C. Bidding Issues

1. Grouping of Licenses

109. *Background.* We determined in the *Competitive Bidding Second Report and Order* that highly interdependent licenses should be grouped together and put up for bid at the same time in a multiple round auction because such grouping provides bidders with the most information about the complementary and substitutable licenses during the course of the auction.[213] In the *NPRM and Order*, we requested comment on whether we should endeavor to have a single auction. We also solicited comments on alternative license groupings and requested bidders to explain how such groupings would benefit bidders.[214]

110. *Discussion.* We believe that all 39 GHz licenses are significantly interdependent. As a result, the optimal grouping of the licenses would be to put all of the licenses up for bid at the same time in order for bidders to have information about the prices of complementary and substitutable licenses during the auction. However, due to the large number of licenses that we anticipate will be auctioned (approximately 6,900), this approach may be burdensome for bidders. Specifically, placing all of the 39 GHz licenses up for bid in a single auction may overwhelm bidders with the processing necessary to analyze effectively and efficiently the amount of information associated with such a large number of licenses. We conclude that a series of simultaneous multiple round auctions would be more advantageous to bidders and the most administratively feasible means of distributing these licenses. At this time, we believe that three channel pairs should be placed up for bid in each auction based on our review of the applicants' requests for channels in the 39 GHz band. We nonetheless reserve the discretion to change the number of channels offered during an auction if it is efficient and administratively feasible to do so and delegate such authority to the Bureau.

2. Reserve Price or Minimum Opening Bids

111. When licenses are subject to auction, the recently enacted Budget Act requires the Commission to prescribe methods by which a reasonable reserve price or a minimum opening bid is established, unless a determination is made that such an assessment is not in the public interest.[215] Recently, in conjunction with the 800 MHz Specialized Mobile Radio ("SMR") Service auction, the Bureau, pursuant to the Budget Act's provisions calling for the establishment of reserve prices or minimum opening bids in FCC auctions, proposed, *inter alia,* a formula for determining a reserve price or minimum opening bid for licenses and sought comment on its formula and other proposals for the auction scheduled to begin on October 28, 1997.[216] For the 39 GHz auction, we direct the Bureau to issue a similar public notice proposing a method for determining a reserve price or minimum opening bid for

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[213] *Id.* at 2366.

[214] *NPRM and Order*, 11 FCC Rcd at 4949-50.

[215] Budget Act, Pub. L. No. 105-33, 111 Stat. 251 (1997); 47 U.S.C. § 309(j)(4)(F).

[216] *See* Comment Sought on Balanced Budget Provisions Calling For Reserve Prices or Minimum Opening Bids in FCC Auctions, *Public Notice*, DA 97-1933 (September 5, 1997).

39 GHz licenses subject to auction and seeking comment on its proposed method and other proposals.

3. *Bid Increments*

112. *Background.* Consistent with our approach for previous simultaneous multiple round auctions for other services, in the *NPRM and Order* we proposed to establish minimum bid increments for bidding in each round of the auction based on the same considerations given in our prior orders.[217] We proposed that the bid increment be the greater of a percentage of the high bid from the previous round or as a fixed dollar amount per megahertz per service area population ("MHz-pops"). 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.

113. *Discussion.* We adopt our bid increment proposals, particularly given that no commenters opposed them. In fact, Milliwave supports our proposal to retain the discretion with respect to bidding increments.[218] We will follow the practice that we have used for other auctions and delegate authority to the Bureau to announce, by Public Notice prior to the auction, the general guidelines for bid increments.

4. *Stopping Rules*

114. *Background.* When simultaneous multiple round auctions are used, a stopping rule must be established for determining when the auction is over. In simultaneous multiple round auctions, bidding may close separately on individual licenses, simultaneously on all licenses, or a hybrid approach may be used. Generally, we proposed to adopt a simultaneous stopping rule in the 39 GHz auction in which bidding generally remains open on all licenses until there is no new acceptable bid for any license. We further proposed to retain the discretion to declare when the auction will end, to vary the duration of bidding rounds or the interval at which bids are accepted, in order to move the auction toward closure more quickly.[219]

115. *Discussion.* We will adopt a simultaneous stopping rule whereby bidding will remain open on all licenses in an auction until bidding stops on every license. We believe that allowing simultaneous closing for all licenses will afford bidders flexibility to pursue back-up strategies without running the risk that bidders will hold back their bidding until final rounds. As a general matter, the auction will close after one round passes in which no new valid bids or proactive activity rule waivers are submitted. In any event, we adopt our proposal to retain the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round. Milliwave supports our proposal to retain such discretion.[220] 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 license-by-license closings.

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217 *Id.* at 4950.

218 Milliwave Comments at 10, n.21.

219 *NPRM and Order,* 11 FCC Rcd at 4951-52.

220 Milliwave Comments at 10, n.21.

116. We further retain the discretion to declare after 40 rounds that the auction will end after some specified number of additional rounds. Under such an approach, bids will be accepted only on licenses where the high bid has increased in the last three rounds.[221] 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 benefits of terminating the auction and issuing licenses exceed the likely benefits of continuing to allow bidding.

5. *Activity Rules*

117. *Background.* In the *Competitive Bidding Second Report and Order*, we adopted the Milgrom-Wilson activity rule as our preferred activity rule when a simultaneous stopping rule is used.[222] The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. In the *NPRM and Order*, we tentatively concluded that the Milgrom-Wilson activity rule should be used in conjunction with the proposed simultaneous stopping rule for this auction. We indicated our belief that the Milgrom-Wilson approach would best achieve the Commission's goals of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time.[223]

118. *Discussion.* In accordance with Section 1.2104 of the Commission's Rules and the guidelines we adopted in the *Competitive Bidding Second Report and Order*, we will employ the Milgrom-Wilson activity rule for the 39 GHz auction. Milliwave supports adoption of this rule.[224] DCT appears to argue that the activity rule adds an incentive for bidders to apply for areas they do not intend to serve.[225] No other comments on this issue were received. DCT's argument with respect to this activity rule is misplaced. The activity rules do not encourage applicants to apply for more licenses than they intend to use, and actually has the opposite effect. Indeed, the total number of licenses applied for determines the activity requirement. Therefore, the greater the number of licenses an applicant applies for the greater its activity level must be in order to maintain eligibility in the auction.

119. For the 39 GHz auction, we will generally use the Milgrom-Wilson activity rule with some variations. Specifically, under the Milgrom-Wilson activity rule, the auction is divided into three stages and the minimum required activity level, measured as a fraction of the bidder's eligibility in the current round, will increase during the course of the auction. As in previous auctions, we will set, by announcement before the auction, the minimum required activity levels for each stage of the auction. We retain the discretion to vary, by announcement before or during the auction, the required minimum activity levels (and associated eligibility calculations) for each auction stage. Retaining this flexibility will

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221 *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5552.

222 9 FCC Rcd at 2371-73.

223 *NPRM and Order*, 11 FCC Rcd at 4955, 4979.

224 Milliwave Comments at 10, n.21.

225 DCT Comments at 18.

improve our ability to control the pace of the auction and help ensure that the auction is completed within a reasonable period of time. We delegate to the Bureau the authority to set or vary the minimum activity levels if circumstances warrant a modification. The Bureau will announce any such modification by Public Notice. The auction will start in Stage One and move to Stage Two and then to Stage Three. The movement from one auction stage to the next will be dependent upon the auction activity level. The Bureau will retain the discretion to determine and announce during the course of an auction when, and if, to move form one auction stage to the next. However, under no circumstances can the auction revert to an earlier stage.

120. As we have in past auctions, to avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission in a particular round, we will provide bidders with five activity rule waivers that may be used in any round during the course of the auction. A waiver will preserve current eligibility in the next round, but cannot be used to correct an error in the amount bid. Bidders also will be afforded an opportunity to override the automatic waiver mechanism when they place a bid, if they wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level.[226] If a bidder overrides the automatic waiver mechanism, its eligibility permanently will be reduced (according to the formulas specified above), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no valid bids will not keep the auction open. Bidders will have the option to proactively enter an activity rule waiver during the bid submission period. If a bidder submits a proactive waiver[227] in a round in which no other bidding activity occurs, the auction will remain open. The Bureau will retain the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control, and also retain the flexibility to adjust, by Public Notice prior to an auction, the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction.[228]

6. Duration of Bidding Rounds

121. *Background.* We proposed in the *NPRM and Order* to retain the discretion to vary the duration of bidding rounds or the interval at which bids are accepted (*e.g.*, run more than one round per day) in order to move the auction toward closure more quickly.[229]

122. *Discussion.* We will retain discretion to vary the duration of bidding rounds and the interval at which bids are accepted. In simultaneous multiple round auctions, bidders may need a significant amount of time to evaluate back-up strategies and develop their bidding plans. Milliwave, the sole

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226 *See Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6861.

A proactive waiver is a waiver submitted by a bidder during the bid submission period and acts as a bid for purposes of keeping the auction open.

228 *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373.

229 *NPRM and Order*, 11 FCC Rcd at 4955.

commenter addressing this issue, supports our decision.[230] The Bureau will announce any changes to the duration of and intervals between bidding rounds, either by Public Notice prior to the auction or by announcement during the auction.

D. Procedural and Payment Issues

1. Short-Form Applications

123. *Background.* In the *Competitive Bidding Second Report and Order*, we determined that we should only require a short-form application (FCC Form 175) prior to the auction, and that only winning bidders should be required to submit a long-form license application after the auction.[231]

124. *Discussion.* We adopt the bidding application and certification procedures contained in Section 1.1205 of the Commission's Rules, as amended by the Part 1 proceeding. Prior to the start of the 39 GHz auction, the Bureau will release an initial Public Notice announcing the auction. The initial Public Notice will specify the licenses to be auctioned and the procedures for the auction in the event that mutually exclusive applications are filed. The Public Notice will specify the method of competitive bidding to be used, applicable bid submission procedures, stopping rules, activity rules, and the deadline by which short-form applications must be filed and the amounts and deadlines for submitting the upfront payment.[232] We will not accept applications filed before or after the dates specified in the Public Notice. Applications submitted before the release of the Public Notice will be returned as premature. Likewise, applications submitted after the deadline specified by Public Notice will be dismissed, with prejudice, as untimely.

125. Soon after the release of the initial Public Notice, a Bidder Information Package will be made available to prospective bidders. The Bidder Information Package will contain information about incumbent licensees based on our licensing records. Bidders also should conduct their own due diligence regarding incumbent licensees within the 39 GHz band.

126. All bidders will be required to submit short-form applications on FCC Form 175 (and FCC Form 175-S, if applicable), by the date specified in the initial Public Notice. Applicants are encouraged to file Form 175 electronically. Detailed instructions regarding electronic filing will be contained in the Bidder Information Package. The short-form applications will require applicants to provide the information required by Section 1.2105(a)(2) of the Commission's Rules, as amended by the Part 1 proceeding.[233]

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230 Milliwave Comments at 10, n.21.

231 *Id.* at 2375-76.

232 *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2376.

233 47 C.F.R. § 1.2105(a)(2).

2. *Amendments and Modifications*

127. *Background.* To encourage maximum bidder participation, we proposed to provide applicants with an opportunity to correct minor defects in their short-form applications prior to the auction. Applicants whose short-form applications are substantially complete, but contain minor errors or defects, would be provided the opportunity to correct their applications prior to the auction.[234]

128. *Discussion.* We received no comments on our proposal. Thus, we will apply the provisions set forth in Part 1 of our rules, including amendments adopted in the Part 1 proceeding, governing amendments to and modifications of short-form applications to the 39 GHz service. 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.

3. *Upfront Payments*

129. *Background.* As in the case of other auctionable services, the *NPRM and Order* proposed to require all auction participants to tender in advance to the Commission a substantial upfront payment. We proposed to use the standard upfront payment formula of $2,500 or $0.02 per MHz-pop for the largest combination of MHz-pops whichever is greater.[235]

130. *Discussion.* We previously have determined that a substantial upfront payment requirement is necessary to ensure that only serious, qualified bidders participate in auctions and to ensure that sufficient funds are available to satisfy any bid withdrawal or default payments that may be incurred. We stated in the *Competitive Bidding Second Report and Order* that as a general matter we will base upfront payments on a formula of $0.02 per MHz-pop for the largest combination of MHz-pops a bidder anticipates being active on in any single round of bidding. We also established a minimum upfront payment of $2,500, but we indicated that the minimum amount could be modified on a service-specific basis.[236] We have varied our minimum upfront payment where we determined that it would result in too high an upfront payment for the service.[237] Various commenters contend that the formula used in the PCS context is not appropriate for the 39 GHz band because it results in an upfront payment that is too high.[238]

131. We recognize, as indicated by commenters, that for purposes of 39 GHz services our standard upfront payment formula may yield excessively high payment amounts relative to license values. Upfront payments at such levels could discourage participation in the auction and would be well above

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234 *NPRM and Order*, 11 FCC Rcd at 4957.

235 *NPRM and Order*, 11 FCC Rcd at 4958.

236 *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2379.

237 *See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Report and Order*, PP Docket No. 93-253, 10 FCC Rcd 9589, 9641 (1995) (*Competitive Bidding Report and Order*).

238 *See, e.g.*, PCS Fund Comments at 6; BizTel Comments at 17; Pacific Comments at 2; Milliwave Comments at 11, n.22; WinStar Comments at 20-21.

the amounts needed to discourage frivolous bidding and above what is necessary to ensure that sufficient funds are available to satisfy any bid withdrawal or default payments that may be incurred.[239] Since the frequency range and anticipated uses of 39 GHz services are more like LMDS than broadband PCS, we believe that it would be appropriate to set upfront payments closer to the levels used for LMDS than the $.02 per MHz-pop used in broadband PCS. LMDS upfront payments for 1150 MHz licenses range from $.00078 per MHz-pop for BTAs with population over one million to $.00026 per MHz-pop for BTAs with population under one hundred thousand.[240] Since many of the 39 GHz licenses are heavily encumbered it may also be appropriate to make license-by-license downward adjustments to the upfront payments to account for the reduced amount of spectrum available. Furthermore, by waiting until after the LMDS auction is conducted, we will have better estimates regarding the value of 39 GHz spectrum and be able to more accurately set the upfront payment amounts. Therefore, to allow the Commission sufficient time to conduct such analysis and to benefit from further auction experience we propose not to set the amounts of the upfront payments for 39 GHz services at this time. Instead, we delegate authority to the Bureau to set the amounts of upfront payments and to announce the levels by Public Notice.

4. Down Payment and Full Payment

132. *Background.* In the *NPRM and Order*, we tentatively concluded that winning bidders should be required to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).[241]

133. *Discussion.* We adopt the requirement that winning bidders must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). No commenters addressed this specific proposal. If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default payments due, the additional monies will be refunded.

134. We also will require winning bidders to submit the required down payment by wire transfer to our lock-box bank, by a date and time to be specified by Public Notice, generally within ten (10) business days following release of the Public Notice announcing the close of bidding. All auction winners generally will be required to make full payment of the balance of their winning bids within ten (10) business days following Public Notice that the Commission is prepared to award the license.

135. We note that we have proposed to adopt a late fee in Section 1.2109(a) in our Part 1 proceeding, to permit auction winners to make their final payments 10 business days after the payment deadline, provided that they also pay a late fee equal to five percent of the amount due.[242] While we do

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[239] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-2381.

[240] Calculations: $.90 per pop/1150 MHz = $.00078 per MHz-pop, $.30 per pop/ 1150 MHz = $.00026 per MHz-pop. *See* Public Notice, DA 97-208, released Sept. 25, 1997, at 11.

[241] *NPRM and Order*, 11 FCC Rcd at 4959-60, 4979.

[242] *See Part 1 Order and NPRM*, FCC 97-60, 12 FCC Rcd 5686 (1997).

not adopt the proposed late fee provision in this proceeding, we note that should we ultimately adopt such a provision in the Part 1 proceeding it shall apply to the 39 GHz band.

5. *Bid Withdrawal, Default, and Disqualification*

136. *Background.* In the *Competitive Bidding Second Report and Order*, we noted the importance to the success of our competitive bidding process that potential bidders be required to make a monetary payment if they withdraw a high bid, are found not to be qualified to hold licenses, or default on payment of a balance due.[243]

137. *Discussion.* To prevent insincere bidding, we will apply our the bid withdrawal, default and disqualification rules found in Sections 1.2104(g), and 1.2109 of the Commission's Rules, as amended by the Part 1 proceeding, to the 39 GHz auctions. No commenters addressed this issue. 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 by the Commission, if this subsequent winning bid is lower than the withdrawn bid.[244] We will calculate the bid withdrawal payment as either (1) the difference between the withdrawn bid net of bidding credit and the subsequent winning bid net of bidding credit, or (2) the difference between the gross withdrawn bid and the subsequent gross winning bid for that license, whichever is less.[245] 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.[246]

138. We note that we have proposed to adopt guidelines for erroneous bids in our Part 1 proceeding, based upon the rationale discussed in the *Atlanta Trunking Order.*[247] While we do not adopt the proposed guidelines in this proceeding, we note that should we ultimately adopt such guidelines for erroneous bids in the Part 1 proceeding it shall apply to the 39 GHz band.

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[243] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373.

[244] 47 C.F.R. § 1.2104 (g)(1).

[245] *In Matter of Atlantic Trunking Associates, Inc. and MAP Wireless, L.L.C. Requests to Waive Bid Withdrawal Payment Provisions*, 11 FCC Rcd 17189 (1996), we decided to partially waive these provisions with respect to individual requests for waiver of withdrawal payments as a result mistaken bids. We fashioned guidelines to address these situations based upon the premise that the appropriate bid withdrawal payment is one that takes into consideration the round and stage in which a mistaken bid is withdrawn. In general, this approach is designed to eliminate the strategic benefit of purposely submitting mistaken bids. On reconsideration, we waived the withdrawal payment in full for these three applicants based upon the possible confusion attributable to a feature of the Commission's software. *See Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions*, FCC 97-154 (released May 6, 1997)("*Atlanta Trunking Order*").

[246] 47 C.F.R. § 1.2104(g).

[247] *See Part 1 Order and NPRM*, FCC 97-60, 12 FCC Rcd 5686 (1997); *See also Atlanta Trunking Order.*

7. *Long-Form Applications and Petitions to Deny*

139. *Background.* In the *NPRM and Order,* we stated that if the winning bidder makes a down payment in a timely manner, it would be required to file a long-form application.[248]

140. *Discussion.* We will apply our Part 1 long-form procedures to the 39 GHz auction, as amended by the Part 1 proceeding. No commenters addressed this issue. While long-form applications may be filed either electronically or manually, beginning January 1, 1998, all applications must be filed electronically. Upon acceptance for filing of the long-form application, the Commission will issue a Public Notice announcing this fact and triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, a Public Notice announcing the grants will be issued.[249]

E. Regulatory Safeguards

1. *Transfer Disclosure Requirements*

141. *Background.* In Section 309(j) 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."[250]

142. *Discussion.* We will adopt the transfer disclosure requirements contained in Section 1.2111(a) of our rules, as amended by the Part 1 proceeding, for all 39 GHz licenses obtained through competitive bidding. Generally, applicants transferring their licenses within three years after the initial license grant will be required to file, together with their transfer applications, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license(s).

2. *Anti-Collusion Rules*

143. *Background.* In the *Competitive Bidding Second Report and Order,*[251] we adopted special rules prohibiting collusive conduct in the context of competitive bidding.[252] We indicated that such rules

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248 *NPRM and Order,* 11 FCC Rcd at 4976-77, 4979.

249 We note, however, that applications for Part 101 licenses for private use are not placed on public notice and may be granted at any time after initial processing. In addition, petitions to deny are not authorized.

250 47 U.S.C. § 309(j)(4)(E).

251 *See Competitive Bidding Second Report and Order,* 9 FCC Rcd at 2387-88.

252 *See* 47 C.F.R. § 1.2105(c).

would serve the objectives of the Omnibus Budget Reconciliation Act of 1993 (Budget Act)[253] by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and that disadvantage other bidders.

144. *Discussion.* We adopt the rules prohibiting collusive conduct in Sections 1.2105 and 1.2107 of our rules,[254] as amended by the Part 1 proceeding, for use in the 39 GHz auctions. We note that we have proposed to adopt two exceptions to our anti-collusion rules in our Part 1 proceeding.[255] While we do not adopt the proposed exceptions in this proceeding, we note that whatever exceptions to the anti-collusion rules we ultimately adopt in the Part 1 proceeding shall apply to the 39 GHz band. Sections 1.2105 and 1.2107 of our rules,[256] operate along with existing antitrust laws as a safeguard to prevent collusion in the competitive bidding process.[257] In addition, 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 or 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.[258]

F. Treatment of Designated Entities

1. Overview and Objectives

145. In authorizing the Commission to use competitive bidding, Congress mandated that the Commission "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."[259] The statute required the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" in order to achieve this Congressional goal.[260] In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses

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253 Budget Act, Pub. L. 103-66, Title VI, § 6002, 107 Stat. 312, 388.

254 47 CFR § 1.2105(c). *See also Part 1 Order and NPRM.*

255 *See Part 1 Order and NPRM*, FCC 97-60, 12 FCC Rcd 5686 (1997).

256 47 CFR § 1.2105(c).

257 *See Part 1 Order and NPRM.*

258 *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388.

259 47 U.S.C. § 309(j)(4)(D).

260 *Id.*

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."[261] Finally, Section 309(j)(4)(A) provides that to promote these objectives, the Commission shall consider alternative payment schedules including installment payments.[262]

146. We have employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to designated entities in other spectrum-based services. The measures considered thus far for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of designated entity opportunities. For example, in the C block broadband PCS auction, small businesses received a 25 percent bidding credit and all entrepreneurs' block licensees were entitled to pay for these licenses under an installment plan.[263] More recently, for the WCS auction, we adopted tiered bidding credits of 25 percent for small businesses and 35 percent for very small businesses, declined to adopt installment payments for designated entities because of the expedited procedures imposed by the Appropriations Act which required entities to make full payment on the bid amount quickly, and adopted a tiered definition of small and very small businesses. For the 800 MHz SMR auction, we also adopted tiered bidding credits of 25 percent for small businesses and 35 percent for very small businesses; eliminated installment payments for the upper 200 channels and deferred the decision on adopting installment payments in the lower 80 and General category channels to the outcome in the pending Part 1 proceeding; and adopted a tiered definition of small and very small businesses.[264]

147. In the *NPRM and Order*, we sought comment on whether the designated entity provisions adopted for broadband PCS should be applied here because this spectrum may be used in support of PCS.[265] We also sought comments broadly on how we can best promote opportunities for businesses owned by minorities and women in light of *Adarand*. Commenters were encouraged to provide the Commission with as much evidence as possible with regard to past discrimination, continuing discrimination, discrimination in access to capital, underrepresentation and other significant barriers facing businesses owned by minorities and women in obtaining licenses in communications services.[266]

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261 47 U.S.C. § 309(j)(3)(B).

262 47 U.S.C. § 309(j)(4)(A).

263 *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5581.

264 Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services, and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, FCC 97-223, PR Docket 93-144, GN Docket 93-252, PP Docket 93-253 (rel. July 10, 1997).

265 *NPRM and Order*, 11 FCC Rcd at 4968-70.

266 Also, pursuant to Section 257 of the Act, we conducted a comprehensive proceeding to explore whether women- and minority-owned businesses as well as small businesses experience/face market entry barriers. *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Notice of Inquiry*, GN 96-113, FCC 96-216, 11 FCC Rcd 10049 (1996); Section 257 Proceeding to Identify and Eliminate Barriers for Small Businesses, *Report*, GN 96-113 (rel. May 8, 1997).

2. *Eligibility for Bidding Credits*

148. At this time we have not developed a record sufficient to sustain race-based measures in the 39 GHz band based on the standard established by *Adarand Constructors v. Peña.* We also believe that at this time the record is insufficient to support any gender-based provisions under the intermediate scrutiny standard.[267] In addition, the record in this proceeding does not demonstrate a need for special provisions for rural telephone companies beyond those that we adopt for small businesses. We thus will limit eligibility for special provisions for designated entities in the 39 GHz band to small businesses. While DCR supports adoption of special provisions designed to promote opportunities for businesses owned by minorities and women, it contends that fashioning provisions that can withstand the *Adarand* test should not be permitted to delay the licensing process. It notes that such a delay would be harmful to minority- and women-owned businesses attempting to attract financing and operate PCS systems.[268] Neither DCR nor other commenters provide evidence with regard to past discrimination, continuing discrimination, or other significant barriers to minorities and women. Based on the record in this proceeding, we intend to adopt bidding credits for applicants qualifying as small businesses, as discussed *infra.* As there will be small businesses with variable abilities to access capital, we will tier the bidding credits to account for these differences. We believe these provisions will provide small businesses with a meaningful opportunity to obtain licenses in the 39 GHz auction. Moreover, many minority- and women-owned entities are small businesses and will therefore qualify for the same special provisions that would have applied to them under our previous PCS rules.[269] As such, these provisions will meet Congress' goal of promoting wide dissemination of 39 GHz licenses.

a. *Small Business Definition*

149. *Background.* In the *Competitive Bidding Second Memorandum Opinion and Order*, we stated we would define small business eligibility on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.[270] In the *NPRM and Order*, we proposed to define small businesses as those entities with not more than $40 million in average annual gross revenues for the preceding three years.[271] In addition, we proposed to apply the same affiliation and attribution rules for calculating revenues that previously we have adopted for broadband PCS. We noted, however, that the attribution rules for calculating gross revenues for

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[267] *See United States v. Virginia,* 116 S.Ct. 2264 (1996). *See also, J.E.B. v. Alabama ex. rel. T.B.,* 511 U.S. 127 (1994); *Mississippi University for Women v. Hogan,* 458 U.S. 718 (1982). *See also,* Implementation of Section 309(j) of the Communications Act - - Competitive Bidding, *Tenth Report and Order*, PP Docket No. 93-253, FCC 96-447 (rel. November 21, 1996), §§ 10-12 ("*IVDS Order*") (discussing the impact of the Supreme Court's decision in *Adarand* and *United States v. Virginia* on our small business provisions).

[268] DCR Comments at 6 n.18.

[269] *See generally 1992 Survey of Minority-Owned Business Enterprises,* December 11, 1995, Agriculture and Financial Statistics Division, Bureau of the Census, U.S. Department of Commerce; *1992 Survey of Women-Owned Businesses,* January 29, 1996, Agriculture and Financial Statistics Division, Bureau of the Census, U.S. Department of Commerce.

[270] 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, 7269 (1994) *(Second Memorandum Opinion and Order).*

[271] *NPRM and Order,* 11 FCC Rcd at 4971-72.

broadband PCS are complex and sought comment on substituting the "control group" concept for a simpler attribution model. We asked how the revenues of a small business entity should be calculated. We also asked how investors should be treated in determining the eligibility of a small business, *e.g.*, whether only investors that hold ownership interests at a certain threshold should have their gross revenues included (*e.g.*, ownership interests of five percent would trigger attribution).[272]

150. *Discussion.* As a general matter, we adopt our proposed small business definition of an entity with not more than $40 million in average annual gross revenues for the preceding three years. We conclude that this definition will accommodate the broadest cross-section of small businesses because it will include, at a minimum, all entities recognized as small businesses in the CMRS contexts for which we have either adopted or proposed small businesses definitions.[273] We, however, reject DCR's suggestion to adopt a definition which completely mirrors our small business definition in the broadband PCS C block rules. Significantly, if certain winning C block winners do not qualify as small businesses here, they will be able to participate in the 39 GHz auctions even though they will not be eligible for special provisions. Moreover, DCR has failed to demonstrate that control group equity structures and affiliation rule exceptions are warranted in the 39 GHz context. In fact, given the broad array of services that may be offered in the 39 GHz band, ranging from CMRS support services to niche service offerings, we are reluctant to adopt such complex ownership structures absent evidence of the same factors present in the broadband PCS context. As discussed in further detail, *infra*, we are providing bidding credits to an additional category of small businesses -- very small businesses.[274] A very small business is an entity that together with its affiliates and persons or entities that hold attributable interests in such entity and their affiliates, has average gross revenues that are not more than $15 million for the preceding three years.

151. In determining whether an applicant qualifies for bidding credits as a small business or a very small business in the 39 GHz auction, we will consider the gross revenues of the small business applicant, its affiliates, and certain investors in the applicant. Specifically, for purposes of determining small business status, we will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant. We also choose not to impose specific equity requirements on the controlling principals that meet our small business definition. We will still require, however, that in order for an applicant to qualify as a small business, qualifying small business principals must maintain "control" of the applicant. The term "control" would include both *de facto* and *de jure* control of the applicant. For this purpose, we will borrow from certain SBA rules that

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272 *Id.* at 4972.

273 For example, for the 900 MHz SMR service, we adopted a two-tiered small business definition to include entities with gross revenues of not more than $15 million and $3 million. *See Competitive Bidding Seventh Report and Order*, 10 FCC Rcd at 6945. Similarly, for LMDS, we adopted a two-tiered small business definition with small businesses defined as entities with average gross revenues for the three preceding years of more than $15 million but not more than $40 million and very small businesses defined as entities with average gross revenues for the three preceding years of not more than $15 million. *See* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service
And for Fixed Satellite Services Order at §§ 14-16, Petitions for Reconsideration of the Commission's Competitive Bidding Rules, *Second Order on Reconsideration*, CC Docket No. 92-297, FCC 97-323 (released September 12, 1997). With respect to broadband PCS service, we adopted a small business definition to include entities with revenues of not more than $40 million. *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5581.

274 *See infra* ¶¶ 152-154.

are used to determine when a firm should be deemed an affiliate of a small business.[275] Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensees; and (3) the entity plays an integral role in all major management decisions.[276] While we are not imposing specific equity requirements on the small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business. Finally, we reject Winstar's proposal to adopt a high attribution standard to determine small business status because the absence of special provisions for minorities and women reduces the risk that applications falsely claiming such status will be filed.[277] The existence of special small business provisions requires us to adopt the provisions set forth herein in order to prevent their improper use.

b. Bidding Credits

152. *Background.* In the *NPRM and Order*, we proposed a 10 percent bidding credit for qualified small businesses. We stated that the magnitude of the credit was reasonable and equitable in view of other proposals which will benefit designated entities, including the relatively small geographic licensing areas and the availability of installment payments. We also proposed to allow eligible entities to apply the credit to all licenses. However, we sought comment on whether small businesses should receive a larger bidding credit, such 25 percent credit.[278]

153. *Discussion.* Based upon the record before us, we adopt tiered bidding credits for the 39 GHz service. Several commenters support our proposal to give bidding credits to small businesses.[279] Some of these commenters also express concern that a 10 percent credit is too low.[280] We agree with PCS Fund's contention that tiered bidding credits will promote vigorous competition not only between small businesses and large businesses but also between small businesses of different economic sizes.[281]

154. We believe that a tiered approach will encourage smaller businesses, that may be very well-suited to provide niche services, to participate in the provision of services in the 39 GHz band. For

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275 *See* 13 C.F.R. §121.401.

276 *See Competitive Bidding Fourth Memorandum Opinion and Order*, 10 FCC Rcd at 447.

277 *See* WinStar Comments at 22-23.

278 *NPRM and Order*, 11 FCC Rcd at 4969-70.

279 *See, e.g.*, WinStar Comments at 21; DCR Comments at 7; PCS Fund Comments at 9.

280 *See, e.g.*, DCR Comments at 7 (suggesting a 25 percent bidding credit); PCS Fund Comments at 9 (suggesting a bidding credit of up to 40 percent).

281 *See* PCS Fund Comments at 9.

example, WinStar states that it believes that a major use of the spectrum will be for wireless local loop services.[282] Microwave Partners indicates that it is looking at the spectrum for medical, public health and safety related applications, such as high speed transmission of medical data between physicians' offices and clinics and hospitals, laboratories and X-ray facilities; interactive videoconferencing for the continuing education of all health care personnel; and surveillance and security monitoring of high risk areas.[283] We recognize that smaller businesses have more difficulty accessing capital and thus need a higher bidding credit. These tiered bidding credits are narrowly tailored to the varying abilities of businesses to access capital. Tiering also takes into account that different small businesses will pursue different strategies. Accordingly, small businesses with average gross revenues of not more than $40 million for the preceding three years will receive a 25 percent bidding credit. Very small businesses, that is, those small businesses with average gross revenues of not more than $15 million for the preceding three years, will receive a 35 percent bidding credit. Bidding credits for small businesses are not cumulative.

c. Installment Payments

155. *Background.* In the *NPRM and Order*, we proposed to allow small businesses to pay off their successful license bids in installments. In the *Competitive Bidding Second Report and Order*, we concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum.[284] Under our proposal, small business licensees may elect to pay their winning bid amount (less upfront payments) in installments over the ten-year term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. We sought comment on these proposals.[285]

156. We also sought comments on proposals for additional special payment provisions to further address the access to capital challenges faced by small businesses. We proposed that small business licensees be permitted to make interest-only installment payments during the first two years of the license term. We also proposed to reduce down payments for small businesses to 5 percent of the winning bid due five days after the auction closes and the remaining 5 percent down payment due five days after release of the Public Notice announcing that the Commission is prepared to award the license. Finally, we sought comment on whether to offer "tiered" installment payments scaled to the financial size of a small business applicant.[286]

157. *Discussion.* We have carefully considered the use of installment payment plans for 39 GHz licenses and have decided not to adopt our proposal to allow small businesses to pay for their licenses in installment payments. First, Congress did not require the use of installment payments in all auctions, but

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282 WinStar Comments at 7.

283 Microwave Partner Comments at 3-4.

284 *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389.

285 *NPRM and Order*, 11 FCC Rcd at 4970.

286 *Id.* at 4971.

rather recognized them as one means of promoting the various objectives of Section 309(j)(3) of the Communications Act.[287] The Commission continues to experiment with different means for achieving its obligations under the statute, and has offered installment payments to licensees in several auctioned wireless services.[288] By no means, however, has Congress dictated that installment payments are the only tool in assisting small business. Indeed, we have conducted several auctions without installment payments.[289] We conclude that we can meet our statutory obligations in the 39 GHz auction absent these provisions.[290]

158. The Commission must balance competing objectives in Section 309(j) that require, *inter alia*, that it promote the development and rapid deployment of new spectrum-based services (i.e., competition) and ensure that designated entities are given the opportunity to participate in the provision of such services.[291] In assessing the public interest, we must try to ensure that all the objectives of Section 309(j) are considered. Our experience with the installment payment program leads us to conclude that

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[287] Specifically, Section 309(j)(4) of the Communications Act states that the Commission shall, in prescribing regulations pursuant to these objectives and others, "*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 that promote the objectives described in paragraph (3)(B) . . . ." *See* 47 U.S.C. § 309(j)(4)(A) (emphasis supplied). *See also* Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255:

> While it is clear that, in many instances, the objectives of section 309(j) will be best served by a traditional, "cash-on-the-barrelhead" auction, it is important that the Commission employ different methodologies as appropriate. Under this subsection, the Commission has the flexibility to utilize any combination of techniques that would serve the public interest.

[288] *See, e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994) (Interactive Video Data Services); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941 (1994) ("*NarrowbandPCS Third Report and Order*") (regional narrowband PCS); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) (broadband PCS); Implementation of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589 (1995) (Multipoint Distribution Service); and Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Implementation of Sections 3(n) and 322 of the Communications Act, GN Docket No. 93-252, *Second Order on Reconsideration* and *Seventh Report and Order*, 11 FCC Rcd 2639 (1995) (900 MHz Specialized Mobile Radio ("SMR")). The Commission has recently reversed its decision to offer installment payment plans for the 800 MHz Specialized Mobile Radio auction. *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, Implementation of Section 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order*, FCC 97-224, 62 Fed. Reg. 41225 (rel. July 10, 1997) ("*800 MHz MO&O*").

[289] We specifically note the auctions of licenses for the Wireless Communications Service ("WCS"), nationwide narrowband PCS, and cellular unserved areas. *See, respectively*, Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, *Report and Order*, FCC 97-50, 62 Fed. Reg. 9636 (rel. February 19, 1997) ("*WCS Report and Order*"); *NarrowbandPCS Third Report and Order*; and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket No. 90-6, *Ninth Report and Order*, 11 FCC Rcd 14769 (1996).

[290] *See LMDS Second Report and Order* at ¶¶ 344-349.

[291] *See* 47 U.S.C. § 309(j)(3) and (4).

installment payments may not always serve the public interest. We are presently examining issues relating to our administration of installment payments in several other proceedings.[292] Because of the importance of these issues, we plan to incorporate our decisions regarding installment payments and other financial issues into our Part 1 rulemaking.[293]

159. Finally, as discussed *infra,* we have adopted enhanced bidding credits for the 39 GHz auction. The bidding credits we adopt for small businesses will help to promote access to the 39 GHz band and various new services by ensuring that small businesses will have genuine opportunities to participate in the 39 GHz auctions and in provision of services. We also note that, given the relatively large numbers of licenses available in the 39 GHz band, there should be opportunities for small business participation. We have determined that, in view of the favorable tiered bidding credits we adopt herein, we do not see the need to adopt reduced down payments for small businesses in order to ensure either their access to capital or their participation in the auction. Instead, we will require a 20 percent down payment, the same down payment that is required of all other 39 GHz auction winners. Under this approach, all winning bidders will be required to supplement their upfront payments to bring their total payment to 20 percent of their winning bid within 10 business days of the close of the auction. Prior to licensing, they will be required to pay the balance of their winning bid. We believe that a 20 percent down payment is appropriate here to ensure that all auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system and protect against possible default, while at the same time not being so onerous as to hinder growth and diminish access.[294]

3. *Transfer Restrictions and Unjust Enrichment Provisions*

160. *Background.* Our unjust enrichment provisions are integral to the success of the special provisions for designated entities in the various auctionable services. In the *Competitive Bidding Second Report and Order,* we outlined unjust enrichment provisions applicable specifically to designated entities. We established these provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or intend to use our provisions to obtain a license at a

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292 *See Part 1 Order and NPRM* at ¶¶ 34-35, proposing changes to the competitive bidding process in Part 1 of the Commission's Rules. *See also* "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," *Public Notice*, WT Docket 97-82, DA 97-679 (rel. June 2, 1997). Several parties also filed petitions for reconsideration in the Commission's paging and 800 MHz SMR proceedings, in which they requested that the Commission reconsider its adoption of installment payment plans for small businesses. *See* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Petitions for Reconsideration,* filed by Paging Network, Inc. and Personal Communications Industry Association, April 11, 1997. *See also* Implementation of Section 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services, *Petition for Reconsideration,* filed March 18, 1996, by Nextel Communications. We have since eliminated installment payments in the auction of the upper 200 channels of 800 MHz SMR. *See 800 MHz MO&O* at ¶¶ 130-132. We also have deferred the issue of the propriety of installment payments for the lower 230 channels to our Part 1 rulemaking. *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, Implementation of Sections 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, FCC 97-223, 62 Fed. Reg. 41190 (rel. July 10, 1997), at § 279; and *Part 1 Order and NPRM* at ¶¶ 34-35.

293 *Part 1 Order and NPRM.*

294 *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2381.

lower cost than they otherwise would have to pay, and later to sell it for a profit.[295] In the *NPRM and Order*, we sought comment regarding the appropriate approach to prevent unjust enrichment.[296]

161. *Discussion.* To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we will adopt unjust enrichment provisions similar to those adopted for other services, including, for example, narrowband PCS and 900 MHz SMR services.[297] These rules provide that, during the initial license term, licensees utilizing bidding credits and seeking to assign or transfer control of a license to an entity that does not meet the eligibility criteria for bidding credits will be required to reimburse the government for the total value of the benefit conferred by the government, that is, the amount of the bidding credit, plus interest, before the transfer will be permitted. The rules which we now adopt additionally provide that, if 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, plus interest, must be paid to the United States Treasury as a condition of approval of the assignment or transfer.

162. If a licensee that utilizes bidding credits seeks to make any change in ownership structure that would render the licensee ineligible for bidding credits, or eligible only for a lower bidding credit, the licensee must first seek Commission approval and reimburse the government for the amount of the bidding credit, or the difference between its original bidding credit and the bidding credit for which it is eligible after the ownership change, plus interest. Additionally, if an investor subsequently, purchases an interest in the business and, as a result, the gross revenues of the business exceed the applicable financial caps, this unjust provision will apply. The amount of this payment will be reduced over time as follows: (1) a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit received by the latter is eligible); (2) in year three of the license term the payment will be 75 percent; (3) in year four the payment will be 50 percent; and (4) in year five the payment will be 25 percent, after which there will be no payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment or transfer.[298] Thus, a small business that received bidding credits seeking transfer or assignment of a license to an entity that does not qualify as a small business will be required to reimburse the government for the amount of the bidding credit, plus interest, before the transfer will be permitted.

4. Entrepreneurs' Block

163. *Background.* In the *Competitive Bidding Fifth Report and Order,* we established entrepreneurs' blocks in broadband PCS on which only qualified entrepreneurs, including small businesses,

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295 *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394.

296 *NPRM and Order*, 11 FCC Rcd at 4973-74.

297 *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2975, 2979; *Competitive Bidding Seventh Report and Order*, 10 FCC Rcd at 6953-55.

298 *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Erratum to Third Memorandum Opinion and Order*, PP Docket No. 93-253, 10 FCC Rcd 173 (1994).

could bid. We requested comment on whether the capital requirements of this service were anticipated to be so substantial that we should insulate certain blocks from very large bidders in order to provide meaningful opportunities for designated entities. We also requested comment on the need to adopt an entrepreneurs' block to ensure that there will be adequate spectrum available for communications links for broadband PCS entrepreneurs' block licensees.[299]

164. *Discussion*. No commenter advocated the adoption of an entrepreneurs' block and we decide not to adopt one in the 39 GHz service. First, the relatively large numbers of licenses available in the 39 GHz band should allow for extensive small business participation. Second, small businesses will have a significant opportunity to compete for licenses given the enhanced bidding credits that we have adopted for small businesses. The bidding credits we adopt for small businesses will help to promote access to the 39 GHz band and various new services by ensuring that small businesses will have genuine opportunities to participate in the 39 GHz auctions and in provision of services.

VI. SECOND NOTICE OF PROPOSED RULE MAKING

A. Background

165. We believe that one issue -- the use of partitioning and disaggregation by parties taking advantage of bidding credits under our competitive bidding licensing rules -- merits further consideration and requires further information from commenters.

B. Partitioning and Disaggregation for Small Business Licensees

166. In the *Report and Order* portion of this decision, we expanded our geographic partitioning provisions to all 39 GHz licensees and permitted spectrum disaggregation. The rules and provisions adopted herein are consistent with those recently adopted by the Commission in connection with expanding our geographic partitioning rules for broadband PCS.[300] In this *Second Notice of Proposed Rule Making*, we propose various rules to implement these partitioning and disaggregation policies as they relate to small businesses that are eligible for bidding credits. We solicit comments on our proposals herein.

167. As noted in our *Report and Order and FNPRM* establishing partitioning and disaggregation rules for broadband PCS licensees,[301] small businesses face certain barriers to entry into the wireless telecommunications marketplace as providers of spectrum-based services that, we believe, could be addressed by rules. Providing licensees with the flexibility to partition their geographic service areas would create smaller areas that could be licensed to small businesses, including those entities which may not have had the resources to participate successfully in spectrum auctions. In addition, partitioning may provide a funding source that would enable licensees to construct their systems and provide the latest in

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[299] *NPRM and Order*, 11 FCC Rcd at 4974-75.

[300] *See Broadband Report and Order and FNPRM.*

[301] *Id.*

technological enhancements to the public.[302] Similarly, providing licensees with the flexibility to disaggregate spectrum would create smaller portions of spectrum that could be licensed to small businesses.

168. The expansion of the partitioning rules to include all 39 GHz licensees, as well as the availability of the disaggregation option, implements, in part, the requirement of Section 257 of the Communications Act.[303] This Section requires that we eliminate entry barriers into the telecommunications market for small businesses. It is important, however, that we take appropriate precautions to prevent unjust enrichment where we provide special incentives to encourage small business participation in 39 GHz services. We believe that we must ensure that licensees that have benefitted from bidding credits are not permitted to become unjustly enriched by immediately partitioning a portion of their license area to parties that do not qualify for such benefits.[304]

169. In the *Report and Order* portion of this decision, we have decided not to adopt an entrepreneurs' block for the 39 GHz service. Instead, we have adopted bidding credits for small businesses in order to promote economic opportunities for a wide range of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, as required by Section 309(j)(4)(C)(ii) of the Communications Act.[305] In addition, we allow all licensees to partition and disaggregate at any time, which will provide a significant benefit to all licensees, including small businesses. We believe that allowing small businesses to partition and/or disaggregate their licenses to other qualified small businesses will help attain the Congressional objective of ensuring that small businesses have an opportunity to participate in the provision of spectrum services.

170. We tentatively conclude, however, that we should apply restrictions on partitioning and/or disaggregation by licensees that have received bidding credits when the buyer is a small business subject to less favorable bidding credits or a non-small business not eligible for bidding credits.[306] We seek comment on the type of unjust enrichment requirements that should be placed as a condition for approval of partitioning and disaggregation arrangements, *e.g.*, an application for a partial transfer of a license owned by a qualified small business to a non-small business. We tentatively conclude that these unjust enrichment provisions would include payment of any bidding credit that we may adopt for small businesses and would be applied on a proportional basis. We seek comment on how such unjust enrichment amounts should be calculated, especially in light of the difficulty of devising a methodology or formula that will differentiate the relative market value of the opportunities to provide service to

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302 *Id.*

303 47 U.S.C. § 257 (1996).

304 See 47 C.F.R. § 101.1210(b), which sets forth unjust enrichment provisions with respect to qualified small businesses seeking to transfer or assign a license to an entity that is not a qualified small business.

305 *See supra* ¶¶ 152-154.

306 *Id.* In the *Report and Order* portion of this decision, we provided that small businesses with average gross revenues of not more than $40 million for the preceding three years will receive a 25 percent bidding credit. Smaller businesses with average gross revenues of not more than $15 million for the preceding three years will receive a 35 percent bidding credit. Bidding credits for small businesses are not cumulative.

various partitioned areas within a geographic or market area. We seek comment on whether we should consider the price paid by the partitionee in determining the percentage of the outstanding principal balance to be repaid. We tentatively conclude that if we permit a small business licensee to disaggregate to another qualified small business that would not qualify for the same level of bidding credit as the disaggregating licensee, the disaggregating licensee will be required to repay a portion of the benefit it received. We seek comment on how that amount should be calculated. We seek comment on what provisions, if any, we should adopt to address the situation of a small business licensee's disaggregation followed by default in payment of a winning bid at auction.

VII. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

171. The analysis for this *Report and Order* pursuant to the Regulatory Flexibility Act, 5 U.S.C. Section 604, is contained in Appendix B.

172. With respect to this *Second Notice of Proposed Rule Making*, an Initial Regulatory Flexibility Analysis is also contained in Appendix B. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the Initial Regulatory Flexibility Analysis. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis we ask a number of questions in our Initial Regulatory Flexibility Analysis regarding the prevalence of small businesses in the 39 GHz services industry. Comments on the Initial Regulatory Flexibility Analysis must be filed in accordance with the same filing deadlines as comments on the *Second Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Second Notice of Proposed Rule Making*, including the initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

B. *Ex Parte* Rules--Non-Restricted Proceeding

173. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. §§ 1.1201, 1.1203, and 1.1206(a).

C. Comment Dates

174. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before 30 days after the date of publication of this *Second Notice of Proposed Rule Making* in the Federal Register, and reply comments on or before 45 days after date of publication of this *Second Notice of Proposed Rule Making* in the Federal Register. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business

hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

175. Written comments by the public on the proposed and/or modified information collections are due 30 days after date of publication in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington D.C. 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington D.C. 20503 or via the Internet to fain_t@al.eop.gov.

D. Initial Paperwork Reduction Act of 1995 Analysis

176. This *Second Notice of Proposed Rule Making* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Second Notice of Proposed Rule Making*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Second Notice of Proposed Rule Making*; OMB comments are due 60 days after the date of publication of this *Second Notice of Proposed Rule Making* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

E. Ordering Clauses

177. Authority for issuance of this *Report and Order and Second Notice of Proposed Rule Making* is contained in Sections 4(i), 257, 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(r), and 309(j).

178. IT IS ORDERED, that Parts 1, 2, and 101 of the Commission's Rules ARE AMENDED as specified in Appendix C, effective 60 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 303(c), 303(f), 303(g), 303(r) and 309(j).

F. Further Information

179. For further information concerning this proceeding, contact Susan Magnotti at (202) 418-0871 (Public Safety and Private Wireless Division, Wireless Telecommunications Bureau) or Christina Eads Clearwater at (202) 418-0660 (Auctions and Industry Analysis Division, Wireless Telecommunications Bureau).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

PARTIES FILING COMMENTS AND REPLY COMMENTS

Comments

Advanced Radio Telecom Corporation (ART)
Alcatel Network Systems, Inc. (ANS)
Altron Communications, L.C. (Altron)
Ameritech Corporation (Ameritech)
Angel Technologies Corporation (Angel)
Association for Local Telecommunications Services (ALTS)
AT&T Wireless Services, Inc. (AT&T)
Bachow and Associates, Inc. (Bachow)
BizTel, Inc. (BizTel)
Columbia Millimeter Communications, L.P. (Columbia)
Commco, L.L.C. (Commco)
Comsearch
DCR Communications, Inc. (DCR)
DCT Communications, Inc. (DCT)
Digital Microwave Corporation (DMC)
Fixed Point-to-Point Communications Section, Network Equipment Division of the Telecommunications Industry Association (TIA)
GHz Equipment Company, Inc. (GEC)
GTE Service Corporation (GTE)
Harris Corporation - Farinon Division (Harris)
INNOVA Corporation (INNOVA)
Microwave Partners d/b/a/ Astroline Communications (Microwave Partners)
Milliwave Limited Partnership (Milliwave)
Motorola Satellite Communications, Inc. (Motorola)
National Spectrum Managers Association (NSMA)
No Wire L.L.C. (No Wire)
Pacific Bell Mobile Services (Pacific)
PCS Fund
Personal Communications Industry Association (PCIA)
Rand McNally & Company (Rand McNally)
Sintra Capital Corporation (Sintra)
Spectrum Communications, L.C. (Spectrum)
Telco Group, Inc. (TGI)
Telephone and Data Systems, Inc. (TDS)
Winstar Communications, Inc. (WinStar)

Reply Comments

Alcatel Network Systems, Inc. (ANS)
Ameritech Corporation (Ameritech)
AT&T Wireless Services, Inc. (AT&T)
Bachow and Associates, Inc. (Bachow)
BizTel, Inc. (BizTel)
Cambridge Partners, Inc. (Cambridge)
Columbia Millimeter Communications, L.P. (Columbia)
Commco, L.L.C. (Commco)
Comsearch
Fixed Point-to-Point Communications Section, Network Equipment Division of the Telecommunications Industry Association (TIA)
Microwave Partners d/b/a/ Astroline Communications (Microwave Partners)
Milliwave Limited Partnership (Milliwave)
Pacific Bell Mobile Services (Pacific)
PCS Fund
Pinnacle Seven Communications, Inc. (Pinnacle)
U S WEST, Inc. (U S West)
WinStar Communications, Inc. (WinStar)