Comments at 20 n.21; AMTA Comments at 21. See also U.S. MobilComm Comments at 6; Roamer Comments at 1-2; Incom Comments at 2.

⁴⁵⁸ Comtech Comments at 15-16.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2379 (para. 177).

licenses.⁴⁶¹ In no event will the upfront payment for any license be less than \$2,500, the minimum suggested in the *Competitive Bidding Second Report and Order* and the *Third Notice*, and the Bureau will retain the flexibility to modify this minimum if experience demonstrates that a higher amount would better deter speculative filings.

256. Prior to the 220 MHz auction, the Wireless Telecommunications Bureau will issue a Public Notice listing the upfront payment amounts required for the licenses to be auctioned. The number of bidding units determines the amount of upfront payment for each license. A prospective bidder must submit an upfront payment equal to the largest combination of bidding units on which the bidder anticipates being active in any single round. Although a bidder may file applications for every license being auctioned, the total upfront payment submitted by each applicant will determine the combinations on which the applicant will actually be permitted to be active in any single round of bidding. Upfront payments will be due by a date specified by Public Notice, but generally no later than 14 days before the scheduled auction.

e. Down Payments and Full Payments

(1) Proposal

257. In the *Third Notice*, we proposed to require the winning bidders for 220 MHz licenses (with the exception of winners that are small businesses) to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).⁴⁶²

(2) Comments

258. All responsive commenters support this proposal.⁴⁶³

(3) Decision

259. We will require all winning bidders, including small businesses and very small businesses,⁴⁶⁴ to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after

⁴⁶¹ *Id.* at 2378-79 (paras. 171-177).

⁴⁶² *Third Notice*, 11 FCC Rcd at 256-57 (para. 137).

⁴⁶³ SMR Comments at 20 n.21; AMTA Comments at 21. *See also* U.S. MobilComm Comments at 6; Roamer Comments at 1-2; Incom Comments at 2.

⁴⁶⁴ *See* paras. 289-295, *infra*.

deducting any bid withdrawal and default payments due, the additional monies will be refunded.

260. We will require winning bidders, except small businesses and very small businesses, to submit the required down payment by cashier's check or wire transfer to our lock-box bank within ten business days following release of a Public Notice announcing the close of bidding.⁴⁶⁵ All auction winners, except those eligible for an installment payment plan, will be required to make full payment of the balance of their winning bids within ten business days following release of a Public Notice mailed to the successful applicant that the Commission is prepared to award the license. The Commission generally will grant uncontested licenses within ten business days after receiving full payment.

f. Bid Withdrawal, Default, and Disqualification

(1) Proposal

261. In the *Third Notice*, we proposed to adopt bid withdrawal, default, and disqualification rules for the Phase II 220 MHz service based on the procedures established in our general competitive bidding rules.⁴⁶⁶ In the *Competitive Bidding Second Report and Order*, we noted that it is critically important to the success of our competitive bidding process that potential bidders understand that there will be a substantial monetary assessment imposed if they withdraw a high bid, are found not to be qualified to hold licenses, or default on payment of a balance due.⁴⁶⁷

(2) Comments

262. All commenters who addressed this issue agree with this approach.⁴⁶⁸

(3) Decision

263. We will apply the bid withdrawal, default, and disqualification provisions found in Part 1 of our rules to the 220 MHz auction. Any bidder that withdraws a high bid before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the "winning bid" the next time the license is offered, if this subsequent "winning bid" is lower than the withdrawn

⁴⁶⁵ See para. 305, *infra*, regarding down payment deadlines for small businesses and very small businesses.

⁴⁶⁶ *Third Notice*, 11 FCC Rcd at 257-59 (paras. 139-140).

⁴⁶⁷ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-74 (para. 151).

⁴⁶⁸ SMR Comments at 20 n.21; AMTA Comments at 21. See also U.S. MobilComm Comments at 6; Roamer Comments at 1-2; Incom Comments at 2.

bid.⁴⁶⁹ If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the "winning bid" refers to the high bid amount made subsequent to the withdrawal in that auction. If a license which is the subject of withdrawal or default is offered to the highest losing bidders in the initial auction, as opposed to being re-auctioned, the "winning bid" refers to the bid of the highest bidder who accepts the offer.⁴⁷⁰

264. After bidding closes, we will assess a defaulting auction winner an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting party's high bid, whichever is less.⁴⁷¹ This additional payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. In the unlikely event that there is more than one bid withdrawal on the same license, we will hold each withdrawing bidder responsible for the difference between its withdrawn bid and the amount of the winning bid the next time the license is offered for auction.

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

266. If a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.

⁴⁶⁹ Section 1.2104(g)(1) of the Commission's Rules, 47 C.F.R. § 1.2104(g)(1).

⁴⁷⁰ We recently addressed the issue of how our bid withdrawal provisions apply to bids that are mistakenly placed and withdrawn in a decision involving the 900 MHz SMR and broadband PCS C block auctions. See *Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Request to Waive Bid Withdrawal Payment Provisions*, FCC 96-203, Order (released May 3, 1996) (summarized in 61 Fed. Reg. 25,807 (May 23, 1996)), *recon. pending*.

⁴⁷¹ Section 1.2104(g)(2) of the Commission's Rules, 47 C.F.R. § 1.2104(g)(2).

g. Long-Form Applications**(1) Proposal**

267. In the *Competitive Bidding Second Report and Order*, we established rules that require a winning bidder to submit a long-form application.⁴⁷² In the *Third Notice*, we proposed to apply these same procedures to the 220 MHz auction.⁴⁷³

(2) Comments

268. No comments were received regarding long-form applications.

(3) Decision

269. We will apply our Part 1 long-form procedures to the 220 MHz auction, as we proposed. A long-form application filed on FCC Form 600 must be filed by a date to be specified by Public Notice, generally within ten business days after the close of bidding. After the winning bidder's down payment and long-form application are received, we will review the application to determine if it is acceptable for filing. Upon acceptance for filing, we will issue a Public Notice announcing this fact, triggering the filing window for petitions to deny. If all petitions to deny are dismissed or denied, the license(s) will be granted to the auction winner.

h. Petitions to Deny and Limitations on Settlements**(1) Proposal**

270. In the *Third Notice*, we proposed to adopt petition to deny procedures based on former Section 22.30 of our rules, which provided for procedures regarding oppositions to applications.⁴⁷⁴ In addition, we proposed to adopt rules similar to former Section 22.943 of our rules, which provided for procedures regarding the withdrawal of applications,⁴⁷⁵ to

⁴⁷² *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383 (para. 199). See also Sections 1.2107(c) and 1.2107(d) of the Commission's Rules, 47 C.F.R. §§ 1.2107(c) and 1.2107(d).

⁴⁷³ *Third Notice*, 11 FCC Rcd at 259-60 (para. 142).

⁴⁷⁴ This provision was slightly modified and recodified as Section 22.130 of the Commission's Rules. See *Part 22 Rewrite Order*, 9 FCC Rcd 6599 (citing 47 C.F.R. § 22.130). The text of this provision is identical to that of the Part 90 provision 47 C.F.R. § 90.163, which is referenced in the rule adopted herein.

⁴⁷⁵ This provision was recently amended and recodified as Section 22.129 of the Commission's Rules. See *Part 22 Rewrite Order*, 9 FCC Rcd at 6598.

prevent the filing of speculative applications and pleadings designed to extract money from sincere 220 MHz license applicants.⁴⁷⁶

(2) Comments

271. No comments on this issue were received.

(3) Decision

272. We adopt our proposals regarding petitions to deny and limitations on settlements. A party filing a petition to deny against a 220 MHz license application will be required to demonstrate standing and meet all other applicable filing requirements. The restrictions in Section 90.162 (which replaced Section 22.943 for purposes of CMRS)⁴⁷⁷ were established to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from 220 MHz license applicants. Thus, we will limit the consideration that an individual or entity is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner.⁴⁷⁸

4. Regulatory Safeguards

a. Anti-Collusion Rules

(1) Proposal

273. In the *Competitive Bidding Second Report and Order*, as modified by the *Competitive Bidding Reconsideration Order*, we adopted special rules prohibiting collusive conduct in the context of competitive bidding.⁴⁷⁹ In the *Third Notice*, we proposed to apply these rules to the Phase II 220 MHz service.⁴⁸⁰ Generally, our rules limit parties who have applied for licenses in the same geographic license areas from agreeing to bidding strategies that divide the market according to their strategic interests and/or disadvantage other bidders.

⁴⁷⁶ *Third Notice*, 11 FCC Rcd at 260 (para. 143).

⁴⁷⁷ See also Section 1.53 of the Commission's Rules, 47 C.F.R. § 1.53.

⁴⁷⁸ But see Section 1.2105(c) of the Commission's Rules, 47 C.F.R. § 1.2105(c).

⁴⁷⁹ *Competitive Bidding Second Report and Order* at 2386-88 (paras. 221-26); Implementation of Section 309(j) of the Communications Act--Competitive Bidding, Second Memorandum Opinion and Order, PP Docket No. 93-253, 9 FCC Rcd 7245, 7253-54 (paras. 48-53) (1994); Erratum, Mimeo No. 50228 (released Oct. 19, 1994).

⁴⁸⁰ *Third Notice*, 11 FCC Rcd at 262-63 (paras. 147-149).

(2) Comments

274. The SMR Advisory Group supports our proposed anti-collusion rules for the Phase II 220 MHz service.⁴⁸¹ No other commenters addressed this issue.

(3) Decision

275. We will require Phase II 220 MHz service applicants to comply with the reporting requirements and rules prohibiting collusion embodied in Sections 1.2105 and 1.2107 of our rules.⁴⁸² We also note that even where the applicant discloses parties with whom it has reached an agreement on the short-form application, thereby permitting discussions with those parties, the applicant nevertheless is subject to existing antitrust laws.⁴⁸³ Moreover, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, we may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws, in addition to any penalties they incur under the antitrust laws, or who are found to have violated the Commission's rules in connection with their participation in the auction process, may be subject to a variety of sanctions, including forfeiture of their down payment or their full bid amount, revocation of their license(s), and possible prohibition from participating in future auctions.⁴⁸⁴

b. Transfer Disclosure Requirements**(1) Proposal**

276. In Section 309(j)(4)(E) of the Communications Act, Congress directed the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."⁴⁸⁵ In the *Competitive Bidding Second Report and Order*, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied, including a transfer disclosure requirement for licenses

⁴⁸¹ SMR Comments at 20 n.21.

⁴⁸² See Sections 1.2105(c) and 1.2107 of the Commission's Rules, 47 C.F.R. §§ 1.2105(c), 1.2107.

⁴⁸³ *Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6869 n.134 (para. 59).

⁴⁸⁴ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 (para. 226).

⁴⁸⁵ 47 U.S.C. § 309(j)(4)(E).

obtained through the competitive bidding process.⁴⁸⁶ In the *Third Notice*, we proposed to apply the transfer disclosure requirements contained in Section 1.2111(a) of our rules to all Phase II 220 MHz licenses obtained through the competitive bidding process.⁴⁸⁷

(2) Comments

277. The SMR Advisory Group supports our proposed transfer disclosure provisions.⁴⁸⁸ No other commenters addressed this issue.

(3) Decision

278. We will apply Section 1.2111(a) to all Phase II 220 MHz licenses obtained through the competitive bidding process. We have also adopted specific rules that will apply solely to small business licensees, as discussed in subsequent sections. We will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, so that we may determine if any unforeseen problems relating to unjust enrichment have occurred.

5. Treatment of Designated Entities

a. Overview and Objectives

279. Section 309(j) of the Communications Act provides that, in developing competitive bidding procedures, the Commission shall, *inter alia*, "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."⁴⁸⁹ Small businesses, rural telephone companies and businesses owned by minorities and/or women are collectively referred to as "designated entities."⁴⁹⁰ Section 309(j)(4)(A) provides that in order to promote such objectives, the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and

⁴⁸⁶ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2384-88, 2394-95 (paras. 210-226, 258-265). See also Section 1.2111(a) of the Commission's Rules, 47 C.F.R. § 1.2111(a).

⁴⁸⁷ *Third Notice*, 11 FCC Rcd at 260-61 (para. 145).

⁴⁸⁸ SMR Comments at 20 n.21.

⁴⁸⁹ 47 U.S.C. § 309(j)(3)(B).

⁴⁹⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 (para. 227).

combinations of such schedules and methods.”⁴⁹¹ Section 309(j)(4)(D) also requires the Commission to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”⁴⁹²

280. To meet the statutory objective of providing opportunities for designated entities, we have employed a wide range of special provisions and eligibility criteria in other spectrum-based services.⁴⁹³ These measures have been designed to help designated entities overcome barriers to accessing capital and increase the likelihood that designated entities that win licenses in the auctions become strong competitors in the provision of wireless services. In the *Third Notice*, we sought comment on the type of designated entity provisions that should be incorporated into our competitive bidding procedures for the Phase II 220 MHz service.⁴⁹⁴

b. *Small Businesses*

(1) *Proposal*

281. In the *Third Notice*, we asked commenters to address: (1) the capital requirements of the 220 MHz service in comparison with other wireless services; (2) the

⁴⁹¹ 47 U.S.C. § 309(j)(4)(A).

⁴⁹² *Id.* at § 309(j)(4)(D).

⁴⁹³ For instance, we determined that minority- and women-owned businesses in the nationwide narrowband PCS auction would receive a 25 percent bidding credit on certain channels. *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2970 (para. 72). In the regional narrowband PCS auction women- and minority-owned businesses were eligible for a 40 percent bidding credit on certain channels and small businesses were eligible for installment payments on all channels. *Id.* at 2978-79 (para. 87); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 10 FCC Rcd 175, 201 (para. 58) (1994) (*Competitive Bidding Third Memorandum Opinion and Order and Further Notice*). After the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995), discussed at para. 284, *infra*, we amended our rules for various auctions, making them race- and gender-neutral and extending certain special provisions to small businesses. We took this approach to the broadband PCS C block and F block rules, for example. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Sixth Report and Order, 11 FCC Rcd 136, 161 (para. 47) (1995) (*Competitive Bidding Sixth Report and Order*); Amendment of Parts 20 and 24 of the Commission’s Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824, 7834 (para. 18) (1996) (*D, E and F Block Report and Order*). We believe that minority- and women-owned entities will benefit from these provisions.

⁴⁹⁴ *Third Notice*, 11 FCC Rcd at 267 (para. 159).

degree to which designated entities currently provide 220 MHz service; and (3) whether designated entities and small businesses in particular face barriers to entry into the 220 MHz service based on lack of access to capital or other factors.⁴⁹⁵ We tentatively concluded that it was appropriate to establish special provisions in our 220 MHz rules to promote and facilitate participation by small businesses.⁴⁹⁶

(2) Comments

282. AMTA indicates its support for the eligibility criteria proposed as part of our designated entity provisions.⁴⁹⁷ In addition, AMTA states that our proposed bidding credits are reasonable in light of our desire to encourage small business participation in the 220 MHz service.⁴⁹⁸

(3) Decision

283. Congress specifically cited the needs of small businesses in enacting Section 309(j), directing the Commission to promote economic opportunities for small businesses. The House Report states that the statutory provisions related to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" over new companies or start-ups.⁴⁹⁹ While a number of small businesses are successfully participating in the 220 MHz industry, we conclude that it is appropriate to establish special provisions in our 220 MHz service rules to facilitate competitive bidding by small businesses. Construction of a 220 MHz system may require a significant amount of capital. Moreover, Congress made specific findings with regard to access to capital in the Small Business Credit and Business Opportunity Enhancement Act of 1992, finding that "small business concerns which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."⁵⁰⁰ For these reasons, we believe that small businesses applying for 220 MHz licenses should be entitled to some type of bidding credit and should be allowed to pay their bids in installments.

⁴⁹⁵ *Id.* at 266-67 (paras. 158-59).

⁴⁹⁶ *Id.* at 267 (para. 160).

⁴⁹⁷ AMTA Comments at 21-22.

⁴⁹⁸ *Id.*

⁴⁹⁹ See H.R. Rep. No. 111, 103d Cong., First Sess. (1993) at 255.

⁵⁰⁰ Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 331(a)(3), 106 Stat. 1007.

c. *Minority- and Women-Owned Businesses*

(1) Proposal

284. In *Adarand Constructors, Inc. v. Peña*,⁵⁰¹ the Supreme Court held that “all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny.”⁵⁰² As a result of the *Adarand* decision, any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest in order to pass constitutional muster.⁵⁰³ Gender-based programs must satisfy intermediate scrutiny.⁵⁰⁴ Under this standard, there must be an “exceedingly persuasive justification” for a gender-based government provision and such a provision is constitutional if it serves an important governmental objective and is substantially related to achievement of that objective.⁵⁰⁵ In the *Third Notice*, we emphasized that we had not concluded that race- and gender-based measures are unconstitutional or otherwise inappropriate for spectrum auctions we will hold in the future. At a minimum, however, we stated that we must build a thorough factual record concerning the participation of minorities and women in spectrum-based services to support race- and gender-based measures. We expressed our belief that a sufficient factual record does not exist with respect to spectrum-based services generally or the 220 MHz service specifically to sustain such measures under strict scrutiny.⁵⁰⁶ We also indicated our uncertainty regarding the sufficiency of the record to sustain gender-based preferences under intermediate scrutiny.⁵⁰⁷ In light of these considerations, we proposed to limit designated entity provisions for the 220 MHz service to small businesses.⁵⁰⁸

285. We requested comment, however, on the possibility that in addition to small business provisions, separate provisions for women- and minority-owned entities should be adopted for the 220 MHz service. We asked commenters to discuss whether the capital requirements of the 220 MHz service pose a barrier to entry by minorities and women and whether assisting women and minorities to overcome such a barrier, if it exists, would constitute a compelling government interest. In particular, we sought comment on the actual

⁵⁰¹ 115 S. Ct. 2097 (1995).

⁵⁰² *Id.* at 2113.

⁵⁰³ *Id.*

⁵⁰⁴ *United States v. Virginia*, 116 S. Ct. 2263 (1996).

⁵⁰⁵ *Id.* at 2275. See also *J.E.B. v. Alabama ex. rel T.B.*, 511 U.S. 127 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

⁵⁰⁶ *Third Notice*, 11 FCC Rcd at 266 (para. 158).

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

cost of acquisition, construction and operation of 220 MHz systems, and the proportion of existing 220 MHz businesses that are owned by women or minorities. We also sought comment on the analytical framework for establishing a history of past discrimination in the 220 MHz service industry and urged parties to submit evidence (statistical, documentary, anecdotal or otherwise) about patterns or cases of discrimination in this and related communications services. We sought comment on whether, assuming that a compelling governmental interest is established, separate provisions for women and minorities are necessary to further this interest and whether such provisions can be narrowly tailored to satisfy the standard of judicial review.⁵⁰⁹

(2) Comments

286. AMTA agrees with the Commission's determination that a sufficient record has not been developed to indicate that race-based measures would be sustained under the strict scrutiny standard adopted by the Supreme Court in *Adarand*.⁵¹⁰ AMTA is not aware of any compelling governmental interest that would be served by increased participation by women or minorities in the provision of 220 MHz service.⁵¹¹ AMTA also is unable to provide the Commission with any particular evidence, other than general societal trends, linking past discrimination with either 220 MHz service specifically or communications services in general.⁵¹² Comtech's comments generally concur with AMTA's position.⁵¹³ Comtech believes that the best way to promote opportunities for women and minorities is to make special provisions, such as bidding credits, reduced down payments, and installment payments, available to small businesses on all 220 MHz channel blocks.⁵¹⁴

(3) Decision

287. In the Phase II 220 MHz service, as in other auctionable services, we are committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentrations of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including businesses owned by members of minority groups and women. Commenters did not cite any evidence of specific discrimination for purposes of creating a record sufficient to support special provisions for minorities under the strict scrutiny standard. *Adarand* makes

⁵⁰⁹ *Id.* at 267 (para. 159).

⁵¹⁰ AMTA Comments at 21. *See also* U.S. MobilComm Comments at 6; Roamer Comments at 1-2; Incom Comments at 2.

⁵¹¹ AMTA Comments at 21.

⁵¹² *Id.* at 21-22.

⁵¹³ Comtech Comments at 16.

⁵¹⁴ *Id.*

clear that only a record of discrimination against a particular racial group would support remedial measures designed to help that group. A record of discrimination against minorities in general may not be sufficient.⁵¹⁵ We are also concerned that our record would not support gender-based provisions under intermediate scrutiny.⁵¹⁶ Balancing our obligation to provide opportunities for women- and minority-owned businesses to participate in spectrum-based services against our statutory duties to facilitate the rapid delivery of new services to the American consumer and promote efficient use of the spectrum, we conclude that we should not delay the Phase II 220 MHz service auction for the amount of time it would take to adduce sufficient evidence to support race- and gender-based provisions. Moreover, we believe that most minority- and women-owned businesses will be able to take advantage of the specific provisions that we adopt for small businesses, as discussed *infra*.⁵¹⁷

288. We note, too, that we have initiated a separate inquiry to gather information regarding barriers to entry faced by minority- and women-owned firms as well as small businesses.⁵¹⁸ We will also continue to track the rate of participation in our auctions by minority- and women-owned firms and evaluate this information with other data gathered with the goal of developing a record to support race- and gender-based provisions that will satisfy judicial scrutiny. If a sufficient record can be adduced, we will consider race- and gender-based provisions for future auctions. Finally, we are looking for other ways to reduce barriers to entry for women- and minority-owned businesses, such as extending partitioning and disaggregation of licenses to entities that do not currently qualify, an adjustment to our rules that may be helpful to small businesses generally.⁵¹⁹

d. *Small Business Definition*

(1) Proposal

289. In the *Third Notice*, we sought comment regarding how to define small business for purposes of eligibility for bidding credits, installment payments, and reduced down payments.⁵²⁰ For companies wanting to bid on nationwide and Regional licenses, we proposed to define small businesses as those entities with less than \$15 million in average annual gross revenues for the preceding three years. For companies bidding for EA licenses, we proposed

⁵¹⁵ *Adarand*, 115 S. Ct. at 2113.

⁵¹⁶ *Telephone Electronics Corp. v. FCC*, No. 95-1015, (D.C. Cir. Mar. 15, 1995) (order granting stay); *United States v. Virginia*, 116 S. Ct. at 2275.

⁵¹⁷ See paras. 298, 301, *infra*.

⁵¹⁸ Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry, GN Docket No. 96-113, 11 FCC Rcd 6280 (1996).

⁵¹⁹ See paras. 306-311, *infra*.

⁵²⁰ *Third Notice*, 11 FCC Rcd at 271 (para. 170).