weeks leading up to the start date of each auction, any minor, non-substantive amendments or clarifications to the specific mechanisms set forth in auction-related public notices or the Bidder Information Package. We believe that this process is consistent with the requirements of Section 3002(a)(1)(B)(iv) of the Balanced Budget Act, and will afford potential bidders adequate notice, as well as an opportunity to comment on the Bureau's intentions regarding issues relating to the day-to-day conduct of each auction.

2. "Real time" Bidding

126. Background. Congress has directed the Commission to "design and test multiple alternative methodologies for auction designs."[349] In the *Order* accompanying the *Notice*, we amended our general auction rules to specify a menu from which the Commission may choose an auction design.[350] These designs include: (1) simultaneous multiple-round auctions, using remote and/or on-site electronic bidding; (2) sequential multiple-round auctions, using either oral ascending or remote and/or on-site electronic bidding; and (3) sequential or simultaneous single-round auctions, using either remote or on-site electronic bidding, or sealed bids. The simultaneous multiple-round auction methodology with discrete rounds has been used in most auctions thus far because it provides bidders with information regarding the value others place on licenses and allows bidders to pursue backup strategies as more information becomes available during the auction.

127. As we indicated in the *Notice*, the Commission is always interested in exploring new ways to reduce the length of each auction without sacrificing the economic efficiency of the competitive bidding process.[351] We sought comment on how we could speed our auctions, and in particular, our simultaneous multiple-round auctions. For example, we sought comment on how we could modify our current procedural rules for simultaneous multiple-round auctions to meet this objective, or what new designs we might use to efficiently allocate numerous licenses.[352] Among other options, we proposed to modify our current simultaneous multiple-round auction rules to allow for "real time" bidding -- a system in which bidding occurs on an open and continuous basis within each bidding period -- as another design feature for electronic multiple-round auctions.[353] This is in contrast to the current discrete bidding periods currently used in the simultaneous multiple round auction where bidders cannot see or react to the bids of other bidders until the close of each bidding period. In addition, we sought comment on the appropriate length for the real time bidding

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[349] 47 U.S.C. § 309(j)(3).

[350] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-2374, ¶¶ 146-153.

[351] *Notice* at ¶ 79.

[352] *Id.* at ¶ 80.

[353] *Id.* at ¶¶ 81-84.

rounds and on what measures we can take to assure bidders that they will have enough time to determine their bidding strategies with "real time" bidding. Finally, we sought comment on the impact of "real time" bidding on small businesses, generally, and in particular on their ability to process bid information during the course of a single round.

128. Discussion. We adopt our proposal in the *Notice* to allow for "real time" bidding as an alternate design methodology in our rules. After careful consideration of the comments received in this proceeding, as well as our experience in conducting 15 auctions to date, we conclude that "real time" bidding will allow auctions to proceed more rapidly because it will allow bidders immediate feedback on new high bids. We also note that in an effort to simplify the auction process and prevent "gaming" of bids, the Commission has recently modified its electronic bidding process by implementing "click-box bidding."[354] This feature, which replaces the field where bidders previously typed their dollar bid amount with a "click on check box to bid" field (where the only bid amount allowed is at the minimum acceptable bid) no longer allows bidders to type a bid amount on the Bid Submission screen. As such, "click-box bidding" can work well in a "real-time" bidding context because bidders can more rapidly respond to the bids of other bidders, permitting an auction to progress more rapidly and efficiently. The Commission has successfully employed click box bidding in the recently completed 800 MHz SMR auction,[355] and plans to employ it in the forthcoming LMDS auction.[356]

129. The Commission delegates to the Bureau the authority to determine whether the public interest will be served by "real time" bidding in a particular auction. Most commenters oppose the use of "real time" bidding, arguing it may be difficult for bidders to react quickly enough to ensure that in each bidding round they make new high bids on the necessary percentage of their bidding eligibility to meet their activity requirement.[357] These commenters also believe that the somewhat accelerated pace of "real time" bidding may leave less time to craft informed bidding strategies during the auction.[358]

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[354] *See, e.g.*, Applications of Mercury PCS II, LLC For Facilities in the Broadband Personal Communications Systems in the D, E and F Blocks, *Notice of Apparent Liability for Forfeiture*, FCC 97-388 (rel. October 28, 1997) ("*Mercury NALF*").

[355] *See* "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," *Public Notice*, DA 97-1934 (rel. September 5, 1997).

[356] *See LMDS Pre-Auction Public Notice.*

[357] *See* Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-14; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6; NextWave Reply Comments at 7. *See* Competitive Bidding Second Report and Order, 9 FCC Rcd 2371, ¶¶ 133-37 (1994), for an explanation and description of the Commission's activity rules.

[358] *See* Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-14; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6; NextWave Reply Comments at 7.

130. As mentioned above, the "click-box bidding" format should significantly improve a bidder's ability to react quickly. Further, should we determine to employ "real-time" bidding in the future, we believe that the issues involving meeting activity requirements will be alleviated by our proposal in the *Notice* to open a discrete closed bidding period after each fixed period of "real time" bidding (when only standing high bids from the previous round and new high bids from the current round count in determining the bidder's activity level). During this closed bidding period, bidders will be able to submit valid bids (bids that meet or exceed the minimum accepted bid) to ensure that they have the opportunity to meet their activity requirements for the round. Following the discrete closed bidding period, the Commission will post the final round results for the period and make all bids available to the public. This discrete period should help to eliminate any risks of not meeting eligibility requirements or having time to formulate bidding strategies which commenters suggest may be associated with "real time" electronic bidding.[359] In particular, this period will help to provide bidders sufficient time to meet eligibility requirements and will minimize the risks, suggested by some commenters, of the submission of erroneous bids.[360]

131. One of the greatest advantages to "real time" bidding is that it allows bidders to obtain immediate feedback on new high bids, withdrawn high bids and minimum accepted bids, and thereby provides them with the opportunity to immediately respond to this information and move licenses toward their final valuations more quickly. We believe that, particularly in the case of complex auctions of multiple licenses, it is one means of helping auctions to progress more efficiently. Under the current simultaneous multiple-round auction rules, each round of bidding contains a discrete bidding period during which bidders cannot see the actions of other bidders. Bidders must wait until the end of each round to see the bids placed by other bidders and determine their status as high bidder. In contrast, an open, continuous bidding round -- in which bidders know when their bid has been exceeded and are free to bid again -- can be used to reduce the delay inherent in the current design where a bidder must wait until the next discrete round to react to the actions of other bidders.

132. We note that some commenters express concern that the widespread use of "real time" bidding would increase the administrative costs of participating in the auction due to the incentive to stay on-line during the continuous bidding period and thereby work to exclude smaller entities that may lack the resources to devote to a concentrated bidding period or to stay on-line during the entire bidding period.[361] We agree with commenters that under some circumstances the costs of participating in an auction in which bidders are required to be "on-

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[359] *See* Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-15; NextWave Reply Comments at 6-7; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6.

[360] *See* Nextel Comments at 3; CII Comments at 17; NextWave Reply Comments at 7.

[361] Nextel Comments at 3; AMTA Comments at 13-14; NextWave Reply Comments at 6-7; CellNet Reply Comments at 6.

line" may discourage the participation of small businesses. We therefore conclude that the per minute charge for bidding "on-line" should be reexamined, and delegate to the Bureau that authority to implement such a reduced fee in the future, if appropriate.[362]

133. No commenters addressed our tentative conclusion in that *Notice* that because "real time" auctions are a variation of the simultaneous multiple-round auction design established in our rules, many of the same procedures (*i.e.*, upfront payments to determine eligibility, activity requirements that apply to each round, minimum bid increments, and a stopping rule) should apply.[363] These procedures have proven workable and easily understood by bidders in the context of our simultaneous multiple-round auction design, but some modifications to these procedures may be necessary if we employ "real time" bidding. We conclude that the Bureau should undertake this task.

134. Consistent with the Balanced Budget Act,[364] we direct the Bureau (*see* Section III.E.1, *supra*) to seek comment from the public on auction-specific issues (*i.e.*, duration of bidding rounds and activity requirements) prior to the start of each auction. We believe that this practice of seeking comment on such issues prior to the start of each auction will adequately address any additional concerns associated with the use of "real time" bidding. We also note that we seek, on an ongoing basis, to enhance and improve our bidding processes. We believe that the Bureau should explore "real time" bidding consistent with the requirement under Section 309(j) that we experiment with different bidding methodologies.[365]

3. Combinatorial Bidding

135. Background. Combinatorial bidding, also known as package bidding, allows bidders to place single bids for groups of licenses. For example, in a combinatorial auction, bidder A could place a bid of $100,000 for licenses 1, 2 and 4, while bidder B places a bid of $500,000 for licenses 2, 3 and 5. The bidding software then calculates the revenue maximizing solution and awards the high bids for that round to the appropriate package(s). Three commenters discussed the possible use of combinatorial bidding as a method of

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[362] The Commission adopted a fee schedule for obtaining access to the Commission's database and remote bidding software packages. The remote bidding software package is available for $175. The current charge for on-line remote access via a 900 number is $2.30 per minute. *See* Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Services Charges, and Bidders Information Packages in Connection with Auctionable Services, WT Docket No. 95-69, *Report and Order*, FCC 95-308 (rel. July 21, 1995).

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

[364] *See* Balanced Budget Act, § 3002.

[365] *See* 47 U.S.C. § 309(j)(3).

speeding the auction process by providing for the efficient aggregation of licenses. Specifically, the Automated Credit Exchange ("ACE") strongly supports the use of combinatorial bidding, stating that such a system can increase the speed of particular auctions and provide for the deployment of spectrum resources in the most efficient license configurations.[366] In contrast, Merlin argues that combinatorial bidding is too complex and difficult to implement, and suggests that such a system would disadvantage smaller entities interested in bidding for smaller areas or niche markets.[367] Finally, AirTouch contends that combinatorial bidding should not be used in auctions of encumbered spectrum because incumbents do not undertake the same system/license acquisition planning strategy as bidders in auctions for unencumbered spectrum.[368]

136. Discussion. We did not specifically seek comment in the *Notice* on the use of combinatorial bidding as an auction design methodology. Our current Part 1 rules already provide for the use of combinatorial bidding as one of our competitive bidding design options.[369] In addition, the Commission was directed by Congress in the Balanced Budget Act of 1997 to consider the use of combinatorial bidding as an alternative auction design that could be used, in certain instances, as a means of speeding the auction process.[370] Specifically, the Balanced Budget Act requires the Commission, for testing purposes, to design and conduct an auction in which a system of combinatorial bidding is used.[371]

137. We have insufficient information to determine how this relatively new bidding methodology might be used to improve our spectrum auction program. The Commission will seek comment on a number of issues relating to combinatorial bidding, and will more thoroughly address this issue once the record is complete. The Commission has also awarded a research and development contract to a private sector consultant to examine theoretical and applied combinatorial bidding approaches where licenses exhibit strong synergies and bidders have overlapping preferences (*i.e.*, prefer different packages of licenses). The contractor will also evaluate the most appropriate of the theoretical and applied approaches to combinatorial bidding for spectrum auctions and address a number of concerns raised by the Commission and other interested parties. Our goal in awarding the contract is to allow private sector and government auction experts to address these concerns and investigate the possible effects of

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366 ACE Comments at 1-15.

367 Merlin Reply Comments at 8.

368 AirTouch Reply Comments at 8.

369 *See* 47 C.F.R. § 1.2103(b).

370 Balanced Budget Act.

371 Balanced Budget Act; 47 U.S.C. § 309(j)(3)(i).

the use of combinatorial bidding on the auction process, including the Commission's fulfillment of the objectives of Section 309(j) of the Communications Act.

4. Minimum Opening Bids and Reserve Prices

138. Background. Section 1.2104(d) of our rules states that the Commission may establish *suggested* minimum opening bids.[372] In the *Notice*, we proposed to amend Section 1.2104 to specify that the Commission may establish minimum opening bids, rather than suggested minimum opening bids.[373] Such a provision has been adopted in service-specific rules.[374] In the *Notice*, we indicated that a minimum opening bid can serve some of the same purposes as a reservation price by preventing a license from being awarded under circumstances where there would be little competition among bidders and significant incentives to collude.[375] In addition, we noted that establishing a minimum opening bid is one way of helping to speed the auction process, and thus the provision of service to the public.[376] After the release of the *Notice*, Congress passed the Balanced Budget Act of 1997, which directed the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid will be established, unless the Commission determines that a reserve price or a minimum opening bid are not in the public interest.[377]

139. Discussion. Several commenters oppose the use of minimum opening bids.[378] However, the Balanced Budget Act establishes a presumption in favor of a required minimum opening bid or reserve price.[379] We therefore adopt our proposal in the *Notice* to delete the term "suggested" from Section 1.2104(d). We also clarify that the Bureau has the authority to seek comment on minimum opening bids and reserve prices and to establish such mechanisms

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[372] 47 C.F.R. § 1.2104(d) (emphasis added).

[373] *Notice* at ¶ 86.

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

[375] *Notice* at ¶ 86. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2384, ¶ 207.

[376] *Id.*

[377] Balanced Budget Act; 47 U.S.C. § 309(j)(4)(F).

[378] *See* AirTouch Comments at 10; PageNet Comments at 12; Nextel Comments at 7 and Reply Comments at 6; CII Comments at 18; ISTA Comments at 3; Hughes Comments at 9-10; Airadigm Comments at 17; AMTA Comments at 15; CellNet Reply Comments at 7.

[379] Section 3002(a)(1)(C)(iii) of the Balanced Budget Act provides that the Commission must "prescribe methods by which a reasonable reserve price will be required, or a minimum opening bid will be established, to obtain any license or permit being assigned . . . unless . . . such a reserve price or minimum opening bid is not in the public interest." Balanced Budget Act, § 3002(a)(1)(C)(iii).

for each auction, consistent with its role in managing the auction process and setting valuations for other purposes (*e.g.*, setting upfront payment amounts). The Bureau shall establish a minimum opening bid and/or reserve price for each auction, unless, after comment is sought prior to a particular auction, it is determined that a minimum opening bid or reserve price would not be in the public interest.

140. The terms "minimum opening bid" and "reserve price" are traditionally different, and are employed for different purposes. A reserve price is defined as an absolute minimum price below which an auctioneer will not sell an object being auctioned. It may be disclosed to bidders before an auction or during an auction, or it may be kept secret, so that a "winning" bidder does not actually find out if the object has been won until after the auction has closed. Auctioneers generally employ reserve prices to order to maximize the revenue earned from an auction.[380] A minimum bid is a minimum value below which bids will not be accepted in the first round of an auction. The level of a minimum opening bid is not unchangeable like a reserve price, but may be reduced at the discretion of the auctioneer if no bids are made at the existing level. The primary purpose of a minimum opening bid is to speed up the course of an auction. However, a minimum bid also can serve a revenue-enhancing function like a reserve price, because if bids will not be accepted below a certain level, they will also not be sold below that level. That is, a minimum opening bid effectively functions as a reserve price unless or until it is reduced. Regarding the level of reserves or minimum bids, we do not believe that the Balanced Budget Act provision means that we should now be attempting to *maximize* the revenue earned in all future spectrum license auctions. The other auction goals in the Act, such as ensuring the deployment and rapid deployment of new technologies and services and promoting economic opportunity and competition,[381] have not been eliminated, and we must continue to balance and pursue them all. Therefore, we conclude that the new provision does not call for traditional reserve prices. Rather, it calls for an added protection that licenses will not be assigned at unacceptably low prices.

141. We believe that the Bureau should have the discretion to employ either or both of these mechanisms for future auctions.[382] We direct the Bureau to seek comment on the use of a minimum opening bid and/or reserve price, as it will do for a variety of auction-specific issues,[383] prior to each auction. In addition, the Bureau should seek comment on the

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[380] Auction theory shows that the reserve price device accomplishes its revenue maximization goal because it gives all bidders an incentive to increase the level of their bids above what they would be in the absence of a reserve.

[381] *See* 47 U.S.C. § 309(j)(3).

[382] We note that our Part 1 rules already provide that the Commission may provide for a suggested minimum opening bid and may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded. *See* 47 C.F.R. §§ 1.2104(c), (d).

[383] *See* Section II, *supra*.

methodology to be employed in establishing each of these mechanisms. Among other factors, the Bureau should consider the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands, and any other relevant factors that could reasonably have an impact on valuation of the spectrum being auctioned.

5. Maximum Bid Increments

142. Background. A bid increment is the amount or percentage by which a bid must be raised above the high bid of the previous round in order to be accepted as a valid bid in the current round. In the *Competitive Bidding Second Report and Order*, we determined that the Commission would reserve the right to specify minimum bid increments in dollar terms as well as in percentage terms.[384] We reasoned that imposing a minimum bid increment speeds the progress of the auction and, in combination with activity and stopping rules, helps to ensure that the auction comes to a close within a reasonable period of time.[385] We did not reserve the discretion to specify maximum bid increments. In the *Notice*, we therefore sought comment on whether the Commission should retain the discretion to employ a maximum bid increment if it finds that jump bidding (*i.e.*, placing bids that are significantly higher than the minimum acceptable bid) is impairing the auction process.[386]

143. Discussion. Several commenters suggest that jump bidding is not a problem of serious concern.[387] Some theoretical literature, however, suggests that bidders could use jump bidding to manipulate the auction process and potentially reduce efficiency of the auction.[388] For example, a general principle of auction theory is that the auction mechanisms that perform the best are those which are able to induce bidders to reveal the most information. To the extent that jump bids enable bidders to conceal information, the phenomenon moves us away from the informational advantages of an ascending bid (multiple round) auction in the direction of a first-price sealed bid (single round) auction. As ISTA recognizes, jump bidding can complicate bidding strategy and deny bidders information about the number of bidders

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

[385] *Id.*

[386] *Notice* at ¶ 88.

[387] *See* AirTouch Comments at 11, Reply Comments at 5; PageNet Comments at 12-13; NextWave Reply Comments at 8.

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

who would be willing to pay prices between the minimum acceptable bid and the jump bid.[389] In the absence of information about the bidders who would be willing to participate at intermediate bids, other bidders may feel compelled to shade their bids more than they would otherwise. This behavior is an attempt to avoid the "winner's curse," that is, the tendency for the winner to be the bidder who most overestimates the value of the item being auctioned.

144. As an initial matter, we note that recent changes designed to improve the Commission's electronic auction bidding process eliminate the dangers that a maximum bid increment is designed to avoid (*e.g.*, jump bidding).[390] In an effort to speed the auction process and eliminate unwarranted "gaming" of our processes, the Commission has simplified the electronic auction bidding process by implementing "click box bidding".[391] As discussed above (*see* Section III.E.2, *supra*), this feature permits bidders to enter a bid only at the maximum bid increment as determined by the Commission, and thus makes bidding tactics such as jump bidding impossible. Nevertheless, we will reserve the discretion to employ a maximum bid increment should we return to an auction format in which jump bidding can in any way decrease the competitiveness of an auction. In this regard, we disagree with NextWave's suggestion that by disallowing jump bids as one method by which bidders may obtain information about each other the Commission risks prolonging an auction.[392] On the contrary, the Commission has alternate methods (*e.g.*, "click-box bidding", employing minimum bid increments and activity rules and increasing the number of rounds per day) to ensure that auctions close within a reasonable time.

6. Bid Withdrawal Payments

145. Background. Under our current rules, if a high bid is withdrawn prior to the close of a simultaneous multiple-round auction, the Commission will impose a bid withdrawal payment equal to the difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. 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.[393]

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[389] ISTA Comments at 3.

[390] *See, e.g.*, "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," *Public Notice*, DA 97-1934 (rel. September 5, 1997).

[391] *See Mercury NALF.*

[392] NextWave Reply Comments at 8.

[393] 47 C.F.R. § 1.2104(g).

146. We adopted these bid withdrawal rules in the *Competitive Bidding Second Report and Order* and determined that they would discourage insincere bidding without causing bidders to be too cautious in attempting to aggregate licenses.[394] However, in the *Atlanta Trunking Order*, we held that in some cases of erroneous bids, full application of the bid withdrawal payment provisions could impose an extreme and unnecessary hardship on bidders and that some relief appears necessary.[395] We also noted that it may be extremely difficult for the Commission to distinguish between "honest" erroneous bids and "strategic" bids that appear erroneous. We therefore fashioned guidelines in the *Atlanta Trunking Order* to provide for reduced bid withdrawal payments in cases of erroneous bids that balance issues of fairness to bidders with the importance of discouraging insincere bidding. We later modified the broadband PCS rules for the D, E, and F blocks to establish similar provisions governing the withdrawal of erroneous bids.[396] In the *Notice*, we proposed to amend Sections 1.2104 and 1.2109 of our rules to establish similar provisions to apply to all future auctions.[397]

147. Discussion. As discussed above (*see* Section III.E.2, *supra*), we recently implemented "click box bidding" in an effort to improve the auction process and eliminate erroneous bids. We also have recently modified the electronic bidding format to limit withdrawals. As a result of such changes, the types of erroneous bids discussed in the *Notice* cannot occur under our new bidding format. We therefore conclude that our proposal regarding decreased bid withdrawal payments in cases of erroneous bids is moot.

7. Misuse of Bid Withdrawals

148. Background. As we indicated in the *Notice*, in prior auctions we have found that allowing bid withdrawals risks encouraging insincere bidding and the use of withdrawals for anti-competitive strategic purposes, such as signaling other bidders.[398] We therefore sought

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

[395] *See* Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, *Order*, 11 FCC Rcd 17189, FCC 96-203 (May 3, 1996) ("*Atlanta Trunking Order*") and Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, *Order*, DA 96-706 11 FCC Rcd 13728 (May 6, 1996). *See also* Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Petition for Reconsideration of Bid Withdrawal Payment and Georgia Independent PCS Corp., Application for Review of Request to Waive Bid Withdrawal Payment Provision, *Memorandum Opinion and Order*, FCC 97-154, 12 FCC Rcd 6382 (rel. May 6, 1997) (waiving the full bid withdrawal payments assessed against these parties after a finding that the Commission's remote bidding system may have contributed to some confusion leading to the submission of the erroneous bids).

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

[397] *See Notice* at ¶ 92.

[398] *See Notice* at ¶ 90. *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-74, ¶¶ 146-153; *Mercury NALF*.

comment on whether we should exercise our authority to limit withdrawals, and if so, under what circumstances.[399] Finally, we sought comment on other ways to address the concern about strategic withdrawals without unduly affecting bidders' ability to efficiently aggregate licenses, such as increasing the withdrawal payment or changing its structure.[400]

149. Discussion. Several commenters oppose the Commission's proposal to place limits on bid withdrawals in certain circumstances as a means of avoiding strategic withdrawals that are intended for anti-competitive purposes.[401] Both AT&T and Merlin argue that the ability to withdraw bids is critical to a bidder's auction strategy.[402] While they recognize the difficulty in determining the true intent behind a withdrawn bid, these commenters suggest that the Commission continue to monitor each auction carefully, and address abusive behavior on a case-by-case basis.[403] Similarly, PageNet states that the Commission should not limit bid withdrawals as they are critical to providing applicants with the flexibility to correct bids that are placed in error and to quickly change bidding strategy.[404] PageNet contends that concerns about strategic withdrawals intended to produce anti-competitive results are not sufficient to eliminate the bidding flexibility that bid withdrawals provide.[405] Finally, AirTouch suggests that the Commission permit bid withdrawals at any time, subject to certain conditions.[406] In particular, AirTouch recommends that: (1) all bid withdrawals should be subject to applicable bid withdrawal payments; (2) a bidder withdrawing a bid should not be permitted to regain eligibility on any bidding units lost as a result of the withdrawal; and (3) the high bidder in the round prior to the withdrawn bid should be permitted to bid again on the license, and to reacquire eligibility for bidding units necessary to resubmit the new bid.[407]

150. In contrast, NextWave supports a limitation on bid withdrawals. NextWave states that bid withdrawals are a necessary tool, but in some instances, bid withdrawals are used for

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399 *Notice* at ¶ 93.

400 *Id.*

401 *See* AT&T Comments at 5-6; PageNet Comments at 13-14; AirTouch Comments at 11; Merlin Reply Comments at 5-6.

402 AT&T Comments at 5-6; Merlin Reply Comments at 5-6.

403 AT&T Comments at 5-6, Merlin Reply Comments at 5-6.

404 PageNet Comments at 13-14.

405 PageNet Comments at 14.

406 AirTouch Comments at 11.

407 AirTouch Comments at 12.

insincere bidding designed to "game" the auction.[408] To protect against such misuse, NextWave proposes, for example, that the Commission create a fourth stage of the auction, during which a bidder who has withdrawn from a particular market would be prohibited from re-bidding in the same market.[409] In the past, we have recognized that allowing bid withdrawals facilitates efficient aggregation of licenses and pursuit of efficient backup strategies as information becomes available during the course of an auction. Nevertheless, we also have recognized that bidders may, in some instances, seek to remove bids for improper purposes, such as to delay the close of the auction for strategic purposes. For this reason, the Bureau has traditionally retained the discretion to limit withdrawals as part of the management of an auction.[410] To prevent strategic delays to the close of the auction, or other abuses, the Bureau should exercise its discretion assertively. In addition, the Bureau should consider limiting the number of rounds in which bidders may withdraw bids,[411] and to prevent bidders from bidding on a particular market if the Bureau finds that a bidder is abusing the Commission's bid withdrawal procedures. These are among the types of issues on which the Bureau will seek comment prior to the start of each future auction.[412]

8. Reauction Versus Offering to Second Highest Bidder

151. Background. Under Section 1.2109(b) of the Commission's rules,[413] if a winning bidder withdraws its bid after the auction has closed or fails to remit the required down payment within ten business days after the Commission has issued a Public Notice announcing winning bidders, the bidder will have defaulted. In such event, Section 1.2109(b) provides that the Commission may, in its discretion, either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids.[414] In the *Notice*, we requested comment on whether we should (1) retain Section 1.2109(b) in its

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[408] NextWave Reply Comments at 9.

[409] *Id.*

[410] *See, e.g.*, "Auction of Broadband Personal Communications Services D, E and F Blocks -- Auction Notice and Filing Requirements," *Public Notice*, DA 96-1026 (rel. June 26, 1996).

[411] This practice was employed in the recently-completed 800 MHz SMR auction, and will be employed in the upcoming LMDS auction. *See* "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," *Public Notice*, DA 97-1934 (rel. September 5, 1997); *LMDS Pre-Auction Public Notice*.

[412] *See* Section I.A., *supra*.

[413] 47 C.F.R. § 1.2109(b).

[414] 47 C.F.R. § 1.2109(b). If a winning bidder defaults on a license or is disqualified after having made the required down payment, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications. *Id.*

current form; (2) modify the rule so that the Commission retains the discretion regardless of when a default occurs to offer the license only to the second highest bidder at its bid price; (3) modify the rule so that the Commission retains discretion to offer a license on which the winning bidder has defaulted on its down payment obligation only to the second highest bidder; (4) modify the rule so that the Commission retains discretion to offer a defaulted license to the highest losing bidders (in descending order of their bids), but only at the final bid level of the second highest bidder; or (5) modify the rule to require reauction of defaulted licenses regardless of when a default occurs.[415] In addition, we sought comment on whether we should modify Section 1.2109(b) to codify our statement in the *Competitive Bidding Fifth Report and Order*[416] that where there are a relatively small number of low value licenses, and only a short time has passed since the initial auction, the Commission may choose to offer the license to the second highest bidder because the cost of conducting another auction may exceed the benefits. Finally, we requested that commenters favoring this option indicate the parameters that the Commission should employ in determining which licenses might be re-offered to bidders in the original auction.[417]

152. Discussion. We will modify Section 1.2109(b) to reserve the discretion to either reauction a defaulted license or offer it to the other highest bidders (in descending order) at their final bids.[418] Several commenters support the reauction of defaulted licenses because it helps to ensure that the price paid for a license is the current price, rather than the price that was applicable at the time the original auction occurred.[419] Only two commenters oppose reauction in all circumstances.[420] Airadigm and AMTA oppose providing the Commission with the discretion to reauction defaulted licenses because they believe that awarding licenses to the next highest bidder will be faster than reauctioning.[421] However, as we stated in the *Notice*, we have developed a computerized auction system and conducted numerous auctions and we now believe that the costs of a reauction, even for a small number of relatively low

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[415] *Notice* at ¶ 97.

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

[417] *See Notice* at ¶ 97.

[418] 47 C.F.R. § 1.2109(b). If a winning bidder defaults on a license or is disqualified after having made the required down payment, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications. *Id.*

[419] Nextel Comments at 8-9 and Reply Comments at 7.

[420] AMTA Comments at 15-16; Airadigm Comments at 16-17.

[421] Airadigm Comments at 16-17; AMTA Comments at 15-16..

value licenses, is generally minimal.[422] We also believe that the planned use of regularly scheduled quarterly auctions will ensure rapid reauction.[423]

153. Further, we note that re-offering a defaulted license to the next highest bidder (in descending order) at their final bids may not ensure that the license will be awarded to the bidder who values it the most highly. In particular, as the license is offered to bidders at the next highest bids, other parties can argue that they would pay more for the license if given the opportunity. In addition, when more than one license is being auctioned, aggregation strategies may shift during the course of the auction, affecting the value placed on any individual license by a particular bidder. As we discussed in the *Notice*, when we first adopted rules governing the licensing of defaulted licenses, we stated that "[i]n the event that a winning bidder in a simultaneous multiple-round auction defaults on its down payment obligations, the Commission will generally reauction the license either to existing or new applicants."[424] Noting that in some circumstances the costs of conducting a reauction may not always be justified, we reserved the discretion in cases in which the winning bidder defaults on its down payment obligation to offer a defaulted license to the highest losing bidders (in descending order of their bids) at their final bids if "only a small number of relatively low value licenses are to be reauctioned . . . ."[425]

154. Nextel and others suggest that the Commission should retain the discretion to award defaulted licenses to the next highest bidder only when the default occurs soon after the close of the auction and there has been no opportunity for parties to file petitions to deny.[426] Nextel suggests that in such an instance, there is little risk of a significant change in market price, and no risk of encouraging frivolous petitions to deny.[427] We are aware of the dangers of adopting a rule which could have the unfortunate consequence of encouraging the filing of frivolous petitions to deny. Nevertheless, we believe that by reserving the discretion to either reauction defaulted licenses or award them to the next highest bidder, the Commission will be in the best possible position to determine which option serves the public interest in each particular situation.

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422 *See Notice* at ¶ 96.

423 *See Notice* at ¶ 7 (providing for regularly scheduled quarterly auctions).

424 *Notice* at ¶ 95, citing *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2374, ¶ 154 n.115.

425 *Id.*

426 Nextel Reply Comments at 7.

427 *Id.*

F. Anti-Collusion Rules

155. Background. In the *Competitive Bidding Second Report and Order* the Commission adopted rules designed to prevent and facilitate the detection of collusive conduct in order to enhance and ensure the competitiveness of both the auction process and the post-auction market structure.[428] Section 1.2105(c) of the Commission's rules requires that auction applicants identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process.[429] Applicants are also required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bids, bidding strategies, or the particular markets on which they will or will not bid.[430] After short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders that have applied to bid in the same geographic license area, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.[431] In addition, winning bidders are required to attach as an exhibit to their long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process prior to the close of bidding.[432] All such arrangements must have been finalized prior to the filing of short-form applications.[433]

156. Under Section 1.2105(c)(4) of our rules, a party holding a non-controlling, attributable interest in one applicant may acquire an ownership interest, form a consortium with, or enter into a joint bidding arrangement with other applicants for the same geographic license area, provided that (1) the attributable interest holder certifies that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of

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[428] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385-2386, ¶¶ 221-226. *See also* 47 C.F.R. § 1.2105(c).

[429] 47 C.F.R. § 1.2105(c)(1). *See also Competitive Bidding Second Report and Order,* 9 FCC Rcd at 2387, ¶ 225.

[430] 47 C.F.R. § 1.2105(a)(2)(ix).

[431] 47 C.F.R. § 1.2105(c); *Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6868 (1994); *Competitive Bidding Second Report and Order,* 9 FCC Rcd at 2387, ¶ 225.

[432] 47 C.F.R. § 1.2107(d).

[433] *See* 47 C.F.R. § 1.2105(c)(1).

the applicants in which it holds an attributable interest, has formed a consortium, or has entered into a joint bidding arrangement; and (2) the arrangements do not result in a change in control of any of the applicants.[434] In the *Notice*, we recognized that this exception, although helpful in facilitating the flow of capital to multiple applicants, is difficult to apply in a business setting.[435] In particular, we stated that entities are reluctant to invest in multiple applicants if they cannot obtain information about business plans and strategies, which often necessarily reflect bidding strategies or bids. We therefore proposed to modify this provision to permit entities to invest in multiple applicants, subject to certain conditions, if the original applicant withdraws from the auction.[436]

157. In the rule making proceeding adopting service-specific auction rules for paging services, several commenters suggested that discussions between bidders for the same license area regarding a business merger or acquisition may be construed as discussions of bidding or bidding strategy, and thus a violation of Section 1.2105(c)(4).[437] These commenters requested that the Commission create a "safe harbor" for discussions of certain non-auction related business matters between applicants for the same license areas to minimize any chilling effect on ongoing business acquisitions and transactions.[438] At that time, we stated that we did not believe a sufficient record had been established to enable us to make a decision on this proposal, and that we would more thoroughly examine this issue in our review of our general auction procedures.[439] In the *Notice,* we therefore sought comment on creation of such a "safe harbor," in light of efforts by the Commission and its staff to clarify the relationship between the anti-collusion rule and non-auction related business negotiations occurring during the time the anti-collusion rule applies to parties participating in an auction.[440] We also sought comment in the *Notice* on any other changes to our rules prohibiting collusion that

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[434] 47 C.F.R. § 1.2105(c)(4).

[435] *Notice* at ¶ 100.

[436] *Id.* at ¶ 101.

[437] *See* AirTouch Comments at 37-40 and Arch Comments at 19-20, *Paging Second Report and Order and Further Notice of Proposed Rule Making. See also* MobileMedia Comments at 26 and Metrocall Comments at 21-22 filed in the same proceeding.

[438] *Id.*

[439] *Paging Second Report and Order and Further Notice of Proposed Rule Making* at ¶ 156.

[440] *Notice* at ¶ 102.

commenters believe are warranted.[441] Finally, we sought comment on the public notices and letters issued by Commission staff interpreting and clarifying these rules.[442]

158. Discussion. We have taken this opportunity in revisiting our general competitive bidding procedures to examine the effectiveness of the anti-collusion rule in the 15 auctions we have conducted to date. We continue to believe that our anti-collusion rules are necessary to deter bidders from engaging in anti-competitive behavior. Nevertheless, after careful review of the comments received in this proceeding, we have determined that some modifications to Section 1.2105(c) can be made which will benefit bidders in several respects, without jeopardizing the competitiveness and overall integrity of our auction program.

159. In the *Collusion MO&O*,[443] the Commission revisited the anti-collusion rules prior to the start of the PCS auctions, and concluded that allowing holders of non-controlling attributable interests in an applicant greater flexibility to form agreements with other applicants would help applicants to acquire the additional capital necessary to bid successfully for licenses. We therefore created an exception to the general rule contained in Section 1.2105 to permit a holder of a non-controlling attributable interest in one applicant for a particular license or licenses to obtain ownership interests in or enter into consortium arrangements with a second applicant for a license in the same geographic service area.[444] The attributable interest holder must certify to the Commission that it has observed and will observe certain restrictions on communication concerning the applicants in which it holds an attributable interest or with which it has entered into a bidding arrangement.[445]

160. After considering the comments filed in response to our proposals in the *Notice*, we have decided to adopt a second exception to our general rules prohibiting collusion.[446] Specifically, we will permit a holder of a non-controlling attributable interest in an applicant to obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area provided that the original applicant has withdrawn from the auction, is no longer placing bids, and has no further eligibility. To meet

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[441] *Notice* at ¶ 102.

[442] *Id.*

[443] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, WT Docket No. 93-253, *Memorandum Opinion and Order*, 9 FCC Rcd 7684 (1994) at 7687-89, ¶¶ 8-12 (1994) ("*Collusion MO&O*").

[444] For purposes of this rule, an "attributable" investor is one holding five percent or more of the applicant. *See* 47 C.F.R. § 1.2105(c)(4).

[445] *Id. See also Collusion MO&O*, 9 FCC Rcd at 7688-89, ¶ 11.

[446] *See* 47 C.F.R § 1.2105(c).

the requirements of this exception, the attributable interest holder will be required to certify to the Commission that it did not communicate with the new applicant prior to the date the original applicant withdrew from the auction, and that it will not convey bidding information, or otherwise serve as a nexus between the previous applicant and the new applicant. As stated in the *Notice*, this additional exception will further facilitate the flow of capital to auction applicants by encouraging, and providing the flexibility necessary for, non-controlling investors to invest in other auction applicants if their original applicant fails to complete the auction.[447] The majority of commenters addressing this proposal agree that it will encourage investment in auction applicants without threatening the overall competitiveness of the auction process.[448]

161. Only Nextel and PageNet oppose this exception, citing the potential for collusive activity when an investor in an applicant that has chosen to withdraw from the auction explores possible investments in other applicants, thus learning bidding strategies of multiple auction participants.[449] In addition, PageNet contends that this exception could encourage speculation which would threaten the integrity of the auction process and ultimately result in lower prices paid for the spectrum.[450] However, after balancing these factors, we believe that the benefits of this certification requirement, in particular the likelihood that auction applicants will be able to attract increased investment, exceed any possible disadvantages. The Commission requires that auction applicants certify to the truthfulness and accuracy of a number of issues on their Form 175 applications, and to make minor amendments when necessary. We believe that applicants are no more likely to make false certifications about the exception which we adopt today than about other information on the form. As discussed *infra*, we also remind prospective applicants that the Commission will conduct a detailed investigation in the event it becomes aware of a possible violation of the anti-collusion rule, and that violations may result in the loss of the down payment or full bid amount, the cancellation of licenses, and preclusion from participation in future auctions.

162. Commenters in both the Paging proceeding and in this proceeding[451] support the creation of a safe harbor for discussions of certain non-auction related business matters between applicants for the same license areas. In general, these commenters argue that (1) the

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[447] *Id.*

[448] *See* Airadigm Comments at 17 and Reply Comments at 7; AT&T Comments at 7; CII Comments at 20; ISTA Comments at 3.

[449] *See* Nextel Comments at 9-10 and Reply Comments at 8; PageNet Comments at 15.

[450] PageNet Comments at 15.

[451] *See* Metrocall Comments at 4; AT&T Comments at 7; PCIA Comments at 5-6; AMTA Comments at 16; PageNet Comments at 14; AirTouch Comments at 12-13, Reply Comments at 7; CII Comments at 19-20; ISTA Comments at 3; Nextel Reply Comments at 3-4; CellNet Reply Comments at 5.

Commission's anti-collusion rules cause unnecessary confusion in their current form,[452] (2) the purposes of the anti-collusion rules would not be threatened by such a safe harbor,[453] and (3) existing antitrust laws and policies will adequately accomplish the goal of protecting the competitiveness of the bidding process.[454] As our auction program has evolved, we have continued to refine and clarify for bidders the operation and impact of the anti-collusion rule upon bidder conduct during the course of an auction.[455] Prior to the start of the broadband PCS D, E and F block auction, the Bureau received numerous inquiries concerning the impact of these rules upon business contacts between current broadband PCS licensees and auction winners and eligible participants in the ongoing broadband PCS D, E and F Block auction. In response to these inquiries, the Bureau released a Public Notice providing guidance on these business negotiations in the context of our anti-collusion rules.[456] The Bureau emphasized that Section 1.2105(c) may affect the way in which auction applicants conduct their routine business during an auction by placing significant limitations upon their ability to pursue business opportunities involving services in the geographic areas for which they have applied to bid for licenses.[457] These interpretations have provided sufficient guidance concerning the types of non-auction related communications which are permitted under Section 1.2105(c), and we therefore decline to create such a safe harbor.

163. We affirm the Bureau's interpretation of this aspect of the anti-collusion rule. As a general matter, the anti-collusion rule does not prohibit non auction-related business negotiations between auction applicants who have applied for the same geographic service areas. We caution auction applicants, however, that discussions concerning, but not limited to, issues such as management, resale, roaming, interconnection, partitioning and disaggregation may all raise impermissible subject matter for discussion because they may

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[452] AT&T Comments at 6-7.

[453] *See* Metrocall Comments at 4; AT&T Comments at 7.

[454] AT&T Comments at 6-7.

[455] *See Public Notice*, "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rules for D, E and F Block Bidders," DA 96-1460 (August 28, 1996) *("August 28 Public Notice")*; *Public Notice*, "FCC Staff Clarifies Application of Anti-Collusion Rule to Broadband PCS 'C' Block Reauction," DA 96-929 (June 10, 1996) ("*June 10 Public Notice*"); *Public Notice*, "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules, DA 95-2244 (Oct. 26, 1995); *News Release*, "Staff Adopts Order and Releases Letters Clarifying Issues on Broadband PCS Auctions" (Oct. 26, 1994); Letter from William E. Kennard, FCC, to Gary M. Epstein & James H. Barker, Oct. 25, 1994; Letter from Rosalind K. Allen, FCC, to R. Michael Senkowski, Dec. 1, 1994; Letter from Rosalind K. Allen, FCC, to Leonard J. Kennedy, Dec. 14, 1994; Letter from Kathleen O'Brien Ham, FCC, to Mark Grady, Apr. 16, 1996; Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996.

[456] *June 10 Public Notice.*

[457] *Id* at 2.

convey pricing information and bidding strategy.[458] Because auction applicants should avoid all discussions with each other that will likely affect bids or bidding strategies, we believe that individual applicants, and not the Commission, are in the best position to determine in the first instance which communications are permissible and which are not.[459]

164. As discussed above, the *Notice* also invited comment on any other changes to our rules prohibiting collusion that commenters believe are warranted.[460] Section 1.2105(c)(6)(i) of our rules provides that, for purposes of the anti-collusion rule, an applicant is defined as an entity submitting a short-form application, as well as all holders of partnership, ownership, and any stock interest amounting to five percent or more of the entity.[461] One commenter, the Coalition of Institutional Investors ("CII"), states that defining any holder of five percent or more of an auction applicant as part of the applicant for purposes of the Commission's anti-collusion rules unnecessarily restricts applicants' abilities to obtain financing from a variety of sources.[462] After careful consideration of the issue, we agree with CII. Therefore, we will increase the attribution standard contained in Section 1.2105(c)(6)(i) to 10 percent, or any holder of a controlling interest in the applicant.[463]

165. A higher attribution standard will facilitate the flow of capital to applicants by enabling parties to make investments in multiple applicants, including applicants for licenses in the same geographic areas. Our decision to use an attribution threshold of 10 percent is consistent with the change we make to our general reporting requirement (*see* Section III.C.3, *supra*). We recognize that some potential for collusion exists whenever an entity is permitted to hold an interest in more than one applicant for licenses in the same geographic service area. However, we reemphasize that auction applicants and their owners continue to be subject to existing antitrust laws, and that conduct that is permissible under the Commission's rules may be prohibited by the antitrust statute.[464] In addition, we remind prospective auction participants that we will continue to scrutinize carefully any instances in which bidding patterns suggest that collusion may be occurring.

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[458] *See Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996,* at 1-2.

[459] *See August 28 Public Notice.*

[460] *Notice* at ¶ 102.

[461] 47 C.F.R. § 1.2105(c)(6)(i).

[462] CII Comments at 18-19.

[463] *See* 47 C.F.R § 1.2105(c)(6)(i).

[464] *See Collusion MO&O*, 9 FCC Rcd at 7684, ¶ 12.

166. Finally, we reemphasize that the Commission will aggressively investigate any allegations that an auction participant has violated Section 1.2105(c).[465] Bidders who are found to have violated the Commission's anti-collusion rules may, among other sanctions, be subject to the loss of their down payment or their full bid amount, face the cancellation of their licenses, and may be prohibited from participating in future auctions.[466] In addition, where allegations appear to give rise to violations of the federal antitrust laws, the Commission may investigate and/or refer such cases to the United States Department of Justice for investigation.[467]

G. Pre-grant Construction

167. Background. Section 22.143 of the Commission's rules permits auction winners in the Public Mobile Services to begin construction of facilities prior to the grant of their applications, at their own risk and subject to certain exceptions, 35 days after the date of the public notice listing the application for that facility as acceptable for filing.[468] In the *Notice*, we proposed to extend similar pre-grant construction rules to all auction winners, regardless of whether petitions to deny have been filed against their long-form applications.[469] We further proposed to permit each auction winner to begin construction of its system, at its own risk, upon release of a public notice announcing that their post-auction long-form applications were accepted for filing. We tentatively concluded that to do so would further the public interest by expediting, in most cases, the initiation of service to the public.[470]

168. Discussion. We will adopt our proposal in the *Notice* to permit applicants for all licenses awarded by competitive bidding to begin construction of facilities prior to the grant

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[465] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388, ¶ 226. *See also August 28 Public Notice* at 3-4.

[466] *See* Commercial Realty St. Pete, *Notice of Apparent Liability for Forfeiture*, FCC 95-58, 10 FCC Rcd 4277 (1995) (assessing two $10,000 forfeitures for violations of the Commission's anti-collusion rules during the IVDS auction); Application of Mercury PCS II, L.L.C. for Authority to Construct and Operate Broadband PCS Systems on Frequency Blocks D, E, and F, *Memorandum Opinion and Order*, DA 97-1782 (rel. August 21, 1997) (conditioning the final grant of an applicant's licenses on any action that may be taken based on the outcome of any investigation conducted by the Commission or the Department of Justice regarding bid signaling or other bidding activity); *Mercury NALF* (assessing a $650,000 forfeiture for an apparent violation of Section 1.2105(c) by placing trailing numbers at the end of its bids to disclose its bidding strategy in a reflexive manner that invited collusive behavior).

[467] *Id.*

[468] *See* 47 C.F.R. § 22.143.

[469] *Notice* at ¶ 104.

[470] *Id.*

of their applications. All commenters addressing the issue support our proposal to permit license applicants to begin construction of their facilities, at their own risk, upon release of a public notice announcing the acceptance for filing of post-auction long-form applications.[471] These commenters agree that allowing pre-grant construction furthers the statutory objective of rapidly deploying new technologies, products, and services for the benefit of the public.[472]

169. Commenters also support our proposal to permit license applicants with petitions to deny filed against their long-form applications to begin construction of their facilities at the same time as license applicants whose licenses are not the subject of pending petitions to deny.[473] While our current service-specific rules require as a condition for pre-grant construction no pending petitions to deny,[474] we conclude that the merits of petitions to deny may be judged by an applicant and factored into its assessment of the risk of proceeding with construction before license grant.[475] We therefore adopt a pre-grant construction rule for all services subject to competitive bidding that permits construction by applicants that are subject to petitions to deny. Of course, pre-grant construction will be subject to any service-related restrictions, including but not limited to antenna restrictions, environmental requirements, and international coordination. Any applicant engaging in pre-grant construction activity does so entirely at its own risk, and the Commission will not take such activity into account in ruling on any petition to deny. Finally, we note that we expect our licensing process to be more rapid generally in light of the shortened petition to deny period permitted by the Balanced Budget Act.[476]

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[471] *See* PCIA Comments at 6; PageNet Comments at 16, AMTA Comments at 17; CTIA Comments at 1; AirTouch Comments at 13 and Reply Comments at 6; Airadigm Comments at 18; NextWave Reply Comments at 9-10.

[472] 47 U.S.C. § 309(j)(3)(A).

[473] *See* CTIA Comments at 1; CTIA Comments at 1; AirTouch Comments at 13, Reply Comments at 6; NextWave Reply Comments at 9-10.

[474] *See, e.g.*, 47 C.F.R. § 22.143(d)(1).

[475] *See, e.g.*, PCIA Comments at 6.

[476] Balanced Budget Act, § 3008.

IV. SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

A. Rules Governing Designated Entities

1. Designated Entities

170. Background. Section 309(j)(4)(D) of the Communications Act provides that in prescribing rules for a competitive bidding system, the Commission shall "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." The statute further provides that for this purpose, the Commission shall consider the use of tax certificates, bidding credits and other procedures. In addition, pursuant to Section 309(j)(4)(A), 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," in order to "disseminat[e] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[477] Pursuant to these mandates, the Commission has adopted a number of measures, including entrepreneur blocks, bidding credits, reduced upfront payments/down payments and installment payments.[478]

171. In addition, Section 257 of the Telecommunications Act requires the Commission to identify and eliminate market entry barriers for small and entrepreneurial telecommunications businesses. We are committed to completing a study to examine barriers encountered by minorities and women in the auctions process and in the secondary market for licenses.[479] We have initiated this process with regard to the study on secondary markets, and will initiate the auctions study expeditiously. We will release the results in 1998.

172. Any measures that we decide to adopt that give special preferences specifically to minority- and women-owned businesses must comply with recent Supreme Court decisions, as discussed below. To that end, we seek comment on (1) whether there is a compelling governmental interest that would justify the use of preferences for minority-owned businesses and "exceedingly persuasive justification" for preferences for women-owned businesses; (2) what evidence supports the commenter's position on the issue; and (3) what measures, if any,

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[477] 47 C.F.R. §§ 309(j)(3)(B) and (j)(4)(A).

[478] *See generally The FCC Report to Congress on Spectrum Auctions*, FCC 97-353 (rel. Oct. 9, 1997). Congress repealed, as of January 17, 1995, that portion of section 1071 of the Internal Revenue Code, 26 U.S.C. § 1071, under which the Commission administered the tax certificate program. *See* Self-Employed Health Insurance Act, H.R. 831, § 2(d).

[479] *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, *Report*, 12 FCC Rcd 16802 (1997) ("*Section 257 Report*").

could be narrowly tailored to withstand judicial review. The specific issues that commenters should address are discussed in more detail below.

173. Discussion

a. *Minority-based designated entity provisions*

174. As we have recognized in the past, in *Adarand Constructors, Inc. v. Peña*, the Supreme Court established that governmental policies that take race into account are reviewed under a strict (as opposed to intermediate) scrutiny standard.[480] We tentatively conclude that, to the extent consistent with constitutional standards, we should take steps to further our statutory mandate to ensure that minorities have the opportunity to engage in the provision of spectrum services pursuant to Section 309(j)(4). We seek comment on how we can modify our designated entity provisions, consistent with the standards set forth in *Adarand*. In particular, we seek comment on what tools, such as bidding credits, might be used consistent with *Adarand*. In addition, we seek comment on whether we should limit any tools designed to ensure that minority-owned businesses have the chance to take part in our auction program to those minority-owned businesses that also qualify as small businesses. Commenters advocating the adoption of such measures should address the constitutional issue and present specific empirical evidence supporting their views.

175. Should we determine that provisions for minorities would withstand strict scrutiny as required by *Adarand*, we also seek comment on appropriate eligibility standards for applicants seeking to qualify for minority-based provisions. For example, we could specify that to qualify for any minority-based provisions, an applicant must be minority-controlled (*i.e.*, minorities must have *de facto* as well as *de jure* control of the applicant and must own more than 50 percent of the equity on a fully diluted basis) and meet the eligibility requirements set

[480] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) ("*Adarand*"). *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, *Notice of Inquiry*, 11 FCC Rcd 6280, 6309-15 (1996); *Section 257 Report*, 12 FCC Rcd 16802, 16927-30. The Commission also has sought comment on post-*Adarand* provisions for minority- and women-owned businesses in a number of service-specific rule making proceedings. *See, e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, GN Docket No. 90-314, Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Further Notice of Proposed Rule Making*, 10 FCC Rcd 1872, 1877-79 (1995); *See also* Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz, PP Docket No. 93-252, *Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making*, 11 FCC Rcd 188, 266-67 (1995).

forth in 47 C.F.R. § 1.2110(b)(2).[481] Alternatively, to ensure that any minority policies are reserved for businesses in which minorities have a substantial financial stake, as well as *de jure* and *de facto* control, we could strictly define equity to require that minorities have the right to receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock and the right to receive dividends, profits, and other distributions from the business in proportion to their equity interests.[482] This requirement would be similar to the eligibility standards for minority-owned businesses adopted but never implemented for the broadband PCS auctions, and to the eligibility standards recently proposed for the auction of pending broadcast license applications.[483] In addition, we seek comment on alternate formulas that might be appropriate for determining eligibility for minority-based provisions.[484]

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[481] Section 1.2110(b)(2) requires that minority owners must have a controlling interest in the applicant, must own on a fully diluted basis 50.1 percent of the equity, and in the case of corporate applicants, must hold at least 50.1 percent of the voting stock or, in the case of partnerships, all general partners must be minorities (or entities 100 percent owned or controlled by minorities), and minorities must collectively own at least 50.1 percent of the partnership equity. As discussed above, we also note that the Office of Management and Budget recently modified the definition of the term "minority" contained in Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting. *See* 62 Fed. Reg. 58782 (October 30, 1997).

[482] We note that these restrictions differ from the benchmarks used to attribute ownership of broadcast stations for purpose of our multiple ownership restrictions set forth in 47 C.F.R. § 73.3555, where the intent is to identify ownership interests in, or relationships to, a licensee potentially conferring the ability to influence or control the operations of a licensee, including core functions, such as programming. *Notice of Proposed Rulemaking* in MM Docket No. 94-150, et al. 10 FCC Rcd 3606, 3614 (1995); *Attribution of Ownership Interests*, 97 FCC 2d 997, 999, 1005 (1984), *recon.* 58 RR 2d 604 (1985), *further recon.* 1 FCC Rcd 802 (1986). For that purpose, ownership interests below 50% are attributed but nonvoting and other passive interests are generally disregarded. Our tentative view is that a more restrictive approach is warranted here to safeguard the integrity of our minority ownership policy by strictly limiting it to circumstances in which minority owners will have *de facto* and *de jure* control of the license.

[483] *See Broadcast NPRM* at ¶ 88.

[484] *See, e.g., Implementation of Section 309(j) of the Communications Act (Fifth Report and Order)*, 9 FCC Rcd 5532, 5611-13 ¶¶ 183, 185 (1994), *recon. Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994), *modified, Sixth Report and Order*, 11 FCC Rcd 136 (1995), *aff'd sub nom, Omnipoint v. FCC*, 78 F.3d 620 (D.C.. Cir. 1996) (due to the "exceptionally great financial resources" required by broadband PCS applicants, they qualify for preferential treatment so long as minorities hold 25 percent of the equity and 50.1 percent of the voting stock, provided no single investor holds 25 percent of the corporation's passive equity). The favorable bidding credits originally intended to enhance the opportunities of minority- and female-owned small businesses were suspended after the decision in *Adarand*. In *Omnipoint* the court upheld our decision in the *Sixth Report and Order* to make these credits available to small businesses following *Adarand*.