closed filing period exists only in the event that there are pending *mutually exclusive* applications not subject to Section 309(l). *See infra* ¶¶ 105-109. To the extent that we suggested otherwise in the *Notice*, we correct that impression here.

66. ***Pending Applications With Waiver Requests of the Freeze on Television Applications.*** In a related context, we have received a number of comments asking us to clarify whether Section 309(l)(2), which insulates pre-July 1, 1997 applicants from competition with post-June 30, 1997 applicants in the event of an auction, applies to analog television applications submitted for filing before July 1, 1997 along with requests for waiver of the permanent freeze on applications for new analog television broadcast stations.[64] By way of background, we note that the Commission announced in July 1996 that it would no longer accept applications for any vacant NTSC allotment, but it provided an additional 30-day period (until September 20, 1996) for the filing of such applications. *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service (Sixth Further Notice)*, 11 FCC Rcd 10968, 10992 (1996). At that time, the Commission indicated that it would continue to process on a case-by-case basis pending requests for waiver of the 1987 freeze that involved the top 30 television markets, as well as any waiver requests filed during the 30-day period. It pledged further that, in the event it granted any waiver requests and accepted the related television applications, it would "continue [its] process of issuing Public Notices that 'cut-off' the opportunity for filing competing, mutually exclusive applications [and] . . . w[ould] allow additional competing applications to be filed." *Id.* at 10992 (1996).

67. At issue here is whether pending applications with waiver requests, all filed before July 1, 1997, are subject to the provisions of Section 309(l), and in particular the extent to which Section 309(l)(2) precludes the acceptance of additional applications that would be eligible to compete in any auction employed to resolve mutual exclusivity among any pre-July 1, 1997 analog television applications accepted for filing. We conclude that the pending applications with waiver requests constitute "applications . . . filed with the Commission before July 1, 1997" within the meaning of Section 309(l). We discern no distinction in the statutory language, or in the accompanying legislative history, between applications filed with waiver requests and applications submitted without waiver requests.

68. Thus, to the extent that there are multiple pending applications with waiver requests for a single television allotment, that, if granted, would result in mutually exclusive applications, the restrictions on bidder eligibility set forth in Section 309(l)(2) would apply. We disagree that these applications are beyond the scope of Section 309(l) because no file number was assigned, no public notice was issued, and no cut-off list was published. We recognize that there is some degree of unfairness in this result, particularly given our explicit pledge to provide an opportunity for the filing of competing applications with respect to any analog television application that we accepted. We believe, however, that we have no choice under the statute. The language of paragraph (2) is unambiguous that, where competing applications were filed with the Commission before July 1, 1997, "the Commission shall . . . treat the persons filing such applications as the only persons eligible to be qualified bidders." The situation of prospective applicants deprived of the opportunity to file competing applications by our grant of multiple waiver requests for a single allotment is analogous to that of post-June 30th applicants that are similarly ineligible to participate in an auction because more than one application was filed with the Commission

[64] The commenting parties are divided on whether Section 309(l) applies. Several urge that it does apply. *See* Comments of Davis Television Duluth, LLC, *et al.* at 3-8; Reply Comments of Arnold Broadcasting, Inc. at 2-4. Others take the opposing view. *See* Comments of Gulf Coast Broadcasting, Inc. at 6-8; New Life Evangelistic Center, Inc. at 2-4.

before July 1, 1997 during an open cut-off period.[65] We note that these pending, potentially mutually exclusive applicants, who filed applications with freeze waiver requests before July 1, 1997, would not be entitled to participate in an auction except to the extent that we grant particular waiver requests and accept the related applications.[66] Pursuant to our determination to use auctions for all applications that are subject to Section 309(l), if we grant multiple waiver requests for a single allotment, we will conduct an auction that, as required by Section 309(l)(2), will be limited to mutually exclusive applicants who submitted applications on or before the September 20, 1996 close of the period for filing such applications. No auction would be required, however, where multiple applications with waiver requests were filed but by the time they were processed only one application with a waiver request remained on file. In the event we grant the remaining waiver request, we would simply grant the related pre-July 1, 1997 application without soliciting further applications. We believe that this result is compelled by the express language of Section 309(l)(2).

69. By contrast, if only one application with a freeze waiver request was filed for a single allotment, such that there would be no mutually exclusive applications, Section 309(l) would not apply because the threshold requirement for "competing applications . . . filed with the Commission before July 1, 1997" has not been satisfied. Nothing in the Budget Act or the legislative history indicates that, where a single pre-July 1st application with a waiver request was filed, Section 309(l)(2) precludes the acceptance of additional applications consistent with our normal practice, that would then be resolved through a system of competitive bidding pursuant to Section 309(j). Such applications are no different under the statute than other pre-July 1, 1997 applications that were not subject to a cut-off period.

70. In this regard, we disagree with commenters urging that we may, consistent with the legislative history, grant such single television applications as soon as we grant the freeze waiver request. As noted above, the Conference Report, at 574, reflects that, where no competing applications were filed against a singleton application because "the Commission has yet to open a filing window," it is expected to provide an opportunity for competing applications to be filed and to use an auction if competing applications are filed. A few commenters urge that the Commission effectively opened a filing window for competing applications when it afforded a 30-day period ending on September 20, 1996 for the filing of applications for vacant NTSC allotments before it ceased accepting such applications.[67] We disagree. The intent of that 30-day period was to afford an opportunity to file any applications that were currently being prepared for filing, not to solicit competing applications. *Sixth Further Notice*, 11 FCC Rcd at 10992. The Commission did not, for example, publish a list of pending applications with requests for waiver of the 1987 freeze, but promised to provide in the future an opportunity to file competing applications, with respect to any applications with waiver requests filed by September 20, 1996 that it accepted. *Id.* For this reason, we disagree with commenters that, by delaying the effective date of the permanent freeze until September 20, 1996, the Commission effectively opened such a filing period.

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[65] *See* Comments of New Life Evangelistic Center, Inc. at 1-2, urging the publication of an A cut-off list so that it can file an application that would be mutually exclusive with two pending applications for Channel 14 at Pittsburg, Kansas.

[66] One commenter requests that we dismiss the waiver requests for a single allotment and delete the vacant allotment at this time. *See* Comments of Gulf Coast Broadcasting, Inc. at 8-9. That request, however, is beyond the scope of this proceeding, as are the merits of individual waiver requests.

[67] *See, e.g.*, Comments of Davis Television Duluth, LLC, *et al.* at 5.

Thus, in the event we grant a freeze waiver request and accept a single television application for a NTSC allotment filed prior to July 1, 1997, we will, consistent with the statute and the Conference Report, solicit additional applications, and, if mutually exclusive applications are filed, resolve those applications by competitive bidding.

71. ***Settlements***. In the *Notice*, 12 FCC Rcd at 22374-75 (¶ 26), we tentatively construed Section 309(l)(3) to require the Commission to waive any applicable provisions of its settlement regulations to permit applicants subject to Section 309(l) to enter into settlement agreements that remove conflicts among their applications. We also indicated that, in addition to the mandatory waiver of any regulations governing settlements among competing broadcast applicants, we were willing to waive certain policies to facilitate settlements among pending applicants for new commercial full-power radio or television stations filed before July 1, 1997, including the prohibition against "white knight" settlements involving the award of a permit to non-applicant third party where necessary to facilitate a full-market settlement among pre-July 1, 1997 comparative broadcast applicants. Based upon the express language of the statute, we concluded that applicants outside the scope of Section 309(l) (*i.e.*, pending applicants for secondary broadcast service, post-June 30, 1997 applicants for a new commercial full-power radio or television station, and a single pre-July 1, 1997 applicant that is mutually exclusive with one or more post-June 30, 1997 applicant(s) for a new commercial full-power radio or television station) could not benefit from the waiver.

72. Pursuant to Section 309(l)(3), mandating that the Commission "shall . . . waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications," we have waived the payment limitations set forth in Section 73.3525 of the Commission's rules, 47 C.F.R. § 73.3525, as well as our prohibition against third-party settlements.[68] Several commenters urge that our settlement policy is too restrictive in excluding post-June 30, 1997 applicants for new commercial full power radio and television stations (even if mutually exclusive with pre-July 1, 1997 applicants) and all pending applicants for licenses to provide secondary broadcast service.[69]

73. ***Discussion.*** We believe that, with one minor modification, our tentative reading of Section 309(l)(3) was correct. Although we indicated that this provision would apply to settlement agreements filed with the Commission within the 180-day period, we believe that the better reading of this provision is that it applies to agreements executed within the 180-day period and filed with the Commission, pursuant to Section 73.3525(a) of the Commission's rules. We note, moreover, that we have received comments suggesting that only full-market settlements among pre-July 1, 1997 applicants are eligible to take advantage of the waiver mandated by Section 309(l).[70] We reiterate that the statutory waiver provision applies to any settlement among pre-July 1, 1997 applicants for a new commercial full-power radio or television station, even if all the applicants are not parties to the agreement. *See Notice*, 12 FCC Rcd at 22375 (¶ 27). We will, however, only waive our policy against "white knight" settlements to

[68] *See, e.g, Gonzales Broadcasting, Inc.*, 12 FCC Rcd 12253, 12255-56 (1997) (waiving limitations on payments to settling applicants); *Playa Del Sol Broadcasters*, FCC 98I-05 (OGC Feb. 12, 1998) (same); *Praise Broadcasting Network. Inc.*, FCC 98I-03 (OGC Feb. 9, 1998); *Charles A. Farmer*, FCC 98M-20 (ALJ Feb. 12, 1998).

[69] *See, e.g.*, Reply Comments of Paxson Communications Corp. at 10.

[70] *See, e.g.*, Comments of R. L. Schwary at 1; Linear Research Associates at 1-8.

facilitate full-market settlement agreements among competing applicants. *Id.* at 22374-75 (¶ 26). *See also infra* ¶¶ 78-79.

74. Commenters are correct that we have the discretion to waive our settlement rules and policies on our own motion to facilitate settlements among applicants outside the scope of Section 309(l) and to extend beyond the 180-day period the statutorily mandated waiver for settlements among pre-July 1st applicants that fall within Section 309(l). As several commenters assert, nothing in the language of Sections 309(j)(1) or 309(l)(3) or the accompanying legislative history expressly precludes us from waiving our settlement rules and policies on our own motion to accommodate settlement agreements that are not expressly within the scope of Section 309(l)(3).[71] And, despite the expansion of our authority under Section 309(j) to mandate auctions in certain situations, Congress did not modify our statutory obligation under Section 309(j)(6)(E) to use appropriate means "to avoid mutual exclusivity in application and licensing proceedings." Indeed, the Commission's continuing obligations under Section 309(j)(6)(E) were specifically highlighted in the Conference Report.[72]

75. We are not persuaded, however, that an across-the-board waiver for applicants ineligible to take advantage of the waiver mandated by Section 309(l)(3) or a further waiver period for applicants that were eligible to take advantage of the statutorily mandated waiver but did not do so would serve the public interest or comport with congressional intent. Congress made no change in Section 311(c) that would require a substantial relaxation of our settlement rules generally. Moreover, in an apparent effort to expedite resolution of the frozen *Bechtel* comparative cases and at the same time provide an avenue of relief to the long-pending frozen *Bechtel* applicants, Congress selected a significant yet not unlimited period of time during which more liberal settlements were permitted among these applicants. It did not make this waiver open-ended or extend it to other pending mutually exclusive commercial broadcast applicants, who, by virtue of Section 3002(a) of the Budget Act, are now subject to resolution by competitive bidding. Post-June 30, 1997 applicants in comparative licensing cases, moreover, were expressly excluded from the 180-day waiver provision. In these circumstances, we believe that a further across-the-board waiver is not what Congress contemplated and would not further Congress's policy of encouraging early settlements of these pending comparative cases. We believe, moreover, that our existing settlement rules and policies are adequate to fulfill our statutory obligation to avoid mutual exclusivity under Section 309(j)(6)(E) for applicants in the frozen *Bechtel* cases that were not settled by February 1, 1998.

76. We emphasize, moreover, that pre-July 1, 1997 applicants, who would have been able to take advantage of the statutorily mandated waiver set forth in Section 309(l)(3) if such agreements had been entered into by February 1, 1998, may still avoid an auction through a settlement agreement that complies with all Commission regulations. This same avenue is available to post-June 30th applicants and to all

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[71] *See, e.g.*, Reply Comments of WB Television Network at 10; Comments of Grace Communications LC at 7.

[72] *See* Conference Report at 572 ("[T]he conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.").

pending secondary service applications, which fall outside the scope of Section 309(l). Our settlement rules permit, *inter alia*, payments to a settling applicant that do not exceed its legitimate and prudent expenses. We note further that this is the second time that there has been a waiver of the settlement rules in an effort to facilitate resolution of the long-frozen comparative initial licensing proceedings. While we agree that a further waiver would not necessarily lead to the kind of abusive filings the settlement rules were originally intended to discourage,[73] the settlement period that just ended was fairly lengthy. We have no reason to believe that an additional period would produce settlements in a significant number of the remaining cases.

77. In these circumstances, therefore, we are not persuaded that fundamental fairness requires a further waiver period, particularly given our explicit statement in the *Notice* that we did not envision waiving our settlement rules beyond the 180-day period that ended February 1, 1998.[74] In the event that pending applicants believe special circumstances warrant a waiver of our settlement regulations and policies, they may submit a waiver request. However, in no event may pending competing applicants for new facilities discuss settlement after short-form applications (FCC Form 175) are due. *See infra* ¶ 155. In accordance with our continuing obligation to avoid mutual exclusivity under Section 309(j)(6)(E) and our public interest responsibilities, we will, of course, give full and careful consideration to all such waiver requests.

78. ***White Knight Settlement Agreements***. Three separate questions have been raised relating to the waiver of the prohibition against non-party settlements that warrant consideration. First, SL Communications urges that the waiver should apply to all comparative proceedings involving pre-July 1, 1997 applications, even proceedings in which there is only one remaining applicant (*e.g.*, to permit the buyout by a non-party of a bankrupt or unqualified applicant). However, as noted in ¶¶ 71-73 above, the special settlement provisions of Section 309(l)(3) apply only to "competing [*i.e.*, mutually exclusive] applications." Moreover, as we determined in *Dorothy O. Schulze and Deborah Brigham, A General Partnership*, 13 FCC Rcd 3259, 3264 (1998), this provision of the Budget Act applies exclusively to cases that might otherwise be resolved by competitive bidding. The discretion to use a system of competitive bidding, however, arises only if there are mutually exclusive applications. Second, Paxson Communications urges that the waiver of the prohibition against "white knight" settlement agreements is too restrictive. In support of its claim that the waiver should encompass partial, as well as universal, settlements, Paxson observes that white knight settlements are often the only realistic means by which applicants can be reimbursed for tremendous expenses incurred in these protracted cases. However, approving white knight settlement agreements that did not include all of the pending applicants would be contrary to the spirit, if not the letter, of Section 309(l)(2). This provision expressly restricts qualified bidders to those persons filing applications before July 1, 1997 and was clearly intended to insulate pending applicants from having to bid against entities whose financial resources were not similarly encumbered by prosecution expenses.

79. Two commenters make a similar suggestion regarding pre-July 1, 1997 applicants that were unable to reach a settlement within the 180-day period. Specifically, they urge us to permit such

[73] *See Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990), *recon. granted*, 6 FCC Rcd 2901 (1991); *Rebecca Radio of Marco*, 5 FCC Rcd 937, *recon. denied*, 5 FCC Rcd 2913 (1990).

[74] *See* Comments of Bledsoe Communications, Ltd. at 2-3.

applicants to enter into "white knight" settlements whereby non-parties can acquire the bidding rights of the pending applicants. They claim this would provide equitable relief to applicants, which did not anticipate having to participate in an auction, and would also serve the public interest by maximizing auction revenues.[75] Whatever the benefits of this approach in terms of settling the remaining cases, it is, however, contrary to Section 309(l)(2), which explicitly restricts our discretion regarding persons qualified to participate in a competitive bidding proceeding that involves pre-July 1, 1997 applicants. And, in any event, for the reasons set forth above, we are not inclined to waive any of our settlement rules and policies beyond the 180-day period that ended on February 1, 1998.

80. ***Special Auction Procedures for Frozen Non-Hearing Cases.*** To auction the pre-July 1, 1997 full service commercial broadcast applications that have not been designated for hearing and that did not settle under the special provisions of Section 309(l)(3), we will, to the extent possible, apply the general competitive bidding procedures adopted for future broadcast auctions, as set forth in Section III(C)(3) below. Some modifications will, of course, need to be made to our general auction procedures adopted herein, so as to apply them to a closed group of pending mutually exclusive applications. To keep our auction procedures as clear and consistent as possible, we have attempted, as described below, to deviate as little as possible from the competitive bidding procedures adopted for broadcast auctions generally.

81. To prepare the frozen pre-July 1st non-hearing cases for auction, the Mass Media Bureau, in conjunction with the Wireless Telecommunications Bureau, will by public notices identify the applicants in each group of mutually exclusive applications who are eligible to bid on the broadcast construction permits for which they previously filed long-form applications (*i.e.*, FCC Form 301 for AM, FM or television construction permits). We emphasize that, in accordance with congressional directive, pending applicants will be eligible to bid on only those construction permits for which they previously filed long-form applications. Such public notices will also announce the filing deadline for short-form applications (FCC Form 175), announce the amount of and deadline for submitting upfront payments, and provide more detail on the time, place and method of competitive bidding to be used, as well as applicable bid submission and payment procedures.

82. We will require all pending applicants to confirm their interest in participating in an auction by filing a short-form application. Although we realize that these applicants have already filed complete long-forms, the submission of a short-form application is necessary so that applicants may identify their authorized bidders, create their FCC account numbers, and indicate whether they are entitled to a "new entrant" bidding credit. *See infra* ¶ 190. Pending applicants who have already filed long-form applications will not, of course, need to file any engineering data with their FCC Form 175s, as future applicants in non-table services will be required to do so that determinations of mutual exclusivity can be made. *See infra* ¶ 143. Given the importance of certain information on the short-form application to the auction process and the brevity of the short-form itself, we will require the submission of short-forms by pending applicants, and will dismiss the previously-filed, long-form application of any pending applicant who fails to timely file a short-form application to participate in the auction. If the Commission were to receive only one short-form application confirming interest in bidding competitively on any construction permit, and thus there is no mutual exclusivity for auction purposes, the Commission will cancel the auction for any such permit and proceed to the review of the sole remaining applicant's previously-filed long-form application.

[75] *See* Comments of Marri Broadcasting, L.P. at 2-4; Dewey Matthew Runnels at 2-4.

83. Assuming that mutually exclusive short-form applications are submitted by the previously-filed applicants, the auction will proceed pursuant to our general competitive bidding procedures. As in auctions of broadcast applications filed in the future, we will also require prospective bidders submitting short-form applications to make an upfront payment prior to the commencement of the auction of any pending applications. The submission of an upfront payment helps safeguard the auction process by requiring applicants to demonstrate their financial wherewithal and by providing the Commission with funds to cover any bid withdrawal or default payments. The amount of the upfront payments for pending applicants will be determined as set forth under our general auction rules in ¶¶ 129-134. All pending applicants who file complete short-forms and submit appropriate upfront payments will be qualified to participate in the auction, which will proceed as set forth below.

84. We will not, prior to the auction, review the long-form applications previously filed by the pending applicants, nor will we accept amendments to these previously-filed long-forms. In addition, before the auction we will not consider petitions to deny already filed, or accept additional petitions, against pending applications, nor consider any questions raised in such petitions relating to the tenderability or acceptability of the pending long-form applications. Although some commenters called for the review of all pending applications and petitions to deny prior to auction,[76] we believe that the interests of this group of pending applicants will be best served overall by our approach. Only those pending applicants who ultimately become winning bidders will need to expend time and resources to amend their long-form applications. Moreover, if we were to review all of the considerable number of pending applications, and any petitions to deny against them, prior to an auction, we would delay the commencement of bidding significantly.[77] Proceeding to the auction as expeditiously as possible will not only end the administrative limbo in which these pending applications have been caught, but will also result in the licensing of new broadcast stations to serve the public more quickly.

85. Following the close of the auction and the issuance of a public notice announcing the winning bidders, we will require each winning bidder to submit a down payment on its winning bid(s) within ten business days,[78] and to make any necessary amendments to its previously-filed long-form application(s) within 30 days.[79] The winning bidders' long-form applications would then be placed on public notice, thereby triggering the filing window for petitions to deny. Even in those rare instances in which the filing window for petitions to deny against the winning bidder's application had fully or partially run prior to the enactment of the Budget Act, we will, consistent with the procedures adopted herein for petitions to

[76] *See* Comments of John Anthony Bulmer at 2-3; Michael Ferrigno at 6; Linear Research Associates at 4; Williams Broadcasting Co. at 5; Donald James Noordyk at 6; Todd Stuart Noordyk at 5-6; Batesville Broadcasting Co., Inc. at 5-6; Positive Alternative Radio, Inc., *et al.* at 7-8; Throckmorton Broadcasting, Inc. at 6.

[77] In particular, if a pending long-form application were dismissed as unacceptable for filing prior to auction, that applicant would have the right to file a petition for reconsideration of the dismissal, thereby adding to the pre-auction delay. For similar reasons, we have determined not to conduct any pre-auction review of the technical submissions of future broadcast auction applicants, except as necessary to determine mutual exclusivity. *See infra* ¶¶ 149-153.

[78] *See infra* ¶ 162 for a more detailed discussion of down payments.

[79] Such amendments may include the alteration of any commitments, such as divestiture commitments, made in the long-form to obtain an advantage in the comparative hearing process, but which are not required by Commission rules.

deny following an auction generally, allow ten days for the filing of petitions to deny. *See infra* ¶ 165. We believe this approach is appropriate and not unduly burdensome, particularly given the rarity of the situation and the abbreviated petition to deny period for auction winners' applications. We will also, at this time, consider any pending petitions to deny that were previously filed against the winning bidder. For the reasons discussed in greater detail in ¶ 99 below with respect to the frozen hearing cases, we will consider site assurance and financial qualification issues raised in any petition to deny only to the extent they involve allegations of false certification.

86. If the Commission denies any petitions to deny and otherwise determines that the applicant is qualified, we will then follow our general procedures set forth herein for payment and for issuing the construction permit to the winning bidder. *See infra* ¶ 166. The previously-filed long-form applications of the unsuccessful competing bidders will be dismissed following the grant of the winning bidder's construction permit. If, however, the winning bidder fails to remit the required payments, is found unqualified to be a licensee, or is otherwise disqualified, we will exercise our discretion to offer the construction permit to the other highest bidders in descending order at their final bids.[80] Because Congress has expressly restricted participation in any auction of the mutually exclusive applications subject to Section 309(l) to the pending pre-July 1st applicants, we believe that offering any construction permit upon which the winning bidder defaults to the next highest bidders, rather than reauctioning the construction permit to new applicants, would comport with statutory requirements and would be more expeditious.

87. In organizing the auction of the pre-July 1, 1997 pending broadcast applications subject to the comparative freeze, the Commission retains the discretion to conduct a combined auction of some or all pending applications subject to competitive bidding, or to conduct separate auctions for the different services. We also retain the discretion to include some or all of these pending broadcast applications when the Commission holds auctions of unsold or defaulted licenses in other services.

88. ***Special Auction Procedures for Frozen Hearing Applicants***. In the *Notice*, 12 FCC Rcd at 22376 (¶ 30), we tentatively proposed that in these hearing cases the Administrative Law Judge (or the General Counsel in cases pending before the Commission) would issue an order indicating that the permittee is to be selected by competitive bidding, specifying the date by which such applicants must give notice of their intent to participate in the auction, and stating whether there are unresolved issues as to the basic qualifications of any particular applicant. We tentatively proposed to terminate the hearing proceeding in those cases in which there were no such issues, and to resume the hearing in other cases only in the event an applicant with such unresolved issues was the winning bidder after the auction. We sought comment on whether it would be more efficient to review the basic qualifications of the pending applicants in hearing cases prior to the auction.

89. At the outset we clarify that, where the Commission has denied or dismissed an application and such denial or dismissal has become final (*e.g.*, when an applicant failed to seek further administrative or judicial review of that ruling), such an entity is not entitled to participate in the auction. Among those remaining in the proceeding, we will permit all pending applicants to participate in the auction, without regard to any unresolved hearing issues (or outstanding petitions to enlarge) as to the basic qualifications

[80] *See* 47 C.F.R. § 1.2109 (giving Commission discretion to either reauction licenses to existing or new applicants or to offer licenses to other highest bidders in descending order at their final bids, in the event of default by, or disqualification of, the winning bidder).

of a particular applicant. We will do so regardless of the number of remaining applicants or whether the adverse resolution of outstanding basic qualifying issues would eliminate all but one applicant.[81] This serves the public interest by not delaying the selection of an auction winner to resolve potentially irrelevant issues. It also comports with Section 309(j)(5) of the Communications Act authorizing the prescription of expedited procedures for the resolution of any issues pertaining to the winning bidder's basic qualifications. It is more efficient to decide basic qualifying issues only against the winning applicant.

90. We therefore disagree with commenters who contend that deciding basic qualifying issues prior to the auction will lead to a more expeditious resolution of these long-pending hearing cases.[82] Deferring such issues until after the auction furthers the public interest by avoiding unnecessary litigation that would waste the resources of the private parties and of the Commission. The alternative is to postpone the auction until after we fully litigate these unresolved questions, which may substantially delay service to the public. In this regard, we could not, as some commenters have suggested, exclude from the auction pending applicants based on non-final administrative determinations or unresolved allegations against such particular applicants.[83] We believe that the time and expense entailed in adjudicating fully all unresolved issues relating to the basic qualifications as to all pending applicants would greatly exceed any additional delay that might result from the eventual disqualification of a winning bidder. For these reasons, we find that deferring consideration of basic qualifying issues until after the auction is fairer and ultimately more efficient than resolving any issues relating to the basic qualifications of all pending applicants, only one of which will be the winning bidder. This approach is consistent with our practice in prior auctions and lotteries of including applicants even where questions may exist as to their qualifications.

91. We disagree, moreover, that either Section 309(l)(2) or the accompanying legislative history requires that we determine the pending applicants' basic qualifications before conducting any auction.[84] Section 309(l), although clear that we may only award licenses to fully qualified applicants, is silent on whether basic qualifying issues should be adjudicated before or after the competitive bidding procedure. But it directs that any competitive bidding procedure employed to resolve these cases be conducted pursuant to Section 309(j). In this regard, Section 309(j)(5) provides that "[c]onsistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) for the resolution of any substantial and material issues of fact concerning qualifications." 47 U.S.C. § 309(j)(5). The "rapid deployment of new . . . services for the benefit of the public" is one of the objectives listed in paragraph (3), which was not amended as part of the Budget Act, and, despite the termination of our lottery authority to award certain types of commercial broadcast licenses, Section 309(i)(2) still accords the Commission discretion to make the

[81] If the winning bidder is (or a series of winning bidders are) disqualified and only one applicant remains, that applicant will be granted without a further auction.

[82] *See, e.g.,* Comments of United Broadcasters Company at 7-8; Thomas M. Eells at 5; John W. Barger at 3. *But see* Comments of J. McCarthy Miller & Biltmore Forest Broadcasting FM, Inc. at 13; Columbia FM Limited Partnership at 7-8.

[83] *See* Comments of Lisa M. Harris at 9-15; Breeze Broadcasting Co., Ltd. at 4-8.

[84] *See* Comments of Thomas M. Eells at 5-6.

determination of basic qualifications with respect to the lottery winner only.[85] In fact, we initially declined to adopt rules implementing our authority to award licenses through a system of random selection precisely because the statute originally required that we adjudicate the applicants' basic qualifications before the lottery. This undermined the primary purpose of the statute, which was to reduce the expense, delays and backlogs incurred by comparative proceedings.[86] Auction authority was likewise granted to avoid the costs and delays of comparative hearings,[87] and the language in Section 309(i) is comparable to Sections 309(j)(1) and 309(l) in that both prescribe requirements that must be met before the Commission can award a license, not before it conducts a lottery or an auction.[88] In these circumstances, we believe that, if Congress had intended to require that in these frozen *Bechtel* cases the Commission depart from its established practice of determining qualifications only with respect to the winning bidder, it would have done so explicitly. The Conference Report does not suggest otherwise. It provides that "[t]he Commission shall limit the class of eligible applicants who may be considered qualified bidders (provided such applicants otherwise qualify under the Commission's rules) to the persons who filed applications with the Commission before that date."[89] This simply says that the only applicants who may be included in the auction are those on file before July 1, 1997 who meet the Commission's rules to be a qualified *bidder*, not those who are necessarily qualified to be a *licensee*. In this respect, the Conference Report supports our conclusion that Section 309(l)(2) does not require that we exclude from an auction pre-July 1, 1997 applicants with outstanding, unresolved basic qualifications issues.

92. As a result of settlements executed during the 180-day waiver period, all of the frozen hearing cases are now pending before the Commission. Following release of this order, the General Counsel, acting on delegated authority, will issue an order in each case identifying the eligible, qualified bidders entitled to participate in the auction, referring all such cases to the Mass Media Bureau for processing in accordance with the auction procedures outlined above for the frozen *Bechtel* non-hearing cases, and either stay or terminate the hearing proceeding, depending on whether there are any unresolved hearing issues (including any unresolved petitions to enlarge issues) relating to the basic qualifications of any particular applicant. As proposed in the *Notice*, 12 FCC Rcd at 22376 (¶ 30), the hearing proceeding will resume

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[85] Section 309(i)(2)(C) provides that "the Commission may, by rule, and notwithstanding any other provision of law . . . (C) omit the determination [of basic qualifications] with respect to any application other than the one selected pursuant to paragraph (1)." 47 U.S.C. § 309(i)(2)(C).

[86] *Amendment of Part 1 of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings,* 89 FCC 2d 257, 277-279 (1982).

[87] *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding,* 8 FCC Rcd 7635, 7651 (1993), *citing,* H.R. Rep. 111, 103d Cong. 1st Sess. 254, 258 (1993).

[88] Prior to the Budget Act, Section 309(i)(2) provided that "[n]o license or construction permit shall be granted to an applicant selected pursuant to [random selection procedures] unless the Commission determines the qualifications of such applicant . . ." As amended by the Budget Act, Section 309(i) now provides that "the Commission shall have the authority to grant such license or permit to a qualified applicant through the use of a system of random selection." Virtually identical language is contained in amended Section 309(j). That provision specifies that "the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection."

[89] Conference Report at 573.

only in the event that such an applicant is the winning bidder.

93. Thereafter, all pleadings filed before the auction relating to any frozen comparative case (whether hearing or non-hearing) should be submitted to the Mass Media Bureau for processing in accordance with its procedures for frozen non-hearing cases outlined above, except that settlement agreements in stayed hearing proceedings should be submitted to the Commission. As we recognized in the *Notice*, 12 FCC Rcd at 22376-77 (¶ 32), the Mass Media Bureau, as a party to the hearing proceeding, is precluded by the separation of investigative and prosecuting functions prescribed by 5 U.S.C. § 554(d) of the Administrative Procedure Act from having any decision-making function with respect to any remaining qualifying issues in these hearing cases. We continue to believe that having the Mass Media Bureau review FCC Forms 175 to determine completeness and process administrative information relating solely to the conduct of the auction does not entail decision-making responsibilities that would violate the separation of functions requirement. No commenters disagree with this conclusion. And, given our determination to resolve after the auction any remaining basic qualification issues in these hearing cases, pre-auction pleadings unrelated to the conduct of the auction, except possibly for certain settlement agreements, would be procedurally improper and will be summarily dismissed. Thus, even in a stayed hearing proceeding, a settlement agreement is the only type of procedurally proper pre-auction pleading that might be filed that would entail decision-making responsibilities that could not be handled by the Mass Media Bureau. Such settlements, and any related pleadings, should therefore be submitted to the Commission rather than to the Mass Media Bureau.

94. The General Counsel, acting pursuant to delegated authority, will expeditiously process all such settlement agreements in accordance with all applicable Commission rules and policies, including the anti-collusion rules, which, as discussed below, are triggered by the filing of a short-form application. If such a settlement agreement is approved, the General Counsel will issue an order either dismissing the application(s) of certain previously identified qualified bidder(s) or, in the event of a universal settlement agreement resulting in the grant of an application, terminating the proceeding.

95. In the *Notice*, 12 FCC Rcd at 22376 (¶ 30), we asked for comment on how we should proceed in the event a settlement agreement in a frozen hearing case filed either with the ALJ or the Commission was denied or withdrawn. We received no comments on this question. We will proceed as follows. If a settlement agreement pending before the Commission is denied or withdrawn prior to the deadline for short-form applications, the General Counsel will issue an order as described above, stating that the proceeding is ripe for resolution by competitive bidding, identifying all qualified bidders entitled to participate in the auction, referring the case to the Mass Media Bureau, and indicating whether the hearing proceeding is terminated or stayed pending the completion of the auction.

96. ***Post-Auction Procedures for Hearing Cases***. The post-auction procedures for hearing cases in which the hearing proceeding was terminated before the auction shall be governed by the same procedures outlined above for non-hearing frozen *Bechtel* proceedings.

97. In cases in which the proceeding was stayed because there were hearing issues (or unresolved petitions to enlarge issues) pertaining to the basic qualifications of a particular applicant, the hearing proceeding will resume only if such applicant is the winning bidder. In such stayed hearing cases, therefore, the order identifying the winning bidder will also state whether the hearing proceeding is resumed. In the event none of the outstanding hearing issues (or unresolved petitions to enlarge issues) pertain to the winning bidder's basic qualifications, the hearing proceeding will be terminated as a

ministerial matter by the Mass Media Bureau, and the case will proceed in accordance with the procedures for non-hearing cases (and any hearing cases where the hearing proceeding was terminated before the auction).

98. If the hearing proceeding is resumed, it will proceed as follows. All applicants who have not formally requested the dismissal of their applications, or whose applications have not been finally denied or dismissed, are entitled to participate in the resumed hearing proceeding. The Commission will issue an order resolving according to its routine adjudicatory procedures any unresolved hearing issues and any other issues relating to the basic qualifications of the winning bidder. As tentatively proposed in the *Notice*, 12 FCC Rcd at 22377 (¶ 34), we will accord the winning bidder 30 days for any amendments necessary to report changes in its long-form application and 15 days to respond to any new petitions to enlarge. The filing of new petitions to enlarge will be governed by 47 C.F.R. § 1.229 of the Commission's rules. Given the small number of cases in which the hearing proceeding is likely to resume, we deem it inappropriate to restrict the time for filing new motions to enlarge issues, and no commenters have urged that we do so. We clarify, however, that there will be no new opportunity for the filing of petitions to deny in these resumed hearing proceedings.

99. ***Site and Financial Certification Issues***. To the extent that there are unresolved site or financial issues in these resumed hearing proceedings, or such issues are requested in a new petition to enlarge issues, we will resolve such issues (or add such issues if a substantial and material question of fact is raised) only to the extent that they involve a question of false certification. As discussed in ¶¶ 172-176 below regarding broadcast auctions generally, we are eliminating the site and financial certification requirements from the long-form applications filed by auction winners. In these circumstances, we deem it inappropriate to resolve such issues in cases in which there has not been a settlement agreement and the permittee must therefore be selected by competitive bidding. The winning bidder is subject to the same requirements regarding the payment of the winning bid, and the same payment provisions in the event of a default as any other broadcast applicant granted a construction permit through a system of competitive bidding. It is those requirements, rather than the original certifications, that serve as a mechanism to discourage insincere proposals. For this reason, adjudicating issues relating to whether the winning bidder had reasonable assurance of site availability or was financially qualified would waste the resources of the Commission and of the parties and would serve only to delay service to the public. Candor, however, continues to concern the Commission whether it awards the broadcast construction permits through the comparative hearing process or through a system of competitive bidding. *Cf. Dorothy O. Schulze and Deborah Brigham, A General Partnership*, 13 FCC Rcd 3259, 3264 (1998). Issues relating to whether the winning bidder falsely certified reasonable assurance of its site availability or financial qualifications must therefore be resolved before we can grant a construction permit to the winning bidder.

100. All other unresolved hearing issues and any new issues relating to the winning bidder's basic qualifications in these cases will be resolved in accordance with the Commission's routine adjudicatory procedures. Thus, the Commission will issue an order resolving such issues and, if appropriate, grant the winning bidder's application. In the event the winning bidder is ultimately disqualified and such determination is not subject to further administrative and judicial review, we will, as urged by some commenters,[90] exercise our discretion to offer the construction permit to the other highest bidders in descending order at their final bids. *See* 47 C.F.R. § 1.2109. We do not believe that reauctioning any permit upon which the winning bidder defaults or is disqualified would serve the public interest because

[90] *See, e.g.*, Comments of J. McCarthy Miller & Biltmore Forest FM Broadcasting, Inc. at 14-16.

the Commission is precluded by Section 309(l) from soliciting any new applicants to participate in such a reauction, and a reauction could also entail some further delay in granting the permit.

101. ***Refunds.*** In the *Notice*, 12 FCC Rcd at 22370-71 (¶ 16), we proposed to refund all hearing fees paid in any frozen comparative proceeding in which the permittee is ultimately selected by competitive bidding rather than through the comparative hearing process, and also to refund the filing fees paid by any applicant that elects not to participate in the auction. Given the length of the comparative freeze, we continue to believe that such refunds are appropriate as a matter of fairness. Certain commenters request that we pay such refunds immediately, with interest, because, they assert, the fees were collected under false pretenses and are being improperly retained.[91] We disagree. All such fees were properly collected at a time when a comparative hearing was the only mechanism for resolving mutually exclusive applications for full power radio and television stations, and we have not impermissibly retained any fees. In this *First Report and Order* we decide for the first time to exercise our discretion under Section 309(l) regarding comparative licensing cases and to resolve such cases by a system of competitive bidding, pursuant to our newly authorized auction authority for commercial broadcast licenses. Moreover, there is no provision in the statute or our implementing rules authorizing the refund of fees with interest. We believe that the payment of interest would be inappropriate here, particularly since we charge penalties but do not assess interest for late-filed fees.

102. Administrative considerations dictate that refunds be issued only upon a specific request, rather than automatically. In this regard, the procedure for requesting a refund is neither complicated nor lengthy. As to the timing of the refunds, however, we agree with commenters that refunds to applicants electing not to participate in the auction should not be delayed until after the grant of the winning bidder's application is final.[92] On or before the date for filing a short-form application, pending applicants in all comparative licensing cases subject to resolution by competitive bidding pursuant Section 309(l) may file a pleading disavowing any interest in participating in the auction and seeking the dismissal of their applications. Once the dismissal of any such application is final, we will entertain requests for refunds of any hearing and filing fees actually paid by such applicants.

103. However, we will not refund filing fees paid by applicants participating in the auction that are outbid by a competing applicant. We take the extraordinary step of refunding filing fees paid by those applicants not participating in the auction, in recognition of the fact that these applicants might not have filed their applications if they had known the permit would be awarded by competitive bidding. This is appropriate as a matter of fairness because these applications have been pending up to four years or longer.[93] There is no comparable basis to refund such fees to unsuccessful bidders, which, but for the

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[91] *See* Comments of Rio Grande Broadcasting Co. at 11-12; Heidelberg-Stone Broadcasting Co. at 11-12.

[92] *See* Comments of KM Communications, Inc. at 3-4; Rio Grande Broadcasting Co. at 11; Heidelberg-Stone Broadcasting Co. at 11.

[93] *See Implementation of Section 309(j) -- Competitive Bidding (Cellular Unserved Order)*, 9 FCC Rcd 7387, 7391-92 (1994) (noting that if the Commission used competitive bidding procedures for pending cellular applications, those pending applicants indicating no desire to participate would, as a matter of fairness, be entitled to a refund of application processing fees). *Accord Report and Order* in MM Docket No. 94-131 and PP Docket No. 93-253, 10 FCC Rcd 9589, 9632 (1995) (deciding to use lottery for pending MDS applicants, on file over four years, but noting that if it used competitive bidding, those pending applicants indicating a desire not to participate may as a matter

higher bid of a competing applicant, would have received a construction permit. In contrast to applicants withdrawing their applications rather than participating in a competitive bidding proceeding, unsuccessful bidders, by competing in the auction, have continued to prosecute their applications. There is therefore no reason to refund previously paid filing fees. Although equitable considerations militate against requiring applicants to pay fees for proceedings in which they do not participate, the ultimate disposition of an application is not a valid basis for refunding filing fees.

104. As to the timing of the refund of hearing fees to such unsuccessful bidders, the refund is premised on the fact that applications, filed in anticipation of a comparative hearing, are now decided by auction. Refunds are therefore premature until the dismissal or denial of the unsuccessful bidder's application is final and it can no longer challenge the winning bidder's basic qualifications. That occurs, however, only once the grant of the winning bidder's application and the denial of the losing bidder's application is final.

2. Pending Applications Not Subject to Section 309(l)

105. As generally described above in ¶¶ 7-12 and ¶¶ 60-65, a broader group of pending mutually exclusive applications falls outside the scope of Section 309(l) and is subject to the mandatory auction authority contained in Section 309(j)(1). These applications include mutually exclusive pending applications for the secondary broadcast services (whether filed before or after July 1, 1997), and competing full service AM and FM applications filed on or after July 1, 1997, but prior to the temporary freeze on the filing of such applications imposed after the release of the *Notice* in this proceeding. This pending group subject to auction under Section 309(j)(1) also includes a few situations where one broadcast application was filed before July 1, 1997, and other mutually exclusive applications were filed on or after that date. We will, as proposed in the *Notice*, 12 FCC Rcd at 22379-80 (¶ 41), apply to the extent possible the general competitive bidding procedures adopted for future broadcast auctions. *See* Section III(C)(3). The minor adjustments necessary to be made to our general competitive bidding procedures to accommodate the pending mutually exclusive applications not subject to Section 309(l) are set forth below. Any of these pending applicants who choose not to participate in an auction may also request a refund of their previously-paid filing fees, pursuant to the procedure set forth with regard to the Section 309(l) pending applicants. *See supra* ¶¶ 101-104.

106. The most significant issue with regard to the pending applications falling outside the scope of Section 309(l) concerns the pool of bidders who will be eligible for any auction of these mutually exclusive applications. In contrast to new Section 309(l), which expressly restricts the group of applicants eligible to participate in an auction to the pre-July 1, 1997 applicants, Section 309(j)(1) is silent on that question. This section neither precludes the Commission from restricting the class of eligible bidders to those with applications already filed, nor requires the Commission to reopen the filing period for additional applicants that would be eligible to participate in the auction. Because we have discretion as to whether to conduct an auction limited to the pending mutually exclusive applications, or whether we include such applications within our first general broadcast auction and permit new applicants to file additional applications that may be mutually exclusive with the pending applications, we asked for comment on how to exercise this discretion. *See Notice*, 12 FCC Rcd at 22380 (¶ 42).

107. All commenters addressing this issue oppose the reopening of any filing periods or windows

of fairness be entitled to refunds of any application processing fees).

that have already closed to allow additional parties to file competing applications.[94] They argue that reopening any such filing periods or windows would be unfair to pending applicants who were diligent in filing their applications in a timely manner and would reward dilatory applicants who had previously failed to file within clearly delineated time parameters. Commenters assert that the pending applicants have already expended time and funds to file complete long-form applications, and it would be inequitable to reopen filing windows for new applicants who would be required to file only short-form applications. In addition, commenters assert that reopening filing periods to allow additional competing applications would only delay the grant of construction permits and the commencement of service to the public. Given these equitable and public interest considerations, commenters argue that the sole purpose in reopening filing windows would be in expectation of generating higher auction revenues, which they contend is impermissible in this context, citing 47 U.S.C. § 309(j)(7)(A) (in prescribing certain auction regulations, the Commission may not base a finding of public interest, convenience and necessity on expectation of federal revenues from the use of a system of competitive bidding).[95]

108. Notwithstanding Section 309(j)(7)(A), we continue to believe that we have the discretion to reopen relevant filing periods, if so doing would serve the public interest. We agree, however, with the commenters that, in cases of pending mutually exclusive applications not subject to Section 309(l) where the relevant period or window for filing applications under our existing procedures has expired, the public interest would not be served by reopening the filing period for additional mutually exclusive applications. These pending applicants timely filed complete long-form applications pursuant to our procedures then in place, with the reasonable expectation that their only competitors would be persons who similarly timely filed applications within the Commission's designated filing period. The reopening of filing windows would certainly not expedite the disposition of the pending applications or the commencement of service to the public, but could produce further delays. Moreover, unlike situations where we have declined to hold an auction limited to pending applicants but preferred to permit the filing of applications by additional parties, the auction procedures adopted herein make no substantial changes in the nature of the broadcast services or in the rights and responsibilities of broadcast licensees.[96] Thus,

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[94] *See* Comments of Big Ben Broadcasting, *et al.* at 1-3; Dakota Communications, *et al.* at 2-9; Scranton Times L.P. and Shamrock Communications. Inc. at 2-4; Six Video Broadcast Licensees at 2-3; Jay Man Productions, Inc. at 2-5; Apache Radio Broadcasting Corp. at 8-9; Tri-County Broadcasting, Inc. at 6; KERM, Inc. at 6; Certain Broadcast Applicants at 3-8; George S. Flinn, Jr. at 4; James G. Cavallo at 7; KM Communications, Inc. at 6; Grace Communications L.C. at 6-7; Communications Technologies, Inc. at 2; Michael Ferrigno at 7; Kidd Communications at 7; Williams Broadcasting Co. at 6-7; Donald James Noordyk at 7-8; Todd Stuart Noordyk at 6-7; Batesville Broadcasting Co., Inc. at 6-7; Positive Alternative Radio, Inc., *et al.* at 8-9; and Throckmorton Broadcasting, Inc. at 8-9.

[95] *See, e.g.*, Comments of Big Ben Broadcasting, *et al.* at 2-3; Dakota Communications, *et al.* at 4-8; Scranton Times L.P. and Shamrock Communications, Inc. at 3-4; Jay Man Productions, Inc. at 2-3; Apache Radio Broadcasting Corp. at 8-9; Tri-County Broadcasting, Inc. at 6; KERM, Inc. at 6; Certain Broadcast Applicants at 6-7.

[96] For example, in the 220 MHz auction proceeding, we not only adopted auction proceedings but also significantly altered the technical and operational rules for that service. Because of such substantial changes in the nature of the 220 MHz service, we concluded it would be unfair to preclude new applicants from having the opportunity to apply for licenses in what was essentially a new service. *See Third Report and Order and Fifth Notice of Proposed Rulemaking, Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, 12 FCC Rcd 10943, 11038-39 (1997). With regard to the broadcast services, however, there have been no substantial changes in the nature of the services since the expiration

we see no compelling reason to reopen filing windows that have already expired to permit the filing of additional applications by applicants who failed to file during the Commission's previously clearly delineated filing periods.

109. Accordingly, for groups of pending mutually exclusive applications not subject to Section 309(l) where the relevant filing periods have already expired, the auction will proceed in the same manner as the auction of the Section 309(l) pending applications, for which we are statutorily precluded from reopening any filing periods. The procedures set forth in ¶¶ 80-87 above will therefore also govern the auction of the pending applications not subject to Section 309(l) that have already been subject to competition through the opening and closing of periods for the filing of mutually exclusive applications. With regard to any remaining pending singleton applications where the relevant period for filing competing applications has opened and closed, but no mutually exclusive applications were ever filed, we will continue to process and grant according to our regular procedures. *See supra* ¶ 65.

110. We note, however, that there are pending before the Commission a number of broadcast applications (primarily AM and FM translator) that have never been subjected to competition because periods or windows for the filing of competing applications have not yet been opened by the Commission.[97] Rather than open individual filing windows or issue individual cut-off lists for each of these pending broadcast applications, we believe it more efficient to simply include these applications in the first general auction we conduct for new applicants in the relevant service. Specifically, during the first auction window opened for new applications in that service under the general window filing approach adopted herein (*see infra* ¶¶ 136-140), these pending applicants will be required to confirm their interest in participating in an auction for the construction permit for which they previously applied by filing a short-form application. No engineering data will be required to be filed with the short-forms of these pending applicants for the purpose of making mutual exclusivity determinations, as they have already filed complete long-forms.[98] The Commission will dismiss the long-form application of any pending applicant who fails to file a timely short-form application during the first general auction window for the relevant service. Following the determination of mutual exclusivity among all the applications filed in response to this window by both pending and new applicants, the Commission will proceed, as described below in our general auction procedures, to the auctioning of the mutually exclusive applications and to the

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of the filing windows in which the pending applicants filed, and no such changes are being implemented in this proceeding.

[97] As previously described, there are also pending before the Commission analog television applications that have never been accepted for filing or subjected to competition because they request a waiver of our 1987 order imposing a freeze on applications for any new television stations in 30 major markets. *See Order*, RM-5811 (Mimeo No. 4074, released July 17, 1987). In any cases where we ultimately determine to grant such a waiver, those pending television applications that are not subject to Section 309(l) because no mutually exclusive applications were filed (*see supra* ¶¶ 69-70) will be subject to competition in the same manner as the other pending commercial broadcast applications that have not been subject to competition.

[98] If, in addition to reconfirming its interest in the construction permit for which it has already filed a long-form application, a pending applicant that is not subject to Section 309(l) also wants to apply for another available channel or frequency in the first general auction window for that service, the pending applicant will need, like new applicants applying for any available channels or frequencies in the window, to submit with the short-form application the requisite engineering necessary to make mutual exclusivity determinations, as set forth in the general auction procedures. *See infra* ¶¶ 141-143.

processing of any non-mutually exclusive applications. *See infra* ¶¶ 149-161.

111. As with the pending applications subject to Section 309(l), we will not, prior to the auction, review the long-form applications previously filed by pending applicants not subject to section 309(l) who participate in the first general auction window, nor will we accept amendments to or petitions to deny against these previously-filed long-forms. Within 30 days following the close of the auction, a winning bidder will, if a new applicant, be required to submit a complete long-form application and, if a pending applicant, be required to make any necessary amendments to its pending long-form. Procedures for the submission of all payments and for the filing of petitions to deny against the long-forms of the winning bidders will be the same as under our general auction procedures. *See infra* ¶¶ 162-176.

3. Procedures for Broadcast Auctions Generally

a. General Competitive Bidding Matters

112. ***Retention of Broadcast Licensing Procedures***. As proposed in the *Notice*, 12 FCC Rcd at 22381-82 (¶ 46), a winning bidder in broadcast auctions will, consistent with existing broadcast licensing procedures, be awarded a construction permit, rather than a "license." As currently required, winning bidders will then be required, within a specified time period, to construct their facilities and file an application for a "license to cover construction permit" to obtain a license for the constructed facilities. *See* 47 C.F.R. § 73.3598. We will retain this broadcast licensing procedure in the auction context, because it comports with the requirements of Section 319 of the Communications Act[99] and has functioned well in the non-auction context. We also note that, given the requirements of Section 319, broadcast auction winners, unlike winning bidders in some other auctionable services, will not be permitted to construct their facilities prior to grant of their long-form applications and issuance of their construction permits.[100] *See* 47 U.S.C. § 319(d) ("With respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction," except that the requirement for a permit may be waived by the Commission "for minor changes in the facilities of authorized broadcast stations.").[101]

113. ***Secondary Services in the Auction Context***. We reiterate that awarding broadcast and secondary broadcast service construction permits by auction will not alter the secondary nature of the LPTV and FM and television translator services. *See Notice*, 12 FCC Rcd at 22382 (¶ 46). A winning bidder who, after paying for its construction permit and satisfying the requirements for a secondary broadcast license, receives the license will not have any greater rights vis-a-vis full service broadcast facilities than any other broadcaster licensed to provide that same secondary service. For example, an

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[99] Section 319(a) states that "[n]o license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission." 47 U.S.C. § 319(a).

[100] The *Third Report and Order* revising the Commission's general Part 1 auction rules adopted a new Section 1.2113, 47 C.F.R. § 1.2113, which permits winning bidders, at their own risk, to construct facilities prior to the grant of their long-form applications. *Third Report and Order*, 13 FCC Rcd at 469-470.

[101] The Commission has amended its rules to permit certain minor changes in broadcast facilities without a construction permit. *See Report and Order* in MM Docket No. 96-58, 12 FCC Rcd 12371 (1997). Such minor change applications are not, however, subject to auction. *See infra* ¶¶ 177-178.

LPTV or television translator licensee who receives its license by competitive bidding must still protect full power television stations from interference and will still be subject to displacement by a full service television licensee. *See* 47 C.F.R. §§ 73.3572(a); 74.703(b).[102] Similarly, an FM translator station will not be permitted to continue to operate if it causes interference to any authorized broadcast station, even if the translator licensee received its license by competitive bidding. *See* 47 C.F.R. § 74.1203(a) & (b).[103] A few commenters complain that auctioning secondary services is unfair or inequitable.[104] However, the fact that mutual exclusivity among secondary broadcast applicants will in the future be resolved by competitive bidding cannot, in our opinion, provide sufficient grounds to alter the basic character of any of the secondary services. *See* 47 U.S.C. § 309(j)(6)(D) (nothing in the use of competitive bidding shall "be construed to convey any rights . . . that differ from the rights that apply to other licensees within the same service that were not issued pursuant" to the Commission's competitive bidding authority).[105] Given our statutory mandate to auction the LPTV and translator services despite their secondary status (*see supra* ¶¶ 9-12), bidders must carefully weigh the risks that the secondary nature of these services present and adjust their bidding strategies accordingly.

114. ***Displacement of LPTV and Television Translators by Digital Television (DTV) Stations.*** Although the secondary status of the LPTV and television translator services is unchanged by the adoption of competitive bidding procedures, we reemphasize here, as requested by several commenters,[106] our support for certain previously-adopted special measures to protect LPTV and television translator stations during the transition to digital television. As we stated in the *Sixth Report and Order*, LPTV stations and television translators displaced by new DTV stations will be allowed to apply for suitable replacement channels in the same area without being subject to competing applications. Such applications by displaced LPTV and television translator stations will be considered on a first-come, first-served basis, and may be submitted at any time without waiting for a filing window to open. *See Sixth Report and Order* in MM

[102] With regard to the secondary status of LPTV stations, the Commission has requested comment on a petition for rulemaking proposing a new "Class A" television service for which certain LPTV stations could qualify. *See Public Notice, Petition for Rulemaking for "Class A" TV Service* (rel. April 21, 1998).

[103] FM translator stations will also continue to be subject to other existing rules concerning their secondary status. *See, e.g.*, 47 C.F.R. § 74.1204(f) (allowing FM broadcasters right to object to proposed translators that would be likely to interfere with reception of a regularly received existing service, even if there is no prohibited contour overlap); 47 C.F.R. § 74.1232(h) (FM translator authorization subject to termination if the circumstances in the community or area served are so altered as to have prohibited grant of the translator application had such circumstances existed at time of filing).

[104] *See, e.g.*, Comments of Friendship Broadcasting, LLC at 1; Board of Education of the City of Atlanta, *et al.* at 6; Bible Broadcasting Network, Inc. at 3.

[105] *See also* Comments of Jacor Communications, Inc. at 7-8 (auction winner should not obtain any additional right to operate broadcast station that causes interference to previously operating or otherwise protected stations, regardless of means by which permittee obtained its permit); Reply Comments of KQED, Inc. at 2-3 (opposes altering existing rules that establish secondary status of FM translators).

[106] *See, e.g.*, Comments of National Translator Association at 8; Association of America's Public Television Stations at 17-18.

Docket No. 87-268, 12 FCC Rcd 14588, 14653-54 (1997) (hereafter *Sixth Report and Order*).[107] Our adoption of auction filing windows in this proceeding does not alter our earlier decision with regard to displacement relief for LPTV and television translator stations.

115. ***Accommodation of Section 307(b) in AM Auctions.*** As set forth in Section 307(b) of the Communications Act, the Commission is charged with the duty to make such distribution of broadcast licenses "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b). Section 307(b), however, enunciates this mandate without denoting the procedure to be employed to effectuate the fair, efficient and equitable distribution of radio service. Over the years, the Commission has used a variety of means to implement the Section 307(b) directive. Previously, when mutually exclusive applicants sought authority to construct broadcast stations to serve different communities, the Commission, in the context of the comparative hearing process, implemented the Section 307(b) mandate by first determining which community had the greatest need for additional service, before addressing the comparative qualifications of the applicants. *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). If the 307(b) determination was dispositive, the standard comparative issues were not considered. *See Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046 (D.C. Cir. 1977). The Commission altered this approach for implementing Section 307(b) in the commercial FM and television services by establishing and incorporating in its rules a Table of Allotments for each service.[108] These allotment tables provide for a distribution of channels for specific communities throughout the United States based on fixed mileage separations. The Commission fulfills the 307(b) obligation by making available for licensing only a frequency that has been assigned to a specific community in the Table of Allotments through a rulemaking proceeding. A system of priorities guides the Commission's 307(b) determinations, setting preferences for applicants proposing to establish a station in a nonserved or underserved community.[109]

116. By comparison, AM radio frequencies are allocated on a demand basis, with applicants specifying the desired community and providing engineering exhibits to demonstrate the absence of interference to existing stations. Without an allotment table, mutual exclusivity may occur between AM applicants proposing to serve different communities. If such mutually exclusive AM applications were filed, the Commission formerly addressed the Section 307(b) considerations in the resultant comparative hearing process.

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[107] In essence, therefore, applications by LPTV and television translator licensees for DTV displacement relief will be treated like minor modification applications, which can be filed at any time outside of filing windows. *See infra* ¶ 177. This treatment of DTV displacement relief applications is consistent with our general rule regarding displacement relief for LPTV and television translators. *See* 47 C.F.R. § 73.3572(a)(2).

[108] *See Sixth Report and Order on Television Allocations*, 41 FCC 148 (1952); *Revision of FM Broadcast Rules*, 40 FCC 747 (1963). 47 C.F.R. § 73.202 contains the FM Table of Allotments and 47 C.F.R. § 73.606 contains the television Table of Allotments.

[109] In contrast, LPTV and television and FM translator stations are not required to meet basic full-service station requirements, *i.e.* provide responsive programming or maintain a presence in the community, cover the community with an adequate strength signal, *etc.* Although LPTV and translator stations are licensed to specific communities, the Commission has concluded that Section 307(b) issues are not relevant in the context of these secondary services. *See Low Power Television and Television Translator Service*, 2 FCC Rcd 1278, 1281 (1987).

117. As discussed above, Section 309(j) of the Communications Act sets forth the Commission's authority to award spectrum licenses by competitive bidding. In originally authorizing the Commission's use of competitive bidding to award licenses in subscriber-based services and in subsequently expanding that authority to include broadcast licenses, Congress did not eliminate or revise Section 307(b) of the Act. Prior to authorizing (let alone requiring) the use of auctions for broadcast stations, Congress expressly indicated that its grant of auction authority to the Commission should not affect specific provisions of the Communications Act that limit the rights of licensees, or that direct the Commission to adhere to other requirements. In particular, Congress stated that the adoption of competitive bidding procedures does not affect, *inter alia*, Section 307 of the Communications Act. Section 309(j)(6) contains "Rules of construction" and stipulates that "Nothing in this subsection, or in the use of competitive bidding, shall ... (B) limit or otherwise affect the requirements of ... section ... 307 ... of this title ...." 47 U.S.C. § 309(j)(6)(B).[110] This provision of Section 309(j)(6) was neither modified nor excised by the 1997 Budget Act.

118. As noted with respect to FM and television, a community's need for service is assessed in the context of the initial rulemaking proceeding to determine additions and substitutions to the Table of Allotments. This procedure is unaltered by the implementation of competitive bidding. Furthermore, we have always required demonstration that a singleton AM applicant seeking to change its community of license complies with our standards under Section 307(b).[111] However, the discontinuance of the comparative hearing process leaves the 307(b) analysis for mutually exclusive AM applications without a venue.

119. A few commenters urge the Commission to treat all such mutually exclusive AM applicants seeking authority to serve different communities as a non-auctionable class.[112] We reject this proposal as inconsistent with the clear statutory mandate. As described in detail above, amended Section 309(j) requires the Commission to auction mutually exclusive applications for the broadcast and secondary broadcast services, and includes no express exemption from competitive bidding for competing AM applications that specify different communities of license.

120. After consideration, however, we conclude that, our competitive bidding authority under Section 309(j) should be implemented in a way that accommodates our statutory duty under Section 307(b) to effect an equitable geographical distribution of stations across the nation. Congress specifically directed that the requirements of Section 307 should not be affected by the use of competitive bidding. *See* 47 U.S.C. § 309(j)(6)(B). Thus, our obligation to fulfill the Section 307(b) statutory mandate endures. The Commission and the courts have traditionally interpreted Section 307(b) to require that we identify the community having the greater need for a broadcast outlet as a *threshold* determination in any licensing scheme, for to decide otherwise would subordinate the "needs of the community" to the "ability of an

[110] *See also* H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 253 (1993).

[111] *See Ark-Valley Broadcasting Company, Inc.*, 15 FCC 818 (1951); *North Texas Radio, Inc.*, 11 FCC Rcd 8531, 8535 (1996), *citing Ark-Valley* (Section 307(b) must be considered when a licensee seeks to change its community of license. Applications for the removal of stations from one community to another in effect constitute alternative requests, one for a new license to operate in a new community, and the other for authority to continue operation at the existing location. Hence, there is demand for the station by two communities.).

[112] *See* Comments of New Jersey Television Corporation at 3; Jeffrey Eustis at 2.

applicant for another locality." *FCC v. Allentown Broadcasting Corp.* at 361-362.[113] We conclude that our rules should incorporate a similar threshold Section 307(b) analysis to determine whether particular applications are eligible for auctions. Specifically, with respect to AM applications, a traditional Section 307(b) analysis will be undertaken by the staff prior to conducting auctions of competing applications. If the Section 307(b) determination is dispositive, the staff will grant the application proposing to serve the community with the greater need if there are no competing applications for that community, and dismiss as ineligible any competing applications not proposing to serve that community.[114] If no Section 307(b) determination is dispositive (or if more than one application remains for the community with the greater need), the applicants must then be included in a subsequently scheduled auction. This approach is consistent with our established practice in the commercial FM and television services with allotment tables where, as discussed above, the Section 307(b) analysis customarily precedes the licensee selection process. The number of AM applications subject to such a 307(b) staff analysis should be minimal, as there are relatively few instances of mutual exclusivity among AM applications submitted for new stations and major modifications.[115] Moreover, this procedure accommodates both Section 307(b) and Section 309(j), and results in a balanced implementation of the two respective sections of the Communications Act.

b. Competitive Bidding Design

(1) Auction Methodology

121. In the *Notice*, 12 FCC Rcd at 22383 (¶ 51), we proposed to conduct all auctions of mutually exclusive broadcast applications in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules, subject to any changes made to those rules in the then-ongoing Part 1 rulemaking, and substantially consistent with the bidding procedures that have been employed in previous Commission auctions. Accordingly, we asked that commenters review the proposed changes in the Part 1 rules, identify any rules they believed to be inappropriate for broadcast auctions, and propose alternatives. Commenters advocating different procedures were requested to explain in detail how such procedures would work and why the proposed Part 1 rules would be inappropriate in the broadcast context.

122. The *Notice*, 12 FCC Rcd at 22383-85 (¶¶ 52-55), sought comment on a variety of competitive bidding design options for the auction of broadcast service construction permits. Specifically, we discussed the possibility of using a simultaneous multiple round auction design, similar to that used

[113] *See* Comments of New Jersey Television Corporation at 3.

[114] *See generally Storer Broadcasting, supra* ¶ 44 (holding that the Commission has the statutory authority to prescribe threshold eligibility standards and to dismiss without a hearing applications not meeting such requirements).

[115] We recognize that the Commission will need to request supplemental information from the parties to evaluate the 307(b) considerations of any mutually exclusive AM applications proposing to serve different communities. As in past Section 307(b) proceedings, comparisons of the radio needs of the respective communities will be made by examining factual data submissions such as the area and populations that would gain or lose service from the competing proposals, the availability of other primary service to such area and populations, and particular community attributes. *See, e.g., Elijah Broadcasting Corporation*, 2 FCC Rcd 4468 (ALJ 1987); *Radio Greenbrier, Inc.*, 80 FCC 2d 125 (ALJ 1979).

in many previous auctions, as well as alternate bidding designs that might be appropriate in the broadcast context, including: (1) sequential multiple round auctions, using either oral ascending, remote or on-site electronic bidding; and (2) sequential or simultaneous single round auctions, using either remote and/or on site electronic bidding, or sealed bids. *See generally* 47 C.F.R. § 1.2103. Additionally, we noted that we have the authority under Section 309(j) to explore other auction methodologies.[116]

123. We received a number of comments on the type of auction design that should be utilized for the auction of broadcast construction permits. Several commenters addressing the issue oppose the use of a simultaneous multiple round auction design, arguing that the Commission should employ a simpler auction design.[117] Specifically, simultaneous multiple round bidding is regarded as inappropriate for broadcast auctions because such auctions will be for scattered facilities and there is little likelihood that bidders will seek to acquire groupings of licenses.[118] A small number of commenters specifically favor the use of open outcry for broadcast auctions, due to the simplicity and speed of that auction method.[119] With regard to the auction methodology to be employed in the event we determine to auction ITFS licenses, several commenters express similar reservations about simultaneous multiple round bidding and support open outcry.[120] Another commenter specifically favors the use of multiple round auctions because in single round or sealed bid auctions the successful bidder may be forced either to bid too much for the spectrum or be unable to increase its bid if it is too low.[121]

124. The *Notice*, 12 FCC Rcd at 22386-87 (¶ 58), also sought comment on how the Commission should deal with any "daisy chains" presented in auctions of AM radio, LPTV, or television or FM translator applications. As we discussed, daisy chains occur when an application is mutually exclusive (*i.e.*, would cause interference) with a second application, which is mutually exclusive with a third application in the same or adjacent community, and so on, even though the first application may not be directly mutually exclusive with any application except the second.[122] Due to the possibility of daisy

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[116] *See* Section 3002(a) of the Budget Act expanding and extending the Commission's auction authority and, *inter alia*, directing the Commission to design and test a combinatorial bidding system.

[117] *See, e.g.*, Comments of National Association of Broadcasters at 3-4; Seven Ranges Radio Co., Inc. at 3; Liberty Productions, LP at 7; Heidelberg-Stone Broadcasting Co. at 13; Rio Grande Broadcasting Co. at 13; Independent Broadcast Consultants, Inc. at 7.

[118] *See* Comments of National Association of Broadcasters at 4.

[119] *See* Comments of John W. Barger at 5; Seven Ranges Radio Co., Inc. at 2, 5; Independent Broadcast Consultants, Inc. at 7-8.

[120] These commenters contend that, given the lack of interdependence between ITFS licenses, a simultaneous multiple round auction design would be unnecessarily costly and complex, and they instead favor a sequential auction design, such as a sequential open outcry auction. *See, e.g.*, Comments of Wireless Cable Association International, Inc. at 22-23; BellSouth Corporation and BellSouth Wireless Cable, Inc. at 13-14.

[121] *See* Comments of Apache Radio Broadcasting Corporation at 8.

[122] These daisy chains occur due to the contour overlap rules used to determine interference for AM, LPTV, and television and FM translator applications. Because applicants apply for full service FM and television stations pursuant to allotment tables that specifically identify vacant channels, daisy chains do not generally occur in those

chains in AM, LPTV, and television and FM translator auctions, there may be limited instances in these auctions where, depending on who becomes the winning bidder among a mutually exclusive group, another application (in addition to the auction winner) may become grantable, or another smaller mutually exclusive group will still exist and need to be resolved. We therefore sought comment on appropriate methods for resolving any daisy chains in the auction context. We also suggested that commenters address whether the methods used to resolve daisy chains in the lottery process (such as the holding of "sub-lotteries") are applicable in the auction context, or whether a different method or methods may be more suitable, such as the use of combinatorial bidding.

125. Only two commenters addressed the issues of daisy chains and combinatorial bidding. Specifically, one commenter argues that daisy chains are a problem that should be dealt with by not conducting auctions for AM stations.[123] The other commenter states that combinatorial bidding should be avoided because it is an open invitation to speculators who will then resell licenses to the highest bidder.[124]

126. As we discussed in the *Notice*, because the same type of auction methodology may not be appropriate for all mutually exclusive broadcast and secondary broadcast applications, different approaches may be warranted to resolve mutual exclusivity among certain categories of broadcast applications and for "daisy chain" situations. After considering the comments on this issue, we conclude that the appropriate auction design will vary depending on the type of service involved, the number of construction permits at stake, how many bidders are likely to participate, and the degree to which interdependence may be important to those likely to bid on a particular type of permit. As the record suggests, we believe that a simple, rapid auction design, such as a single round sealed bid auction, will likely be appropriate for those permits that are relatively low-valued or for which there is little likelihood of interdependence (such as translator construction permits). At the same time, however, our auction experience demonstrates that there are instances where a simultaneous multiple round auction design can prove useful in ensuring that an auction progresses as efficiently as possible. In addition, as we discussed in the *Notice*, simultaneous multiple round bidding has the advantage of affording bidders more information during the auction concerning the value that competing bidders place on the permits being auctioned than is the case with single round bidding. For this reason, simultaneous multiple-round bidding is more likely to result in the party that values the spectrum the most acquiring the permit. Therefore, for broadcast construction permits that are more highly valued, or for which there is a greater likelihood of interdependence among the permits, we will likely use simultaneous multiple round auctions.

127. Consistent with our Part 1 rules, we therefore delegate authority to the Mass Media Bureau and the Wireless Telecommunications Bureau (hereafter, the Bureaus) to seek comment on and establish an appropriate auction design methodology prior to the start of each broadcast auction or group of broadcast auctions. As we discussed in the *Third Report and Order*, 13 FCC Rcd at 447-449, the Budget Act requires that, "before the issuance of bidding rules" the Commission must provide adequate time for parties to comment on proposed auction procedures, and that "after issuance of bidding rules," the

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services.

[123] *See* Comments of JTL Communications Corp. at 7. We note this proposal is contrary to the Commission's statutory mandate in the amended Section 309(j) to auction mutually exclusive broadcast applications.

[124] *See* Comments of Seven Ranges Radio Co., Inc. at 10.

Commission must provide adequate time "to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment."[125] Consistent with these provisions, in the *Third Report and Order* we directed the Wireless Telecommunications Bureau, under its existing delegated authority,[126] to seek comment on a variety of auction-specific issues prior to the start of each auction.[127] Specifically, we directed the Wireless Telecommunications Bureau to consider a variety of mechanisms relating to day-to-day auction conduct, including the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation. *See Third Report and Order*, 13 FCC Rcd at 448. We also directed the Wireless Telecommunications Bureau to afford interested parties a reasonable time, in light of the start date of each auction and relevant pre-auction filing deadlines, to comment on auction-specific issues. *Id.*

128. As we indicated in the *Third Report and Order*, we believe that this process is consistent with the requirements of Section 309(j)(3)(E), as added by the Budget Act, and will afford potential bidders adequate notice, as well as an opportunity to comment on issues relating to the day-to-day conduct of each auction. *See* 47 U.S.C. § 309(j)(3)(E). Although we did not specifically propose to employ this practice for broadcast auctions, we conclude that it should apply in this context as well. Therefore, consistent with our decision in the *Third Report and Order* and the guidance we provide herein, we direct the Bureaus to seek comment on the types of auction-specific issues raised in the *Notice* prior to the start of each auction or group of auctions for particular broadcast services.

(2) Upfront Payments, Minimum Opening Bids and Reserve Prices

129. The general Part 1 auction rules provide for the submission of upfront payments by prospective bidders prior to the commencement of an auction, the amount of which generally determines a bidder's eligibility to bid on any license or combination of licenses in each round of the auction. *See* 47 C.F.R. § 1.2106. In the *Notice*, 12 FCC Rcd at 22385 (¶ 56), we proposed that the Bureaus should establish the upfront payments applicable in broadcast service auctions, which would be announced by public notice prior to any auction. We sought comment on the appropriate amount, or method of determining an appropriate amount, of this upfront payment for bidders in broadcast auctions. While in previous auctions we have typically based the upfront payments upon the amount of spectrum and population (or "pops") covered by the licenses or permits for which parties intend to bid, we noted that in the broadcast area there is other data, such as market size, market ratings, advertising rates and broadcast transactions, that might prove more useful than the MHz-pop formula utilized in valuing other, less established telecommunications services. We therefore sought comment on alternate valuation

[125] Balanced Budget Act of 1997, § 3002(a)(1)(B)(iv); 47 U.S.C. § 309(j)(3)(E).

[126] *See* 47 C.F.R. §§ 0.131(c), 0.331, 0.332.

[127] *See Third Report and Order*, 13 FCC Rcd at 448. *See also Comment Sought on Balanced Budget Provisions Calling For Reserve Prices or Minimum Opening Bids in FCC Auctions, Public Notice*, DA 97-1933 (rel. Sept. 5, 1997); *Comment Sought on Reserve Prices or Minimum Opening Bids for LMDS Auction, Public Notice*, DA 97-2224 (rel. Oct. 17, 1997); *Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues for the Phase II 220 MHz Service, Public Notice*, DA 98-48 (rel. Jan. 13, 1998).

formulas.

130. As we recognized in the *Notice*, 12 FCC Rcd at 22381 (¶ 57), Congress in the Budget Act directed the Commission to prescribe methods by which a reasonable reserve price or a minimum opening bid will be established for any license that is to be assigned by competitive bidding, unless such reserve prices or minimum opening bids would be contrary to the public interest.[128] In response to this legislative directive, we proposed that the Bureaus consider the use of reserve prices and minimum opening bids for auctionable commercial broadcast construction permits. We sought comment on the methodology to be employed in establishing each of these mechanisms, and noted the possibility of establishing minimum opening bids at the same level as upfront payments, as was done in connection with the auction for the 800 MHz Specialized Mobile Radio service, and of using a MHz-pop formula, as was done in the recently-completed Local Multipoint Distribution Service auction.[129] We also sought comment on a variety of alternative methods for estimating the value of the relevant construction permits and thus for providing a basis for estimating reserve prices or minimum opening bids. Finally, we proposed to announce any reserve prices or minimum opening bids established for broadcast construction permits by public notice prior to auction, unless, based upon the record with respect to a particular auction or service, it is determined that a reserve price or minimum opening bid would not be in the public interest.

131. A number of commenters addressed the issues of upfront payments, minimum opening bids, and reserve prices in the broadcast auction context. With regard to upfront payments, commenters argue that while upfront payments are useful to ensure that only serious applicants participate in broadcast auctions,[130] upfront payments should be small to allow small businesses to compete effectively.[131] Commenters differ, however, on how upfront payments should be determined, and suggest a variety of factors, including: (1) the population served and the class of station;[132] (2) data drawn from station transactions and the performance of operating stations in the market that the applicant hopes to serve;[133]

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[128] *See* 47 U.S.C. § 309(j)(4)(F). A "reserve price" is a price below which a license subject to auction will not be awarded. A "minimum opening bid" is a minimum value below which bids will not be accepted in the first round of an auction.

[129] *Public Notice, Auction of 800 MHz Specialized Mobile Radio Upper 10 MHz Band*, DA 97-2147 (rel. Oct. 6, 1997), 62 Fed. Reg. 55251 (Oct. 23, 1997) (establishing minimum opening bids that are subject to reduction and setting the initial amounts at the level of upfront payments). *See also Auction of Local Multipoint Distribution Service (LMDS), Minimum Opening Bids or Reserve Prices, Order*, 13 FCC Rcd 782 (WTB 1998) (establishing minimum opening bids for LMDS auction and stating that Wireless Telecommunications Bureau has discretion to lower minimum opening bids as it deems appropriate).

[130] *See* Comments of Thomas C. Smith at 10.

[131] *See, e.g.*, Comments of JTL Communications Corp. at 4; Independent Broadcast Consultants, Inc. at 8-9.

[132] *See* Comments of Apache Radio Broadcasting Corporation at 2, 6-7; Kidd Communications at 8; Thomas Desmond at 9.

[133] *See* Comments of Tanana Valley Television Co. at 2. However, this use of market data to establish an appropriate upfront payment is opposed by several other commenters addressing the issue. *See* Comments of Kidd Communications at 8-9; Independent Broadcast Consultants, Inc. at 8-9; JTL Communications Corp. at 5. In particular, Kidd Communications (at 8-9) opposes this method of setting the upfront payment, arguing that it would