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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures	)	WT Docket No. 97-82
	)	
Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use	)	ET Docket No. 94-32
	)	
4660–4685 MHz	)	

THIRD REPORT AND ORDER AND SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1997 **Released: December 31, 1997**

Comments Due: February 6, 1998

Reply Comments Due: February 17, 1998

By the Commission: Commissioners Furchtgott-Roth and Tristani issuing separate statements.

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I. INTRODUCTION

1. In this *Third Report and Order*, we make substantive amendments and modifications to our general competitive bidding rules for all auctionable services. These changes to our general competitive bidding rules are intended to streamline our regulations and eliminate unnecessary rules wherever possible, increase the efficiency of the competitive bidding process, and provide more specific guidance to auction participants. The changes also advance our auction program by reducing the burden on the Commission and the public of conducting service-by-service auction rule makings. In the *Competitive Bidding Second Report and Order* in PP Docket No. 93-253, we stated that we would "issue further Reports and Orders . . . to adopt auction rules for each auctionable service or class of service,"[1] and we identified criteria that would govern our choice of service-specific auction rules and procedures, which may be found in Subpart Q of Part 1 of our rules.[2] Since adoption of the *Competitive Bidding Second Report and Order*, the Commission has completed 15 spectrum

[1] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2360, ¶ 68 (1994) ("*Competitive Bidding Second Report and Order*"), *on recon., Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) ("*Competitive Bidding Second Memorandum Opinion and Order*").

[2] 47 C.F.R. §§ 1.2101 *et seq.*

auctions, adopting service-specific competitive bidding rules for each one.[3] Based on the experience we have gained from the completed auctions and the comments we have received from commenters,[4] we here adopt general competitive bidding rules to provide for a more consistent and efficient licensing process for all auctionable services.

2. In this *Second Further Notice of Proposed Rule Making*, we seek comment on additional issues relating to our general competitive bidding rules for all auctionable services, including ways in which the Commission might offer an effective installment payment program in the future. Finally, we seek comment on our proposal to supersede the rules for the auction of General Wireless Communications Services (GWCS) spectrum with the Part 1 rules adopted in this proceeding. We believe that these proposals will assist our efforts to simplify and streamline our regulations in order to increase the overall efficiency of the competitive bidding process.

II. EXECUTIVE SUMMARY

3. This *Third Report and Order* is intended to establish a uniform set of provisions for all auctionable services, which incorporates our experience to date and allows us to conduct future auctions in a more consistent, efficient, and effective manner. More specifically, the *Third Report and Order* modifies and amends Subpart Q of Part 1 of the Commission's rules as follows:

Rules Governing Status as a Designated Entity

- Continues our practice of defining small business size standards on a service-specific basis so that we may take into account the characteristics and capital requirements of specific services in determining what size businesses should be eligible for bidding credits.

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[3] *See* 47 C.F.R. §§ 24.301-24.320 (narrowband Personal Communications Service (PCS)); 47 C.F.R. §§ 24.701-720 (broadband PCS); 47 C.F.R. §§ 90.901-90.913 (800 and 900 Specialized Mobile Radio (SMR)); 47 C.F.R. § 95.816 (Interactive Video and Data Service (IVDS)); 47 C.F.R. §§ 100.71-100.80 (Direct Broadcast Satellite (DBS)); 47 C.F.R. §§ 21.921-21.961 (Multipoint Distribution Service (MDS)); 47 C.F.R. §§ 22.960-967 (Cellular Unserved); 47 C.F.R. §§ 25.101-531 (Digital Audio Radio Service (DARS)); 47 C.F.R. §§ 27.1-27.325 (Wireless Communications Services (WCS)).

[4] The Commission received 24 comments and 19 reply comments in response to *Amendment of Part 1 of the Commissions Rules -- Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket 97-82, 12 FCC Rcd 5686 (1997) (*"Notice"*). Appendix A contains a list of full and abbreviated names of parties commenting parties. In addition, Appendix A contains a list of parties filing comments, reply comments and *ex parte* comments in response to a public notice seeking comment in this docket, "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," *Public Notice*, DA 97-82 (rel. June 2, 1997) ("*Installment Payment Public Notice*").

- Adopts, for all auctions in which special provisions are made for "designated entities"[5] of a certain business size, uniform definitions of "gross revenues" and "affiliate."

- Eliminates the use of installment payments for the 800 MHz Lower 80 and General Category channels services, and suspends the use of installment payments for other services to be auctioned in the immediate future. Indicates that the Commission intends to eliminate installment payments for the paging and 220 MHz services.

- Provides for higher bidding credits, in lieu of installment payments, to encourage and facilitate the participation of designated entities in future auctions. Adopts schedules of bidding credits for which designated entities qualify (although in service-specific rule making proceedings we will continue to establish the appropriate size standards for each auctionable service).

- Modifies the unjust enrichment rule, Section 1.2111(c), which governs the payment of unpaid principal and accrued interest by existing licensees utilizing installment payments who seek to transfer or assign their licenses, to conform with the broadband PCS rules.[6]

Rules Governing Auction Application and Payment Issues

- Amends Sections 1.2105(a) and 1.2107(c) to require that all short-form and long-form applications be filed electronically beginning January 1, 1999, if feasible.[7]

- Amends Section 1.2105(b)(2) to provide a uniform definition of major amendments to FCC Form 175.

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[5] *See* 47 C.F.R. § 1.2110(a). The Commission's rules define designated entities as small businesses, businesses owned by women or members of minority groups, and rural telephone companies. *See also* 47 U.S.C. §§ 309(j)(4)(C), (D). After the Supreme Court's decision in *Adarand Constructors v. Pena* that federal measures awarding preferential treatment on the basis of race are subject to strict scrutiny, the Commission revised its designated entity provisions so that all designated entities must be small businesses. *See Adarand Constructors v. Pena*, 115 S. Ct. 2097 (1995).

[6] *See* 47 C.F.R. §§ 24.716(d), 24.717(c).

[7] Sections 1.2105(a) and 1.2107(c) were erroneously amended by the *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making* in this docket. The *Notice* portion of the *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making* only requested comment on these proposed amendments to the Commission's rules; the Commission did not intend to adopt the rule at that time. *See Notice* at ¶ 46.

- Creates general ownership disclosure requirements to eventually allow auction applicants to submit ownership information for one auction that will be stored in a central database and updated as necessary for subsequent auctions, instead of requiring resubmission of ownership information on each short-form and long-form application.

- Affirms our policy of refunding upfront payments before the end of the auction to bidders that lose eligibility to continue in the auction.

- Amends Section 1.2104(g) to apply uniform default rules to all auctionable services and all auction designs.

- Amends Sections 1.2109(a) and 1.2110(e) to permit auction winners who have submitted a timely down payment to submit their final payments on the licenses which they have won 10 business days after the applicable deadline, provided they also pay an appropriate late fee.

- Modifies our rules applicable to licensees currently paying for their licenses in installments to provide for one 90-day non-delinquency period and one automatic 90-day grace period, subsequent to the current 90-day non-delinquency period, and institutes a late payment fee on overdue installment payments, which is similar to that contained in our rules for the broadband PCS F block.

- Clarifies that we will not pursue a policy of cross default, either within or across services, where licenses default on an installment payment.

Rules Governing Competitive Bidding Design, Procedure and Timing Issues

- Clarifies that under its general delegated authority, the Wireless Telecommunications Bureau ("Bureau") may seek comment on specific mechanisms relating to day-to-day auction conduct prior to the start, and during each auction, as required by the Balanced Budget Act of 1997.[8]

- Allows for "real time" bidding in simultaneous multiple-round auctions.

- Amends Section 1.2104, consistent with the Balanced Budget Act of 1997, to provide that the Bureau will seek comment on and specify a minimum opening bid and/or reserve price in future auctions, unless it determines that doing so is not in the public interest.

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[8] Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997), to be codified in relevant part at 47 U.S.C. § 309(j)(2)(E) and 309(j)(4)(F) ("Balanced Budget Act").

- Adopts for all auctionable services our broadband PCS rules governing bid withdrawal payments in the event of erroneous bids.

- Retains Section 1.2109(b) in its current form, which governs the Commission's options in the event a winning bidder defaults on its down payment.

- Modifies the attributable investor threshold of the anti-collusion rule, 47 C.F.R. § 1.2105(c), to include controlling interests and/or holders of a 10 percent or greater interest in the applicant and to permit an entity that has invested in an applicant that withdraws from an auction to invest in other applicants who have applied to bid in the same markets.

- Permits all auction winners to begin construction of their systems, at their own risk, upon issuance of a public notice announcing auction winners.

In this *Second Further Notice of Proposed Rule Making,* we seek comment on a variety of additional proposals relating to our general competitive bidding rules. Specifically, we seek comment on:

- Whether there is a compelling governmental interest that would justify the use of provisions for minority-owned businesses and "exceedingly persuasive justification" for provisions for women-owned businesses.

- Whether there are mechanisms that might further opportunities for rural telephone companies to provide spectrum based services.

- How the Commission might offer an effective installment payment program, while minimizing the concerns (*e.g.*, licensee default or difficulty meeting financial obligations to the Commission) that have persuaded us to suspend the use of installment payments for now, and whether there are other provisions or mechanisms by which the Commission could encourage Section 309(j) designated entity participation in future auctions.

- Whether to adopt a controlling interest standard, whether such a standard is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits, whether we should adopt our proposed rule, and whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet our goals. We also seek comment on whether this proposed standard would be strengthened by imposing a minimum equity requirement (*e.g.*, 15 percent) that any person or entity identified as controlling must hold. Alternatively, we ask whether we should not adopt a minimum equity requirement, but rather

indicate only that an absence of equity would raise a question as to whether *de facto* control exists.

- Whether to supersede the competitive bidding rules previously adopted for GWCS with our Part 1 rules.

III. THIRD REPORT AND ORDER

A. Applicability of General Competitive Bidding Rules

4. Background. In the *Notice*, we proposed to apply the general competitive bidding rules adopted in this proceeding to all future auctions, to the extent possible.[9] In keeping with our goal of simplifying and streamlining the rule making process for all auctionable services, we sought comment on whether the rules adopted in this proceeding should supersede all existing, service-specific competitive bidding rules for future auctions. Specifically, we proposed that these rules would affect all services that are subject to pending proceedings[10] and any services that have existing competitive bidding rules that might apply to licenses that have not yet been auctioned or that will be reauctioned. In the alternative, we sought comment on whether we should phase-in the applicability of the revised general competitive bidding rules, such that, at a minimum, initial auctions may be completed under the existing service-specific rules while later auctions in the same service would be conducted pursuant to the rules adopted in this proceeding. In addition, we asked whether we should subject licenses that are reauctioned (due to defaults or if no winning bidder is otherwise declared) to these revised Part 1 general competitive bidding rules in the event we decide that these rules

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[9] *Notice* at ¶ 18.

[10] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding - *Tenth Report and Order*, PP Docket No. 93-253, 11 FCC Rcd 19974 (1996) (Interactive Video and Data Service (IVDS)); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 2732 (1997) ("*Paging Second Report and Order and Further Notice of Proposed Rule Making*") (Paging); Rule Making 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 -- Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making* (rel. March 13, 1997) ("*LMDS Second Report and Order*") (Local Multipoint Distribution Service (LMDS)); 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, *Memorandum Opinion and Order on Reconsideration*, FCC 97-224 (rel. July 10, 1997) ("*800 MHz Memorandum Opinion and Order and Order on Reconsideration*"), 11 FCC Rcd 22114 (1996) (800 MHz SMR).

will not supersede existing service-specific auction rules. Finally, we asked that to the extent commenters believe that service-specific rules should be maintained, they explain which ones and why.

5. Discussion. With some exceptions, we adopt our proposal in the *Notice* to apply the general competitive bidding rules adopted herein to all future auctions, regardless of whether service-specific auction rules have previously been adopted. Our Part 1 rules will apply to all auctionable services, unless we determine that with regard to particular matters the adoption of service-specific rules is warranted. As we indicated in the *Notice*, we have gained significant experience in the course of the 15 auctions conducted to date. In particular, we have found that much of our auction process can be standardized and that adopting service-specific rules for many aspects of the competitive bidding process is both unnecessary and confusing. We also find that conducting separate rule makings for each individual service often slows the delivery of service to the public because it results in regulatory delays before the licensing process begins. The majority of commenters addressing this issue agree,[11] emphasizing that the adoption of uniform auction procedures will (1) shorten the rule making process for future auctions by narrowing the issues on which the Commission must seek comment in service-specific rule makings;[12] (2) decrease uncertainty for auction participants;[13] (3) benefit small businesses because uniform rules are more easily understood and complied with, particularly by those with limited resources and those that participate in different auctions;[14] and (4) enable the Commission to develop a consistent body of law and precedent governing the auction process.[15]

6. The Balanced Budget Act expands the Commission's auction authority.[16] Section 309(j)(2) formerly stated that mutually exclusive applications for initial licenses or construction permits were auctionable if the principal use of the spectrum was for subscription-based services and competitive bidding would promote the expressed objectives. As amended, Section 309(j)(2) provides that, in cases of mutually exclusive applications, all

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[11] *See, e.g.*, PageNet Comments at 2; CII Comments at 4-5; Airadigm Comments at 2; NTCA Comments at 1-2; AT&T Comments at 1-2; AMTA Comments at 1; Metrocall Comments at 3; NextWave Reply Comments at 2; AICC Reply Comments at 2; ISTA Comments at 3 and Reply Comments at 1.

[12] *See* PageNet Comments at 1-2; AT&T Comments at 1-2; AICC Reply Comments at 2.

[13] *See* PageNet Comments at 1-2.

[14] *See* NTCA Comments at 2.

[15] *See* PageNet Comments at 7-8.

[16] *See generally*, Balanced Budget Act, Title III.

spectrum is auctionable except licenses or construction permits for (1) public safety services; (2) digital television service given to existing broadcasters to replace their analog license; and (3) non-commercial educational or public broadcast stations.[17] In addition, the Balanced Budget Act authorizes the Commission to assign pending broadcast license applications filed before July 1, 1997 by means of competitive bidding pursuant to Section 309(j).[18] Because these legislative changes significantly increase the number of services that will be licensed by competitive bidding, we believe that adopting uniform competitive bidding rules for all auctionable services is even more necessary.

7. With limited exceptions, the rules we adopt today will not apply to the initial auction of licenses in the paging, 220 MHz, and Local Multipoint Distribution ("LMDS") services. The Commission previously adopted service-specific auction rules for the auction of these services.[19] We believe that this decision is in the best interest of prospective applicants for these auctions, who may have relied upon the service-specific rules previously adopted by the Commission in formulating business plans and making early efforts to obtain financing. As discussed below, however, we are retaining the discretion to use the revised general competitive bidding procedures adopted in this proceeding for any reauction of licenses in these services. We also note that while service-specific rules exist for the auction of the 220 MHz service, many of these rules are similar, or refer to the Part 1 rules.[20] To apply the existing rules for the most part is also strongly supported by those commenters addressing the issue.[21] For example, AMTA states that the 220 MHz industry has encountered extraordinary

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[17] Balanced Budget Act, § 3002.

[18] Balanced Budget Act, § 3002(a)(3). Comment is currently being sought on the use of the Part 1 rules for the auction of this service. *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Fixed Television Service Licenses, MM Docket No. 97-234, *Notice of Proposed Rule Making*, FCC 97-397 (rel. November 26, 1997) ("*Broadcast NPRM*").

[19] *See Paging Second Report and Order and Further Notice of Proposed Rule Making*; 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, Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Report and Order and Fifth Notice of Proposed Rule Making* (rel. March 12, 1997) ("*220 MHz Third Report and Order and Fifth Notice of Proposed Rule Making*"); Amendment of Part 90 of the Commission's Rules to Facilitate the Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463 (1996); *LMDS Second Report and Order*.

[20] *See, e.g.*, 47 C.F.R. § 90.1001.

[21] *See, e.g.*, Nextel Comments at 2 and Reply Comments at 2; AMTA Comments at 4-5. The Commission received similar comments requesting that the rules adopted in this proceeding not be used for the initial auction of licenses in the 800 MHz service. *See* Nextel Comments at 2 and Reply Comments at 2. Because the 800

delays in achieving regulatory certainty, and that amending or altering the auction rules for this service would create further uncertainty.[22] Consistent with our discussion below (*see* Section III.E.4), our decision regarding the establishment of minimum opening bids will apply to the initial auction of licenses in the paging and 220 MHz services. In addition, we note that several petitions for reconsideration are pending in these proceedings. In resolving these petitions, the Commission will address installment payment financing for licenses in these services in a manner consistent with our decision herein to temporarily suspend the use of installment payments.

8. Many of the commenters who support our proposal to adopt general competitive bidding procedures for all auctionable services argue that the Commission should, in its discretion, adopt or retain service-specific rules in particular instances.[23] Airadigm argues that the Commission should use existing service-specific rules where it would be unfair to allow one group of licensees in the same service to benefit or be disadvantaged by operating under a different set of rules than its competitors in the same service (*e.g.*, in the case of a reauction of licenses following bidder default).[24] Similarly, NextWave contends that the adoption of service-specific rules may be appropriate in some circumstances.[25] In a related argument, some commenters believe that, in certain instances, the rules adopted in this proceeding should not be applied retroactively to supersede previously adopted service-specific rules.[26] For example, AirTouch and WWC suggest that when service-specific rules have been adopted after industry participation and based upon particular characteristics of a specific industry or spectrum to be auctioned, those service-specific rules should govern.[27]

9. With regard to the auction of licenses to provide paging services, AirTouch opposes the Commission's proposal to apply general auction rules to all future auctions, regardless of

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MHz auction closed on December 8, 1997, this issue is moot.

[22] AMTA Comments at 4-5.

[23] AT&T Comments at 1-2; AICC Reply Comments at 2; Airadigm Reply Comments at 6; NextWave Reply Comments at 2.

[24] Airadigm Reply Comments at 6.

[25] NextWave Reply Comments at 2-3.

[26] *See* PageNet Comments at 7-8; Airadigm Comments at 2; PCIA Comments at 2, Merlin Reply Comments at 7; ISTA Reply Comments at 1-2; AirTouch Reply Comments at 4-5; WWC Reply Comments at 1.

[27] AirTouch Reply Comments at 4-5; WWC Reply Comments at 1.

whether service specific rules have been adopted.[28] AirTouch argues in particular that the Commission should not adopt a general stopping rule for the paging auction which would be contrary to the comments received in that proceeding and the stopping rule that the Commission ultimately adopted.[29] As discussed above, the Commission will use previously-adopted, service-specific rules for the paging auction.

10. The rule changes we adopt today streamline and simplify our general competitive bidding procedures. The majority of the rules we adopt today address aspects of our spectrum auction program that affect future auction applicants only. These rules include application procedures (*e.g.*, electronic filing, short-form application amendments, ownership disclosure requirements), upfront and down payment issues, issues relating to competitive bidding design, procedure and timing (*e.g.*, alternate bidding methodologies, minimum opening bids, and bid withdrawal), and rules prohibiting collusion during the auction. However, some of the provisions we adopt today address aspects of our rules that govern current licensees as well. Specifically, these minor rule changes affect certain license-related payment terms (*e.g.*, installment payments, grace periods, and unjust enrichment).

11. Two commenters, AICC and AAA, argue that the general competitive bidding procedures adopted in this proceeding would be wholly inappropriate for auctions of shared frequencies governed by Part 90 of the Commission's rules.[30] In support of this position, these commenters argue that: (1) none of the Commission's auctions have involved shared frequencies; (2) any auction of Part 90 shared spectrum would involve participants ranging in size from very large corporations to very small businesses and individual users, which would require a significant adjustment in the Commission's traditional auction rules; (3) industry participation would be crucial in crafting appropriate auction and service rules; and (4) in light of the public safety services provided using Part 90 spectrum, auctioning such spectrum is not in the public interest.[31] AICC and AAA further suggest that those commenters who favor the adoption of general competitive bidding procedures for all spectrum might not have considered the possibility of auctions for shared channels, since the Commission is not currently authorized to award licenses for such spectrum by means of competitive bidding.[32] We agree that shared spectrum is, by definition, not auctionable under Section 309(j) due to the lack of mutual exclusivity.

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[28] AirTouch Reply Comments at 4-5.

[29] *Id.*

[30] AICC Comments at 1-2 and Reply Comments at 2; AAA Comments at 2 and Reply Comments at 2.

[31] *Id.*

[32] AICC Reply Comments at 2; AAA Reply Comments at 2.

12. Similarly, Hughes suggests that in the event the Commission decides to auction satellite services, it should conduct a service-specific rule making specially tailored to the capital intensive nature of the satellite industry, instead of employing the general competitive bidding procedures adopted in this proceeding.[33] Although we do not decide that issue now, as we suggested in the *Notice*, the Commission will continue to adopt service-specific auction procedures where we find that our general competitive bidding procedures are inappropriate.

B. Rules Governing Designated Entities

13. Section 309(j)(4)(D) of the Communications Act of 1934 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."[34] The statute further directs the Commission to consider the use of tax certificates, bidding preferences, alternative payment schedules and methods of calculations and other procedures as means of accomplishing this statutory objective.[35]

14. We adopt the rules in this *Third Report and Order* in order to facilitate broad-based participation in auctions. We believe that standardizing the rules regarding definitions of eligible entities, unjust enrichment and bidding credits will assist small, minority and women-owned businesses because the rules' predictability will facilitate the business planning and capital fundraising process. While we suspend the use of installment payments, we seek comment in the *Second Further Notice of Proposed Rulemaking* on whether installment payments should be adopted in the future.

15. We also note that pursuant to Section 309(j)'s obligations to ensure opportunities for participation by small enterprises, rural telephone companies, and minority- and women-owned businesses, and Section 257 of the Telecommunications Act, requiring that the Commission identify and eliminate market entry barriers for small and entrepreneurial telecommunications businesses, we have commenced a series of studies, and have other studies in the planning process, to examine barriers encountered by minorities and women in the auctions process and the secondary market for licenses.[36] When those studies are

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[33] Hughes Comments at 1, 6.

[34] 47 C.F.R § 309(j)(4)(D).

[35] *See* 47 C.F.R. §§ 309(j)(3)(B) and (j)(4)(D).

[36] Pursuant to the Commission's report on Section 257 of the Telecommunications Act, adopted on May 7, 1997, the Commission found that further study was required to investigate barriers facing minorities and women in the telecommunications industry, and delegated responsibility to the Office of Communications Business

completed, we will examine whether additional measures are warranted to promote the objectives of giving small businesses, rural telephone companies, and women- and minority-owned businesses the chance to provide spectrum-based services, as required in Section 309(j).

1. Small Business Size Standards

16. Background. In the *Notice*, we proposed to continue our practice, stated in Section 1.2110(b)(1) of our rules, of establishing "the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service."[37] We noted that thus far we have used gross revenue ceilings of $3 million, $15 million, $40 million, and $75 million to define small businesses (and $75 million and $125 million to define entrepreneurs), which qualify for special provisions such as bidding credits and installment payment plans.[38] We also proposed, for purposes of future auctions, to define small businesses purely in terms of gross revenues. Once the small business definition for any particular service was adopted, we proposed that the special provisions for which such businesses qualify would be determined by schedules set forth in the general competitive bidding rules.[39]

Opportunities ("OCBO") to conduct studies on this topic. To date, OCBO has commenced studies examining five major areas: (1) barriers to acquisition of cellular, paging and Specialized Mobile Radio licenses on the secondary market, and barriers to entry or growth, comparing small, large, minority and women-owned licensees; (2) barriers to acquisition of broadcast licenses on the secondary market, and barriers to entry or growth, comparing small, large, minority and women-owned licensees; (3) barriers to entry or growth due to advertising industry practices such as paying less to advertise on stations targeting minority communities, and the impact of such practices on ownership opportunities and viewpoint diversity; (4) the impact of duopoly and multiple ownership rules on broadcast station ownership; and (5) the impact of small, minority and women ownership of broadcast stations on service. The Commission is also planning to undertake a study on the experiences of small, minority- and women-owned businesses in the auctions process. *See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report)*, FCC 97-164 (rel. May 8, 1997) ("*Section 257 Report*").

[37] 47 C.F.R. § 1.2110(b)(1). *See Notice* at ¶¶ 19-20.

[38] 47 C.F.R. § 90.814(b)(1)(i) ($3 and $15 million definition of small business in 800 MHz and 900 MHz SMR); 47 C.F.R. § 24.720(b)(2) ($15 million definition of small business in broadband PCS F block); 47 C.F.R. § 24.720(b)(1) ($40 million definition of small business in broadband PCS for C and F blocks); 47 C.F.R. § 21.961(b)(1) ($40 million definition of small business in MDS) 47 C.F.R. § 24.711(b)(1) ($75 million definition in broadband PCS C and F blocks); 47 C.F.R. § 24.709(a)(1) ($125 million gross revenues threshold for determining entrepreneurs' block eligibility in the broadband PCS C and F blocks); and 47 C.F.R. § 101.1112(d) ($15, $40 and $75 million gross revenues threshold for determining small business and entrepreneurs' block eligibility in LMDS).

[39] *Notice* at ¶ 20; *see infra* at Section III. B.6.

17. We also noted in the *Notice* that some of our eligibility requirements are defined in terms of gross revenues of "less than" a certain amount, rather than "not exceeding" a certain amount. We tentatively concluded that a uniform method of measurement is preferable because it is more equitable and administratively simpler.[40] Thus, we proposed that when we adopt size standards, those standards should be expressed so as to require businesses to have gross revenues "not to exceed" particular amounts, and that all standards already adopted be modified to conform to this method of defining size.[41] We also proposed to base all small business size standards on the applicant's average gross revenues over the preceding three years.

18. Discussion. We adopt our proposal to continue to define small businesses, as we have in the past, based on the characteristics and capital requirements of the specific service. We believe that this approach has given us flexibility that will continue to benefit small businesses in future auctions. We also note that this approach is consistent with the Small Business Administration's practice of approving small business size standards on a service-by-service basis.[42] Commenters addressing this issue support this conclusion. For example, AMTA and NextWave both believe that the determination of appropriate small business size standards should be made on a case-by-case basis.[43]

19. No commenters addressed our proposal in the *Notice* to create size standards that require small businesses to have gross revenues "not to exceed," as opposed to "less than" a certain amount. Nevertheless, we believe that adoption of this proposal is important to further our objective of establishing uniform definitions relating to small business standards for future auctions. From this point forward, our service-specific small business definitions will be expressed in terms of average gross revenues over the preceding three years "not to exceed" particular amounts. We also continue to believe that average gross revenues provide an accurate, equitable, and easily ascertainable measure of business size. As we have discussed in the past, a single gross revenues size standard is an established method for determining size

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[40] *Notice* at ¶ 21.

[41] For example, the eligibility rule for the broadband PCS C and F blocks would be modified to read "gross revenues *not to exceed* $125 million." *See* 47 C.F.R. § 24.709.

[42] *See, e.g.*, Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, re: Approval of Small Business Size Standards -- Competitive Bidding Rules for 800 MHz Specialized Mobile Radio Services (October 27, 1997).

[43] AMTA Comments at 5; NextWave Reply Comments at 3. *See also* Airadigm Comments at 2-3.

eligibility for various kinds of federal programs that aid smaller businesses.[44] NextWave, in its comments, agrees, stating that gross revenues are a generally reliable measure of whether a company is indeed small.[45] In addition, while we have used a total assets test in determining eligibility for entrepreneur blocks,[46] we have not used such a test for determining small business eligibility. We also note that the Small Business Act's statutory definition of small business does not use a total assets test.[47] Thus, we decline to adopt any other measure of business size, such as a total assets test, at this time.[48]

2. Definition of Gross Revenues

20. Background. Previously, each of our revenue-based small business size standards for specific services has required applicants to calculate their average gross revenues over a certain number of years. In the *Notice,* we proposed to adopt a single definition of gross revenues to promote uniformity of regulation.[49] Specifically, we proposed to use our broadband PCS definition of gross revenues, subject to the modification that unaudited financial statements used as a basis for gross revenue calculations must be prepared in accordance with Generally Accepted Accounting Principles ("GAAP"). As we stated previously, this modification would ensure that all gross revenues calculations, audited and unaudited, will be prepared consistently from this point forward. This modification also would discourage bidders from manipulating unaudited financial statements in order to qualify for more advantageous bidding credits or payment terms.

21. In the *D, E, and F Block Report and Order* we amended our broadband PCS rules,

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[44] Fifth Memorandum Opinion and Order, ¶ 23, PP Docket 93-253, FCC 94-285 (Rel. November 23, 1994) (*Fifth Memorandum Opinion and Order*).

[45] NextWave Reply Comments at 3.

[46] *See, e.g.*, 47 C.F.R. § 709(a).

[47] *See* 15 U.S.C. § 632(c).

[48] Parties in our LMDS proceeding requested that we consider a total asset test for LMDS. Under a "total assets" test, the Commission would exclude entities with total assets exceeding a specific threshold from eligibility for small business provisions. While we declined to adopt such a test for LMDS, we indicated that we would consider it in this proceeding. 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, Petitions for Reconsideration of the Commission's Competitive Bidding Rules, *Second Order on Reconsideration*, Docket 92-297 (rel. September 12, 1997) ("*LMDS Second Order on Reconsideration*") at ¶ 22.

[49] *Notice* at ¶ 23.

which required that an applicant's determination of average gross revenues be based on the three most recently completed fiscal years, to allow for the use of fiscal or calendar years and simplified our rules to permit D, E, and F block applicants to use unaudited financial statements to support their statements of gross revenues.[50] We sought comment on whether we should incorporate this practice into our general auction rules and thereby permit future applicants in all auctionable services to use either fiscal or calendar years and unaudited financial statements to support statements of gross revenues.[51]

22. Discussion. All commenters addressing the issue support the Commission's proposal in the *Notice* to adopt a uniform definition of gross revenues for all auctionable services.[52] We believe that a uniform definition of gross revenues, as the essential element of our small business definitions, furthers our goal of establishing uniform definitions and is administratively efficient. Thus, we adopt a uniform definition of gross revenues in our Part 1 rules.

23. Various commenters addressed specific aspects of our proposed definition of gross revenues. CII supports our proposal that applicants be permitted to use *either* fiscal year or calendar year figures for calculation purposes.[53] No commenters opposed this proposal. We are persuaded that, just as we concluded in the *D, E, and F Block Report and Order*, permitting use of either of these figures will assist applicants in providing the most current information available on their applications.[54] We conclude that our general gross revenue definition should permit applicants to support their gross revenue calculations using either fiscal or calendar years.

24. Several commenters responded to our tentative conclusion in the *Notice* to accept the use of unaudited financial statements where audited financial statements are unavailable, if prepared in accordance with Generally Accepted Accounting Principles, for gross revenue calculations by auction applicants seeking to qualify for small business status. A majority of these commenters supported our tentative conclusion that where audited financial statements

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[50] Amendment of Parts 20 and 24 of the Commission's Rules, *Report and Order*, WT Docket No. 96-59, 11 FCC Rcd 7824, 7891, ¶ 141 (1996) ("*D, E, and F Block Report and Order*"); 47 C.F.R. § 24.720(f).

[51] *Notice* at ¶ 24.

[52] *See* CII Comments at 7; ISTA Comments at 1; Airadigm Comments at 3; AMTA Comments at 5; NextWave Reply Comments at 3.

[53] CII Comments at 7.

[54] *D, E, and F Block Report and Order*, at 134, 141.

are not available, they should not be required.[55] In particular, these commenters argue that any strict requirement that financial statements be audited is unduly burdensome for most small business applicants.[56] In addition, AMTA contends that the certification requirement already present on the short-form (FCC Form 175) application is sufficient to ensure that small business applicants submit only accurate information, both financial and otherwise, as part of their applications.[57] Only two commenters, ISTA and PageNet advocate that applicants use audited financial statements in order to qualify for small business status.[58] After review of the comments on this issue, we conclude that such a requirement would be onerous to small business. We also agree with AMTA's observation that the certification requirement on our FCC Form 175 acts to ensure that applicants submit accurate information. Furthermore, as discussed below (*see* Section III.C.5, *infra*), we also will retain the authority to audit applicants individually if there is any question concerning small business status. We therefore decline to require all applicants to use audited financial statements to support their gross revenue calculations. Audited financial statements, however, are necessary if they exist. We also note that, consistent with the Small Business Act,[59] where an entity has been in existence for less than three years, the entity's gross revenues should be averaged for the relevant number of years the entity, or its predecessor in interest (affiliate), has been in existence.

25. Accordingly, as proposed in the *Notice,* and consistent with our broadband PCS rules,[60] we will define gross revenues for all auctionable services as:

> all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited financial statements for the three (3) most recent calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if

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[55] *See* AMTA Comments at 5-6; CII Comments at 7, 11-12; Airadigm Reply Comments at 9, 11-12; NPCS Reply Comments at 4.

[56] *Id.*

[57] AMTA Comments at 6.

[58] *See* ISTA Comments at 1; PageNet Comments at 9.

[59] *See* 15 U.S.C. § 632(c)(ii)(II).

[60] 47 C.F.R. § 24.720(f).

there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not have audited financial statements, its gross revenues must be certified by its chief financial officer or its equivalent and must be prepared in accordance with Generally Accepted Accounting Principles.

3. Definition of Affiliate

26. Background. We sought comment in the *Notice* on our definition of "affiliate." In seeking comment on this uniform Part 1 definition, we asked, for example, whether we should amend our definition of affiliate to provide an exception for Indian tribes and Alaska Regional or Village Corporations, as we did for broadband PCS and LMDS.[61] We also recognized that in August of 1996, the Small Business Administration amended and simplified its regulations governing small business size standards, including its definition of the term "affiliate",[62] and asked whether we should consider making similar changes to our rules.

27. Discussion. We adopt our proposal to adopt a uniform definition of the term "affiliate" for all future auctions. As we discussed in the *Notice*, the term "affiliate" is defined by our Part 1 rules as an individual or entity that directly or indirectly controls or has the power to control the applicant; is directly or indirectly controlled by the applicant; is directly or indirectly controlled by a third person(s) that also controls or has the power to control the applicant; or has an "identity of interest" with the applicant.[63] We have found that this definition, which also contains detailed discussion and examples of relevant terms such as "control" and "identity of interest," has proven workable and is broad enough to address a wide variety of business structures. In particular, this definition has helped to ensure that businesses seeking small business status are truly small. We also believe that this definition, by focusing on "indicia of control," is consistent with our proposal in the *Second Further Notice of Proposed Rulemaking* (*See* Section IV, *infra*).

28. CIRI requests that we include in our general definition of the term "affiliate" an exemption for Indian tribes and Alaska Regional or Village Corporations, as we did for broadband PCS,[64] and more recently, for LMDS.[65] We agree with CIRI that entities owned

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[61] *See* 47 C.F.R. §§ 24.720(l)(11), 101.1112(h)(11).

[62] *See* Small Business Administration, Amendment of Small Business Size Standards, *Final Regulations*, 61 Fed. Reg. 3177 (January 31, 1996); *Corrected Final Regulations*, 61 Fed. Reg. 41496 (August 9, 1996) (amending 13 C.F.R. Part 121).

[63] 47 C.F.R. §§ 1.2110(b)(4), 24.839(d).

[64] *See* 47 C.F.R. § 24.720(l)(11).

and controlled by Indian tribes and Alaska Regional or Village Corporations should be eligible to bid in future auctions as small businesses, notwithstanding their affiliation with other entities owned by tribes or Alaska Native Corporations whose gross revenues cause the combined average gross revenues of the entity and its affiliates to exceed the general limits for eligibility for bidding as such a business. As we stated in support of a similar exemption from our affiliation rules in LMDS, this exception will ensure that these entities will have a meaningful opportunity to participate in spectrum-based services from which they would otherwise be precluded.[66] Furthermore, we do not believe that this exemption for the specified entities will entitle them to an unfair advantage over entities that are otherwise eligible for small business status.[67]

29. We also take this opportunity to clarify our Part 1 definition of affiliate. Our Part 1 rules provide that parties to a joint venture are considered to be affiliated with each other for purposes of determining the gross revenues of an applicant seeking to qualify for status as a small business.[68] In the past, however, the term "consortium" has been defined on a service-by-service basis as "a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a very small business, small business or entrepreneur."[69] This results in each member of a consortium being defined as an affiliate of each other member. The resulting attribution of gross revenues of each member of the consortium is inconsistent with our intention to permit small or very small businesses to form consortia as a means of increasing the capital available to participate in our auctions, while still being eligible for status as a small business.

30. We therefore amend Section 1.2110(b)(4)(x) to provide that a "consortium" as defined on a service-by-service basis for purposes of determining status as a designated entity will not be treated as a "joint venture" under our attribution standards. As a result, when two or more entities form an association that meets the service-specific definition of a "consortium," the gross revenues of each entity will not be attributed to each entity in determining eligibility for

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[65] *See* 47 C.F.R. § 101.1112(h)(11).

[66] *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 -- Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, *Order on Reconsideration* (rel. September 12, 1997) ("*LMDS Order on Reconsideration*") at ¶ 10.

[67] *Id.*

[68] *See* 47 C.F.R. § 1.2110(b)(4)(x).

[69] *See, e.g.*, 47 C.F.R. § 101.1112(f) (defining the term "consortium" for LMDS).

designated entity status. We believe that this clarification to the general definition of the term "affiliate" will enhance the ability of small businesses to form associations that will permit them to bid for licenses that would be too expensive for them individually. Auction winners have successfully used consortium structures to acquire licenses and "spin-off" licenses post-auction, and we wish to continue to make this option available.[70]

4. Definition of Rural Telephone Company

31. Background. Our current Part 1 rules define "rural telephone company" (or "rural telco") as any local exchange carrier, including affiliates, with 100,000 access lines or fewer.[71] We noted at the time this definition was adopted that it comported with the definition that had been adopted for broadband PCS.[72] In the *Notice*, however, we noted that we have revised the definition of rural telephone company contained in our broadband PCS rules to conform with that contained in the Communications Act, as amended by the Telecommunications Act of 1996 ("1996 Act").[73] We tentatively concluded that the definition of rural telco set forth in the 1996 Act should apply to all auctionable services.

32. Discussion. The National Telephone Cooperative Association ("NTCA") and the Rural Telecommunications Group ("RTG"), commented in support of our proposal in the *Notice* to adopt the definition of a rural telephone company contained in the Telecommunications Act of 1996 as the single definition of the term to be used in all auctionable services.[74] No commenters opposed our proposal. As we noted in the *Notice*, when we amended the broadband PCS rule, we stated that using the definition contained in the 1996 Act would likely expedite the delivery of advanced services to rural areas.[75] We also noted that adopting the 1996 Act definition would promote uniformity of regulations and is therefore consistent with the mandate of that legislation to ease regulatory burdens and eliminate unnecessary regulation.[76] We believe that the same reasons for amending this

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[70] *See* "Rural Success Stories" in FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, *Report*, FCC 97-353 (rel. October 9, 1997) ("*Report to Congress*") at 26.

[71] 47 C.F.R. § 1.2110(b)(3).

[72] *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7245, 7257.

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

[74] *See* NTCA Comments at 2; RTG Reply Comments at 1-3.

[75] *See D, E, and F Block Report and Order*, 11 FCC Rcd at 7855, ¶ 66.

[76] *Id.*

definition in the broadband PCS rules justify amending the definition in Part 1 for all services subject to competitive bidding.

33. Thus, we amend Section 1.2110(b)(3) to define the term "rural telephone company" as a local exchange carrier operating entity to the extent that such entity -- (A) provides common carrier service to any local exchange carrier study area that does not include either (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) had less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

5. Installment Payments

34. Background. Section 309(j) of the Communications Act encourages participation by small businesses and other "designated entities" in the Commission's competitive bidding process.[77] Among other methods, allowing winning bidders to pay for their licenses using installment plans has been one method we have used to encourage small business involvement in the wireless marketplace. In the *Competitive Bidding Second Report and Order,* we adopted a framework for establishing installment payment plans that we believed would be an effective way to promote the participation of small businesses in the provision of spectrum-based telecommunications services and an effective tool for efficiently distributing licenses and services among geographic areas.[78] Our general competitive bidding rules currently allow small businesses to pay a substantial amount of their high bids in installments over the term of their licenses.[79] We observed in the *Notice* that small businesses have been successful bidders in the auctions in which installment payment plans were offered.[80] In the *Notice,* we sought comment on a variety of proposals regarding our installment payment program intended to improve the ability of small businesses to participate successfully in future auctions. We also sought comment on whether we should offer higher bidding credits in lieu of installment payments.

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[77] 47 U.S.C. §§ 309(j)(4)(A), (D).

[78] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391, ¶ 240.

[79] 47 C.F.R. § 1.2110(e).

[80] *See Notice* at ¶ 34. *See also Report to Congress* at 27.

35. In considering several petitions for reconsideration of the *LMDS Second Report and Order*, we recently eliminated installment payment provisions in LMDS and indicated that we would reexamine our installment payment rules in considering the general proposals regarding installment payments in this proceeding.[81] Similarly, we eliminated installment payment provisions in the upper 200 channels of the 800 MHz SMR service,[82] and deferred until this proceeding our decision on whether to make an installment payment plan available for the auction of the lower 80 and General Category channels in the 800 MHz SMR service.[83]

36. Earlier this year, the Commission received several requests, from both C and F block licensees, for relief associated with the installment payment program.[84] On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their installment payment obligations, and because of other debt collection issues, the Bureau suspended the deadline for payment of installment payments for all C block licensees.[85] On April 28, 1997, the Bureau extended the suspension to F block licensees.[86]

37. On June 2, 1997, the Bureau, explaining that it had received several proposals from C block licensees regarding alternative financing arrangements and a petition for rule making regarding the issue of broadband PCS C block installment payments, issued the *Installment Public Notice* seeking comment on these proposals and invited any "additional proposals for addressing the C and F block broadband PCS financing terms."[87] The Bureau also sought

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[81] *See LMDS Second Order on Reconsideration. See also*, Petitions for Reconsideration of the *LMDS Second Report and Order* filed by CellularVision USA, Inc. ("CellularVision"), WebCel Communications, Inc. ("WebCel"), Cook Inlet Region, Inc. ("Cook Inlet"), LBC Communications, Inc. ("LBC"), the Rural Telecommunications Group ("RTG"), the Independent Alliance, and Sierra Digital Communications, Inc.

[82] *See 800 MHz Memorandum Opinion and Order and Order on Reconsideration* at ¶ 130.

[83] *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, *Second Report and Order*, FCC 97-223 (rel. July 10, 1997) at ¶ 279.

[84] *See Installment Payment Public Notice. See also* Letter from Thomas Gutierrez, Esq., *et al* to Michele C. Farquhar, Esq., Chief, Wireless Telecommunications Bureau (March 13, 1997).

[85] *See* Installment Payments for PCS Licenses, *Order*, DA 97-649 (rel. March 31, 1997).

[86] *See* "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," *Public Notice*, DA 97-883 (rel. April 28, 1997) at 2.

[87] *Installment Payment Public Notice*. Several parties also filed petitions for reconsideration in the Commission's paging proceeding, 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.

comment on whether C block licensees should be permitted to prepay their installment debt.[88] After consideration of the extensive record in this proceeding, the Commission adopted a menu of options to assist C block licensees experiencing financial difficulties under their installment payment obligations.[89] Citing the difficulties encountered in the past, the Commission proposed not to adopt an installment payment plan for the reauction of licenses surrendered pursuant to these options.[90]

38. Discussion. After careful review of the comments in response to our general Part 1 rule making, the comments in response to the *Installment Payment Public Notice,* and our recent decisions in the broadband PCS C block, LMDS and 800 MHz SMR services, we have determined that installment payments should not be used in the immediate future as a means of financing small business participation in our auction program.[91] As we indicated in the *Second Report and Order* in this Docket, 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 and ensure that designated entities are given the opportunity to participate in the provision of such services.[92] We note that our experience has demonstrated that installment payments may not be necessary to ensure a meaningful opportunity for small businesses to participate successfully in our auction program. For example, in the cellular auction of licenses for unserved areas, which had no special bidding

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and Personal Communications Industry Association, April 11, 1997.

[88] The Bureau also conducted an "FCC Public Forum" on June 30, 1997, to discuss broadband PCS C and F block installment payment issues. In addition, the Commission established an FCC Task Force which included representatives from the Bureau, the Office of Plans and Policy, the Office of General Counsel, and the Office of Communications Business Opportunities. This Task Force was charged with evaluating the C block installment payment program, considering proposals for alternative financing arrangements submitted by licensees, and recommending to the Commission how to respond to those proposals.

[89] *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 62 Fed Reg 55348 (rel. October 16, 1997) ("*Second Report and Order and Further Notice of Proposed Rule Making*").

[90] *Second Report and Order and Further Notice of Proposed Rule Making* at ¶ 101.

[91] *See* "FCC Announces Spectrum Auction Schedule for 1998," *Public Notice*, DA 97-2497 (rel. November 25, 1997), announcing the following upcoming auctions: LMDS, 220 MHz, broadband C block Reauction, 39 GHz, Paging, 800 MHz SMR (Lower 80 and General Category Channels), Location Monitoring Services (LMS), Public Coast Stations, Pending Analog Broadcast Licenses for Commercial Radio and Television Stations. *See also* "FCC Announces Auction Schedule for the General Wireless Communications Service," *Public Notice*, DA 97-2634 (rel. December 17, 1997).

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

provisions, 36 percent of the licenses went to small or very small businesses. We also stated that in assessing the public interest, we must try to ensure that all the objectives of Section 309(j) are considered. The Commission has found, for example, that obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants.[93]

39. In addition, questions have been raised in bankruptcy litigation about whether the Commission can quickly reclaim licenses should a licensee declare bankruptcy (even though licenses are expressly conditioned upon payment and cancel automatically in the event of non-payment) resulting in significant delays in the provision of service to the public.[94] While we are confident of prevailing in any litigation, until controlling precedent is established or legislation addressing the conflicting rights is enacted, such delays may occur.
In this regard, the Commission has strongly urged Congress to adopt legislation that would clarify that provisions of the Bankruptcy Code (1) are not applicable to any FCC license for which a payment obligation is owed; (2) do not relieve any licensee from payment obligations; and (3) do not affect the Commission's authority to revoke, cancel, transfer or assign such licenses.[95] We also note that, in order to balance the impact on small businesses of our decision to discontinue the use of installment payments in the near future, we are adopting higher bidding credits than those proposed in the *Notice* (*see* Section III.B.6, *infra*).

40. Therefore, subject to our proposals in the *Second Further Notice of Proposed Rule Making*, Section IV, *infra*, we conclude that until further notice, installment payments should not be offered in auctions as a means of financing small businesses and other designated entities seeking to secure spectrum licenses. Consistent with this decision, we hereby eliminate installment payments in the auction of the lower 80 and General Category channels in the 800 MHz SMR service.[96] Although Merlin submits that the elimination of the Commission's installment payment provisions in any service would be contrary to the Commission's conclusions in previous rule makings,[97] we believe that this decision is consistent with suggestions of CIRI, as well as our general experience in examining the

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[93] *See 800 MHz Memorandum Opinion and Order* at ¶ 130.

[94] *Report to Congress* at 39.

[95] *See Report to Congress* at 39. *See also* Letters from the FCC Commissioners (1) to the Honorable Orrin G. Hatch and the Honorable Patrick J. Leahy; and (2) to the Honorable Henry J. Hyde and the Honorable John Conors, both dated September 18, 1997; Letter from FCC Chairman Reed E. Hundt to the Honorable Pete Domenici and the Honorable John R. Kasich, dated July 25, 1997.

[96] *See 800 MHz Second Report and Order* at ¶ 279.

[97] Merlin Comments at 4.