

APPENDIX A

Proposed Rules

PART 1 – PRACTICE AND PROCEDURE

Part 1 of Title 47 of the Code of Federal Regulations is revised to read as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

2. Amend § 1.2103 to add new paragraphs (b)(1) and (b)(2) to read as follows:

§ 1.2103 Competitive bidding design options.

* * * * *

(b) * * *

(1) *Apportioned package bid.* The apportioned package bid on a license is an estimate of the price of an individual license included in a package of licenses in an auction with combinatorial (package) bidding. Apportioned package bids shall be determined by the Commission according to a methodology it establishes in advance of each auction with combinatorial bidding.

(2) *Substitute for bid amount.* The apportioned package bid on a license included in a package shall be used in place of the amount of an individual bid on that license when the bid amount is needed to determine the size of a designated entity bidding credit (see § 1.2110(f)(1)-(2)), a new entrant bidding credit (see § 73.5007), a bid withdrawal or default payment obligation (see § 1.2104(g)), a tribal land bidding credit limit (see § 1.2110(f)(3)(iv)), or a size-based bidding credit unjust enrichment payment obligation (see § 1.2111(d),(e)(2)-(3)), or for any other determination required by the Commission's rules or procedures.

* * * * *

3. Amend § 1.2104 by revising paragraphs (c), (g)(1), and (g)(2); removing paragraph (g)(3); and adding paragraph (j) to read as follows:

§ 1.2104 Competitive bidding mechanisms.

* * * * *

(c) Reserve Price. The Commission may establish a reserve price or prices, either disclosed or undisclosed, below which a license or licenses subject to auction will not be awarded. For any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2)), the Commission will establish a reserve price or prices pursuant to which the total cash proceeds from any auction of eligible frequencies shall equal at least 110 percent of the total estimated relocation costs provided to the Commission by the National Telecommunications and Information Administration pursuant to section 113(g)(4) of such Act (47 U.S.C. § 923(g)(4)).

* * * * *

(g) * * *

(1) Bid withdrawal prior to close of auction. A bidder that withdraws a high bid during the course of an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction(s). In the event that a bidding credit applies to any of the bids, the bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less. No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids equals or exceeds that withdrawn bid. The withdrawal payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission. In the case of multiple bid withdrawals on a single license, the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn in the same or subsequent

auction(s). In the event that a license for which there have been withdrawn bids is not won in the same auction, those bidders for which a final withdrawal payment cannot be calculated will be assessed an interim bid withdrawal payment of between 3 and 20 percent of their withdrawn bids, according to a percentage (or percentages) established by the Commission in advance of the auction. The interim bid withdrawal payment will be applied toward any final bid withdrawal payment that will be assessed at the close of a subsequent auction of the corresponding license.

Example 1 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$90 and withdraws. In that same auction, Bidder C wins the license at a bid of \$95. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100-\$95). Bidder B owes nothing.

Example 2 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$95 and withdraws. In that same auction, Bidder C wins the license at a bid of \$90. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100-\$95). Bidder B owes \$5 (\$95-\$90).

Example 3 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, in that same auction, Bidder B places a bid of \$90 and withdraws. In a subsequent auction, Bidder C places a bid of \$95 and withdraws. Bidder D wins the license in that auction at a bid of \$80. Assuming that the Commission established an interim bid withdrawal payment of 3 percent in advance of the auction, withdrawal payments are assessed as follows: At the end of the first auction, Bidder A and Bidder B are each assessed an interim withdrawal payment equal to 3 percent of their withdrawn bids pending Commission assessment of a final withdrawal payment (Bidder A would owe 3% of \$100, or \$3, and Bidder B would owe 3% of \$90, or \$2.70). At the end of the second auction, Bidder A would owe \$5 (\$100-\$95) less the \$3 interim withdrawal payment for a total of \$2. Because Bidder C placed a subsequent bid that was higher than Bidder B's \$90 bid, Bidder B would owe nothing. Bidder C would owe \$15 (\$95-\$80).

(2) Default or disqualification after close of auction. A bidder assumes a binding obligation to pay its full bid amount upon acceptance of the high bid at the close of an auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to a default payment consisting of a deficiency payment, described in § 1.2104(g)(2)(i), and an additional payment, described

in § 1.2104(g)(2)(ii)-(iii). The default payment will be deducted from any upfront payments or down payments that the defaulting bidder has deposited with the Commission.

(i) *Deficiency payment.* The deficiency payment will equal the difference between the amount of the defaulted bid and the amount of the winning bid in a subsequent auction, so long as there have been no intervening withdrawn bids that equal or exceed the defaulted bid or the subsequent winning bid. If the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the defaulted bid, no deficiency payment will be assessed. If there have been intervening subsequent withdrawn bids that are lower than the defaulted bid and higher than the subsequent winning bid, but no intervening withdrawn bids that equal or exceed the defaulted bid, the deficiency payment will equal the difference between the amount of the defaulted bid and the amount of the highest intervening subsequent withdrawn bid. In the event that a bidding credit applies to any of the applicable bids, the deficiency payment will be based solely on net bids or solely on gross bids, whichever results in a lower payment.

(ii) *Additional payment – applicable percentage.* When the default or disqualification follows an auction without combinatorial bidding, the additional payment will equal between 3 and 20 percent of the applicable bid, according to a percentage (or percentages) established by the Commission in advance of the auction. When the default or disqualification follows an auction with combinatorial bidding, the additional payment will equal 25 percent of the applicable bid.

(iii) *Additional payment – applicable bid.* When no deficiency payment is assessed, the applicable bid will be the net amount of the defaulted bid. When a deficiency payment is assessed, the applicable bid will be the subsequent winning bid, using the same basis – i.e., net or gross – as was used in calculating the deficiency payment.

* * * * *

(j) *Bid apportionment.* Prior to each auction of reconfigured licenses (i.e., licenses having similar, but not identical, geographic and spectral components as licenses made available in one or more prior auctions), the Commission will specify, as necessary, a method for apportioning a bid on a reconfigured license among the license's component parts. The Commission may use such an apportionment for

purposes of comparing a bid on the original license with a bid on a reconfigured license.

PART 73 – RADIO BROADCAST SERVICES

Part 73 of Title 47 of the Code of Federal Regulations is revised to read as follows:

4. The authority citation for Part 73 continues to read as follows:
Authority: 47 U.S.C. 154, 303, 334 and 336.

5. Amend § 73.3571 by revising paragraph (h)(4)(ii) to read as follows:

§ 73.3571 Processing AM broadcast station applications

(h)(4) ***

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to §1.2109(a). Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served.

6. Amend § 73.3573 by revising paragraph (f)(5)(ii) to read as follows:

§ 73.3573 Processing FM broadcast station applications.

(f) ***

(5)

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the

deadline established by the Commission pursuant to §1.2109(a). Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served.

7. Amend § 73.5003 by revising this section to read as follows:

§ 73.5003 Submission of full payments.

Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to §1.2109(a). If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five (5) percent of the amount due in accordance with §1.2109(a). Broadcast construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees and in accordance with the provisions of this subsection.

8. Amend § 73.5006 by revising paragraph (d) to read as follows:

§ 73.5006 Filing of petitions against long-form applications.

* * * * *

(d) Broadcast construction permits will be granted by the Commission only if the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, and after full and timely payment of winning bids and any applicable late fees. See 47 CFR 73.5003. Construction of broadcast stations shall not commence until the grant of such permit or license to the winning bidder and only after full and timely payment of winning bids and any applicable late fees.

9. Amend § 74.1233 by revising paragraph (d)(5)(ii) to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

(d) ***

(5)

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to §1.2109(a). Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served. If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five (5) percent of the amount due in accordance with Section 1.2109(a). Construction of the FM translator station shall not commence until the grant of such permit to the winning bidder and only after full and timely payment of winning bids and any applicable late fees.

APPENDIX B

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rule Making (“Notice”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in paragraph 56 of this NPRM. The Commission will send a copy of this Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the Notice and the IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

This Notice proposes modifications to existing Commission rules for the purposes of implementing the recently enacted Commercial Spectrum Enhancement Act (“CSEA”).⁴ CSEA establishes a mechanism to use spectrum auction proceeds to reimburse federal agencies operating on certain frequencies that have been reallocated from federal to non-federal use for the cost of relocating their operations. The Notice also proposes a number of changes to the Commission’s competitive bidding rules that are necessary, apart from CSEA, to bring the rules in line with the current requirements of the Commission’s auctions program.

Reserve price rule. CSEA requires the total cash proceeds from any auction of eligible frequencies to equal at least 110 percent of the total estimated relocation costs provided to the Commission by National Telecommunications and Information Administration (“NTIA”).⁵ To implement this requirement, CSEA directs the Commission to revise its reserve price regulations adopted pursuant to Section 309(j)(4)(F) of the Communications Act. The Commission proposes, therefore, to modify its existing reserve price rule (section 1.2104(c))⁶ to add a requirement that, for any auction of eligible frequencies under CSEA, the Commission will establish a reserve price (or prices)

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ Commercial Spectrum Enhancement Act, Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004) (codified in scattered sections of Title 47 of the United States Code) (“CSEA”).

⁵ The statute identifies four bands (the 216-220 MHz, 1432-1435 MHz, 1710-1755 MHz and 2385-2390 MHz bands) as “eligible frequencies.” See CSEA § 202 (codified at 47 U.S.C. § 923(g)(2)(A)). In addition, the statute designates as “eligible frequencies” any other band of frequencies reallocated from federal use to non-federal use after January 1, 2003, and assigned by the Commission through competitive bidding. See *id.* § 202 (codified at 47 U.S.C. § 923(g)(2)(B)). Bands of frequencies previously identified by the National Telecommunications and Information Administration in the Spectrum Reallocation Final Report, NTIA Special Publication 95-32 (1995), are excluded. *Id.* § 202 (codified at 47 U.S.C. § 923(g)(2)(B)).

⁶ 47 C.F.R. § 1.2104(c).

that ensures that the "total cash proceeds" attributable to such spectrum will equal at least 110 percent of the total estimated relocation costs provided to the Commission by NTIA.

Tribal land bidding credit rule. In an effort to encourage carriers to provide telecommunications services to tribal lands with historically low telephone service penetration rates, the Commission makes tribal land bidding credits available to auction winners that serve qualifying tribal lands.⁷ Under the Commission's current rules, in auctions that include spectrum covering qualifying tribal lands, the Commission may not know for at least 180 days after the long-form application deadline how much of a discount on the auction's winning bids it will have to allow for tribal land bidding credits. In auctions subject to CSEA, this timing could lead to substantial post-auction delay in calculating whether total cash proceeds meet the 110 percent revenue requirement. Accordingly the Commission seeks comment on possible methods of ensuring that the Commission will be able to promptly calculate total cash proceeds while at the same time preserving the availability of tribal land bidding credits in auctions subject to CSEA. Specifically, in the *Notice*, the Commission seeks comment on (1) awarding tribal land bidding credits on a pro rata basis out of the funds exceeding 110 percent of the total estimated relocation costs, (2) awarding tribal land bidding credits on a first-come, first-served basis out of the funds exceeding 110 percent of the total estimated relocation costs, and (3) requiring applicants to specify on their short-form applications any licenses for which they intend to seek a tribal land bidding credit, should they win, so that the Commission can calculate the amount necessary to satisfy CSEA's reserve price requirement if winning bidders receive the maximum tribal land bidding credits for which they indicate an interest on their short-form applications. The *Notice* also invites commenters to propose other methods and seeks comment on adopting the same method as that used for auctions subject to CSEA, or a similar approach, for other, non-CSEA auctions for which the Commission establishes a reserve price based on winning bids net of all bidding credits.

Default payment rule clarification. Under section 1.2104(g), a high bidder that defaults or is disqualified after the close of an auction is subject to a default payment consisting of two parts – a "deficiency payment" and an "additional payment."⁸ The deficiency payment is equal to the payment required for a withdrawn high bid, i.e., the difference between the amount of the defaulted (or withdrawn) bid and the amount of a lower winning bid in the same or a subsequent auction. In the event that a bidding credit applies to any of the bids, the deficiency payment equals the difference between either the net defaulted bid and the subsequent net winning bid or the gross defaulted bid and the subsequent gross winning bid, whichever difference is less. The additional payment is equal to 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulting bidder's bid or the subsequent winning bid, whichever is less.⁹

⁷ *Id.* § 1.2110(f)(3). See *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 11,794 (2000). "Qualifying tribal land" is "any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act . . . and Indian allotments, that has a wireline telephone subscription rate equal to or less than eighty-five (85) percent based on the most recently available U.S. Census Data." 47 C.F.R. § 1.2110(f)(3)(i). Not all Commission auctions include licenses covering qualifying tribal lands. See, e.g., "Auction of Lower 700 MHz Band Licenses Scheduled for July 20, 2005," *Public Notice*, DA 05-737, at 13 (rel. Mar. 22, 2005).

⁸ 47 C.F.R. § 1.2104(g).

⁹ In this *Notice* and in our rules, bidders that are disqualified after the close of an auction are referred to as "defaulting bidders," just as are bidders that default after an auction's close. Similarly, the payment owed by a disqualified bidder is referred to as a "default payment." See *id.* §§ 1.2104(g)(2)-(3); 1.2109. Currently, the deficiency payment for a default or disqualification following a package bidding auction is, in most instances,

(continued....)

No deficiency payment is assessed when either the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the original defaulted bid. It is unclear from the existing rule whether, in such a situation, the additional payment should be a percentage of the higher intervening subsequent withdrawn bid or of the subsequent winning bid. To clarify the rule, the Commission proposes that when, in a subsequent auction, there is a higher withdrawn bid but no winning bid for a license that corresponds to a defaulted license, the additional default payment will be determined as 3 percent (or 25 percent) of the defaulting bidder's bid. The Commission also proposes a further clarification of the additional payment rule for certain situations in which no deficiency payment is owed, because, under the current rule, it is unclear under the current rule whether the additional payment should be based on the net defaulted bid or on the gross defaulted bid. Pursuant to the Commission's proposal, the additional payment in such a situation would be 3 (or 25) percent of the net defaulted bid amount.

Interim withdrawal and additional default payment rules. When a license for which there has been a withdrawn high bid is neither subject to a subsequent higher bid nor won in the same auction, the final withdrawal payment cannot be calculated until a corresponding license is either subject to a higher bid or won in a subsequent auction. In such a case, under the Commission's existing rule, the bidder responsible for the withdrawn high bid is assessed an interim bid withdrawal payment equal to 3 percent of the amount of its withdrawn bid, and this interim payment is applied toward any final bid withdrawal payment that is ultimately assessed. As noted in the previous paragraph, a high bidder that defaults or is disqualified after the close of an auction is subject to a default payment consisting of a deficiency payment and an additional payment. Currently, the additional payment is calculated as 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulting bidder's bid or the subsequent winning bid, whichever is less, except that no deficiency payment is assessed when either the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the original defaulted bid. In an effort to discourage withdrawals and defaults, both of which pose an ongoing threat to the integrity of the auctions process, the Commission proposes to increase the current limits on the interim withdrawal payment and the additional default payment from 3 percent to 20 percent each, with the specific percentage to be set by the Commission in advance of each auction.

Package bid and license apportionment. In combinatorial (package) bidding, bidders place single all-or-nothing bids on groups (or packages) of licenses. Thus, there are no identifiable bid amounts on the individual licenses composing packages of more than one license. Similarly, when the Commission reconfigures licenses, with respect to either geographic or spectral dimensions, following an initial auction, there may not be identifiable bid amounts on licenses comparable to those offered in the initial auction. However, there are several situations in which an individual bid amount is needed for one of the Commission's regulatory calculations, such as calculating a small business bidding credit, an unjust enrichment payment obligation related to such a credit, a tribal land bidding credit limit, or a withdrawal or default payment obligation. Accordingly, the Commission proposes to specify a method for apportioning bids either among the individual licenses composing a package and/or among a license's component parts in advance of each auction that (a) uses a combinatorial bidding design, (b) includes spectrum previously subject to a combinatorial auction, or (c) includes licenses that have been reconfigured following an initial auction.

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calculated differently from the way in which the deficiency payment is calculated for a default or disqualification following a non-package bidding auction. *See id.* § 1.2104(g)(3).

Broadcast construction permit rules. The Commission's Part 1 competitive bidding rules provide that, unless otherwise specified by public notice, auction winners are required to pay the balance of their winning bids in a lump sum within ten business days following the release of a public notice establishing the payment deadline. In recent wireless spectrum auctions, winning bidders have been required to submit the balance of the net amount of their winning bids within ten business days after the deadline for submitting down payments. This procedure is necessary to guard against payment defaults that may then lead to bankruptcy filings and litigation that tie up the availability of the defaulted licenses. Specific Part 73 and 74 rules, however, provide that winning bidders in broadcast service auctions must render their final payment for construction permits won through competitive bidding only after their long-form applications have been processed, any petitions to deny have been dismissed or denied, and the public notice announcing that broadcast construction permits are ready to be granted has been released. In order to provide consistency throughout the Commission's competitive bidding rules and help to ensure that only sincere, financially qualified applicants participate in competitive bidding, the Commission proposes to adopt for broadcast auctions the final payment procedures in its Part 1 competitive bidding rules.

Consortium exception to the designated entity and entrepreneur aggregation rule. For purposes of determining whether an applicant or licensee is eligible for small business or broadband personal communications services ("PCS") entrepreneur status, the Commission attributes to the applicant the gross revenues (and, when determining entrepreneur eligibility, the total assets) of the applicant's affiliates, its controlling interests, and the affiliates of its controlling interests, and aggregates these amounts with the applicant's own gross revenues (and total assets). However, under an exception to this aggregation rule, when an applicant or licensee is a consortium comprised exclusively of members eligible for small business bidding credits or broadband PCS entrepreneur status, or both, the gross revenues (and total assets) of the consortium members are not aggregated. The consortium exception has been seldom used, perhaps because of the absence of clear direction from the Commission as to how consortium members should be formally organized and how (and when) members should allocate and own the licenses they win. In order to provide additional guidance to those interested in taking advantage of the consortium exception and to reduce the likelihood of complications resulting from the exception's use, the Commission seeks comment on possible policy options for improving the pre- and post-auction procedures governing the exception. These options include requiring each member of a consortium to file an individual long-form application for its respective, mutually agreed-upon license(s) and requiring two or more consortium members seeking to be licensed together to form a legal business entity, such as a corporation, partnership, or limited liability company.

B. Legal Basis

The proposed actions are authorized under Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(r), and 309(j).

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹⁰ The RFA generally defines the term "small entity" as having the same meaning as the terms "small organization," "small business," and "small governmental jurisdiction."¹¹ The term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹² A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."¹³ Nationwide, as of 2002, there were approximately 1.6 million small organizations.¹⁴ The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."¹⁵ As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.¹⁶ This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.¹⁷

The changes and additions to the Commission's Part 1 rules proposed in this *Notice* would be of general applicability to all services, applying to all entities of any size that apply to participate in Commission auctions. The changes proposed to Parts 73 and 74 of the Commission's rules would apply to all entities of any size that win broadcast construction permits in future competitive bidding. Accordingly, this IRFA provides a general analysis of the impact of the proposals on small businesses rather than a service by service analysis. The number of entities that may apply to participate in future Commission auctions is unknown. The number of small businesses that have participated in prior auctions has varied. In all of our auctions held to date, 1927 out of a total of 2498 qualified bidders either have claimed eligibility for small business bidding credits or have self-reported their status as

¹⁰ 5 U.S.C. § 603(b)(3).

¹¹ *Id.* § 601(6).

¹² *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.* § 601(3).

¹³ *Id.* § 601(4).

¹⁴ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

¹⁵ 5 U.S.C. § 601(5).

¹⁶ U.S. Census Bureau, *Statistical Abstract of the United States: 2000*, Section 9, pages 299-300, Tables 490 and 492.

¹⁷ See SBA, *Programs and Services*, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

small businesses as that term has been defined under rules adopted by the Commission for specific services. These figures do not generally include applicants for auctions of broadcast construction permits where sized-based bidding preferences have not been available.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

Pursuant to one of the options set forth to change the tribal land bidding credit rule, the Commission would award tribal land bidding credits on a first-come, first-served basis in auctions subject to a CSEA or other reserve price. This option, if adopted, would not alter the burdens on auction winners of licenses covering qualifying tribal land with regard to reporting or recordkeeping; however, it might encourage them to submit the required certifications sooner than they otherwise would have. Pursuant to another option to change the tribal land bidding credit rule, auction applicants of all sizes would be required to indicate on their short-forms any intention to seek tribal land bidding credits should they win qualifying licenses. While this requirement would increase the reporting burden on applicants planning to seek such credits, the burden would likely be as minimal as checking off a box.

The proposal to increase the current limits on the interim withdrawal payment and the additional default payment from 3 percent to 20 percent each would, to the extent that the respective payment had been set at more than 3 percent, increase the financial burden on entities of any size that withdrew a high bid or defaulted on a payment obligation. However, by refraining from withdrawing high bids and defaulting on payment obligations, entities could avoid any such increased financial burden.

Adopting for broadcast auctions the final payment procedures of the Commission's Part 1 competitive bidding rules might require future winners of broadcast construction permits, both large and small, to submit their final payments for such permits sooner than would have been required in the absence of the proposed rule changes.

Requiring each member of a consortium to file an individual long-form application for its respective, mutually agreed-upon license(s) or requiring two or more consortium members seeking to be licensed together to form a legal business entity might increase the reporting requirements and/or regulatory compliance burdens on auction applicants using the consortium exception, all of which would be small businesses or broadband PCS entrepreneurs. However, adopting these requirements might also increase use of the consortium exception, thus increasing the availability of small business bidding credits and entrepreneur eligibility.

None of the other proposals in the *Notice* would alter reporting, recordkeeping, or other compliance requirements.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule or any part thereof for small entities.¹⁸ The Commission has considered the economic impact on small entities of the following rule

¹⁸See 5 U.S.C. § 603.

changes and additions proposed in the *Notice* and has taken steps to minimize the burdens on small entities.

The Commission has sought comment on several options for modifying its tribal land bidding credit rule in order to determine which of the options best ensures that the Commission will be able to comply with CSEA's reserve price requirement while at the same time preserving the availability of tribal land bidding credits in auctions subject to CSEA.

Adoption of the proposed increases to the current limits on the interim withdrawal payments and additional default payments would benefit small entities more than it would burden them. For example, the proposal to provide the Commission with the option of increasing the size of the interim withdrawal payment is intended to discourage strategic withdrawals. Such bid withdrawals could have a significant adverse effect on the competitiveness of small entities in the auctions process. Moreover, to the extent that the proposed increase in the additional default payment encourages bidders to realistically assess in advance their ability to pay for their bids, a larger payment requirement may prevent bidders from placing bids they cannot afford.

With regard to its proposal to modify its payment rules for broadcast construction permits, the Commission believes that amending the final payment deadline for broadcast auctions to conform to its existing procedures for wireless auctions would provide consistency throughout its competitive bidding rules and help to achieve its objective that only sincere, financially qualified applicants participate in competitive bidding. The Commission further believes that providing greater certainty to all winning bidders regarding when final payment will be due will also benefit them as they compete with other sincere bidders that have also secured the financing necessary to participate in an auction and pay for their licenses. The Commission notes that in wireless spectrum auctions, winning bidders, including small businesses, have been able to comply with the Commission's new final payment procedure without difficulty, and it therefore surmises that winning bidders of all sizes in broadcast auctions should be able to comply with this change with similar ease.

The Commission's goal in requesting comment on possible modifications to the consortium exception to the small business and entrepreneur aggregation rule is to promote wider use of the exception and thus to increase the competitive bidding opportunities available to small entities facing capital formation constraints. To that end, the Commission has specifically requested that commenters address whether adopting the rule changes discussed might encourage wider use of the consortium exception.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

None.