

(3) current permit costs;<sup>134</sup> and (4) a flat upfront payment amount such as \$100,000.<sup>135</sup> At least one commenter believes that pending applicants who filed prior to July 1, 1997, should only be required to submit a nominal upfront payment, while other applicants should be required to demonstrate a greater financial commitment.<sup>136</sup> Other commenters oppose an upfront payment requirement for broadcast auctions, arguing that upfront payments are contrary to the public interest,<sup>137</sup> or that the Commission's existing default and bid withdrawal payments alone are sufficient to discourage insincere bidders.<sup>138</sup>

132. Several commenters also discussed the Commission's tentative conclusions regarding minimum opening bids and/or reserve prices. Those commenters who support their use make a variety of suggestions as to how such mechanisms should be established. One commenter contends that the minimum opening bid should be equal to the upfront payment and based upon the population proposed to be served.<sup>139</sup> In contrast, another commenter argues that minimum opening bids, like upfront payments, should be determined using data based upon station transactions and the performance of operating stations in the market that the applicant hopes to serve, particularly in smaller market areas for which there is no comparable market data that could fairly be used to estimate license value.<sup>140</sup> Other commenters oppose the establishment of a minimum opening bid and/or reserve price for the auction of broadcast construction permits, arguing that (1) the Commission, Mass Media Bureau and Wireless Telecommunications Bureau lack the expertise and/or staff resources necessary to establish a minimum opening bid and/or reserve price;<sup>141</sup> (2) a minimum opening bid or reserve price is either unnecessary or not in the public interest because the auction itself will establish the fair market value of the broadcast construction permits;<sup>142</sup> or (3) the purpose of a minimum opening bid or reserve price would only be to generate funds for the U.S.

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be unfair to base the upfront payment on existing competitors' revenues in the market because a "start-up station" might never be able to achieve the same financial results.

<sup>134</sup> See Comments of JTL Communications Corp. at 4.

<sup>135</sup> See Comments of J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 16.

<sup>136</sup> See Comments of John W. Barger at 4.

<sup>137</sup> See Comments of Michael R. Ferrigno at 8; Terry A. Cowan at 4.

<sup>138</sup> See Comments of Liberty Productions, LP at 7; Heidelberg-Stone Broadcasting Co. at 14; Rio Grande Broadcasting Co. at 14.

<sup>139</sup> See Comments of Apache Radio Broadcasting Corporation at 2. *Accord* Comments of JTL Communications Corp. at 6 (set opening bid amount at same level as upfront payment).

<sup>140</sup> See Comments of Tanana Valley Television Co. at 2.

<sup>141</sup> See Comments of Liberty Productions, LP at 7-8; Heidelberg-Stone Broadcasting Co. at 14-15; Rio Grande Broadcasting Co. at 14-15.

<sup>142</sup> See Comments of Seven Ranges Radio Co., Inc. at 4; Liberty Productions, LP at 8; KM Communications, Inc. at 7; James G. Cavallo at 6-7; Heidelberg-Stone Broadcasting Co. at 15; Rio Grande Broadcasting Co. at 15.

Treasury.<sup>143</sup> Two commenters also contend that, for pending applications filed before July 1, 1997, minimum opening bids or reserve prices would be particularly inequitable.<sup>144</sup>

133. We disagree with those commenters who contend that the Commission lacks expertise to establish upfront payments, minimum opening bids or reserve prices for auctions. The submission of upfront payments prior to auction has been provided for in our general Part 1 auction rules since they were first promulgated, and the staff of the Wireless Telecommunications Bureau has established upfront payments for most of the Commission's 16 previously-concluded spectrum auctions. That Bureau has also accurately evaluated such disparate services as Direct Broadcast Satellite, Digital Audio Radio Satellite Service, 800 MHz Specialized Mobile Radio and the Local Multipoint Distribution Service to establish minimum opening bids. Moreover, Congress in the Budget Act explicitly directed us to prescribe methods by which reserve prices or minimum opening bids will be established, unless we specifically determine that doing so would not be in the public interest. *See* 47 U.S.C. § 309(j)(4)(F).<sup>145</sup> General assertions by some commenters that establishment of a minimum opening bid or reserve price would not be in the public interest for broadcast auctions are unpersuasive, given the terms of Section 309(j)(4)(F) and the successful use of minimum opening bids in previous Commission auctions.

134. As discussed above (*see supra* ¶¶ 127-128), we will, for auctions of broadcast construction permits, employ the procedure adopted in the *Third Report and Order*, whereby we will seek comment on a variety of auction-specific issues prior to the start of the auction. Therefore, consistent with the Budget Act, our treatment of these issues in the *Third Report and Order*, and our proposals in the *Notice*, we delegate to the Bureaus authority to seek comment on and, as appropriate, to establish upfront payments, minimum opening bids and/or reserve prices for each auction or group of auctions of broadcast service construction permits. In formulating proposals regarding upfront payments, reserve prices and minimum opening bids, we believe that both Bureaus should consider the issues raised by commenters in this proceeding. With respect to the methodology to be employed in establishing each of these mechanisms, among the factors the Bureaus may consider are the type of service that will be offered, the amount of spectrum being auctioned, the degree of competition from incumbent providers, the size of the geographic service areas, potential advertising revenue, unalterable limitations due to physical phenomena (*e.g.*, propagation losses), equipment design limitations, issues of interference with other spectrum bands, and any other relevant factors that could reasonably have an impact on valuation of the spectrum being auctioned.

### c. Auction Application and Payment Procedures

135. In the *Second Report and Order*, the Commission initially established general competitive

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<sup>143</sup> *See* Comments of Terry A. Cowan at 4.

<sup>144</sup> *See* Comments of KM Communications, Inc. at 7; J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 16.

<sup>145</sup> The Conference Report to the Budget Act also indicates that Congress generally intended for the Commission to establish such minimum opening bids or reserve prices for future auctions. *See* H.R. Rep. No. 217, 105th Cong., 1st Sess. 573 (1997) ("the Commission *must* also prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, for any license or permit assigned by means of auction") (emphasis added).

bidding rules and procedures for all auctionable services, but indicated that such rules could be modified on a service-specific basis. More recently, in the *Third Report and Order*, the Commission substantively amended these general competitive bidding rules in an effort to streamline regulation, increase the efficiency of the auction process, and provide more specific guidance to auction participants. Based on the experience gained in the course of conducting numerous auctions and to provide for a more consistent and efficient competitive bidding process, the *Third Report and Order* modified the general Part 1 auction rules, and stated that these uniform rules would govern all future auctions, unless the adoption of service-specific rules was determined to be warranted with regard to particular matters. *Id.*, 13 FCC Rcd at 382. Accordingly, we will follow for all broadcast services the procedural and payment rules established in the *Second Report and Order* and *Third Report and Order*, set forth at 47 C.F.R. Chapter 1, Part 1, Subpart Q, with certain modifications, as specifically indicated below. Our objective has been to design rules and procedures that will reduce administrative and financial burdens on bidders and the Commission, ensure that bidders and licensees are qualified, and minimize the delays in the authorization and construction of new or expanded broadcast facilities to serve the public. See 47 U.S.C. § 309(j)(3)(A) (in designing auction rules, the Commission should seek to promote development and rapid deployment of new technologies, products and services for public benefit, without administrative or judicial delays).

#### (1) Pre-Auction Application Procedures

136. **Window Filing Approach.** As described in the *Notice*, 12 FCC Rcd at 22387 (¶ 60), the broadcast and secondary broadcast services currently all have differing filing procedures, and none of these procedures was designed to work in conjunction with the auction of mutually exclusive applications. In this *First Report and Order*, we replace these disparate filing procedures for the various services with a uniform window filing approach that will facilitate the efficient determination of groups of mutually exclusive applications for auction purposes.

137. In the television, AM and FM translator services, the new window filing approach will replace the existing two-step cut-off list procedures presently utilized. See 47 C.F.R. §§ 73.3571; 74.1233.<sup>146</sup> The current LPTV and television translator window filing procedures will be modified to conform with the auction window filing procedures. See 47 C.F.R. § 73.3572(g). In the FM service, as discussed in the *Notice*, 12 FCC Rcd at 22390 (¶ 65), the adoption of a fixed period filing window will terminate the ability of applicants to tender new and major change FM applications on a first come/first served basis, as permitted under the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985). See also 47 C.F.R. § 73.3573. With regard to the FM allotment process, channels will continue to be assigned to the FM Table of Allotments through our existing rulemaking process, and we will continue to accept and process petitions for rulemaking requesting the allotment of new FM channels to the Table of Allotments at any time. However, we will no longer open filing windows in allotment report and orders for the newly-allotted channel; applicants will, instead, be able to apply for any such allotments during subsequently announced FM auction filing windows. See 47 C.F.R. § 73.3564(d).

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<sup>146</sup> Under these rules, after an initial review for acceptability, the lead application is placed on an "A" cut-off list by a public notice, which announces a cut-off date by which applications mutually exclusive with, and petitions to deny, the lead application must be filed. Following an initial review of applications filed in response to the "A" cut-off list and a determination as to which of these applications are mutually exclusive with the lead application, a "B" cut-off list, which enumerates such applications and sets the date for filing petitions to deny against them, is released.

138. We hereby replace these disparate filing procedures with a specific time period, or auction window, during which all applicants seeking to participate in an auction must file their applications for new broadcast facilities or for major changes to existing facilities.<sup>147</sup> Prior to any broadcast auction, the Bureaus will release, pursuant to delegated authority, various public notices concerning the auction and the procedures to be followed in the auction. As indicated in the *Notice*, 12 FCC Rcd at 22389 (¶ 63), an initial public notice will announce an upcoming auction and will specify when the window for filing to participate in the auction will open and how long it will remain open. The filing window will remain open a sufficient period of time so that applicants, such as those for the AM and LPTV services, will be able to prepare and file the engineering information necessary to make determinations of mutual exclusivity. See *infra* ¶ 143. We emphasize that applications filed before or after the dates specified in the public notice will not be accepted. Applications submitted prior to the window opening date identified in the public notice will be returned as premature, and applications submitted after the specified deadline will be dismissed with prejudice as untimely.

139. We will retain the discretion to have combined filing windows allowing the submission of applications for several broadcast services, or to have separate filing windows for each type of broadcast or secondary broadcast service. Although the opening of a combined window for the filing of applications for the various broadcast and secondary broadcast services at the same time may be more efficient, we recognize that opening separate windows for each service may better accommodate the circumstances unique to each service and better allow the Commission to control the filing and processing of applications.<sup>148</sup> We will open filing windows for the broadcast and secondary broadcast services as often as our resources allow, taking into consideration the Commission's need to maintain orderly processing procedures and the frequency with which broadcast auctions may be efficiently conducted, as well as equitable considerations that may warrant conducting auctions for pending applications before opening auction filing windows for new applications. Mutually exclusive broadcast applications filed during these windows may also be included in auctions of unsold or defaulted licenses, particularly if the number and estimated value of the construction permits at issue is low. We feel that the efficiency of the broadcast application and auction process will be best promoted by the Commission retaining discretion to open filing windows and schedule auctions in such a flexible manner.

140. We feel that the uniform window filing approach described above best complements the auction process and, at the same time, provides the staff with a mechanism to control effectively the filing and processing of broadcast applications.<sup>149</sup> In particular, adherence to date certain openings and closings of filing windows (rather than first come/first served processing) will enable the Commission to identify more efficiently discrete groups of mutually exclusive applications for auction purposes. Although a few commenters state that the window filing approach would encourage the filing of large numbers of speculative applications,<sup>150</sup> we have found that speculation is actually greatly reduced in the auction

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<sup>147</sup> As discussed in detail in ¶ 177, minor modification applications may continue to be filed at any time.

<sup>148</sup> See, e.g., Comments of Kyle Magrill at 2; Six Video Broadcast Licensees at 4 (supporting separate filing windows for different services).

<sup>149</sup> Thus, we disagree with one commenter who thought that filing windows would be burdensome for Commission staff. See Comments of Hatfield & Dawson Consulting Engineers, Inc. at 4.

<sup>150</sup> See Comments of Seven Ranges Radio Co. Inc. at 6; Sellmeyer Engineering at 2.

context, given the strict payment and other bidding requirements. Given the paucity of substantive comments even addressing our window filing proposal, we conclude that commenters had no strong objections to the replacement of our existing disparate filing procedures with a uniform window filing approach.

141. *Short-Form Applications.* To reduce the burden on bidders and the Commission, and to minimize the potential for delays, broadcast applicants, in accordance with our general Part 1 auction rules, will be required to submit only a short-form application (FCC Form 175) prior to any auction, and only winning bidders will need to file complete long-forms (FCC Form 301 for AM, FM and television stations, FCC Form 346 for LPTV and television translators, or FCC Form 349 for FM translators). Specifically, in response to a public notice announcing a window for the filing of broadcast and/or secondary broadcast applications for new stations and for major changes in existing facilities, we will, as proposed in the *Notice*, 12 FCC Rcd at 22390 (¶ 65), require applicants to file a short-form application, along with any engineering data necessary to determine mutual exclusivity in a particular service.<sup>151</sup>

142. With regard to the FM service, the *Notice* proposed that applicants would apply by submitting the FCC Form 175 application for any vacant FM allotment specified in the public notice announcing the auction filing window. Applications specifying the same vacant FM allotment would be mutually exclusive, and no supplemental engineering data would be necessary to make this determination. Commenters, however, noted that the Commission's proposal would protect from subsequently filed applications (such as minor change applications that may be filed at any time) only the reference points of any vacant allotment. According to these commenters, the reference point of a vacant allotment and an applicant's actual desired location may be separated by a considerable distance, and they argued that FM applicants should be allowed to submit actual site preferences prior to the auction, emphasizing that the ability to protect a specific tower or site from subsequently filed proposals would be a crucial factor in deciding whether to participate in an auction and how much to bid.<sup>152</sup> Accordingly, to address these

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<sup>151</sup> With a single exception involving freeze waivers, applicants will not be permitted to file applications for new analog television stations in these windows because, in the *Sixth Report and Order* concerning advanced television, the Commission essentially ended the licensing of new analog television stations. Specifically, the Commission determined to treat the existing vacant analog television allotments in the Table of Allotments that were not the subject of pending applications as deleted, and stated that we would not accept new applications for new stations on those allotments. With regard to pending applications and petitions for rule making requesting new television allotments, we determined to maintain and protect those vacant allotments that were the subject of such pending applications. *Sixth Report and Order*, 12 FCC Rcd at 14639. In the event we grant a pending freeze waiver request and accept for filing a singleton television application filed prior to July 1, 1997, we will announce a period during which mutually exclusive applications may be filed. See *supra* ¶ 70. Any applicant then filing a competing application against a pending analog television applicant granted a freeze waiver will only need to submit an FCC Form 175 application indicating the specific television allotment at issue.

<sup>152</sup> See Comments of Association of Federal Communications Consulting Engineers at 3 (auction participants will likely conduct extensive investigations of potential transmission sites before deciding whether to apply for a vacant allotment, and, unless applicants' site preferences are protected and "cut-off" from subsequently filed applications, auction participants will be exposed to unnecessary risk that, at conclusion of the auction, their preferred sites will no longer be usable); Reynolds Technical Associates at 2 (if only reference coordinates for FM allotments receive protection, then bidders will not know the value of the allocations they are bidding on during the course of an auction); Hatfield & Dawson Consulting Engineers, Inc. at 2 (initial filing for FM stations must be site-specific because subsequently-filed minor change applications by existing stations, while protecting the reference coordinates

concerns, we will give FM applicants the opportunity to submit a set of preferred site coordinates as a supplement to the FCC Form 175. We emphasize that FM applicants are not required to submit a set of preferred site coordinates, and may simply indicate the vacant allotment upon which they intend to bid.<sup>153</sup>

143. Applicants for AM stations, LPTV stations, and television and FM translators will be required to file short-form applications specifying a channel or frequency upon which the applicant may operate in accordance with the Commission's existing interference standards for these services, which we are not altering in any way.<sup>154</sup> To determine which AM, LPTV, and television and FM translator applications are mutually exclusive for auction purposes, we will require applicants for these services to file, in addition to their short-form applications, the engineering data contained in the pertinent FCC form (*i.e.*, FCC Form 301, FCC Form 346 or FCC Form 349). Similarly, in those rare instances in which analog television licensees file major modification applications (such as a change in the community of license), we will require that such applicants file both an FCC Form 175 and the engineering data contained in the FCC Form 301. We believe that submission of this technical data with a short-form constitutes the least burdensome means of providing us with the necessary information to make mutual exclusivity determinations.

144. Overall, we conclude requiring prospective bidders to file only short-forms (supplemented for non-table services with engineering information) prior to any auction will enable us to identify the groups of mutually exclusive applications for auction in the most expeditious manner possible.<sup>155</sup> Based on our experience in conducting numerous auctions in different services, we also believe that submission of the FCC Form 175, which requires various certifications as to the legal, technical, financial and other qualifications of the applicant, is sufficient documentation to demonstrate an applicant's qualifications to participate in an auction. We therefore disagree with commenters who argue that merely requiring submission of the short-form prior to auction (as is our practice for all auctions) will invite speculators

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of vacant allotments, might not protect actual usable site coordinates, thereby limiting new station applicants to undesirable sites).

<sup>153</sup> Any specific site indicated by FM applicants will be entered into the Commission's database without determining its ultimate acceptability from a technical standpoint, and the site will be protected from subsequently filed applications (such as minor modification applications) as a full-class facility. See ¶¶ 180-183 for general discussion of cut-off protection. Requests to upgrade, downgrade or change the channel of the allotment will not be accepted prior to the auction. In addition, we note the possibility that preferred site coordinates filed for two separate FM allotments during the same filing window may conflict, creating cross-allotment mutual exclusivity. In the unlikely event that the preferred site coordinates submitted for two separate FM allotments were to conflict, we will expect the winning bidders for these allotments to resolve such conflict through negotiations after the close of the auction.

<sup>154</sup> See, *e.g.*, 47 C.F.R. §§ 73.37, 73.182, and 73.187 (AM interference rules); 47 C.F.R. §§ 74.703; 74.705, 74.707 and 74.709 (LPTV and television translator interference rules); and 47 C.F.R. §§ 74.1203 and 74.1204 (FM translator interference rules).

<sup>155</sup> See Comments of Tri-County Broadcasting, Inc. at 4; KERM, Inc. at 4 (prior to auction, requiring submission of long-forms is unnecessary and preparing long-forms is burdensome and expensive for applicants).

and insincere applicants.<sup>156</sup> We emphasize that, for broadcast auctions, we will follow the general auction rule, 47 C.F.R. § 1.2105, with regard to completion of the short-form<sup>157</sup> and exhibits to be submitted with the short-form.<sup>158</sup> More detailed information about the completion and submission of the short-form applications will be included in the public notices released prior to the opening of auction filing windows.

145. **Amendment of Short-Form Applications.** To encourage maximum bidder participation in broadcast auctions, we will, in accordance with the Part 1 auction rules, provide applicants whose timely-filed short-form applications are substantially complete, but which contain minor errors or defects, with an opportunity to correct and resubmit their applications prior to the auction. However, applicants will not be permitted to make any major changes to their applications after the initial filing deadline (*i.e.*, the close of the filing window), and any application that does not contain the requisite certifications will be dismissed with prejudice and may not be resubmitted. *See* 47 C.F.R. § 1.2105(b)(1). Major amendments include changes in ownership of the applicant that would constitute a change of control, changes in an applicant's size that would affect eligibility for any designated entity provisions, and changes in the license service areas identified in the short-form applications on which the applicant intends to bid. *See* 47 C.F.R. § 1.2105(b)(2). For auctions of broadcast services, we will construe "changes in the license service areas" to encompass changes in the engineering information submitted with short-form applications in non-table services, changes of the vacant allotments specified in short-forms in the FM and television services, or changes in any preferred site coordinates submitted with short-forms in the FM service. Thus, changes in the engineering submissions accompanying a short-form will be regarded as major changes, and cannot be made after the initial filing deadline.<sup>159</sup> Minor amendments include typographical corrections, those reflecting ownership changes or formation of bidding consortia specifically permitted under the anti-collusion rule (*see infra* ¶ 158), and those making other changes not identified as major.

146. After reviewing the short-form applications, the Bureaus will issue a public notice listing all applications containing minor defects, and applicants will be given the opportunity to cure and resubmit

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<sup>156</sup> *See* Comments of Williams Broadcasting Co. at 4-5; Todd Stuart Noordyk at 4-5; Donald James Noordyk at 5; Batesville Broadcasting Co., Inc. at 4-5; Positive Alternative Radio, Inc., *et al.* at 5-6; Throckmorton Broadcasting, Inc. at 5.

<sup>157</sup> *See* Section 1.2105(a)(2) for a description of the information required to be submitted on the FCC Form 175. 47 C.F.R. § 1.2105(a)(2). Applicants will also need to indicate whether they are eligible for the new entrant bidding credit adopted herein.

<sup>158</sup> For example, applicants will need to submit exhibits disclosing certain ownership information, identifying all parties with whom the applicant has entered into joint bidding arrangements, and, if seeking any special measures that may be available to small businesses, disclosing gross revenue information. *See* 47 C.F.R. §§ 1.2105(a)(2), 1.2112; *Third Report and Order*, 13 FCC Rcd at 419-420.

<sup>159</sup> As discussed in detail below (*see infra* ¶¶ 149-153), to the extent engineering information is required to be submitted with short-forms for certain broadcast services, such information is required only for the staff to utilize in making mutual exclusivity determinations for auction purposes. A comprehensive review of any applicant's technical proposal will be undertaken by the staff only post-auction, and an applicant who becomes a winning bidder will be able to make changes to its technical proposal at that time. We will also, as described above (*see supra* ¶ 17), allow applicants who have filed competing major modification applications, or competing major modification and new applications, to make changes in their engineering submissions following the filing of their short-forms so as to resolve their mutual exclusivities.

defective applications. On the date set for submission of corrected applications, applicants who on their own discover minor errors in their applications also will be permitted to file corrected applications. Following a review of the corrected applications, we will proceed to determine which of the short-form applications accepted for filing are mutually exclusive. See *infra* ¶¶ 149-153.

147. **Method of Filing Short-Form Applications.** After requesting comment on the issue, the Commission determined in the *Third Report and Order* to require all short-form applications to be filed electronically beginning January 1, 1999. See 47 C.F.R. § 1.2105(a). The *Notice* in this proceeding, 12 FCC Rcd at 22390-91 (¶ 67), anticipated that all broadcast and secondary broadcast applicants would file their FCC Form 175 applications electronically, and requested comment on this proposal. Some commenters oppose requiring electronic filing, stating concerns about technical problems and placing certain applicants, such as LPTV and translator applicants and those who are not computer literate, at a disadvantage.<sup>160</sup> After consideration, we have determined to follow the general auction rule mandating electronic filing, and will therefore require all applicants for broadcast auctions to file their FCC Form 175 applications electronically beginning January 1, 1999, unless it is not operationally feasible. Applicants for non-table services, who, as noted above, must submit engineering information with their short-forms, will be required to file the engineering section of the electronic versions of the FCC Forms 301, 346 and 349, which are currently being developed.<sup>161</sup> More detailed instructions on electronic filing will be provided in the public notices announcing auction filing windows.

148. We believe that requiring electronic filing for broadcast auctions will best serve the interests of the prospective bidders as a whole. Electronic filing does not pose an undue financial burden for applicants, as no fee is assessed for filing the FCC Form 175 electronically. This method of filing also promotes openness in the auction process generally. Competing bidders, as well as the general public, may easily review electronically filed applications by downloading applications, without needing to travel to Commission headquarters or contract for the photocopying of paper applications. To further 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 easily file and review applications. This software also aids applicants in ensuring the accuracy of their applications as they are being completed, and enables applicants 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. Especially after the recent enhancements to our electronic filing system, we are confident that the system is reliable and secure, and bidders in previous auctions have apparently agreed, as the vast majority have chosen to file electronically, even when electronic filing was not

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<sup>160</sup> See *Six Video Broadcast Licensees* at 6; *Kyle Magrill* at 3; *Thomas C. Smith* at 12; *Liberty Productions, LP* at 8; *Rio Grande Broadcasting Co.* at 15; *Heidelberg-Stone Broadcasting Co.* at 15.

<sup>161</sup> If the electronic versions of the FCC Forms 301, 346 and 349 are not available by the time of the first auction filing window opened for new applicants, then the Bureaus will by public notice announce the filing procedures for applicants to follow in submitting the necessary engineering information. We note that this question of the method of filing the engineering data necessary to make mutual exclusivity determinations will not arise in the initial broadcast auctions expected to be conducted by the Commission, which will be limited to pending applicants who have already filed complete long-form applications and who will only need to submit the FCC Form 175.

required.<sup>162</sup> While we are cognizant of the fact that some broadcast applicants may currently lack experience in the filing of electronic applications, we feel, for the reasons described above, that the advantages of electronic filing are significant, and we will therefore, in accordance with the Part 1 auction rules, require short-form applications to be filed electronically.<sup>163</sup> Although we are mandating the electronic filing of the FCC Form 175 in broadcast auctions, we nevertheless reserve the right to provide for manual filing in the event of technical failure or other difficulties.

149. *Determination of Mutual Exclusivity.* After receipt of the short-form applications, the Commission must determine which applications are mutually exclusive for auction purposes. In the *Notice*, 12 FCC Rcd at 22391 (¶ 68), we tentatively concluded that, in cases where applicants have submitted engineering data in addition to the FCC Form 175, the Commission would not engage in pre-auction processing of the data, beyond the review necessary to determine mutual exclusivity for auction purposes. We sought comment on an alternate approach whereby the Commission would substantively evaluate the submitted engineering data, noting that this more extensive pre-auction processing could reduce the risk of applicants with defective technical proposals prevailing at auction. We cautioned, however, that evaluating and returning short-form applications with technical problems (such as interference or international coordination) would likely delay the auction process, as a returned applicant could seek reconsideration of the Commission's decision.

150. While some commenters support our alternate approach of conducting an engineering review prior to auction,<sup>164</sup> other commenters addressing this issue support our tentative conclusion to utilize pre-auction engineering submissions solely for the purpose of determining mutual exclusivity.<sup>165</sup> These commenters emphasize that the primary purpose of filing applications prior to auction should be to determine mutual exclusivity, rather than to determine the acceptability of an applicant's engineering proposal or other submissions. According to these commenters, the filing and review of long-form applications *following* the auction would be sufficient for the Commission to determine the acceptability of the applicant's engineering proposal, and, moreover, would relieve the Commission of the burden of reviewing in depth the technical and other qualifications of all potential applicants prior to the auction.

151. We will adopt our tentative conclusion and will accordingly examine the engineering data submitted by applicants for AM and LPTV stations and television and FM translators only to the extent

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<sup>162</sup> For example, in the 800 MHz SMR auction, 93% of the qualified bidders filed their short-form applications electronically. Moreover, we required all applicants to file their short-forms electronically in the Wireless Communications Service auction, with no objections from bidders.

<sup>163</sup> The electronic filing of short-form applications is also consistent with the Commission's movement toward electronic filing in the broadcast area generally. See *Notice of Proposed Rulemaking, 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 11349, 11352-55 (1998) (*Nontechnical Streamlining Notice*); *Notice of Proposed Rulemaking, 1998 Biennial Regulatory Review-- Amendment of Part 73 and Part 74 Relating to Call Sign Assignments for Broadcast Stations*, FCC 98-130 (rel. June 30, 1998).

<sup>164</sup> See, e.g., Comments of Michael Ferrigno at 9; Independent Broadcast Consultants, Inc. at 4; Communications Technologies, Inc. at 2; Hatfield & Dawson Consulting Engineers, Inc. at 2.

<sup>165</sup> See, e.g., Comments of KERM, Inc. at 4; Tri-County Broadcasting, Inc. at 4; John W. Barger at 3.

necessary to determine the mutually exclusive groups of applications for auction purposes.<sup>166</sup> In keeping with the Commission's efforts to "reduce the administrative burdens of the initial stages of the auction process, avoid unnecessary delay in the initiation of service, and encourage applicants to participate in the process," *Second Report and Order*, 9 FCC Rcd at 2376, we will not make any determination as to the acceptability or grantability of an applicant's technical proposal prior to the auction. Deferring technical review until the post-auction submission of long-form applications by the winning bidders will minimize the potential for delay and will promote the deployment of new broadcasting service to the public as expeditiously as possible, in keeping with our statutory objective.<sup>167</sup>

152. We observe, however, that by filing the FCC Form 175, broadcast applicants are certifying that they are "legally, technically, . . . and otherwise qualified pursuant to Section 308(b) of the Communications Act of 1934," and we expect to be able to rely on applicants' representations in this regard. We also remind applicants that the Commission has ample tools at its disposal to discourage unqualified applicants from participating in the auction process. For example, prospective bidders should be aware that a winning bidder whose long-form application cannot ultimately be granted for either legal or technical reasons may be subject to default payments under the Commission's general competitive bidding rules.<sup>168</sup> See *infra* ¶ 161. See also 47 C.F.R. §§ 1.2104(g)(2); 1.2107(b); 1.2109. Our general competitive bidding rules also provide that if a winning bidder is found unqualified to be a licensee, the Commission may either reacquire the license to existing or new applicants, or offer it to the other highest bidders in descending order at their final bids. See 47 C.F.R. § 1.2109(c). These provisions establish strong incentives for potential bidders to make certain of their qualifications before the auction, so that we may avoid delays in the deployment of new services to the public that would result from the disqualification of winning bidders and the reacquiring of broadcast construction permits. See *Second Report and Order*, 9 FCC Rcd at 2382.

153. Following the determination of mutual exclusivity among the applications filed in an auction window, the Bureau will issue a public notice identifying the applicants in each mutually exclusive group eligible to bid at auction on the construction permits for the allotments or channels identified in their short-form applications. The public notice may also provide more detailed information regarding the time, place and method of competitive bidding to be used in the upcoming auction, applicable bid submission and payment procedures, the amount of the upfront payments, the procedures and deadline for submitting the upfront payments, and any minimum opening bid or reserve price for the construction permits being auctioned. Mutually exclusive applicants identified by public notice will be required to submit the full

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<sup>166</sup> As noted above, applicants for FM stations need not submit any engineering data in addition to their FCC Form 175 applications because FM applications specifying the same available vacant allotments, as reflected in the FM Table of Allotments, will be mutually exclusive.

<sup>167</sup> See 47 U.S.C. § 309(j)(3)(A) (*in designing competitive bidding systems, Commission should seek to promote the development and rapid deployment of new services for public benefit*).

<sup>168</sup> Several commenters specifically state that the proposal to defer determinations regarding the acceptability or grantability of an applicant's technical proposal until after the auction appears workable, provided that the Commission strictly enforces its post-auction processing rules and assures that winning bidders whose long-form applications cannot ultimately be granted for either legal or technical reasons are subject to default payments under the Commission's general competitive bidding rules. See Comments of Liberty Productions, LP at 9; Rio Grande Broadcasting Co. at 15-16; Heidelberg-Stone Broadcasting Co. at 15-16.

amount of their upfront payment to the Commission's lock-box bank by the date specified in the public notice, in accordance with the provisions of 47 C.F.R. § 1.2106. After receiving from the Commission's lock-box bank the names of all applicants who have submitted timely upfront payments, the Bureaus will issue a public notice announcing the names of all applicants determined to be qualified to bid in the broadcast auction. An applicant who fails to submit a sufficient upfront payment will not be identified on this public notice as a qualified bidder, will be ineligible to bid in the auction, and its application will be dismissed. See 47 C.F.R. § 1.2106(c). Each applicant identified on this public notice will be issued a bidder identification number that must be used when submitting bids.<sup>169</sup>

154. **Non-Mutually Exclusive Short-Form Applications.** If the Commission receives only one acceptable short-form application for any broadcast allotments or channels, then mutual exclusivity is absent and the Commission is precluded from using competitive bidding to award the broadcast construction permits. In these circumstances, the Bureaus will issue a public notice cancelling the auction for those particular construction permits and identifying the non-mutually exclusive applicants, who will then be required to submit the appropriate long-form application within 30 days.<sup>170</sup> The Commission's general rules governing the submission of fees and the filing of applications will apply to the long-form applications submitted by non-mutually exclusive applicants,<sup>171</sup> and these applications will be processed in accordance with our general processing procedures. In particular, the long-form applications will be placed on public notice, and, consistent with the procedures adopted herein, ten days will be allowed for the filing of petitions to deny. See *infra* ¶ 165.

155. **Anti-Collusion Rule.** In the *Notice*, 12 FCC Rcd at 22393-94 (¶ 73), we sought comment on whether applicants for broadcast auctions should be subject to the Commission's anti-collusion rule, which provides that, after the short-form filing deadline, applicants generally may not discuss the substance of their bids or bidding strategies with other bidders that have applied to bid on the same licenses or permits. See 47 C.F.R. § 1.2105(c).<sup>172</sup> We adopt our proposal to apply the anti-collusion rule

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<sup>169</sup> We decline to follow the suggestion of one commenter that the Commission should require the filing of short-form applications and the submission of upfront payments at the same time, with the number of licenses being applied for restricted to the bidding eligibility limit, as established by the amount of the upfront payment submitted. See Comments of American Women in Radio & Television, Inc. at 18. We have rejected similar arguments in previous auction orders, and continue to believe that our established procedures with regard to short-form applications and upfront payments strike the proper balance between deterring speculation, yet still providing bidders with flexibility during the auction. See *Second Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 96-18 and PP Docket No. 93-253, 12 FCC Rcd 2732, 2793-94 (1997).

<sup>170</sup> See 47 C.F.R. § 73.3533 for identification of the specific long-forms used in applying for broadcast service construction permits or for modification of construction permits.

<sup>171</sup> See, e.g., 47 C.F.R. §§ 1.1104 (schedule of application filing fees); 1.1111 (filing locations).

<sup>172</sup> We noted that this prohibition also prevents the transfer of indirect information which affects, or could affect, bids or bidding strategy, and asked for comment on the effect of the rule. As we have previously explained, the anti-collusion rule may affect the way in which auction participants conduct their routine business during an auction by placing limitations upon an auction participant's ability to pursue business opportunities in the areas in which it has applied to bid for licenses. See *Public Notice, Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E and F Block Bidders*, DA 96-1460 (Aug. 28, 1996) (*August 28 Public Notice*); *Public Notice, FCC Staff Clarifies Application of Anti-Collusion Rule to Broadband PCS 'C' Block Reauction*, DA

to broadcast service auctions. We recognize that a number of commenters oppose this, believing instead that auction applicants should be permitted to conclude settlement agreements following the short-form filing deadline with those applicants with whom they are mutually exclusive.<sup>173</sup> Except to the extent discussed in ¶ 17 with respect to competing major modification applicants, we disagree. The Commission adopted the anti-collusion rule to both prevent and to facilitate the detection of collusive conduct, thereby enhancing the competitiveness of the auction process and the post-auction market structure. *See Second Report and Order*, 9 FCC Rcd at 2386-2388. Although the services subject to auction have increased in number and have become more diverse, we continue to believe that our anti-collusion rule is necessary to deter bidders from engaging in anti-competitive behavior. The rule has proven effective in the 16 spectrum auctions conducted to date, and we conclude that it should apply in the broadcast context as well.

156. Accordingly, applicants in broadcast auctions will be required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process. *See* 47 C.F.R. §§ 1.2105(a)(2)(viii); 1.2105(c)(1). Applicants also will be required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bids, bidding strategies, or the particular construction permits on which they will or will not bid. *See* 47 C.F.R. § 1.2105(a)(2)(ix). After short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders that have applied to bid in the same geographic license area, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.<sup>174</sup> Consistent with the anti-collusion rule's prohibition of discussions between competing applicants, we also conclude that we will not permit applicants to modify or amend their technical or engineering data submitted with their short-form applications following the short-form filing deadline so as to eliminate mutual exclusivity, except as previously discussed with regard to the engineering submissions of competing major modification applicants. *See supra* ¶¶ 17, 145. For purposes of the anti-collusion rule, an applicant is defined as the entity submitting a short-form application; all holders of partnership, ownership, and any stock interest amounting to ten percent or more of the applicant; and any holder of a controlling interest in the applicant. 47 C.F.R. § 1.2105(c)(6)(i).

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

<sup>173</sup> *See, e.g.*, Comments of KM Communications, Inc. at 8; Positive Alternative Radio, Inc., *et al.* at 10; Throckmorton Broadcasting, Inc. at 11; Independent Broadcast Consultants, Inc. at 9; National Translator Association at 8.

<sup>174</sup> *See* 47 C.F.R. § 1.2105(c); *Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6866-69 (1994); *Second Report and Order*, 9 FCC Rcd at 2387-88.

157. In addition, winning bidders in broadcast service auctions will be required to attach as an exhibit to their long-form applications a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process. All such arrangements must have been finalized prior to the filing of the short-form applications. See 47 C.F.R. §§ 1.2107(d); 1.2105(c)(1).

158. We also adopt for broadcast auctions the exceptions to the anti-collusion rule, which were recently reaffirmed in the general Part 1 auction rules. Specifically, under Section 1.2105(c)(4) of our rules, a party holding a non-controlling, attributable interest in one applicant will be permitted to acquire an ownership interest, form a consortium with, or enter into a joint bidding arrangement with other applicants for licenses in the same geographic area, provided that (1) the attributable interest holder certifies that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, has formed a consortium, or has entered into a joint bidding arrangement; and (2) the arrangements do not result in a change in control of any of the applicants. 47 C.F.R. § 1.2105(c)(4)(i) & (ii). In addition, participants in broadcast auctions will be permitted to take advantage of another exception to the general anti-collusion rule, under which a holder of a non-controlling attributable interest in an applicant may obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area provided that the original applicant has withdrawn from the auction, is no longer placing bids, and has no further eligibility. To meet the requirements of this exception, the attributable interest holder will be required to certify to the Commission that it did not communicate with the new applicant prior to the date the original applicant withdrew from the auction, and that it will not convey bidding information, or otherwise serve as a nexus, between the previous applicant and the new applicant. See 47 C.F.R. § 1.2105(c)(4)(iii). These exceptions were adopted to allow holders of non-controlling attributable interests in an applicant greater flexibility to form agreements with other applicants, thereby enabling applicants to acquire additional capital needed to bid at auction.<sup>175</sup> As we previously have stated, we believe that these exceptions will encourage investment in auction applicants without threatening the overall competitiveness of the auction process. See *Third Report and Order*, 13 FCC Rcd at 465-466.

159. We take this opportunity to reemphasize certain aspects of our anti-collusion rule for the benefit of potential broadcast auction applicants. As indicated in the *Notice*, Section 1.2105(c) may affect the way in which auction applicants conduct their routine business during an auction by placing significant limitations upon their ability to pursue business opportunities involving broadcast services in the geographic areas for which they have applied to bid for permits. 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. We caution auction applicants, however, that certain business discussions concerning, but not limited to, issues such as management, sales, local marketing agreements, rebroadcast agreements, and other transactional arrangements may all raise impermissible subject matter for discussion because they may convey pricing information and bidding strategies.<sup>176</sup> Because auction applicants should avoid all discussions with each other that will likely affect bids or bidding strategies, we believe that individual applicants, and not the Commission, are in the best position

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<sup>175</sup> See *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Memorandum Opinion and Order, 9 FCC Rcd 7684, 7687-89 (1994).

<sup>176</sup> See Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996, at 1-2.

to determine in the first instance which communications are permissible and which are not.<sup>177</sup>

160. As previously indicated, the Commission will aggressively investigate any allegations that an auction participant has violated Section 1.2105(c).<sup>178</sup> Bidders who are found to have violated the Commission's anti-collusion rules may, among other sanctions, have their applications denied, be subject to forfeitures, be subject to the loss of their down payments or their full bid amounts, or face the cancellation of their licenses. In addition, where allegations appear to give rise to violations of the federal antitrust laws, the Commission may investigate and/or refer such cases to the United States Department of Justice for investigation.

161. **Rules Regarding Bid Withdrawal and Default.** We also sought comments in the *Notice*, 12 FCC Rcd at 22394 (¶ 74), on the advisability of applying in the broadcast context the Commission's general policy of imposing bid withdrawal and default payment requirements in instances where high bids are withdrawn during the course of an auction, where winning bids are withdrawn after an auction has closed, and where winning bidders fail to submit their long-form applications or pay their winning bids. See 47 C.F.R. §§ 1.2104(g); 1.2109. All commenters addressing these issues support our proposals.<sup>179</sup> We therefore will apply our Part 1 auction rules regarding bid withdrawal and default to auctions of broadcast construction permits. The Commission has successfully employed these rules in previous auctions, and they have functioned effectively to ensure that only serious, financially qualified bidders participate in our auctions. In the event that a broadcast auction winner defaults or is otherwise disqualified, we will similarly follow the established Part 1 rules regarding the reauctioning of the construction permits at issue. See 47 C.F.R. § 1.2109.

## (2) Post-Auction Processing Procedures

162. **Down Payments.** Following the close of bidding in an auction, the Bureaus will issue a public notice announcing the close of the auction and identifying the winning bidders. To provide further assurance that winning bidders will be able to pay the full amount of their bids and construct their facilities, we will, consistent with the Part 1 auction rules, require winning bidders in broadcast auctions to submit a down payment. See 47 C.F.R. § 1.2107(a) & (b). Specifically, within ten business days of the public notice announcing the close of the auction, winning bidders will be required to supplement their upfront payments with a down payment amount sufficient to bring their total deposits with the Commission up to 20% of their winning bids. If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal payments due, amounts to 20% or more of its winning bid(s), no additional deposit will be required. To the extent that any upfront payment not only covers, but exceeds, the required down payment, the Commission will refund any excess amount after determining that no bid withdrawal payments are owed by the bidder.<sup>180</sup> The down payment will be held by the

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<sup>177</sup> See August 28 Public Notice.

<sup>178</sup> See Second Report and Order, 9 FCC Rcd at 2388. See also August 28 Public Notice at 3-4.

<sup>179</sup> See Comments of Communications Technologies, Inc. at 2; Liberty Productions LP at 9; Heidelberg-Stone Broadcasting Co. at 17; Rio Grande Broadcasting Co. at 17

<sup>180</sup> The upfront payments submitted by unsuccessful bidders will generally be returned as soon as possible after the close of the auction.

Commission until the winning bidder has been issued its construction permit and has paid the remaining balance of its winning bid, or until the winning bidder is found unqualified to be a permittee or has defaulted, in which case it will be returned, less any applicable default payments. All down payments should be submitted to the Commission's lock-box bank in accordance with 47 C.F.R. § 1.2107(b) and any relevant public notices.

163. **Long-Form Applications.** A winning bidder that meets its down payment obligations in a timely manner must file an appropriate long-form application for each construction permit for which it was the high bidder. Under the general Part 1 auction rules, a winning bidder is required, within ten business days after being notified of its winning bidder status, to submit its long-form application. See 47 C.F.R. § 1.2107(c). Given the complexity of certain of the technical and legal submissions in broadcast service long-form applications, we suggested in the *Notice* that winning bidders in broadcast auctions should be allowed 30 days to file their long-form applications. A small number of commenters state that winning bidders should be given an even longer period of time, such as 45, 60 or 90 days, to file their long-form applications,<sup>181</sup> although other commenters find 30 days to be sufficient.<sup>182</sup> After consideration, we believe that 30 days should be a sufficient period of time for winning bidders to prepare their long-form applications. In particular, we note that winning bidders in the AM, LPTV, and television and FM translator services will have already prepared engineering data required by long-form applications in connection with their earlier submission of their short-form applications. Even in the FM service, applicants may have already conducted investigations of potential transmission sites and submitted a set of preferred site coordinates as a supplement to the FCC Form 175. Moreover, we are eliminating herein the reasonable assurance of site certification and the financial qualification requirements contained in long-form applications, which may additionally reduce the period of time necessary for winning bidders to complete their long-form applications. See *infra* ¶¶ 172-176. For these reasons, we will adopt our proposal in the *Notice* to require submission of long-form applications by winning bidders within 30 days following the release of the public notice announcing the close of the auction and identifying the winning bidders. We will, however, retain the discretion to extend this 30 day period for the filing of long-form applications upon the showing of good cause by an applicant.

164. Long-form applications filed by winning bidders in broadcast auctions should include, if applicable, the exhibits required by the general Part 1 auction rules,<sup>183</sup> and should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice. The statutorily established application fees will apply to the long-form applications filed by winning bidders.<sup>184</sup> When electronic procedures become available for the submission of broadcast service long-form applications, the Commission may require all winning bidders to file their long-form applications

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<sup>181</sup> See, e.g., Comments of Thomas C. Smith at 13; Communications Technologies, Inc. at 2; Seven Ranges Radio Co. Inc. at 13; KERM, Inc. at 4-5; Tri-County Broadcasting, Inc. at 4.

<sup>182</sup> See, e.g., Comments of Michael Ferrigno at 10; JTL Communications Corp. at 10.

<sup>183</sup> See 47 C.F.R. §§ 1.2107(d) (concerning bidding consortia or joint bidding arrangements); 1.2110(i) (concerning designated entity status); and 1.2112(a) & (b) (concerning disclosure of ownership and real party in interest information, and disclosure of gross revenue information for small business applicants).

<sup>184</sup> See 47 U.S.C. § 8; 47 C.F.R. § 1.1104 (schedule of application fees).

electronically.<sup>185</sup> An applicant that fails to submit the required long-form application will be deemed to have defaulted and will be subject to the default payments set forth in the Part 1 auction rules. See 47 C.F.R. §§ 1.2107(c); 1.2104.

165. *Petitions to Deny.* After the winning bidder's long-form application has been accepted for filing, a public notice will be released announcing this fact, thereby triggering the filing window for petitions to deny. See 47 C.F.R. § 1.2108(b). Previously, the Commission has generally provided a 30 day period for the filing of petitions to deny against broadcast applications.<sup>186</sup> As indicated in the *Notice*, however, in Section 3008 of the Budget Act, Congress granted the Commission the authority to shorten the period for filing petitions to deny, and, as a result, to grant licenses more rapidly.<sup>187</sup> Some commenters objected to the establishment of a petition to deny period as brief as that allowed under Section 3008 (*i.e.*, five days), contending, *inter alia*, that such a short period is insufficient to evaluate the technical proposals and legal information contained in broadcast long-form applications.<sup>188</sup> While recognizing that the Commission relies on petitioners as private attorneys general to assist in overseeing the conduct of applicants and licensees and in the fulfillment of its statutory functions, we also consider expedition of service to the public to be of paramount significance. Delay in awarding a construction permit frustrates the public interest and denies communities new or expanded broadcast service. To expedite service, the Commission was asked to disincent disappointed bidders from raising spurious objections to winning bidders.<sup>189</sup> Accordingly, after careful consideration and in light of Congress' directive in the Budget Act, we believe that a shortened petition to deny period of ten days is appropriate for applications for broadcast and secondary broadcast construction permits obtained through the competitive bidding process. Consistent with the Part 1 auction rules, the time for filing oppositions will be five days from the filing date for petitions to deny, and the time for filing replies will be five days from the filing date for oppositions. See 47 C.F.R. § 1.2108(c).

166. If the Commission denies or dismisses all petitions to deny (if any are filed), and is otherwise satisfied that the applicant is qualified, a public notice will be issued announcing that the construction permit is ready to be granted. Auction winners will be required to pay the balance of their

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<sup>185</sup> As discussed above (*see* ¶ 147), the electronic versions of the FCC Forms 301, 346 and 349 are currently being developed, and the Commission has requested comment on a range of issues relating to the electronic filing of long-form applications. See *Nontechnical Streamlining Notice*, 13 FCC Red at 11352-55.

<sup>186</sup> See 47 C.F.R. §§ 73.3584(a); 73.3584(c).

<sup>187</sup> Section 3008 of the Budget Act provides as follows:

[N]o application for an instrument of authorization for frequencies assigned under this title . . . shall be granted by the Commission earlier than 7 days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereto. Notwithstanding section 309(d)(1) of such Act (47 U.S.C. 309(d)(1)), the Commission may specify a period (no less than 5 days following issuance of such public notice) for the filing of petitions to deny any application for an instrument of authorization for such frequencies.

<sup>188</sup> See Comments of KERM, Inc. at 5; Tri-County Broadcasting, Inc. at 5; Communications Technologies, Inc. at 2; Michael Ferrigno at 10; Hatfield & Dawson Consulting Engineers at 3.

<sup>189</sup> See Comments of James G. Cavallo at 6.

winning bids in a lump sum within ten business days following the release of this public notice. If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten business days after the payment deadline, provided that it also pays a late fee equal to 5% of the amount due. When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default and subject to the applicable default payments. See 47 C.F.R. § 1.2109(a). We anticipate generally issuing the construction permit to the auction winner within ten business days after receiving full payment.

167. *Amendments to Long-Form Applications.* To assist winning bidders in resolving Commission concerns relating to their technical proposals or other matters contained in their long-form applications, we specifically proposed to modify our application processing procedures to relax the limitations on the number, and the timing of filing, of curative amendments. The *Notice*, 12 FCC Rcd at 22395 (¶ 78), indicated that such changes would affect the rules for amending applications for all auctionable broadcast services, and would specifically eliminate the tenderability criteria and two-tiered minimum filing requirements currently in effect for new full service FM applications.<sup>190</sup> No comments were received regarding this proposal.

168. Under the competitive bidding and processing procedures established herein, only winning bidders and non-mutually exclusive applicants will file long-form applications. We believe the relatively smaller volume of long-forms requiring processing permits us to accomplish our operational goals in a less restrictive manner and warrants liberalization of the procedures now applied to defective broadcast and secondary broadcast service applications.<sup>191</sup> Accordingly, we shall adopt a more lenient approach toward the processing of defective broadcast applications for new facilities and major changes, employing staff deficiency letters, and permitting multiple corrective amendments, if necessary.

169. Applicants must continue to meet the technical and legal requirements of all applicable rules, but we will expand the current limited opportunity to amend defective applications. Long-form applications for new facilities and for major changes in existing facilities in all broadcast services will no longer be immediately returned for defects pertaining to completeness or technical or legal acceptance criteria, without ample opportunity to correct the deficiency. As stated in the *Notice*, however, in relaxing the standards for filing amendments, deficiencies in long-form applications filed by winning bidders will not be curable by major amendment. As they significantly change the long-form application as originally filed, major amendments must be filed in accordance with the window filing procedures discussed above. Moreover, winning bidders in all broadcast and secondary broadcast services who file long-form applications with waiver requests that cannot be granted, and who cannot provide timely alternate proposals consistent with our rules, will be dismissed.

170. With regard to applications for new full service commercial FM stations or for major

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<sup>190</sup> See 47 C.F.R. §§ 73.3522; 73.3525; 73.3564.

<sup>191</sup> By contrast, the Commission designed the strict "hard-look" processing approach for commercial FM applicants to, *inter alia*, provide the staff with a mechanism to handle the dramatic increase in applications expected from the allocation of 689 new FM channels pursuant to Docket 80-90. See *Report and Order*, MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), *recon. denied*, 50 Fed. Reg. 43157 (Oct. 24, 1985), *aff'd sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987).

changes to such facilities, this new process will replace the existing procedure whereby applicants are provided with one opportunity period to correct application defects, and applicants unable to correct all acceptability defects within this time period are dismissed without occasion for reinstatement.<sup>192</sup> The new process will also replace the current AM and FM translator approach to defective applications, where the nature of the defect determines the course of staff action. Currently, if the AM or FM translator application is substantially complete and meets all core technical acceptance criteria, the staff will send a deficiency letter giving the applicant 30 days to correct the defect in question. For more substantial defects, *i.e.*, those going to substantial completeness or technical acceptability, the staff returns the application as either not substantially complete or unacceptable for filing.<sup>193</sup> Similarly, the Commission currently allows LPTV and television translator applicants whose applications are substantially complete but contain defects or omissions 30 days to amend in response to a staff deficiency letter. *See* 47 C.F.R. § 73.3564(a)(2). Unlike these current procedures, the new processing standards for broadcast long-form applications will enable applicants for new facilities and for major changes to avoid dismissal and to liberally correct heretofore fatal defects in application information. We will, however, retain the amendment filing procedures presently used for applicants for minor modification of facilities in all broadcast services.

171. For all full service FM applications for new facilities and major changes, we will also abolish the two-tiered minimum filing requirement, regardless of whether the long-form application is submitted post-auction by a winning bidder, or by an applicant determined to be non-mutually exclusive.<sup>194</sup> In essence, the short-form application previously submitted at the initial stage of the competitive bidding process serves this function. Having established through the short-form that the applicant has met the minimum filing requirements prior to auction, the Commission need not repeat the exercise upon the subsequent filing of the long-form application. Applications for minor modification of FM facilities, however, will continue for the present to be processed under existing procedures, including the employment of the two-tiered minimum filing requirements.<sup>195</sup>

172. ***Elimination of Reasonable Assurance of Site Certification.*** In the *Notice*, 12 FCC Rcd at 22396 (¶ 81), we proposed to eliminate the requirement that applicants certify they have a "reasonable assurance" that the site or structure proposed as the location of their transmitting antennas will be

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<sup>192</sup> *See Report and Order, Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd 5074 (1992); 47 C.F.R. § 73.3522(b)(2).

<sup>193</sup> However, the AM or FM translator applicant is provided with an opportunity to have its application reinstated *nunc pro tunc* if the applicant submits a petition for reconsideration together with an amendment curing the defect in substantial completeness or in acceptability within 30 days. *See Public Notice, Patently Defective AM and FM Construction Permit Applications*, FCC 84-366, 49 Fed. Reg. 47331 (December 3, 1984).

<sup>194</sup> As an indication that the listed applications satisfied the minimum filing requirements, the staff would issue a Notice of Tender. The staff will discontinue the issuance of such Notices of Tender for all new and major modification FM applications. We will, however, continue to issue Notices of Acceptance. These Notices will not indicate compliance with our acceptance criteria, but will continue to serve as the mechanism for permitting petitions to deny. *See supra* ¶ 165.

<sup>195</sup> In the *Nontechnical Streamlining Notice*, 13 FCC Rcd at 11367 n. 68, the Commission has invited comment on whether we should modify the tenderability and two-tier processing standards for minor change FM applications.

available. We requested comment on our proposal to delete the reasonable assurance of site certification from the FCC Forms 301, 346 and 349, and to rely on the strict enforcement of our existing construction requirements to ensure that winning bidders in future broadcast auctions construct their facilities in a timely manner.<sup>196</sup> Given the relatively brief time period that winning bidders will have to prepare and file their long-form applications following the close of a broadcast auction, we surmised that elimination of the requirement of reasonable assurance of site availability was appropriate.

173. A certification of site availability, requiring that an applicant certify that reasonable assurance has been obtained from the property owner that the site will be available, was added to the FCC Form 301, at the request of commenters, as a component of the "hard look" processing approach.<sup>197</sup> The certification provided verification of existing Commission policy and was implemented as a deterrent to the filing of frivolous and speculative applications that frustrated our processing goals.

174. We believe that the competitive bidding process itself serves to lessen the incentive for insincere application filings and provides a strong stimulus for timely station construction, so to recapture bidding investments.<sup>198</sup> We therefore will eliminate the reasonable assurance of site certification requirement for all broadcast and secondary broadcast new and major change applicants, regardless of whether the long-form application is submitted post-auction by a winning bidder, or by an applicant determined to be non-mutually exclusive.

175. Furthermore, our construction period requirements provide the Commission with an additional safeguard to ensure that winning bidders construct their authorized facilities in a timely manner. The Commission has found that the strict enforcement of such build-out requirements, in conjunction with the employment of competitive bidding procedures, best promote the rapid deployment of service to the public.<sup>199</sup> Although some commenters urge the Commission to retain the site certification requirement,<sup>200</sup>

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<sup>196</sup> See 47 C.F.R. § 73.3598 (establishing a two-year construction period for television stations and an 18-month construction period for AM, FM and LPTV stations, as well as television and FM translators).

<sup>197</sup> See *Report and Order* in MM Docket No. 84-750 at ¶ 22.

<sup>198</sup> See, e.g., Comments of J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 17; Liberty Productions, LP at 10; Thomas Desmond at 9; JTL Communications Corp. at 11 (agreeing with proposal to eliminate site certification requirement).

<sup>199</sup> See, e.g., *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5815 (1997); *Second Report and Order*, 9 FCC Rcd at 2358. In addition, the Commission has proposed to eliminate, to the extent permitted by statute, the circumstances under which the time for construction will be extended, and to make the construction permits subject to automatic forfeiture upon expiration. To compensate for the proposed "no extension" policy, the Commission has proposed to issue permits that would provide an increased and uniform construction period of three years. See *Nontechnical Streamlining Notice*, 13 FCC Rcd at 11371-73.

<sup>200</sup> See, e.g., Comments of Rio Grande Broadcasting Co. at 17; Heidelberg-Stone Broadcasting Co. at 17; Independent Broadcast Consultants, Inc. at 5; Jeffrey Eustis at 2; Communications Technologies, Inc. at 3; Michael Ferrigno at 10; Todd Stuart Noordyk at 9; Batesville Broadcasting Company, Inc. at 9; Williams Broadcasting Company at 9; Throckmorton Broadcasting, Inc. at 11; Donald James Noordyk at 9; Positive Alternative Radio, Inc., *et al.* at 11.

we no longer find it vital to our pursuit of prompt initiation of service to the public.

176. ***Elimination of Financial Qualification Certification Requirement.*** After consideration, we will also eliminate from the broadcast long-form applications the requirement for the applicant to certify as to its financial qualifications, estimate the total funds necessary to construct and operate the broadcast facility for three months, and to identify each source of funds. We believe that our competitive bidding procedures provide adequate assurance that applicants will be financially qualified. Any winning bidder submitting a long-form application will have, prior to filing its application, already submitted a timely upfront payment and down payment, and will also be required to pay the full amount of its winning bid to obtain its construction permit. We think it unlikely that bidders, who must construct their facilities to recoup the expenditures made in obtaining their construction permits via auction, will have the incentive to participate in and prevail at auction if they lack the financial wherewithal to construct their facilities. Accordingly, we agree with the few commenters who address this issue,<sup>201</sup> and eliminate the financial qualification requirements from the FCC Forms 301, 346 and 349.

### (3) Additional Application Processing Issues

177. ***Minor Modification Applications.*** Although, under the window filing approach adopted herein, applications for new and major changes in the broadcast and secondary broadcast services must be filed in an announced filing window, applications for minor modifications of existing facilities will not be restricted to announced window filing periods and may continue to be filed at any time in accordance with existing procedures.<sup>202</sup> Minor modification applications will continue to be governed by first come/first served processing procedures, whereby priority rights are determined by the filing date of the minor modification application and such filing will cut-off the filing rights of all subsequent applicants. To avoid the possibility of the filing of minor modifications that are mutually exclusive with the applications submitted by auction applicants during general auction filing windows, we will retain the discretion to impose temporary freezes on the filing of minor modifications in particular services during the brief periods that auction filing windows are open for such services.<sup>203</sup>

178. In rare instances, two or more FM, AM, television or LPTV minor modification applications can be mutually exclusive.<sup>204</sup> As discussed above and as the commenters urge, we will generally not subject mutually exclusive minor modification applications to competitive bidding, but expect the parties

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<sup>201</sup> See Comments of J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 17-18; Thomas Desmond at 9.

<sup>202</sup> Thus, applicants proposing minor modifications will continue to file the appropriate long-form application, rather than a short-form.

<sup>203</sup> See *Robert M. Richmond*, 8 FCC Rcd 471 (1993) for an example of the complications that may occur when a modification application filed during a window filing period for new facilities is mutually exclusive with certain of those applications for new facilities.

<sup>204</sup> With regard to LPTV and television translators, applications by two or more licensees seeking displacement relief under 47 C.F.R. § 73.3572(a)(2) are the only types of minor modifications that can create mutual exclusivity. FM minor modification applications may become mutually exclusive only when conflicting applications are filed on the same day. Currently, television, AM and FM translator minor modification applications can become mutually exclusive until grant by the filing of a conflicting application. See *infra* ¶¶ 180-183 for a discussion of cut-off rules.

to use engineering solutions and negotiations to resolve the mutual exclusivities. *See supra* ¶ 19. However, we note one situation in which many minor modification applications have recently been filed on the same day, with the potential to create an unusually large number of mutual exclusivities. On June 1, 1998, we received over one thousand LPTV and television translator applications requesting replacement channels due to displacement by new DTV stations.<sup>205</sup> As with other competing minor modification applications, we expect these LPTV applicants to use engineering solutions and negotiations to resolve any mutual exclusivities. But we note in this situation, due to the large number of applications filed on the same day all seeking a limited number of replacement channels, that the applicants may experience greater difficulties in resolving the mutual exclusivities. If we find that, following a reasonable period after release of a public notice identifying any mutually exclusive LPTV displacement applicants, a significant number of these applicants have been unable to resolve their mutual exclusivities, then the Commission reserves the right to subject these competing displacement applications to competitive bidding.<sup>206</sup>

179. ***Cross-Band Mutual Exclusivity in FM Service.*** Mutual exclusivity may also arise between applications filed for channels in the FM reserved band (Channels 200-220) and applications filed for non-reserved FM channels.<sup>207</sup> Given the lack of statutory authority to auction applications for channels reserved for noncommercial educational use (*see supra* ¶ 24), we will not subject these cross-band mutually exclusive applications to competitive bidding. In the rare instances in which cross-band conflicts arise, we will, as in the case of competing minor modification applications, expect the parties concerned to use engineering solutions and negotiations to resolve the mutual exclusivities.

180. ***Cut-Off Protection for Auction Applicants.*** Pursuant to the window filing procedures adopted herein, applicants for new broadcast facilities or for major modifications to existing facilities must file short-form applications during specified window filing periods. After the closing date of any window, no applications (such as minor modification applications) may be filed that would conflict with the short-form applications filed during the window. Accordingly, under the new window filing procedures, short-form applications for all services will receive cut-off protection as of the close of the window filing

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<sup>205</sup> June 1, 1998 was the first day for filing DTV displacement relief applications by LPTV and television translator licensees and permittees who face *eventual* channel displacement by DTV stations. (In contrast, operators facing *imminent* channel displacement, for example due to the filing of an application for a conflicting DTV station, were allowed to apply for such displacement relief at any time.) Because displacement applications are filed on a first-come, first-served basis and because there may not be enough channels to accommodate all displaced stations, there was a premium on filing applications on this initial June 1st filing date. *See Public Notice, Commission Postpones Initial Date for Filing TV Translator and Low Power TV Applications for Displacement Channels*, Mimeo No. 82914 (rel. April 16, 1998).

<sup>206</sup> Given Congress' termination of our lottery authority in the Budget Act, there is no efficient method other than auctions to select the licensee, if the parties themselves cannot resolve the mutual exclusivities. Also, although technically regarded as "minor" modifications, LPTV displacement applications are akin to new applications in that they generally propose operations on new channels at new locations.

<sup>207</sup> Specifically, an application for a new facility in the FM reserved band that has not yet been cut-off may be mutually exclusive with the preferred site indicated by an auction winner for a vacant allotment in the FM non-reserved band.

period.<sup>208</sup> FM applicants supplementing their FCC Form 175 applications with a set of preferred site coordinates will be protected at that site from subsequently filed applications. *See supra* ¶ 142. All FM applicants, including those choosing not to supplement the FCC Form 175 with preferred site coordinates, will receive full class facility protection at the reference points of the vacant allotment.<sup>209</sup> As described above, applicants for AM and LPTV stations and for television and FM translators must submit with their short-form applications the engineering data from the appropriate long-form application to provide us with the information necessary to make mutual exclusivity determinations. *See supra* ¶ 143. The specific facilities proposed in these engineering supplements will be protected pursuant to our existing interference rules as of the date of the closing of the auction window.<sup>210</sup>

181. In addition to protecting the sites specified in short-form applications, long-form applications will also be afforded cut-off protection. All long-form applications for new facilities and for major modifications to existing facilities (whether filed by winning bidders or non-mutually exclusive applicants) will be cut-off as of the date of filing with the Commission, and will be protected from subsequently filed long-form applications and rulemaking petitions. All long-form applicants will be required to protect all previously filed commercial and noncommercial applications.

182. Winning bidders (or non-mutually exclusive applicants) filing long-form applications may change the technical proposals that they specified in their short-form applications. A winning bidder may not, however, specify in its long-form application a change in its proposed facility that constitutes a major change from the facility specified in its short-form. With respect to the FM service, if an FM applicant specifies a preferred site in its short-form application, and specifies a different site in its long-form, the site specified in the short-form will no longer receive cut-off protection. However, the reference points of the vacant allotment will remain protected until a construction permit is granted, even if the site specified in the applicant's long-form and the allotment site differ. In the non-table AM, LPTV, and television and FM translator services, if the facilities specified in the long-form differ from those previously specified in the short-form, both facilities will receive protection until grant of the long-form application.

183. Furthermore, we note our proposal in another proceeding to conform the processing procedures for AM and FM translator minor modification applications to those currently used for commercial FM minor modification applications by providing cut-off protection. *See Technical Streamlining Notice*, FCC 98-117 at ¶¶ 46-47. This represents a departure from our current procedures,

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<sup>208</sup> In *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 663 (D.C. Cir. 1984), the Court recognized that a cut-off procedure basically serves two purposes. "First, it advances the interest of administrative finality . . . . Second, it aids timely broadcast applicants by granting them a 'protected status,' . . . that allows them to prepare for what often will be an expensive and time-consuming contest, fully aware of the competitors they will be facing."

<sup>209</sup> The allotment will be protected until the grant of a long-form application for a construction permit for that allotment.

<sup>210</sup> This approach will therefore alter the current practice of affording cut-off protection to AM and FM translator applications on a date specified by Commission public notice. Minor amendments to the engineering submissions accompanying short-form applications that are filed so as to resolve mutual exclusivities among competing major modification applications, or competing major modification and new applications (*see supra* ¶¶ 17, 145), will be considered on a first come/first served basis, as are minor amendments to long-form applications.

as AM and FM translator minor change applications currently receive no cut-off protection from competing applications until the date the application is granted. It is therefore not unusual for a minor change application in the AM service, which had no conflicts as of the date of its filing, to conflict with a subsequently filed application.<sup>211</sup> If ultimately adopted, our proposal to provide cut-off protection for AM and FM translator minor modification applications as of the date of filing with the Commission should reduce the potential for mutual exclusivity between minor modification applications.<sup>212</sup>

184. *Transfer and Assignment of Broadcast Permits Awarded by Auction.* Under Section 1.2111(a) of the general auction rules, an applicant seeking approval of a transfer of control or assignment of a license within three years of receipt of such license by means of competitive bidding must, together with its transfer or assignment application, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the consideration that the applicant would receive in return for the transfer or assignment of the license. 47 C.F.R. § 1.2111(a). These transfer disclosure requirements are intended to aid the Commission in monitoring whether abuses relating to trafficking in licenses have occurred,<sup>213</sup> and we see no reason to deviate from our general auction rules in the broadcast context. Accordingly, we will require broadcast service auction winners to comply with these disclosure requirements if they apply to assign or transfer their construction permits or licenses within the relevant three-year period.

185. As part of the Commission's current, wide ranging efforts to streamline Mass Media Bureau procedures and initiate the electronic filing of applications, we have, however, proposed in another proceeding to eliminate entirely the requirement to submit contracts with any broadcast assignment or transfer applications,<sup>214</sup> contrary to the provisions of Section 1.2111(a). If the Commission were ultimately to adopt this proposal with regard to broadcast assignment and transfer applications generally, we will at that time revisit the requirements imposed by Section 1.2111(a) on broadcast auction winners who apply to assign or transfer their licenses so as to make the broadcast auction rules consistent with the general broadcast service rules.<sup>215</sup>

#### 4. Designated Entities

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<sup>211</sup> If the mutually exclusivity was not eliminated through settlement or technical amendment, the minor AM modification application would have been designated for comparative hearing.

<sup>212</sup> See *supra* ¶¶ 177-178 for a discussion of minor modification applications and filing procedures.

<sup>213</sup> See *Second Report and Order*, 9 FCC Rcd at 2385.

<sup>214</sup> See *Nontechnical Streamlining Notice*, 13 FCC Rcd at 11362.

<sup>215</sup> Similarly, if we ultimately adopt our streamlining proposals in the *Nontechnical Streamlining Notice*, we will revisit the issue of requiring applications for assignment or transfer of control of broadcast licenses held by auction winners to include an exhibit disclosing the ownership information set forth in Section 1.2112(a) of the Part 1 auction rules. See 47 C.F.R. § 1.2112(a). We note this same ownership information is already required to be submitted by all prospective bidders with the short-form applications and by all winning bidders as an exhibit to their long-form applications, and any changes in such information must also be reported within 30 days.

186. Section 309(j) of the Communications Act provides that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). To achieve this congressional goal, the statute directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures."<sup>216</sup> *Id.* In addition, Section 309(j)(3)(B) instructs the Commission, in establishing eligibility criteria and bidding methodologies, to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," which are collectively referred to as "designated entities." 47 U.S.C. § 309(j)(3)(B). Section 309(j)(4)(A) further provides that to promote these objectives, the Commission shall consider alternative payment schedules, including lump sums or guaranteed installment payments. 47 U.S.C. § 309(j)(4)(A).<sup>217</sup> In addition to the statutory directive to "ensure" opportunities for designated entities in spectrum auctions, the Commission has had a long-standing commitment to promoting the diversification of ownership of broadcast facilities. Indeed, "a maximum diffusion of control of the media of mass communications" was one of the two primary objectives of the traditional comparative broadcast licensing system. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965).<sup>218</sup> Section 257 of the Telecommunications Act of 1996,<sup>219</sup> moreover, directed the Commission to identify and eliminate market entry barriers for small and entrepreneurial telecommunications businesses.<sup>220</sup>

187. To fulfill our obligations under Section 309(j), the *Notice*, 12 FCC Rcd at 22397-22404 (¶¶ 83-97), sought comment on whether bidding credits or other special measures were necessary to encourage participation by rural telephone companies, small businesses, and minority- and women-owned businesses in the provision of broadcast services, and, if so, how eligibility for any such special measures should be established. In particular, we requested comment on how special measures for minority- and women-owned entities could be developed consistent with applicable constitutional standards. The *Notice* also asked for comment on the advisability of adopting bidding credits or other measures to promote diversification of ownership, and on the appropriateness of adopting rules to prevent unjust enrichment in connection with the special measures approved for designated entities.

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<sup>216</sup> Congress repealed, as of January 17, 1995, that portion of Section 1071 of the Internal Revenue Code, 26 U.S.C. § 1071, under which the Commission administered the tax certificate program.

<sup>217</sup> In the *Third Report and Order*, the Commission determined that, until further notice, installment payments should not be offered in auctions as a means of promoting participation by small businesses and other designated entities. To ameliorate the impact on small businesses of this decision to discontinue the use of installment payments in the near future, the Commission approved the use of higher bidding credits for designated entities. See *Third Report and Order*, 13 FCC Rcd at 398-400.

<sup>218</sup> See also *Notice of Proposed Rulemaking* in MM Docket Nos. 94-149 and 91-140, 10 FCC Rcd 2788 (1994) (inviting comment on initiatives to increase ownership of mass media facilities by minorities and women to further a "core" Commission goal of maximizing diversity of points of view available to public).

<sup>219</sup> Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

<sup>220</sup> See *Report, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 12 FCC Rcd 16802 (1997).

188. Many commenters argue that the present record is insufficient to support the adoption of bidding credits for women and minorities under the standards enunciated in *United States v. Virginia, et al.*, 518 U.S. 515 (1996) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).<sup>221</sup> Some commenters urge that we delay the adoption of competitive bidding procedures for broadcast auctions until completion of studies already in progress that may shed light on these questions.<sup>222</sup> And, although a number of commenters support the adoption of bidding credits for small businesses, they have supplied relatively little information regarding the capital requirements of, or the characteristics of the expected pool of bidders for, the various broadcast services.<sup>223</sup> Determining the details of any small business credit is also complicated in the broadcast context by the fact that, at least traditionally, most applicants for new broadcast stations are in fact small businesses under almost any reasonable definition, particularly in the context of radio. Pursuant to our Section 257 proceeding, we have commenced a series of studies to examine the barriers encountered by small, minority- and women-owned businesses in the secondary markets and the auctions process.<sup>224</sup> We believe it is important to complete these studies and provide for an opportunity for public comment before any ultimate determination of what rules we should have for designated entities. At the same time, we believe that it is important to move forward promptly with auctions. Particularly with regard to pending cases, considerations of fairness demand that no further delays occur and that we proceed expeditiously to licensing.

189. In proceeding with auctions before determining what rules we may ultimately adopt for small, minority- or women-owned businesses, we are, of course, sensitive to our statutory obligations regarding designated entities. As a preliminary matter, we note that, based on our experience in conducting comparative hearings under the 1965 *Policy Statement on Comparative Broadcast Hearings*, it is likely that the vast majority of the pending pre-July 1st applicants are small businesses,<sup>225</sup> and indeed likely very small businesses. With respect to specific measures that may further assist designated entities,

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<sup>221</sup> See, e.g., Comments of Cook Inlet Region, Inc. at 6, 14-15; J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 23. See also *Lutheran Church-Missouri Synod v. FCC*, No. 97-1116 (D.C. Cir. April 14, 1998), petition for rehearing pending.

<sup>222</sup> See Comments of American Women in Radio & Television, Inc. at 3, 16; Reply Comments of United Church of Christ, Office of Communications, et al. at 2-3, 18-19; Reply Comments of NOW Foundation at 1.

<sup>223</sup> Only one commenter provided any specific information as to the capital requirements of any of the broadcast services. See Comments of Danbeth Communications, Inc. at 2-3 (providing information as to the estimated capital required to construct a television station in one North Carolina market).

<sup>224</sup> Studies have been commenced examining the following: (i) 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; (ii) barriers to acquisition of broadcast licenses on the secondary market, and barriers to entry or growth, comparing small, large, minority- and women-owned licensees; (iii) 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; (iv) the impact of duopoly and multiple ownership rules on broadcast station ownership; and (v) the impact of small, minority and women ownership of broadcast stations on service. The Commission is also planning to undertake a comprehensive study on the experiences of small, minority- and women-owned businesses in the auctions process.

<sup>225</sup> As we stated in the Notice, "[o]ur experience has been that most applicants for new broadcast stations are small businesses." 12 FCC Rcd at 22397 (¶ 85).