success of the installment payment program to date.[98] As we recently recognized in eliminating installment payments for LMDS licensees, Congress did not require the use of installment payments in all auctions, but rather recognized them as one means of promoting the objectives of Section 309(j)(3) of the Communications Act.[99] The Commission continues to experiment with different means of achieving its obligations under the statute, and has offered installment payments to licensees in several auctioned wireless services.[100] Installment payments are not the only tool available to assist small businesses. Indeed, we have

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[98] CIRI asserts that installment payment plans fueled speculation in the broadband PCS auctions, encouraged expectations of Commission relief from payment obligations, and saddled the Commission with difficult credit-related tasks for which it has no experience. CIRI further argues that installment payment programs force the Commission to balance its duty to regulate the provision of wireless services with its sometimes conflicting obligation to manage the federal debt responsibly. *See* CIRI Comments at 11; Petition for Rule Making Regarding the Administration and Disposition of Competitive Bidding Installment Payment Obligations filed by Cook Inlet Region, Inc. (May 7, 1997) ("*CIRI Petition for Rule Making*").

[99] Specifically, Section 309(j)(4) of the Communications Act states that the Commission shall, in prescribing regulations pursuant to these objectives and others, "*consider* alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B) . . . ." *See* 47 U.S.C. § 309(j)(4)(A) (emphasis added). *See also* Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255:

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

[100] *See, e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994) (Interactive Video Data Services); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941 (1994) ("*Narrowband PCS Third Report and Order*") (regional narrowband PCS); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) (broadband PCS); Implementation of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589 (1995) (Multipoint Distribution Service); and Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Implementation of Sections 3(n) and 322 of the Communications Act, GN Docket No. 93-252, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639 (1995) (900 MHz Specialized Mobile Radio ("SMR")).

conducted auctions without installment payments.[101] Moreover, Section 3007 of the Balanced Budget Act requires that the Commission conduct certain future auctions in a manner that ensures that all proceeds from such bidding are deposited in the U.S. Treasury not later than September 30, 2002. Although we seek comment on offering installment payment plans in the future (*see* Section IV), we believe that Section 3007 may require that these auctions be conducted without offering long-term installment payments.[102]

41. In this regard, we agree with commenters such as CIRI, that contend that increased bidding credits will allow responsible small bidders with appropriately tailored business plans to secure adequate private financing to be successful in future auctions.[103] Further, as we have already noted, Section 309(j) requires the Commission to consider alternative methods to allow for dissemination of licenses among designated entities, including small businesses. We believe that the rules we adopt below (*see* Section III.B.6, *infra*) regarding the use of bidding credits for small business applicants in future auctions will both fulfill the mandate of Section 309(j) to provide small businesses with the opportunity to participate in auctions and ensure that new services are offered to the public without delay.

42. Merlin contends that while significant bidding credits can be useful in helping smaller entities win licenses when they bid against larger companies, bidding credits alone do not help smaller entities access the capital required to build a spectrum-based service.[104] In addition, Merlin states that eliminating the installment payment plan would raise the cost of capital for small businesses which would be forced to borrow additional funds from commercial lenders

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

[102] *See* Section 3001 of the Omnibus Consolidated Appropriations Act for 1997, P.L. 104-208, 110 Stat. 3009 (1996) ("Omnibus Consolidated Appropriations Act"). *See also* the Balanced Budget Act of 1997. The Conference Report on the Balanced Budget Act of 1997 indicates that the deadline set forth in Section 3007 "applies to all competitive bidding provisions in this title of the conference agreement and any amendments to other law made in this title." Conference Report on H.R. 2015, Balanced Budget Act of 1997, Congressional Record -- House, Vol. 143, No. 109 -- Part II, at H6176.

[103] *CIRI Petition for Rule Making.*

[104] Merlin Comments at 5.

at higher interest rates.[105] Merlin also argues that because many small businesses have relied on the current installment plan terms in formulating business plans necessary to bid in upcoming auctions, any decision to eliminate the installment payment program could effectively preclude small business participation in future auctions altogether.[106] We disagree with Merlin's assertions. As we have discussed, we believe that the increased bidding credits we adopt below will help fulfill the mandate of Section 309(j)(4)(D) of the Communications Act to provide small businesses with the opportunity to participate in spectrum-based services.[107] As noted above, this approach was successful in enabling small businesses to participate in the WCS auction, in which we were unable to employ installment payments because of the statutory deadline for depositing auction revenues in the U.S. Treasury.[108] We also recently used this approach in establishing rules for the auction of licenses for 800 MHz SMR and LMDS.[109]

43. We recognize that the Commission previously adopted rules for both the 220 MHz and paging services that permit eligible small businesses to pay for their licenses in installments.[110] Several petitions for reconsideration have been filed in these proceedings that remain pending before the Commission.[111] The Commission will resolve these petitions separately in a manner consistent with our decision herein to suspend the use of installment payment plans at least until our rights to recover and reauction licenses in a timely fashion are established.

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[105] Merlin Comments at 7.

[106] Merlin Comments at 5-6.

[107] 47 U.S.C. § 309(j)(4)(D). Additionally, providing a sufficient period of time for potential small business bidders to formulate their business plans is important. Congress acknowledged this in the Balanced Budget Act, and this is an issue to which we are sensitive. *See* "LMDS Auction Postponed Until February 18, 1998," *Public Notice*, DA 97-2352 (rel. November 10, 1997).

[108] *See* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, *Notice of Proposed Rulemaking*, FCC 96-441, 61 Fed. Reg. 59048 (rel. November 12, 1996), at ¶ 63; and *WCS Report and Order* at ¶ 182. *See also* Section 3001 of the Omnibus Consolidated Appropriations Act.

[109] *See 800 MHz MO&O*. In the 800 MHz auction, 10 of the 14 bidders winning licenses qualified as either small or very small businesses. These bidders won 38 of 525 licenses offered.

[110] *See 220 MHz Third Report and Order*, 12 FCC Rcd at 10943, ¶ 301; *Paging Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd at 2813-14, ¶ 184.

[111] *See, e.g.*, Arch Communications, Inc., Petition for Partial Reconsideration and Request for Clarification (filed April 11, 1997); Paging Network, Inc., Petition for Reconsideration and Clarification (filed April 11, 1997); Personal Communications Industry Association, Petition for Reconsideration (filed April 11, 1997).

6. Bidding Credits

44. Background. The current general competitive bidding rules provide for bidding credits (*i.e.*, payment discounts) for eligible designated entities and state that service-specific rules will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits, and other procedures.[112] Thus, the Commission has adopted separate rules governing bidding credits for various auctionable services.[113] We proposed in the *Notice* that our general competitive bidding rules be amended so that the levels of available bidding credits are defined and uniform for all auctionable services. We proposed a schedule of bidding credits that we believed would provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions. We also asked how limiting the use of installment payments should affect the levels of bidding credits that are offered.

45. Discussion. Although all commenters addressing the issue are largely supportive of the use of bidding credits as a means of ensuring the widest possible participation in future auctions,[114] there is disagreement among commenters as to whether a standard schedule of bidding credits for small businesses is desirable. For example, CII supports our proposal to standardize the sliding scale of bidding credits that is available to an applicant. Specifically, CII believes that granting businesses of different sizes different levels of bidding credits in different services threatens to result in inconsistent participation by small businesses in spectrum auctions.[115] In contrast, some commenters oppose any set schedule of bidding credits, and believe that the Commission should specify appropriate bidding credits for each auctionable service.[116] Among these, PCIA and AMTA believe that the Commission should continue to examine what constitutes an effective bidding credit on a service-by-service basis because the financing requirements of different spectrum-based services may necessitate use of different size bidding credits to provide the proper assurances that small businesses will be able to effectively compete.[117] As we stated in the *Notice*, we believe that an approach in

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[112] 47 C.F.R. § 1.2110(f).

[113] *See, e.g.* 47 C.F.R § 24.712.

[114] *See* Airadigm Comments at 6; CIRI Comments at 11-12; CII Comments at 13; PCIA Comments at 3; AMTA Comments at 10-11; Merlin Comments at 15-16 and Reply Comments at 3; Compu-DAWN Comments at 9; NTCA Comments at 2-3; RTG Reply Comments at 1, 6; NPCS Reply Comments at 5.

[115] CII Comments at 13.

[116] *See* PCIA Comments at 3; AMTA Comments at 10-11; Compu-DAWN Comments at 9.

[117] PCIA Comments at 3; AMTA Comments at 10-11.

which we provide certainty for future auctions about the size of available bidding credits will benefit small businesses because potential bidders will have more information well in advance of the auction than previously about how such levels will be set.[118] Once a small business definition is adopted for a particular service, eligible businesses will benefit they are able to refer to a schedule in our Part 1 rules to determine the level of bidding credit available to them. We therefore adopt our proposal to create a standard schedule of bidding credits.

46. In light of our decision (*see* Section III.B.5, *supra*) to suspend installment payment financing for the near future, we have determined that higher bidding credits than those proposed in the *Notice* would better effectuate our statutory mandate. Airadigm supports larger bidding credits than those proposed by the Commission.[119] Similarly, CIRI contends that unless the Commission is prepared to establish the creditworthiness of installment payment applicants, the Commission should offer substantial bidding credits to small businesses in lieu of government financing.[120] We note that some commenters argue that, in relation to installment payment provisions, bidding credits are less effective in allowing designated entities to participate in the Commission's auction program.[121] For example, Pocket states that bidders often "bid through" bidding credits and that bidding credits tend to result in higher bids and, in general, higher auction prices.[122] We believe that without installment payments, bidding credits, coupled with providing bidders sufficient time to raise financing, will enable small businesses to successfully compete in future auctions. Also, tiered bidding credits have proven to work well and provide for more competition between small business participants of different sizes. The use of tiered bidding credits was successful in enabling small businesses to participate in the WCS auction, in which we were unable to employ installment payments because of the statutory deadline for depositing auction revenues in the U.S. Treasury.[123] Finally, while we recognize Pocket's concerns about the possibility that bidders "bid through" bidding credits, we do not believe that this problem is significant where not all bidders are eligible for bidding credits, and the size of the bidding credit varies among those who are eligible.

47. Consistent with this reasoning, we adopt the following schedule of bidding credits for

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[118] *See supra* at ¶ 36-38.

[119] Airadigm Comments at 6, Reply Comments at 9.

[120] CIRI Comments at 11 and Reply Comments at 2-3.

[121] *See, e.g.*, Merlin Reply Comments at 3.

[122] Pocket Comments at 4-5.

[123] *See WCS Report and Order*, 12 FCC Rcd at 10785, ¶ 182.

use in future auctions in which provisions for designated entities are offered:

Average Annual Gross Revenues	Bidding Credits
Not to exceed $3 million	35%
Not to exceed $15 million	25%
Not to exceed $40 million	15%

We recognize that these credits are higher than some previously adopted for specific services.[124] Based on our past auction experience and the suspension of installment payments, however, we believe that the approach taken here will provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions.

48. We recognize that Merlin recommends providing higher bidding credits than those which we adopt.[125] Specifically, Merlin suggests that (1) businesses with average gross revenues for the preceding three years not exceeding $3 million be eligible for bidding credits of 40 percent; (2) businesses with average gross revenues for the preceding three years not exceeding $15 million be eligible for bidding credits of 35 percent; and (3) businesses with average gross revenues for the preceding three years not exceeding $40 million be eligible for bidding credits of 25 percent.[126] As discussed above, we believe that higher bidding credits than those proposed in the *Notice* are necessary now that our installment payment program is suspended. We believe that the schedule of bidding credits we adopt is reasonable in light of our decision to suspend installment payments for services auctioned in the immediate future, and expect that it will prove sufficient to enable small businesses to obtain spectrum licenses through our auction program. Thus, we decline to adopt Merlin's proposal. We also note that we seek comment in this *Second Further Notice of Proposed Rule Making* on means other than bidding credits and installment payments by which the Commission might facilitate the participation of small businesses in our spectrum auction program.

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[124] For instance, a business with average gross revenues of not more than $3 million in the 900 MHz SMR auction received a 15% bidding credit rather than the 35% bidding credit we adopt. *See* 47 C.F.R. § 90.814(b)(2). In contrast, our decision is consistent with our rules for the broadband PCS F block, in which a business with average gross revenues of not more than $15 million received a 25% bidding credit. *See* 47 C.F.R. § 24.717(b).

[125] Merlin Comments at 15-16.

[126] Merlin Comments at 17-18.

7. Unjust Enrichment

49. Background. In the *Notice*, we observed that unjust enrichment provisions in our general competitive bidding rules and service-specific rules vary. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing installment payments is required to pay the remaining principal balance as a condition of the transfer. No payment is required, however, when the proposed transferee or assignee is qualified to obtain the same installment financing and assumes the applicant's installment payment obligations.[127] In the broadband PCS unjust enrichment rule, however, we specify that applicants seeking to assign or transfer control of a license to an entity not meeting the eligibility standards for installment payments must pay not only unpaid principal as a condition of Commission approval but also any unpaid interest accrued through the date of assignment or transfer.[128] This rule also provides that if a licensee utilizing installment financing seeks to make any change in its ownership structure that would result in the loss of eligibility for installment payments, it must pay the unpaid principal and accrued interest as a condition of Commission approval of the change.[129] Finally, in recognition of the tiered installment payment plans offered to broadband PCS licensees, the rule provides that if a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan, it must seek Commission approval and adjust its payment plan to reflect its new eligibility status.[130] A licensee, under this rule, may not switch its payment plan to a more favorable plan.

50. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing bidding credits, or proposing to take any other action relating to ownership or control that will result in loss of eligibility for such bidding credits, is required to pay the sum of the amount of the bidding credit plus interest as a condition of FCC approval.[131] Under our broadband PCS rules, if, within the original term, a licensee applies to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify must be paid as a condition of approval of the

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[127] 47 C.F.R. § 1.2111(c).

[128] 47 C.F.R. § 24.716(d)(1).

[129] 47 C.F.R. § 24.716(d)(2).

[130] 47 C.F.R. § 24.716(d)(3).

[131] 47 C.F.R. § 1.2111(d).

assignment or transfer.[132] We proposed to amend our general unjust enrichment rules to conform them to our broadband PCS rules.

51. We also requested comment in the *Notice* on whether we should adopt a uniform unjust enrichment provision, and if so, whether it should be modeled on those we have recently adopted for some other services that provides a scale of decreasing payment liability for licensees that received a bidding credit based on the number of years a license is held.[133] We also requested comment on unjust enrichment rules as they apply to partitioning and disaggregation.[134] We asked whether, assuming we decide to adopt partitioning and disaggregation for various services, how the unjust enrichment rules should apply when the partitioner or disaggregator is the recipient of a bidding credit or is paying on an installment payment plan. We also asked whether we should adopt for all auctionable services the same provisions that we adopted for broadband PCS.[135]

52. Discussion. We adopt our proposal to conform our Part 1 unjust enrichment rules to the broadband PCS rules. We believe that effective unjust enrichment rules are necessary to ensure that meaningful small business participation in spectrum-based services is not thwarted by transfers of licenses to non-designated entities. As we stated in the *Notice*, the broadband PCS unjust enrichment rules are preferable to our current general unjust enrichment rules because they provide greater specificity about funds due at the time of transfer or assignment and specifically address changes in ownership that would result in loss of eligibility for installment payments, which the current general rules do not address. The broadband PCS rules also address assignments and transfers between entities qualifying for different tiers of installment payments or bidding credits, thus supplying clearer guidance for auctions in which tiered installment payment plans or bidding credits are provided. Commenters addressing this issue largely support this decision. For example, Pocket and Ericsson both argue that modified unjust enrichment rules would still deter transfers designed to subvert the Commission's rules, but would provide businesses with more flexibility in situations of financial distress and permit the transfer of individual licenses that no longer comport with their business plans.[136]

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[132] 47 C.F.R. §§ 24.712(b)(2), 24.717(c)(2).

[133] *See, e.g.,* 47 C.F.R. § 90.810(b)(1) (SMR).

[134] *See* Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, *Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 21831 at 21851, ¶¶ 31-36, 55 (1996) ("*Partitioning and Disaggregation Report and Order*").

[135] *Id.*

[136] Pocket Comments at 6; Ericsson Reply Comments at 4.

53. Current as well as future licensees will be governed by the rules we adopt providing for unjust enrichment payments upon assignment, transfer, partitioning and disaggregation. While we did not receive significant comment on this issue, we note that in awarding licenses in the past, the Commission has emphasized that the terms associated with the continued grant of a license will be governed by current Commission rules and regulations. For example, in awarding licenses to C block licensees paying for their licenses in installments, the Commission indicated in the associated "Note" and "Security Agreement" that the terms of the installment plan would be governed by and construed in accordance with then-applicable Commission orders and regulations, as amended. Therefore, we conclude that the unjust enrichment rules we adopt apply to existing licensees, and supersede service-specific rules where applicable. Specifically, these rules will supersede existing unjust enrichment provisions in the narrowband and broadband PCS, WCS, 900 MHz, and IVDS services.[137] As discussed above (*see* Section III.B.5, *supra*), we suspend the use of installment payments for the immediate future as a means of financing small business participation in our auction program. As a result, our decision with regard to unjust enrichment payments as they relate to licensees paying for their licenses in installment payments will apply only to existing licensees, their transferees and assignees (until we reinstate installment payments).

a. Installment Payments

54. For existing licensees who make use of Commission installment payment financing, we amend Section 1.2111(c) to conform to our broadband PCS rules. Specifically, if a licensee seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of the assignment or transfer as a condition of Commission approval. Similarly, if the licensee seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee must first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval.[138] If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan, the licensee

[137] *See* 47 C.F.R. §§ 24.309(f) (narrowband PCS), 24.711 (C block), 24.716(d) (F block), 27.209(d)(1), (2) (WCS), 90.812(b) (900 MHz), 95.816(e) (IVDS).

[138] We note that, consistent with out broadband PCS rules, a licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments (*i.e.*, from sources whose gross revenues and total assets are not considered under § 24.709(b)), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

must seek Commission approval and must adjust its payment plan to reflect its new eligibility status.[139]

b. Bidding Credits

55. For existing and future licensees who qualified or qualify in the future for a bidding credit in paying for their winning bid, we also amend Section 1.2111(c) to provide for unjust enrichment payments similar to those contained in our broadband PCS rules. Specifically, during the term of the initial license grant, if a licensee seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits, or seeks to make any other change in ownership that would result in the licensee no longer qualifying for a bidding credit, the licensee must seek Commission approval and must reimburse the government for the amount of the bidding credit, plus interest based on the rate for U.S. Treasury obligations applicable on the date the license is granted, as a condition of the approval of such assignment, transfer or other ownership change.[140] Similarly, if the licensee seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits, or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and must pay to the United States Treasury the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible as a condition of the approval of such assignment, transfer or other ownership change. These provisions also will apply to licensees who partition or disaggregate their licenses.

56. We also adopt our proposal in the *Notice* to provide for decreasing unjust enrichment payments for licensees that utilized a bidding credit when paying for their licenses and that make transfers and assignments occurring later in the license term. This decision also is supported by the commenters.[141] In amending the rule in this manner, we ensure that our general rule resembles those rules the Commission has adopted in specific services (*e.g.*, MDS, narrowband PCS, and 900 MHz SMR) that reduce the amount of unjust enrichment payments due on transfer based upon the amount of time the initial license has been held.[142] Consistent with the rules that exist in these services,[143] the amount of this payment will be

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[139] A licensee may not switch its payment plan to a more favorable plan.

[140] *But see Second Report and Order and Further Notice of Proposed Rule Making.*

[141] *See* ISTA Comments at 2; CII Comments at 13-14.

[142] Ericsson Reply Comments at 4-5.

[143] *See, e.g.*, 47 C.F.R. § 90.810(b)(1) (SMR).

reduced over time as follows: A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible); in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent; and in year five the payment will be 25 percent, after which there will be no payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment, transfer, or ownership change. All current and future licensees, with the exception of entrepreneur block licensees subject to restrictions on assignments and transfers of licenses,[144] will be governed by this modification to our general rules. We believe that our decision to maintain the original transfer restrictions for such licensees is proper in light of the special provisions which were made available for licensees in our entrepreneur blocks.[145]

c. Unjust Enrichment and Partitioning and Disaggregation

57. Also as proposed in the *Notice*, we will adopt a general rule modeled on our broadband PCS rules to determine the amount of unjust enrichment payments assessed for all current and future licensees.[146] Thus, we adopt a general unjust enrichment rule that treats partitioning and disaggregation by licensees in the same manner as the broadband PCS rule. Specifically, if the licensee seeks to partition any portion of its geographic service area, the amount of the unjust enrichment payment discussed above will be calculated based upon the ratio of population in the partitioned area to the overall population of the licensed area.[147] Similarly, if a licensee seeks to disaggregate spectrum, the amount of the unjust enrichment payment will be determined based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the disaggregating licensee.[148]

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[144] *See* 47 C.F.R. § 24.839(d).

[145] *See, e.g.*, 47 C.F.R. § 90.810(b)(1) (SMR). *But see Broadcast NPRM* at ¶ 95 (seeking comment on somewhat different unjust enrichment provisions).

[146] *Notice* at ¶ 43; *Partitioning and Disaggregation Report and Order.*

[147] *Partitioning and Disaggregation Report and Order*, 11 FCC Rcd at 21851, ¶¶ 31-36.

[148] *Partitioning and Disaggregation Report and Order*, 11 FCC Rcd at 21862, ¶ 55.

C. Application Issues

1. Electronic Filing

58. Background. Sections 1.2105(a) and 1.2107(c) of our rules govern the filing of short-form and long-form applications.[149] In recent auctions, we have allowed applicants to file their applications either manually or electronically and required applicants to submit exhibits to short-form and long-form applications that were filed manually on a 3.5 inch diskette in ASCII text (.txt) format. Only applicants that have filed their short-form applications electronically have been allowed to bid electronically from remote locations; applicants filing manually have been required to bid telephonically. In the *Notice*, we tentatively concluded that Sections 1.2105(a) and 1.2107(c) of our rules should be amended to require electronic filing of all short-form and long-form applications, beginning January 1, 1998.[150]

59. Discussion. We believe that electronic filing of all short-form and long-form applications for auctionable services is in the best interest of auction participants, as well as members of the public monitoring Commission auctions. Therefore, we amend Sections 1.2105(a) and 1.2107(c) of our rules to require electronic filing of all short-form and long-form applications, beginning January 1, 1999, unless it is not operationally feasible.[151] Although in the *Notice* we proposed to require electronic filing commencing January 1, 1998, we believe that this additional phase-in period before the requirement becomes effective will benefit potential bidders. The majority of the comments addressing the issue support the decision to require electronic filing.[152] For example, PageNet contends that electronic filing promotes access to applications by competing bidders, as well as the general public, by making it possible to review and download applications without traveling to FCC headquarters or contracting for photocopying of paper applications.[153] To facilitate public access, the Commission has developed user-friendly electronic filing software and Internet World Wide Web forms to give auction applicants the ability to conveniently file and review

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[149] 47 C.F.R. §§ 1.2105(a) and 1.2107(c). *See also* n.7.

[150] *Notice* at ¶ 46.

[151] 47 C.F.R. §§ 1.2105(a) and 1.2107(c).

[152] *See, e.g.*, AT&T Comments at 2; PageNet Comments at 16; AMTA Comments at 11.

[153] PageNet Comments at 16.

applications.[154] This software helps applicants ensure the accuracy of their applications as they are filling them out, and enables them to correct errors and omissions prior to submitting their applications. To assist the public, we provide technical support personnel to answer questions and work with callers using the electronic auction system. In addition, the Commission has demonstrated its auction software at conferences organized by potential bidders and members of the industry in order to familiarize interested parties with our recent software enhancements.

60. AT&T is generally supportive of electronic filing, but proposes that the Commission create a waiver process whereby an applicant that has missed a filing deadline due to technical problems can obtain a waiver quickly or be permitted to submit a paper original of the application by hand or mail the same day.[155] In addition, AT&T requests that a Commission staff member be provided with the authority to grant such a waiver in the event of electronic filing difficulties.[156] We do not believe that a specific waiver provision is necessary. The Commission's existing waiver provisions, which specify the showing required for the grant of a waiver, provide adequate assurance that requests for waiver relating to the electronic filing of applications will receive proper consideration.[157] In addition, we emphasize that the Commission has typically responded rapidly to time-sensitive waiver requests filed by auction applicants, and we intend to continue to do so in the future.[158]

61. Only one commenter, Airadigm, opposes an electronic filing requirement. Airadigm states that the Commission experienced difficulties in processing electronic filings during the IVDS auction and argues that removing the option of manual filing could result in similar

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

[155] AT&T Comments at 2.

[156] *Id.*

[157] *See, e.g.*, 47 C.F.R. § 24.819.

[158] *See, e.g.*, Letter to James Hillyard, Alaskan Choice Television, L.L.C., from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau (April 23, 1997) (responding to Alaskan Choice Television, L.L.C.'s Petition for Waiver of the Upfront Payment Deadline). *See also* Letter to Mr. John Prawat, DigiVox Telecom, Inc., from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, DA 97-730 (April 11, 1997) (responding to DigiVox Telecom, Inc.'s Request for Rule Waiver of the Upfront Payment Requirement in the WCS Auction).

problems in future auctions.[159] We believe that the system enhancements discussed above, most of which were not in place during the IVDS auction, adequately respond to Airadigm's concerns. We also note that our experiences from recent auctions demonstrate that the electronic bidding system is reliable. For example, in the broadband PCS D, E, and F block auction, 94 percent of the qualified bidders filed their short-form applications electronically. In the recently completed 800 MHz SMR auction, 93 percent of the qualified bidders filed their short-form applications electronically. We did not experience problems with our electronic filing procedures.

62. Finally, as we stated in the *Notice,* we recognize that there is a need for a period of time before a comprehensive electronic filing requirement becomes effective in order for bidders to prepare and be completely comfortable with this process.[160] The effective date of January 1, 1999, will provide potential bidders with adequate time in which to adapt to electronic filing requirements.[161] Finally, although we conclude that electronic filing is the preferred filing method, we nevertheless reserve the right to provide for manual filing in the event of technical failure or other difficulties.

2. Short-form Application Amendments

63. Background. Section 1.2105(b) of our rules addresses modifications and amendments to applicants' short-form (FCC Form 175) applications. Specifically, Section 1.2105(b)(2) provides that bidders may make minor changes or correct minor errors in the FCC Form 175 application, but that major amendments may not be submitted after the initial application deadline.[162] This section further provides that the Commission will classify all amendments as major or minor pursuant to service-specific rules.[163] In the *Notice*, we proposed to amend our general auction rules to create a uniform definition for major amendments to FCC Form 175 for all auctionable services.[164] We proposed at a minimum to consider any change in ownership that constitutes a change in control to be a major amendment. We also proposed to consider application amendments that show a change in an applicant's size which would affect

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[159] Airadigm Comments at 9.

[160] *Notice* at ¶ 46.

[161] We note that this phase-in period is similar to the approach taken by the Securities and Exchange Commission when it eliminated paper financial filings. *See* 17 C.F.R. § 232.902(a).

[162] 47 C.F.R. § 1.2105(b).

[163] *Id.*

[164] *Notice* at ¶ 48.

its eligibility for small business provisions as a major amendment.[165] Finally, we sought comment on what other kinds of changes should be deemed major or minor.[166]

64. We also indicated in the *Notice* that in previous auctions, applicants have claimed that they made mistakes in their license selection and have requested that the Commission allow them to add or delete license selections during the resubmission period.[167] While the Bureau has generally refused to grant these requests in order to prevent collusive conduct or gaming that would reduce the competitiveness of the auction, we recognized that there may be some circumstances in which the competitiveness of the auction might be enhanced by allowing applicants to add licenses to their FCC Form 175 applications. We sought comment on whether an amendment to add licenses should be permissible as a minor amendment.[168] We also asked whether such an amendment should be permitted only until the deadline for submitting upfront payments, because after that point the risks of gaming in the auction increase due to the availability of information concerning each bidder's eligibility.[169]

65. Discussion. The majority of commenters support our proposal in the *Notice* to create a uniform definition of major and minor amendments to applicants' short-form (FCC Form 175) applications for all future auctions.[170] However, commenters' opinions differ on what types of amendments the Commission should categorize as major or minor. For example, AT&T and ISTA argue that major amendments should include all changes in ownership that constitute a change in control, as well as all changes in size that would affect an applicant's eligibility for designated entity provisions.[171] In contrast, Metrocall contends that all changes in ownership incidental to mergers and acquisitions, non-substantial *pro forma* changes, and involuntary changes in ownership should be categorized as minor.[172] Metrocall also states that an applicant should not be permitted to upgrade its designated entity status after the short

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[165] *Id.*

[166] *Id.*

[167] *Id.* The Commission may provide a limited opportunity, after the deadline for filing short-form applications has passed, for applicants to correct minor defects and then resubmit their corrected applications. The decision as to whether to provide such a resubmission period is made on a service-by-service basis.

[168] *Id.*

[169] *Id.*

[170] *See* Airadigm Comments at 9; AT&T Comments at 2-3.

[171] AT&T Comments at 2-3; ISTA Comments at 2.

[172] Metrocall Comments at 6-7.

form filing deadline (*i.e.*, go from a "small" to "very small" business), but should be permitted to lose its designated entity status as a result of a minor change in control (*i.e.*, exceed the threshold for eligibility as a small business).[173]

66. After careful consideration of the comments addressing the issue, we believe that a definition of major and minor amendments similar to that provided in our PCS rules,[174] is appropriate. After the short-form filing deadline, applicants will be permitted to make minor amendments to their short-form applications both prior to and during the auction. However, applicants will not be permitted to make major amendments or modifications to their applications after the short-form filing deadline. Major amendments will include, but will not be limited to, changes in license areas designated on the short-form application, changes in ownership of the applicant which would constitute a change in control, and the addition of other applicants to any bidding consortia. Consistent with the weight of the comments addressing the issue,[175] major amendments will also include any change in an applicant's size which would affect an applicant's eligibility for designated entity provisions. For example, if Company A, an applicant that qualified for special provisions as a small business, merges with Company B during the course of an auction, and if, as a result of this merger, the merged company would not qualify as a small business, the amendment reflecting the change in ownership of Company A would be considered a major amendment. Otherwise, the new entity could receive small business bidding credits and installment payments when it does not qualify for them. As is the case in our PCS rules, however, applicants will be permitted to amend their short-form applications to reflect the formation of bidding consortia or changes in ownership that do not result in a change in control of the applicant, provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas.[176] In contrast, minor amendments will include, but will not be limited to, the correction of typographical errors and other minor defects, and any amendment not identified as major.

67. As noted above, the Commission has generally refused to grant requests to add or delete markets on an applicant's short-form application in order to prevent collusive conduct or gaming that would reduce the competitiveness of the auction. While we recognize that there may be some circumstances in which the competitiveness of the auction might be enhanced by allowing applicants to add markets to their short-form applications, we conclude that the risks of encouraging or facilitating conduct that negatively affects the competitiveness

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[173] *Id.* at 8.

[174] 47 C.F.R. § 24.822.

[175] *See* AT&T Comments at 2-3; ISTA Comments at 2. *See also* Metrocall Comments at 8.

[176] *See* 47 C.F.R. § 1.2105(c).

of the auction and the post-auction market structure outweigh the benefits of categorizing such amendments as minor. Several commenters support this conclusion that the addition or deletion of markets on the short-form application should always be deemed a "major" amendment.[177] Specifically, PageNet states that because the only new information that an applicant could be deemed to possess at this stage would be licenses on which other applicants intend to bid, amendment of the short-form application in this regard could only lead to auction abuses.[178] Those commenters supporting defining the addition or deletion of markets after the short-form filing deadline as a minor amendment argue that such an amendment should only be permitted prior to the upfront payment deadline or the release of the Public Notice announcing qualified bidders.[179] After this point, the overall competitiveness of the auction may be threatened.[180]

68. AT&T proposes that the deletion of markets to avoid specifying markets that overlap with another auction applicant (and thus preventing discussion on potentially non-auction-related matters such as interconnection, resale, and equipment orders that do not affect bids or bidding strategies) be deemed a minor amendment.[181] We note that in previous auctions some applicants have inadvertently placed themselves at risk of violating the Commission's anti-collusion rule by choosing to specify "all markets" on their short-form applications when they intended to bid only on a particular license or group of licenses. As a general matter, the anti-collusion rule does not prohibit non-auction-related business negotiations between auction applicants that have applied for the same geographic service areas.[182] AT&T argues that the aspect of the rule prohibiting the addition or deletion of markets often has had the unfortunate result of discouraging non-auction, business-related discussions between auction applicants who are not actually bidding for licenses in the same geographic license areas.[183] Because of the potential anti-competitive results of allowing bidders to delete markets after the short-form filing deadline, however, we believe that this type of error can be more effectively addressed by other means, including increased awareness on the part of prospective auction applicants of

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[177] *See* ISTA Comments at 2; PageNet Comments at 8-9.

[178] PageNet Comments at 8.

[179] *See* PCIA Comments at 3-4; AirTouch Comments at 5-6; Airadigm Comments at 9-10.

[180] *See, e.g.*, AirTouch Comments at 5-6 and Reply Comments at 6.

[181] AT&T Comments at 2-3.

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

[183] AT&T Comments at 2-3.

the consequences of choosing "all markets," as well as software enhancements that make specifying particular markets on the FCC Form 175 less burdensome.

69. We also emphasize that, pursuant to Section 1.65 of the Commission's rules, each auction applicant is required to assure the continuing accuracy and completeness of information furnished in a pending application.[184] Each applicant is therefore under a continuing obligation to update its short-form and long-form applications as appropriate to reflect any changes that would make a pending application inaccurate or incomplete, or that are necessary to determine that an applicant is in compliance with our rules.[185] As in all prior auctions, an application that is amended by a major amendment will be considered newly filed, and therefore will not be accepted after the short-form filing deadline.[186] We further note that the Commission has waived its *ex parte* rules as they apply to the submission of amended short-form applications to maximize applicants' opportunities to seek the advice of Commission staff when making amendments at any time after the short-form filing deadline.[187]

70. Finally, we note that in the context of cellular unserved area licensing, WWC contends that the rules adopted in this proceeding addressing major and minor amendments to short-form applications should not apply to cellular unserved area applications filed in 1994 as these applications were to be governed by a "letter-perfect" standard and applicants were given no opportunity to cure minor defects.[188] While we have considered WWC's argument, we believe that it is inapplicable. WWC addresses the initial application procedures for cellular unserved area licenses, while the Part 1 rules, in contrast, address application procedures for participation in an auction once a finding of mutual exclusivity has been made.

3. Ownership Disclosure Requirements

71. Background. Currently, our general competitive bidding rules do not set forth any

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[184] 47 C.F.R. § 1.65.

[185] *See, e.g.*, Letter to Linda Feldmann from Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 97-2261 (rel. October 24, 1997).

[186] *See* 47 C.F.R. § 1.2105(b)(2).

[187] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Order on Reconsideration and Seventh Report and Order*, PP Docket No. 93-253, 11 FCC Rcd 2639, 2679, ¶ 104 (1995), and "Commission Announces that Mutually Exclusive "Short-Form" Applications (Form 175) to Participate in the Competitive Bidding Process ("Auctions") Are Treated as Exempt for *Ex Parte* Purposes," *Public Notice*, 9 FCC Rcd 6760 (1994).

[188] WWC Comments at 2-3.

ownership disclosure requirements for auction applicants on their short-form applications. As we recognized in the *Notice*, however, our service-specific rules require varying degrees of specific ownership information from applicants.[189] For example, in the 900 MHz SMR auction, an applicant claiming small business status was required to disclose on the short-form application the names of each affiliate and a gross revenues calculation. On the long-form application, such an applicant was required to disclose an additional gross revenues calculation, any agreements that support small business status, and any investor protection agreements.[190] At the same time, both our narrowband PCS and broadband PCS rules require detailed ownership disclosure from all auction applicants that differ from each other and from the 900 MHz SMR requirement. Rules for narrowband and broadband PCS also impose additional requirements for applicants claiming small business status. Finally, although the broadband PCS disclosure requirements are very similar to those for narrowband PCS, we have recently amended the broadband PCS application requirements to make them less burdensome on applicants.[191]

72. In the *Notice*, we sought comment on whether to adopt standard ownership disclosure requirements for all auctionable services in order to eliminate these inconsistencies from service to service.[192] Specifically, we proposed to adopt standard disclosure requirements that are similar to our current rules for broadband PCS. We sought comment on what ownership information should be required.[193] We also proposed to adopt a uniform reporting requirement for all applicants claiming small business status, and proposed to model this requirement on the 900 MHz SMR rules.[194]

73. Discussion. As we indicated in the *Notice*, we continue to believe that detailed ownership information is necessary to ensure that applicants claiming small business status qualify for such status, and to ensure compliance by all applicants with spectrum caps and other ownership limits.[195] Disclosure of ownership information also aids bidders by providing

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[189] *Notice* at ¶¶ 49-50.

[190] 47 C.F.R. § 90.815(b).

[191] 47 C.F.R. § 24.813.

[192] *Notice* at ¶ 51.

[193] *Id.*

[194] *900 MHz SMR Report and Order*; Bidder Information Package for 900 MHz SMR (November 28, 1995).

[195] *Notice* at ¶ 51.

them with information about their auction competitors and alerting them to entities subject to our anti-collusion rules. Therefore, we adopt standard ownership disclosure requirements for all auctionable services that will avoid the variations found in our current service-specific ownership disclosure requirements.

74. This decision is widely supported by the majority of comments in this proceeding. Most commenters addressing the issue of ownership disclosure support requiring some level of ownership information at the short-form application stage.[196] For example, PCIA believes that full disclosure of bidder ownership information is necessary if competing bidders are to accurately assess the legitimacy of their auction opponents and their respective bids.[197] PCIA contends that there can be no valid reason for legitimate bidders to hide their ownership. Such information, according to PCIA, is crucial for purposes of the Commission's anti-collusion rules, spectrum caps, and other ownership limits.[198] Similarly, PageNet contends that full ownership disclosure is important to aid bidders in compiling information about their auction competitors and, most importantly, to alert them to any conduct that might be a violation of the Commission's anti-collusion rules.[199] In the satellite context, Hughes argues that the submission of detailed ownership information is essential because of the extreme costs associated with the build-out of a satellite system.[200] In contrast, only CII argues that the Commission's objectives with regard to the rules governing designated entity status, spectrum caps, and other ownership limitations would be fully satisfied by deferring the filing of comprehensive ownership information until the long-form application stage.[201]

75. For all future auctions, therefore, we will model our reporting requirements on the general application requirements contained in our broadband PCS rules.[202] Under this standard, all auction applicants will be required to disclose the real party or parties in interest by including as an exhibit to their short-form applications detailed ownership information. Although our current Part 1 rules require auction applicants to list all owners of a five percent or greater interest in the applicant, we agree with commenters such as CII that argue that

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[196] *See* PCIA Comments at 4, ISTA Comments at 2; PageNet Comments at 2-3; Hughes Comments at 6-7.

[197] PCIA Comments at 4.

[198] *Id.* at 4. *See also* ISTA Comments at 2.

[199] PageNet Comments at 2-3.

[200] Hughes Comments at 6-7.

[201] CII Comments at 13-14.

[202] *See* 47 C.F.R. § 24.813.

applicants should not be required to list all holders of this small an interest in the applicant, unless they are in a position of control by virtue of other factors (*i.e.*, voting agreements, management structure), or hold a significant passive ownership interest (*i.e.*, 20 percent).[203] Thus, we amend our rules to require that applicants list controlling interests as well as all parties holding a 10 percent or greater interest in the applicant and any affiliates of these interest holders.[204] A 10 percent or greater interest reporting requirement is consistent with the revised definition of the term "applicant" we adopt for purposes of the anti-collusion rule (*See* Section III.F, *infra*). We note that PageNet contends that the Commission should require disclosure of entities and individuals that own more than five percent of the applicant or who have provided more than five percent of the applicant's equity.[205] However, as suggested above, we believe that the detailed reporting requirement we create today, in combination with our comprehensive affiliation rules (*see* Section III.B.3, *supra*), permits us to determine the "real party or parties in interest"[206] when parties apply to participate in an auction.

76. Specifically, all auction applicants will be required to disclose: (1) a list of any FCC-regulated business, 10 percent or more of whose stock, warrants, options or debt securities are owned by the applicant; (2) a list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest; (3) a list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC-regulated business in which a 10 percent or greater interest is held by another party which holds a 10 percent or greater interest in the applicant (*e.g.*, if company A owns 10% of company B (the applicant) and 10% of company C, a company holding or applying for an FCC-regulated business, the companies A and C must be listed in company B's application); (4) the name, address and citizenship of any party holding 10 percent or more of each class of stock, warrants, options or debt securities, together with the amount and percentage held;[207] (5) the name, address and

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[203] CII Comments at 14-15.

[204] *See* 47 C.F.R. § 1.2110(b)(4).

[205] *Id.* at 6.

[206] *See* 47 C.F.R. § 24.813(a).

[207] For purposes of determining ownership interests, stock interests held in trust shall be attributed to (1) any person who holds or shares the power to vote such stock; (2) any person who has the sole power to sell such stock; and (3) in the case of stock held in trust, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust (*See* 47 C.F.R. § 20.6(d)(3)). Non-voting stock shall be attributed as an interest in the issuing entity if equal to or greater than 20 percent of the value of the entity (*See* 47 C.F.R. § 20.6(d)(4)). Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests must treated as if fully exercised.

citizenship of all controlling interests of the applicants, as this term is defined in Section 1.2110 of our rules; (6) if the applicant is a general partnership, the name, address and citizenship of each partner, and the share or interest participation in the partnership; (7) if the applicant is a limited partnership, the name, address and citizenship of each general partner and each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses); (8) if the applicant is a limited liability corporation, the name, address and citizenship of each of its members; and (9) a list of all parties holding indirect ownership interests in the applicant, as determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, that equal 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated and reported as if it were a 100 percent interest.[208]

77. In addition, consistent with the reporting requirements set forth in the 900 MHz SMR rules,[209] we will require that applicants claiming small business status disclose on their short-form applications the names of each controlling interest and affiliate, as these terms are defined in this proceeding, and to provide gross revenues calculations for each. On their long-form applications, such applicants will be required to disclose any additional gross revenues calculations, any agreements that support small business status, and any investor protection agreements. We believe that these reporting requirements will help to assure that only qualifying applicants obtain the benefits of our small business provisions, without being unduly burdensome.

78. Finally, in a related proposal, PageNet states that Commission should expressly prohibit "blind bidding" (*i.e.*, bidding in which auction participants do not know the identities or ownership information of the other bidders in the auction) in any pending and future auction because it (1) is unfair to auction participants; (2) encourages auction abuses; and (3) encourages speculation.[210] PageNet contends that these factors can have a significant impact upon the competitiveness of the auction and the post-auction marketplace.[211] In situations in which an incumbent has already met the Commission's build-out requirements and must still bid in an auction in which blind bidding is used, PageNet contends that a competitor is often able to bid up the price of a license that it never intends to win in order to force the

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[208] *See, e.g.*, 47 C.F.R. § 20.6(d)(8).

[209] *900 MHz SMR Report and Order*; Bidder Information Package for 900 MHz SMR (November 28, 1995).

[210] *Id.*

[211] *Id.* at 4.

incumbent to buy the license at a higher price. PageNet further contends that this higher price is then reflected in higher rates for services, which in turn affect the incumbent's ability to compete.[212] As discussed above, we agree that it is important that auction applicants disclose certain ownership information prior to the start of an auction. At the same time, however, we believe that in certain circumstances, the competitiveness of an auction may be increased if less bidder information is made available. In the *Competitive Bidding Second Memorandum Opinion and Order*, we retained the flexibility to conceal bidder identities if further experience showed that it would be desirable to do so.[213] More recently, in the auction rules for geographic area paging licenses, the Commission concluded that the advantages of limiting information disclosed to bidders outweigh the disadvantages of this approach, and reserved the discretion to announce by Public Notice prior to the auction the precise information to be revealed to bidders during that auction.[214] We believe that the uniform rules we adopt today provide us with the necessary flexibility to tailor the amount of bidder information made available to applicants to ensure the competitiveness of each auction. We therefore decline to adopt a provision prohibiting non-disclosure of bidder identities in all future auctions.

4. Ownership Disclosure Filings

79. Background. Currently, the Commission's ownership disclosure rules require applicants to file specific ownership information in conjunction with their FCC Form 175 applications prior to each auction.[215] Similarly, at the close of each auction, winning bidders are required to file ownership information on each long-form application.[216] In the *Notice*, we tentatively concluded that we should permit applicants to file ownership information to apply for the first auction in which they participate, and we would store this information in a central database which would be updated each time applicants participate in another auction.[217] We proposed that an applicant filing for a subsequent auction would either update the ownership information in the database, or certify that there have been no changes in ownership status.[218]

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[212] *Id.*

[213] *See Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7252, ¶ 42.

[214] *See Paging Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd at 2803, ¶ 160.

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

[216] *See* 47 C.F.R. §§ 1.2107(c) - (d). *See also,* FCC Form 601 ¶¶ 1-16, 29-33, and 39 (January 1995).

[217] *Notice* at ¶ 54.

[218] *Id.*

80. Discussion. We believe that permitting applicants to file ownership information when they apply for their first auction, which would then be stored in a central database and updated each time the information changes during or after the first auction and when applicants participate in a subsequent auction, will streamline our application processes and minimize the burden on auction applicants. This concept is supported by the record.[219] For example, CII and Airadigm argue that this approach will benefit auction applicants by reducing the time spent preparing auction applications, and will benefit the Commission by eliminating the need to review and analyze duplicative filings.[220] We believe that by requiring ownership disclosure filings, we ensure that we receive all the information necessary to evaluate an applicant's qualifications. As we indicated in the *Notice*, however, these requirements could result in duplicative filings.[221] For example, where licenses for a service are offered in a series of blocks, as in the case of broadband PCS, an entity may wish to participate in several auctions, and would be required to disclose the same information a number of times.[222] Under the system we envision, when applying to participate in subsequent auctions, applicants will be permitted to update the database or certify that there have been no changes in ownership and that the information contained in the database remains correct. We will look to implement this process in the near future as part of our Universal Licensing System.[223]

5. Audits

81. Background. Under our broadband PCS auction rules, we have reserved the right to conduct random audits of auction applicants and licensees in order to verify information provided regarding their eligibility for certain special provisions.[224] These rules require that entities certify their consent to such audits on their short-form applications.[225] In the *Notice*, we proposed to explicitly reserve this right for all auctionable services.

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[219] *See* AMTA Comments at 11-12; Airadigm Comments at 10; Hughes Comments at 7; ISTA Comments at 2; CII Comments at 15.

[220] *See* CII Comments at 15; Airadigm Comments at 11.

[221] *Notice* at ¶ 54.

[222] 47 C.F.R. §§ 24.413, 24.709(c) and 24.813.

[223] *See generally* "Wireless Telecommunications Bureau Universal Licensing System Registration Now Available," *Public Notice* (rel. November 4, 1997).

[224] 47 C.F.R. § 24.709(d).

[225] *Id.*

82. Discussion. The only commenters to address this proposal, PageNet and Airadigm, support this proposal.[226] Airadigm requests that applicants and licensees subject to audit be afforded sufficient time to provide information to the Commission and that the Commission issue written findings following its examination.[227] We therefore adopt our proposal, and will modify our rules governing status as a designated entity to expressly provide that applicants and licensees claiming eligibility for special provisions shall be subject to audits by the Commission. Such audits will be governed by the standards set forth in Sections 403 and 308(b) of the Communications Act.[228] We believe that these provisions, as well as the general provisions of the Administrative Procedure Act,[229] will adequately address Airadigm's concerns, and we therefore decline at this time to adopt specific rules to govern audits of applicants and licensees conducted in the future.

D. Payment Issues

1. Determination of Upfront Payment Amount

83. Background. Section 1.2106 of our rules provides that the Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment in order to be eligible to bid in an auction.[230] Although not specifically addressed in the *Notice*, we received significant comment on the proper upfront payment to be required for participation in future auctions.

84. Discussion. In the *Competitive Bidding Second Report and Order*, we indicated that the upfront payment should be set using a formula based upon the amount of spectrum and population (or "pops") covered by the license or licenses for which parties intend to bid.[231] We reasoned that this method of determining the required upfront payment would enable prospective bidders to tailor their upfront payment to their bidding strategies.[232] At the same

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[226] PageNet Comments at 9.

[227] Airadigm Comments at 11-12.

[228] 47 U.S.C. §§ 403, 308(b).

[229] *See* 5 U.S.C. § 551 *et seq.*

[230] 47 C.F.R. § 1.2106(a). *See also* 47 C.F.R. § 1.2110(g).

[231] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377, ¶ 169.

[232] *Id.*