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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	))))	WT Docket No. 05-211

REPORT AND ORDER

Adopted: January 23, 2006 **Released: January 24, 2006**

By the Commission:

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I. INTRODUCTION AND BACKGROUND

1. In this *Report and Order* ("*R&O*") we adopt several modifications to our competitive bidding rules. We sought comment on these changes in our recent *Notice of Proposed Rule Making* ("*NPRM*"), which, in combination with a *Declaratory Ruling*, began this proceeding.[1] Some of the changes we make today are required by the Commercial Spectrum Enhancement Act ("CSEA");[2] others are intended to enhance the effectiveness of our auctions program.

2. In order to comply with CSEA, we:

- Modify our reserve price rule, section 1.2104(c), to provide that, for any auction of "eligible frequencies" requiring the recovery of estimated relocation costs pursuant to CSEA, the Commission will establish a reserve price(s) pursuant to which the total cash proceeds shall equal at least 110 percent of the total estimated relocation costs provided to the Commission pursuant to CSEA; and
- Modify our tribal land bidding credit rule, section 1.2110(f)(3), to enable the Commission in auctions subject to CSEA to award all eligible applicants tribal land bidding credits on a pro rata basis in the event that the net winning bids at the close of bidding (exclusive of tribal land bidding credits) are not sufficient both (a) to meet the reserve price(s) and (b) to award all eligible applicants full tribal land bidding credits.

3. To enhance the effectiveness of our auctions program, we:

- Modify our tribal land bidding credit rule, section 1.2110(f)(3), to enable the Commission in auctions with specified reserve price(s) not mandated by CSEA to award all eligible applicants tribal land bidding credits on a pro rata basis in the event that the net winning bids at the close of bidding (exclusive of tribal land bidding credits) are not sufficient both (a) to meet the reserve price(s) and (b) to award all eligible applicants full tribal land bidding credits;
- Clarify our default rule, section 1.2104(g)(2), to facilitate early determination of a final default payment and clarify the appropriate calculation in certain circumstances;

[1] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Declaratory Ruling and Notice of Proposed Rule Making*, 20 FCC Rcd 11,268 (2005) ("*Declaratory Ruling*" and "*Notice of Proposed Rule Making*" or "*NPRM*"). The Commission received three comments, one reply comment, and two *ex parte* filings in response to the *NPRM*. Appendix A contains a list of full and abbreviated names of commenting parties.

[2] Commercial Spectrum Enhancement Act, Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004) (codified in various sections of Title 47 of the United States Code) ("CSEA").

- Enhance our rules for interim withdrawal and the additional payment portion of default payments, section 1.2104(g)(1)-(2), by enabling the Commission in advance of each auction to set each type of payment at between 3 percent to 20 percent of the relevant withdrawn or defaulted bids;
- Facilitate combinatorial (or "package") bidding by enabling the Commission to establish in advance of each such auction a mechanism to attribute an individual bid amount to individual licenses won as part of a package when an individual bid amount is needed for a regulatory calculation, such as calculating the amount of a small business bidding credit;[3]
- Modify section 1.2104 of our rules to allow the Commission to apportion a bid amount on an individual license whenever a bid amount on a portion of a license is needed to compare with bids on portions of corresponding reconfigured licenses, such as when a withdrawn bid on a license in an auction must be compared to bids on corresponding reconfigured licenses in a later auction;[4]
- Standardize auction payment rules by conforming rules applicable to broadcast construction permits won at auction, sections 73.3571, 73.3573, 73.5003, 73.5006, and 74.1233, to the final payment procedures in section 1.2109(a); and
- Enhance the availability of the consortium exception to the designated entity and entrepreneur aggregation rule, section 1.2110(b)(3)(i), by providing further clarity as to its implementation. In particular, we provide that (a) each member or group of members of a winning consortium seeking separate licenses shall file a separate long-form application for its respective license(s) and, in the case of a license to be partitioned or disaggregated, the member or group filing the applicable long-form application shall provide the parties' partitioning or disaggregation agreement in its long-form application; (b) two or more consortium members seeking to be licensed together shall first form a legal business entity; and (c) any such entity must meet the applicable eligibility requirements in our rules for small business or entrepreneur status.

II. IMPLEMENTATION OF CSEA

A. Background

4. CSEA establishes a mechanism for reimbursing federal agencies out of spectrum auction proceeds for the cost of relocating their operations from certain "eligible frequencies" that have been reallocated from federal to non-federal use.[5] Under CSEA, the "total cash proceeds" from any auction of eligible frequencies must equal at least 110 percent of estimated relocation costs of eligible federal

[3] *See infra* part III.D.1.

[4] *See infra* part III.D.2.

[5] CSEA §§ 201-209. Eligible frequencies comprise four bands specified in CSEA (the 216-220 MHz, 1432-1435 MHz, 1710-1755 MHz and 2385-2390 MHz bands), as well as 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. *Id.* § 202 (codified at 47 U.S.C. § 923(g)(2)). 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)).

entities.[6] CSEA prohibits the Commission from concluding any auction of eligible frequencies that falls short of this revenue requirement. Instead, if the auction does not raise the required revenue, it must be canceled.[7]

5. As explained in the *NPRM*, implementing CSEA necessitates that we modify our tribal land bidding credit rules. In the *Declaratory Ruling*, we determined that "total cash proceeds" for purposes of meeting CSEA's revenue requirement means winning bids net of any applicable bidding credit discounts. Accordingly, to determine whether CSEA's revenue requirements have been met at the end of a CSEA auction, the Commission will have to determine whether winning bids net of any applicable bidding credit discounts equal at least 110 percent of estimated relocation costs. However, under our current rules, the Commission may not know for at least 180 days after the end of the auction the amount of tribal land bidding credits that will be awarded with respect to those winning bids. Consequently, being able to determine promptly after the close of bidding whether or not CSEA's revenue requirement has been met requires revision of our tribal land bidding credit rules.

B. CSEA's Reserve Price Requirement

6. In the *NPRM*, we sought comment on a proposed revision to our current reserve price rule. CSEA directs the Commission to revise its reserve price regulations to ensure that an auction of eligible frequencies raises at least 110 percent of the estimated relocation costs for federal users as determined pursuant to CSEA.[8] The Commission's competitive bidding rules have, since their inception, allowed for the use of reserve prices,[9] and, since 1997, section 309(j) of the Communications Act has required the Commission to "prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest."[10] Section 1.2104(c) of our rules gives the Commission the discretion to employ a reserve price, stating that we "may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded."[11] This rule, however, does not satisfy the CSEA mandate that the reserve price rule ensure that an auction of eligible frequencies raises the revenue required by the statute. Accordingly, we proposed a rule that does conform to the CSEA requirement.

7. No commenter addressed this issue. Given the statutory mandate and the absence of opposition from commenters, we will adopt the rule proposed in the *NPRM*.[12]

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[6] *Id.* § 203(b) (Section 203(b) amended section 309(j) by adding at the end a new paragraph (15)).

[7] *Id.*

[8] CSEA, §203(b) (codified at 47 U.S.C. § 309(j)(15)(A)).

[9] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2384 ¶¶ 206-07, 2387 ¶ 224 (1994) ("*Competitive Bidding Second Report and Order*"); 47 C.F.R. § 1.2104(c) (1994-present).

[10] Balanced Budget Act of 1997, Pub. L. No. 105-33, 88 Stat. 259, § 3002 (codified at 47 U.S.C. § 309(j)(4)(F)) ("Balanced Budget Act").

[11] 47 C.F.R. § 1.2104(c). This provision has been unchanged since its adoption in 1994. *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2407; 59 Fed. Reg. 49,938 (Sept. 30, 1994).

[12] As proposed in the *NPRM*, we replace the term "reservation price" with the synonymous "reserve price," the term used in section 309(j) of the Communications Act. In addition, we make non-substantive revisions clarifying the rule proposed in the *NPRM*.

C. Tribal Land Bidding Credits in CSEA Auctions

8. In the *NPRM*, we sought comment on three alternative methods of ensuring that, in auctions subject to CSEA, the Commission will be able to calculate "total cash proceeds" promptly after the completion of bidding, while still preserving its ability to award tribal land bidding credits to qualified license winners at some point after such proceeds have been determined. The need for revision of our rules arises because we allow applicants seeking tribal land bidding credits 180 days after the long-form filing deadline in which to demonstrate their eligibility for such credits. To qualify for a tribal land bidding credit, a license winner must indicate on its long-form application (FCC Form 601) that it intends to serve a qualifying tribal land within a particular market.[13] The applicant must then amend its long-form application within the 180-day period by attaching a certification from the tribal government authorizing the applicant to provide service on its tribal land, certifying that the area to be served by the winning bidder is indeed qualifying tribal land, and assuring that it has not and will not enter into an exclusive contract with the applicant and will not unreasonably discriminate among wireless carriers seeking to provide service on the qualifying tribal land.[14] The applicant must also attach its own certification that it will comply with construction requirements for tribal land and consult with the tribal government regarding the siting of facilities and service deployment.[15]

9. As soon as the long-form applications have been submitted, the Commission can calculate the maximum amount of tribal land bidding credits for which auction winners could be eligible assuming full compliance with the certification requirements. However, because the deadline for submitting the required certifications is not until 180 days after the filing deadline for long-form applications, the Commission may not know for 180 days or longer to what extent tribal land bidding credit applicants have actually qualified for such credits.[16] Thus, when an auction that has a reserve price or prices includes licenses covering qualifying tribal lands, the Commission may not know for at least 180 days after the long-form 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 situation could lead to a potentially substantial post-auction delay in calculating whether "total cash proceeds" meet the 110 percent revenue requirement. Thus, our current tribal land bidding credit procedures could prevent the Commission from concluding the auction expeditiously after the cessation of bidding and, should the award of the credits reduce the auction's net winning bids to below the 110 percent revenue requirement,

[13] *Id.* § 1.2107(e). The Commission requires that winning bidders intending to apply for tribal land bidding credits do so by the filing deadline for long-form applications and does not permit applicants to amend their applications after the filing deadline to indicate their intention to seek a credit. *See, e.g.*, "Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58," *Public Notice*, 20 FCC Rcd 3703, 3736-37 (2005). We clarify that when a deadline for final payment of a winning bid occurs before an applicant's eligibility for a tribal land bidding credit is determined, the Commission requires the applicant to make full payment of the balance of its winning bid by that deadline. In other words, such an applicant receives no reduction in the balance due by the final payment deadline for any as yet un-awarded tribal land bidding credit the applicant is seeking. When an applicant's eligibility for a tribal land bidding credit is established after final payment has been made, the Commission will refund the amount of the credit.

[14] 47 C.F.R. § 1.2110(f)(3)(ii)(A).

[15] *Id.* § 1.2110(f)(3)(ii)(B).

[16] *Id.* § 1.2110(f)(3)(ii)(A)-(B).

might even lead to cancellation of the auction long after the bidding has ended. Accordingly, we sought comment on which of three possible modifications to our tribal land bidding credit rules would best enable us to meet our dual objectives of facilitating CSEA compliance and continuing to encourage service on tribal lands. We also invited commenters to propose other methods of accomplishing these objectives.

10. T-Mobile, the only commenter to address this issue, supports either of the first two options on which we sought comment.[17] Under the first option, the Commission would award pro rata tribal land bidding credits out of the amount by which net winning bids at the close of bidding exceeded the reserve price(s) applicable to that auction. If this amount were insufficient to pay all of the tribal land bidding credits for which auction winners were eligible, then each eligible tribal land bidding credit applicant would receive a pro rata credit based on the credit the applicant would have received had the auction not been subject to a reserve price.

11. T-Mobile also likes the second option,[18] pursuant to which the Commission would award tribal land bidding credits on a first-come, first-served basis in auctions subject to CSEA. Winning bidders would, under this alternative, still have to file the certifications for a tribal land bidding credit no later than 180 days after the filing deadline for long-form applications. However, bidding credits up-to the full amount determined by the existing formula[19] would be awarded to eligible applicants in the order in which they had filed the certifications for such credits, to the extent that funds remained available. As with the first alternative, the money available for tribal land bidding credits would be limited to the net winning bids exceeding 110 percent of the total estimated relocation costs. T-Mobile believes that this option, by allowing early and final determination of outstanding tribal land bidding credit valuations, has an advantage over the pro rata option.

12. Under the third option, the Commission would require applicants to specify on their short-form applications the licenses, if any, for which they intended to seek a tribal land bidding credit, should they win. The Commission would determine whether the CSEA reserve price had been met, insofar as tribal land bidding credits were concerned, by deducting the maximum amount of tribal land bidding credits for which winning bidders that had indicated on their short-form applications an interest in receiving such credits could be eligible. T-Mobile opines that neither adopting this option nor leaving the rules unchanged would serve the public interest.

13. We will adopt the first option, i.e., the pro rata approach. The time at which winning bidders are able to file their suitably amended long-forms is not completely within their control, given that applicants for tribal land bidding credits must depend on tribal governments to provide them with some of the required certifications. In light of these circumstances, we believe that the pro rata option, rather than the first-come, first-served option, is the preferable method of equitably apportioning tribal land bidding credits among the largest number of qualified applicants, while still allowing a speedy determination of whether the reserve price has been met in auctions of eligible frequencies. We agree with T-Mobile that neither the third option, i.e., requiring advance notification on the short-form, nor the status quo would adequately serve the interests of the public.

14. Under the pro rata approach, if the reserve price limits the funds available for tribal land bidding credits to less than the full amount for which auction winners seeking tribal land bidding credits might qualify, each applicant eligible for a tribal land bidding credit will receive a pro rata portion of the

[17] T-Mobile Comments at 6.

[18] T-Mobile Comments at 7.

[19] 47 C.F.R. § 1.2110(f)(3).

available funds. The funds available equal the amount by which winning bids for licenses subject to the reserve price, net of discounts the Commission takes into account when reporting net bids in the public notice closing the auction, exceed the reserve price.[20] The ratio of (a) each applicant's pro rata credit to (b) the total funds available for tribal land bidding credits will equal the ratio of (a) the applicant's full credit (the tribal land bidding credit for which that applicant would have qualified absent limitations resulting from the reserve price) to (b) the aggregate maximum amount of tribal land bidding credits for which all applicants might have qualified absent limitations resulting from the reserve price. In order to assure that funds are available for all applicants seeking tribal land bidding credits, we will calculate the aggregate maximum amount of tribal land bidding credits for which all applicants might have qualified by assuming that any applicant seeking a tribal land bidding credit on its long-form application will be eligible for the largest tribal land bidding credit possible for its bid for its license, absent limitations resulting from the reserve price. We will use this ratio to determine the pro rata credit awarded when we grant the license.[21]

15. We may be able to award each applicant proving eligibility for a pro rata tribal land bidding credit a larger amount in the event that any other applicant ultimately proves to be eligible for less than the largest possible tribal land bidding credit. Funds available for an applicant that proves to be eligible for less than the largest possible credit can be used to increase pro rata credits for other applicants. However, we can determine the largest possible pro rata credit for an applicant only after all applications seeking a tribal land bidding credit with respect to licenses covered by a reserve price have been finally resolved.[22] Accordingly, we will recalculate pro rata tribal land bidding credits once all such applications have been finally resolved.

16. After all such applications have been finally resolved, we will recalculate the amount of pro rata credits using the aggregate amount of actual full credits – i.e., the tribal land bidding credits for which the applicants would have qualified absent the limitations resulting from the reserve price – rather than the hypothetical maximum aggregate amount for which all applicants might have qualified. In other

[20] The net bids reported in the Public Notice closing the auction reflect discounts based on final information available from the applicants at the close of bidding, e.g., size-based bidding credits and, in broadcast auctions, new entrant bidding credits. However, as discussed above, the Commission is not able to determine tribal land bidding credits at the close of bidding because the deadline to submit the information required for such credits is not until nearly six months after the long-form application filing deadline. *See* 47 C.F.R. §1.2110(f)(3)(ii) (describing required post-auction certifications). For purposes of calculating pro-rata tribal land bidding credits, any repayments of tribal land bidding credit amounts pursuant to section 1.2110(f)(3)(C)(viii), as amended, are not funds available for granting other pro-rata tribal land bidding credits. *See* 47 C.F.R. § 1.2110(f)(3)(C)(viii), as amended.

[21] When making any necessary refunds of already-made license payments, we will continue to follow the usual Commission procedures, as set forth in the procedures public notice for the relevant auction. *See, e.g.*, Entertainment Unlimited, Inc. Request for Refund of Late Payment Fees for PCS Licenses Purchased in Auction No. 22, *Memorandum Opinion and Order*, 16 FCC Rcd 10,030 (2001).

[22] Final resolution of all applications occurs only after any review or reconsideration of any such credit has been concluded and no opportunity remains for further review or reconsideration. We note that it is possible that final resolution of less than all applications seeking tribal land bidding credits may make it apparent that funds available for tribal land bidding credits equal or exceed the full amount for which all other applications seeking tribal land bidding credits might qualify. For example, the funds available may have been just short of the full amount for which all applicants might qualify. If one applicant withdraws its application for a tribal land bidding credit, the funds available subsequently may exceed the full amount for which all other applicants might qualify, even though it may be some time before all other applications are finally resolved. In light of this possibility, we reserve the power to award full credits when available information makes it clear that funds available exceed the full amount for which all applicants might qualify, even though all applications have not yet been fully resolved. In such circumstances, we will increase the amounts of any previously awarded pro rata credits to make them full credits as well.

words, the ratio of (a) each applicant's recalculated pro rata credit to (b) the total funds available for tribal land bidding credits will equal the ratio of (a) the applicant's full credit (the tribal land bidding credit for which that applicant would have qualified absent limitations resulting from the reserve price) to (b) the aggregate amount of the actual full credits. In the event that the recalculated pro rata credit is larger than the initial pro rata credit, we will award the difference. If the second calculation produces a different result from the first, it will reflect the fact that when the amount of any one applicant's portion of the fixed funds available for tribal land bidding credits decreases, the amounts of other applicants' portions should increase. An applicant's portion of the fixed funds might decrease, for example, if it reaches agreements with tribal governments regarding service for less than the full area of tribal land covered by the license. Consequently, that applicant may be eligible for a credit smaller than the largest credit possible.[23]

III. UPDATING COMPETITIVE BIDDING RULES AND PROCEDURES

A. Tribal Land Bidding Credits in Non-CSEA Auctions

17. We sought comment in the *NPRM* on whether we should extend the same or a similar approach to the one we selected for allocating tribal land bidding credits in auctions with a CSEA-mandated reserve price (or prices) to those non-CSEA auctions for which we established a reserve price or prices based on winning bids net of discounts. No commenter addressed this aspect of the issue. We believe that, for the reasons discussed above, the pro rata approach we adopt today for auctions with a CSEA-mandated reserve price would, in non-CSEA auctions, best allow both a speedy auction conclusion and an equitable allocation of available tribal land bidding credits among all qualified applicants. Accordingly, we adopt a rule extending the pro rata approach, at the discretion of the Commission, to non-CSEA auctions with reserve prices.

B. Default Rule Clarification

18. In the *NPRM*, we proposed two clarifications of our default payment rule. The first deals with the proper time to calculate the amount of the default payment when, in a subsequent auction, there is a higher withdrawn bid but no winning bid for a license that corresponds to the defaulted license. The second addresses an unusual situation in which it might not be clear whether net or gross bids should be used in calculating the default payment. Neither proposal prompted any response from commenters.

19. Under section 1.2104(g) of our rules, a winning bidder that defaults or is disqualified after the close of an auction is subject to a "deficiency payment" (or "deficiency portion") plus an additional payment equal to 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding[24] auction, 25 percent) of the defaulting bidder's bid or the subsequent winning bid, whichever is less.[25]

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[23] We note that an applicant may be able to obtain the largest tribal land bidding credit possible for a bid for a license even when it is not able to provide service to all of the tribal land covered by the license. If the tribal land covered by the license is less than 200 square miles, the largest tribal land bidding credit possible for a bid for that license is not affected by the size of the area that ultimately is served. *See* 47 C.F.R. §1.2110(f)(3)(iii). Moreover, the largest tribal land bidding credit possible for a bid for a license is also subject to a cap based on the amount of the bid. *See* 47 C.F.R. §1.2110(f)(3)(iv).

[24] We use the terms "combinatorial bidding" and "package bidding" synonymously.

[25] In this *R&O* 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. Under existing rules, the deficiency payment for a default or disqualification following a package bidding auction (or in situations where the subsequent winning bid is for a license won as part of a package) is, in most instances, calculated differently

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20. The deficiency payment is calculated in the same manner as a payment owed following the withdrawal of bid. Section 1.2104(g) provides that a bidder that withdraws a 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. In the event that a bidding credit applies to any of the bids, the bid withdrawal payment equals the difference between either the net withdrawn bid and the subsequent net winning bid or the gross withdrawn bid and the subsequent gross winning bid, whichever difference is less.[26] However, no withdrawal payment is assessed for a withdrawn bid if either the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the original withdrawn bid.[27] The additional 3 (or 25) percent payment must be calculated using the same bid amounts and basis (i.e., net or gross bids) as used in calculating the deficiency payment.[28]

21. In the *NPRM*, we described the anomaly that might result from calculating the additional 3 or 25 percent payment for a bidder that defaults or is disqualified after the close of an auction, when, in a subsequent auction, there is a higher withdrawn bid, but no winning bid, for a license corresponding to the defaulted license.[29] A selective reading of section 1.2104(g) might indicate that, while the defaulter's deficiency obligation would be calculated as the difference between the defaulter's bid and the higher withdrawn bid in the subsequent auction (thus resulting in no deficiency payment), the defaulter's additional 3 or 25 percent payment obligation, which is based upon the lesser of the defaulter's bid or the subsequent *winning* bid, could not be calculated until the corresponding license had been won in a still later auction. However, as we pointed out, such a reading would conflict with the assumption evident in our default payment rule that the deficiency payment and the additional payment are calculated using the same bids. This assumption is reflected, for example, in the rule's explanation of which basis – net bids or gross bids – should be used in calculating the interim bid withdrawal payment: "If either bid amount is subject to a bidding credit, the 3 percent [payment] will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the [withdrawal] payment. . . ."[30] Perhaps just as

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from the way in which the deficiency payment is calculated when none of the relevant bids is part of a package bid. *See id.* § 1.2104(g)(3). However, under rule changes we adopt today, we will use a single method of calculating deficiency payments across all auctions.

[26] As we stated in the *NPRM*, for purposes of calculating the withdrawal payment amount, net bids do not include any discounts resulting from tribal land bidding credits.

[27] An intervening subsequent withdrawn bid less than the original withdrawn bid may limit the amount of the withdrawal payment. *See* 47 C.F.R. § 1.2104(g)(1) ("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)."), particularly, examples 2 and 3. However, it is only possible to determine the final amount of a withdrawal payment once there is a higher intervening subsequent withdrawn bid or a subsequent winning bid.

[28] *Id.* § 1.2104(g)(2).

[29] By "corresponding license," we generally mean a license with the same geographic and spectral components as those of the defaulted license or the license on which a bid was withdrawn. However, when, because of intervening partitioning, disagregration, or rule change, there is no single license with the same geographic and spectral components as the original license, then "corresponding license" means a license covering any part of the geography or spectrum of the original license. Under these circumstances, an original license may have more than one corresponding license. In some instances, the Commission may designate as a "corresponding license" a license that shares no spectrum or geography with the original license.

important, reading the rule this way would prolong the period before the final amount of the default payment obligation could be assessed and payment could be collected.

22. *To prevent the anomaly just described, we proposed to clarify the default payment rule* as follows. If, in a subsequent auction, there were a higher withdrawn bid but no winning bid for a license that corresponds to a defaulted license, the additional default payment would be determined as 3 percent (or 25 percent) of the defaulting bidder's bid.[31] Under our proposal, the additional payment would, as always, be calculated using the same basis, i.e., net or gross bids, as used in the calculation of the deficiency payment. As noted, this proposal generated no comments. Because we believe that the proposed clarification would simplify and accelerate the calculation of final default payments in applicable situations, we adopt the proposal.[32]

23. We also sought comment in the *NPRM* on a proposal to clarify the additional payment portion of the default payment rule in certain situations in which no deficiency payment is owed. The additional payment is, as noted, normally a percentage of either the defaulting bidder's bid or the subsequent applicable bid, whichever is less, using the same basis – net or gross bids – as used in calculating the deficiency payment. However, when the defaulted bid is subject to a bidding credit and the subsequent applicable bid equals or exceeds the defaulted bid, regardless of which basis – net or gross bids – is used, it is not clear whether the additional payment should be based on the net defaulted bid or on the gross defaulted bid. Accordingly, we proposed that, in such a situation, the additional payment be 3 (or 25) percent of the net defaulted bid amount, thus basing the default payment on what the defaulter was obligated to pay at the close of bidding. Because we believe that this clarification of the default rule is needed, and as no commenter opposed this aspect of the *NPRM*, we adopt the proposal.[33]

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[30] 47 C.F.R. § 1.2104(g)(2). *See also id.* § 1.2104(g)(3)(ii) (calculating the additional 25 percent payment for defaults and disqualifications after the close of a combinatorial bidding auction). As we mentioned in the *NPRM*, the quoted sentence of section 1.2104(g)(2) actually reads: "If either bid amount is subject to a bidding credit, the 3 percent *credit* will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the payment in paragraph (g)(1) of this section." (emphasis added) The use of the word "credit" in this sentence is an error which will be eliminated by the modification of section 1.2104 we adopt today.

[31] In this situation, because the applicable subsequent bid was higher, no deficiency payment would be required. In the event that there were no intervening subsequent withdrawn bids that were higher than the defaulted bid but there were intervening subsequent withdrawn bids that were higher than the subsequent winning bid, under our proposal the highest such intervening subsequent withdrawn bid would be used to calculate both portions of the final default payment. For example, if the defaulted bid were for $100 and the subsequent winning bid were for $80 but there were an intervening subsequent withdrawn bid for $90, the default payment (both the deficiency portion and the additional payment) would be calculated using the $100 defaulted bid and the $90 intervening subsequent withdrawn bid.

[32] As in the calculation of withdrawal payments, net bids for purposes of calculating default deficiency and additional payments do not include discounts resulting from tribal land bidding credits.

[33] As previously noted, in most instances, our existing default rule has required use of a different calculation to determine the amount of the deficiency portion of a default payment in the context of combinatorial bidding. *See* 47 C.F.R. § 1.2104(g)(3). However, in a subsequent section of this *R&O*, we adopt changes to our rules that instead require use of the "conventional" default rule (i.e., the default rule used where neither the initial nor the subsequent winning bid is for a license won as part of a package) for combinatorial bidding situations. Accordingly, as we proposed in the *NPRM*, we extend the clarification adopted here to determinations of the amount of default payments in situations where the initial bid, the subsequent winning bid, or any intervening withdrawn bid is for a license that is part of a package.

C. Withdrawal and Default Payment Percentages

24. We proposed in the *NPRM* to replace the current interim withdrawal and additional default payments of 3 percent of the relevant bid with an amount up to 20 percent of the relevant bid, with the precise amount for each auction established in advance of the auction.

1. Background

25. *Withdrawals.* As we have discussed, our rules provide that a bidder that withdraws a bid during 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).[34] If a license for which there has been a withdrawn 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 subject to a higher bid or won in a subsequent auction. When that final payment cannot yet be calculated, the bidder responsible for the withdrawn 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.[35]

26. The Commission adopted the withdrawal payment rules in 1994 to discourage insincere bidding, which, whether done for frivolous or strategic purposes, distorts price information generated by the auction process and may reduce the efficiency of the auction.[36] The Commission anticipated that strategic withdrawals – such as when a bidder attempts to deter a rival from acquiring a license by bidding up the price of the license and then withdrawing – would be particularly damaging to competitive bidding.[37] The Commission added the 3 percent interim bid withdrawal payment to the rules to help ensure that the withdrawal payment could be collected if one ultimately were assessed.[38]

27. *Defaults and Disqualifications.* Also as discussed above, our rules provide that if, after the close of an auction, a winning bidder defaults on a down payment or final payment obligation or is disqualified, the bidder is liable for a default payment.[39] This payment consists of a deficiency portion, equal to the difference between the amount of the bidder's bid and the amount of the winning bid the next time a license covering the same spectrum is won in an auction, plus an additional payment equal to 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulter's bid or of the subsequent winning bid, whichever is less.[40] The rule as applied in non-combinatorial auctions has been in effect since 1994. In 1997, the Commission extended to all

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[34] 47 C.F.R. § 1.2104(g)(1). The withdrawal payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission. No withdrawal payment is 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. *Id.*

[35] *Id.*

[36] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-74 ¶¶ 146-53.

[37] *Id.*

[38] Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,302 ¶ 15 (2000) ("*Part 1 Fifth Report and Order*").

[39] *See* 47 C.F.R. § 1.2104(g); *see also id.* § 1.2109. As noted earlier, 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."

[40] *Id.* § 1.2104(g)(2)-(3).

auctionable services a policy, earlier adopted for broadband personal communications services ("PCS"), of assessing initial default deposits.[41] In instances when the amount of a default payment cannot yet be determined, the Commission assesses an initial default deposit of between 3 percent and 20 percent of the defaulted bid amount.[42]

28. Requiring an additional payment in the case of post-auction defaults is intended to provide an incentive to bidders wishing to withdraw their bids to do so prior to the close of an auction, because a default or disqualification after an auction is generally more harmful to the auction process than a withdrawal during the auction.[43] The Commission set the additional payment at 3 percent, estimating that amount as the transaction cost of selling a license in the "after-market."[44] The Commission posited that if it were to establish a significantly higher additional default payment, bidders in a position to do so would opt to sell unwanted licenses individually in the secondary market rather than default.[45] The Commission determined that such a result would not only "be unfair to entities unable to rely on the after-market"[46] but also would be a less efficient mechanism for assigning defaulted licenses than would Commission auctions of such licenses.[47]

29. We noted in the *NPRM* that there have been a disproportionate number of withdrawals late in our auctions, indicating that some bidders have been placing and then withdrawing bids primarily to discourage potential or existing market competitors from seeking to acquire licenses.[48] We noted further that bidders continue to default on their payment obligations.[49] Because withdrawals and defaults

[41] *See* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 434 ¶ 102 (general initial default deposit policy) (1998) (rel. Dec. 31, 1997) ("*Part 1 Third Report and Order*"); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5563 n.51 (1994) ("*Competitive Bidding Fifth Report and Order*") (initial default deposit policy for broadband PCS); *see also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2382-83 ¶ 197.

[42] *See Part 1 Third Report and Order*, 13 FCC Rcd 374, 434 ¶ 102; *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5563 n.51; *see also Competitive Bidding Second Report and* Order, 9 FCC Rcd at 2382-83 ¶ 197. For defaults and disqualifications following combinatorial bidding auctions, the Commission assesses an initial default deposit of 25 percent. Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, WT Docket No. 97-82, *Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd 10,180, 10,203-204 ¶¶ 25-31 (2003) ("*Part 1 Order on Reconsideration of the Fifth Report and Order*")

[43] *Competitive Bidding Second Report and* Order, 9 FCC Rcd at 2374 ¶ 154, 2382-83 ¶ 197.

[44] The Commission noted that "brokers of cellular licenses typically charge a three percent commission" and, therefore, "estimate[d] the after-market transaction costs to be approximately three percent." *Id.* at 2374 ¶ 155.

[45] *Id.*

[46] These might include, for example, entities with capital constraints and those, such as C and F block broadband PCS entrepreneurs, subject to strict resale restrictions limiting utilization of the secondary market. *See also id.* at 2374 ¶ 153.

[47] *Id* at 2374 ¶ 155.

[48] *See, e.g.*, round results for Auctions No. 33 (700 MHz Guard Bands) and No. 37 (FM Broadcast). Links to these round results may be found on the Commission's Web site at, respectively, http://wireless.fcc.gov/auctions/33/ and http://wireless.fcc.gov/auctions/37/. Software to assist with viewing round results may be downloaded from http://wireless.fcc.gov/auctions/data/trackingtools.html.

[49] For example, three bidders defaulted on a total of thirteen licenses following Auction No. 40 (Lower and Upper Paging Bands); three bidders defaulted on a total of six licenses following Auction No. 37 (FM Broadcast); two

(continued....)

weaken the integrity of the auctions process and impede the deployment of service to the public and could prove particularly troublesome in auctions with a specific cash proceeds or reserve price requirement, such as auctions subject to CSEA,[50] we proposed to deter such behavior more effectively by increasing to a maximum of 20 percent the current 3 percent limit on interim withdrawal payments and additional default payments.

2. Discussion

30. We will adopt our proposal in the *NPRM* to determine the precise amount of interim withdrawal and additional default payments, up to 20 percent of the relevant bid, in advance of the auction. The comments we received support our proposal. T-Mobile "strongly supports" increasing the limit on both interim withdrawal payments and additional default payments, noting that bid withdrawals could have an "especially pernicious effect" in the upcoming Advanced Wireless Services auction,[51] which will likely be the first auction of licenses for eligible frequencies under CSEA.[52] Verizon also encourages us to adopt the proposal, submitting that "raising the default payment . . . will help curtail speculation" and that increasing the interim withdrawal payment should help deter late round withdrawals.[53] With regard to interim withdrawal payments, Verizon suggests that we consider using "tiered" payments whereby we would require the highest interim payment for withdrawals made in the last stage of an auction.[54]

31. The comments provide additional support for the observation in the *NPRM* that the Commission's rationale for limiting additional default payments to 3 percent no longer holds the same validity that it did eleven years ago when the payment was established. Resale restrictions have since been reduced,[55] and secondary market tools for the redistribution of access to spectrum have been rapidly developing.[56] Consequently, we are less concerned about potential negative effects resulting from a bidder's decision to pay for an unwanted license and resell it rather than default. Moreover, we believe that raising the limit on the size of the payments may persuade bidders to be more realistic in their advance assessment of how much they can afford to pay for licenses. Accordingly, we will modify section 1.2104(g) of our rules to raise the current 3 percent limits on the interim withdrawal payment and the additional default payment to 20 percent each. The Commission will, as part of its determination of competitive bidding procedures in advance of each auction, establish the appropriate level, from 3 percent up to a maximum of 20 percent, at which to set each of the two payments. The level will be based on the

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bidders defaulted on a total of five licenses following Auction. No. 35 (C and F Block Broadband PCS); and a single bidder defaulted on ten licenses following Auction No. 34 (800 MHz Specialized Mobile Radio Service).

[50] *See* 47 U.S.C. § 309(j)(4)(F), (15)(B).

[51] T-Mobile Comments at 7.

[52] *Id.* at 2-4.

[53] Verizon Comments at 4.

[54] *Id.*

[55] *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16,266, 16,289-91 ¶¶ 46-51 (2000); 47 C.F.R. § 24.839(a)(6).

[56] *See, e.g.*, Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17,503 (2004); *id. Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20,604 (2003).

nature of the service and the inventory of the licenses being offered.[57]

32. We note that the 3 to 20 percent range permits the Commission to use more than one percentage in an auction for either the interim withdrawal payment or the additional default payment, or both. For example, the Commission could choose, along the lines of Verizon's suggestion, to "tier" interim withdrawal payment percentages by requiring higher percentage payments for withdrawals made later in an auction. In no event, however, would either payment be set at more than 20 percent of the amount of the withdrawn or defaulted bid. We did not propose to, nor will we, alter the size of the 25 percent additional payment for defaults or disqualifications following combinatorial bidding auctions, as we continue to believe that there is a greater potential for harm resulting from defaults following combinatorial bidding auctions than following other auctions.[58]

D. Apportionment of Bid Amounts

1. Among the Licenses in a Package

33. We proposed in the *NPRM* to determine a "stand-in" to use for the bid on an individual license included as part of a package in a combinatorial (or "package") bidding auction whenever an individual bid amount was needed for a regulatory calculation. The need for this change arises out of the assumption in our competitive bidding rules and procedures that the amount of each bid on an individual license will always be known. For example, our rules for calculating the amount of a small business, new entrant, or tribal land bidding credit, presume that we know the amount of the winning bid amount on the license or construction permit involved.[59] Similarly, in determining the amount of a default or withdrawal payment, which involves a comparison between the withdrawing or defaulting bidder's bid and a subsequent bid, we need to know the bid amounts for individual licenses. However, in package bidding, where bidders place single all-or-nothing bids on groups (or packages) of licenses, there will be no identifiable bid amounts on the individual licenses comprising packages of more than one license.

34. Recognizing this problem in the context of default payments, the Commission established a rule, section 1.2104(g)(3)(i),[60] for calculating the deficiency portion of default payment obligations in connection with package bidding auctions. This provision accommodates situations in which all relevant licenses won in one or more subsequent auctions correspond to licenses originally made available in the

[57] When it does not appear likely that bidders will need to use withdrawals legitimately to avoid the risk of failed aggregations, for example, the Commission may impose a higher interim withdrawal payment percentage to deter the anti-competitive use of withdrawals. Such a situation might occur when the auction inventory consists largely of licenses not adjacent to each other in terms of bandwidth or geography, such as licenses left unsold from previous auctions. In those cases, it is much less likely that bidders will need to assemble complete sets of licenses. The need to win groups of licenses may also be relatively low in services in which there are few synergies to be captured from license aggregations.

[58] *NPRM*, 20 FCC Rcd at 11,278 ¶ 33. While we did not propose to change either the size of the payments required for defaults on licenses won in package bidding auctions or our bid withdrawal rules as they pertain to package bidding auctions, TDS comments that it does not oppose "possible changes in the amount of the default penalty which will apply in package bidding auctions relating to the apportionment of a winning package bid amount among the licenses in [sic] comprising that package" and "possible future rules changes to adopt bid withdrawal procedures to apply in package bidding auctions." TDS Comments at 2.

[59] *See* 47 C.F.R. §§ 1.2110(f), 73.5007. Knowing the size of a small business bidding credit on an individual license may be necessary in order to calculate a small business bidding credit unjust enrichment obligation on a license won as part of a package.

[60] *Id.* § 1.2104(g)(3).

same initial auction. However, it does not allow for situations in which the corresponding licenses are made available in one or more subsequent auctions that include licenses that were not won in the same initial auction.

35. *As a more comprehensive solution, we proposed in the NPRM that the Commission* specify in advance of each auction that uses a combinatorial bidding design or includes spectrum previously subject to combinatorial bidding a method for apportioning the bid on a package among the individual licenses comprising the package. We proposed further that the "apportioned package bid" ("APB") – the portion of the total bid attributed to an individual license pursuant to the selected method – serve as a substitute for the bid on that license whenever the individual bid amount was needed for one of our regulatory calculations.

36. As we noted in the *NPRM*, there are at least two available methods by which the Commission could apportion package bids to the individual licenses comprising a package. One such method would be to use a "MHz-pops" ratio, just as is currently done for unjust enrichment calculations involving partitioning or disaggregating licenses.[61] For Auction No. 51, the only auction conducted so far in which package bidding has been available, the Commission decided that MHz-pops would be used to determine a substitute individual bid amount should it be necessary to calculate a tribal land bidding-credit for a license won as part of a package.[62] In some cases, however, using a simple MHz-pops ratio to apportion a package bid to its component licenses might not reflect very well the relative values of the licenses in the package. For example, if a heavily encumbered license were packaged with an unencumbered license of the same bandwidth and in the same geographic area, the MHz-pops method would assign the same substitute price (half of the bid on the package) to each license, despite the possible effect on value of the encumbrance differential. An alternative method of calculating substitute prices would take into account information indicating the individual values of the licenses, including the minimum opening bid amounts (which may reflect differences in incumbency, for example) and all of the bids placed in the auction covering those licenses. The Commission has used a mathematical algorithm to calculate price estimates that takes these factors into account. These estimates of the prices of individual licenses covered in a single combinatorial bid are referred to as "current price estimates" ("CPEs").[63] The Commission developed a methodology for determining CPEs as part of the combinatorial bidding procedures established for Auction No. 51, as well as for Auction No. 31, an upcoming auction of licenses in the Upper 700 MHz bands for which the Commission previously announced plans to use package bidding.[64] CPEs were calculated after every round of Auction No. 51 as part of the mathematical

[61] *Id.* § 1.2111(e)(3).

[62] "Regional Narrowband PCS Spectrum Auction; 2 Qualified Bidders," *Public Notice*, 18 FCC Rcd 18,570, 18,577 (2003).

[63] The mathematical derivation of current price estimates is described in detail in the *Auction No. 51 Procedures Public Notice*, 18 FCC Rcd at 12,003-04, 12,029-34, and in the *Auction No. 31 Procedures Public Notice*, 17 FCC Rcd at 5178-81, 5193-99.

[64] "Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000; Procedures Implementing Package Bidding for Auction No. 31; Bidder Seminar Scheduled for July 24, 2000," *Public Notice*, 15 FCC Rcd 8809, 8813 (2000). Auction No. 31 has been postponed from its original planned start date, and a new start date has not yet been announced. "Auction of Licenses in the 747-762 and 777-792 MHz Bands (Auction No. 31) is Rescheduled," *Public Notice*, 17 FCC Rcd 14,546 (2002).

optimization process used to determine the winning bids and were also used in determining the minimum acceptable bid amounts for each subsequent round.[65] The same use of CPEs was also announced before the previously scheduled start of Auction No. 31.[66]

37. Although CPEs calculated after the final round of the auction are not needed to determine further minimum acceptable bids, final round CPEs ("final price estimates" or "FPEs") can be interpreted as indicators of the individual value that a license covered by a package bid contributes to the winning bid amount for the package. FPEs reflect all available information about the relative demand for the licenses, since they are calculated using a mathematical algorithm that takes into account all the bids placed in the auction. In addition, the sum of the FPEs for the component licenses of a package is mathematically constrained to equal the winning bid for the package.[67] Consequently, the ratios of these estimates to the package bid amount can be seen as indicators of the relative weights of the different licenses in the market value of the package. FPEs, therefore, may be useful in determining apportioned package bid amounts when an individual price is needed for a regulatory calculation.

38. Verizon, the sole commenter to address this issue, supports both aspects of our proposal, including affording the Commission the flexibility to use either what it refers to as a "proportionate" approach (i.e., MHz-pops) or an FPE approach to apportion bids among licenses in a package.[68] Verizon believes, however, that in most cases the market approach would yield a better approximation of "the real cost of subsequent default, a bidding credit or an unjust enrichment obligation."

39. Given this support and the absence of opposition, we adopt the proposal. Under this rule, the Commission will establish a methodology in advance of each auction with combinatorial bidding for determining APBs for licenses that are part a package and will use the APB in place of the individual bid amount on a license included in a package whenever the amount of an individual bid on that license is needed for any determination required by the Commission's rules or procedures, such as determining the amount of a bidding credit or of a withdrawal or default payment. Adoption of this rule renders unnecessary section 1.2104(g)(3)(i), the existing rule for calculating the deficiency portion of default payment obligations in connection with package bidding auctions. Accordingly, we will eliminate this provision. However, as discussed above, we will retain the substance of current section 1.2104(g)(3)(ii), which provides 25 percent as the size of the additional payment for defaults or disqualifications following a combinatorial bidding auction.

2. Among the Components of a License

40. In the *NPRM*, we proposed that, prior to auctions involving licenses which, due to a rule change, covered different geographic areas or bandwidths than did corresponding licenses made available at an earlier auction, the Commission specify, as necessary, a method for apportioning the bid on any-such "reconfigured license" among the license's component parts (i.e., portions of the license's service area or bandwidth, or both). Implicit in our rules for determining the amount of a withdrawal or default payment – determinations that involve a comparison between the withdrawing or defaulting bidder's bid and a subsequent bid – is the assumption that the subsequent bid will be for a license with the same geographic and spectral components as the original license. However, when there have been intervening rule changes involving the relevant spectrum, the second license may not be identical in geography and spectrum to the

[65] *See Auction No. 51 Procedures Public Notice*, 18 FCC Rcd at 12,003-04, 12,029-34.

[66] *Auction No. 31 Procedures Public Notice*, 17 FCC Rcd at 5178-81, 5193-99.

[67] *Auction No. 51 Procedures Public Notice*, 18 FCC Rcd at 12,003; *Auction No. 31 Procedures Public Notice*, 17 FCC Rcd at 5198.

[68] Verizon Comments at 3.

first. For example, both the geographic and spectral characteristics of what formerly were known as Multipoint Distribution Service ("MDS") and the Instructional Television Fixed Service ("ITFS") licenses in the 2495 – 2690 MHz band and now are known as Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") licenses were changed last year when, in order to provide greater flexibility and a more functional band plan for licensees, the Commission restructured the rules governing these licenses.[69] We can expect that, as radio technology continues to evolve, there will be other instances where our band plans are updated. Therefore, for purposes of calculating a withdrawal or default payment – or for any comparison of a bid for one license with a bid for a corresponding license in a subsequent auction – we need a procedure for apportioning the bid placed on the reconfigured license(s).

41. In discussing our proposal for apportioning individual bids, we noted that using a MHz-pops ratio would be suitable for such an apportionment, as the Commission has successfully employed the ratio to apportion small business bidding credit amounts in order to calculate unjust enrichment payments when the relevant license has been partitioned or disaggregated.[70] However, we proposed to retain the flexibility to select another method of apportionment in the event we identified a method we believed would better suit the particular licenses involved. Further, we proposed to use methods for package bid apportionment and individual license bid apportionment in concert when circumstances warranted. We received no comments on this issue.

42. We adopt our proposal with the following modification. Rather than specify a method for apportioning an individual bid among a license's component parts prior to auctions involving reconfigured licenses, the rule we adopt will allow the Commission to apportion an individual bid amount whenever such an apportionment is necessary under Commission rules or procedures, such as when determining the amount of a withdrawal or a default payment. We recognize that past bids on original licenses, not just future bids on reconfigured licenses, might need to be apportioned in order to compare bids on the original licenses to bids on one or more other reconfigured licenses, or portions thereof.[71] Accordingly, the Commission will use an "apportioned individual bid" ("AIB") whenever it is necessary to allocate the bid on a license among its subparts, such as when comparing bids on licenses, at least one of which has been reconfigured. Under our rule, the Commission will retain the discretion to use a MHz-pops ratio or any other suitable method for the apportionment. Should it be necessary to apportion the bid on a license included as part of a package, the Commission will use both package bid apportionment and individual license bid apportionment together.

E. Payment Rules for Broadcast Construction Permits

43. We proposed in the *NPRM* to adopt for broadcast auctions the final payment procedures in our Part 1 rules. Our Part 1 rules provide that, unless otherwise specified by public notice, auction

[69] Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, RM-10586, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14,165 (2004).

[70] *See* 47 C.F.R. §§ 1.2111(e)(3), 24.714(c)(1).

[71] For example, a past withdrawn bid on an MDS license might need to be apportioned in order to compare it to the bids on one or more corresponding BRS licenses covering a different geographic area or a different spectrum band from the original MDS license.

winners are required to pay the balance of their winning bids[72] in a lump sum within ten business days following the release of a public notice establishing the payment deadline.[73] In recent wireless spectrum auctions, the Commission has required each winning bidder to submit the balance of the net amount of its winning bid(s) within ten business days after the deadline for submitting down payments; whereas, the Commission's prior practice was to require final payment ten business days after release of a public notice announcing that license applications were ready to be granted.[74] This procedural change was necessary to limit the potential for post-auction bankruptcies to affect the payment obligations of winning bidders. Nevertheless, specific broadcast auction rules in Parts 73 and 74 provide that winning bidders of broadcast construction permits need not render their final payment until 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.[75] Recognizing the discrepancy between the broadcast auction payment procedure and that for all other auctions, the Commission, in the *Auction No. 37 Procedures Public Notice,* noted that it would consider future changes to the broadcast rules to conform the broadcast final payment procedures to the analogous Part 1 requirements.[76]

44. Verizon, which filed the only comment on this issue, opposes the proposal.[77] It recommends that the Commission instead conform its Part 1 final payment rule to the payment procedures for broadcast auctions or, alternatively, require only "a 50 percent down payment, rather than payment in full."[78] Verizon argues that the Part 1 final payment rule is disproportionately burdensome to smaller carriers.[79] Verizon also contends that the proposed rule change is unnecessary, because the Supreme Court's decision in *NextWave*,[80] which involved a licensee's failure to pay for a license that had already been awarded, does not apply to a winning bidder's failure to pay prior to license grant.[81]

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[72] The balance is the amount of the winning bid remaining to be paid after the down payment, which down payment must be paid ten businesses days after release of the public notice announcing the close of the auction, unless otherwise specified by public notice. 47 C.F.R. § 1.2107(b).

[73] *Id.* § 1.2109(a). The Commission adopted this procedure for establishing final payment deadlines in the Part 1 Third Report and Order. *See Part 1 Third Report and Order,* 13 FCC Rcd at 428-30 ¶¶ 92-96. Prior to that rule change, auction winners were required to pay the balance of their winning bids in a lump sum within five business days following the award of the license. 47 C.F.R. § 1.2109(a) (1996).

[74] *See, e.g.*, "Auction of Licenses in the Multichannel Video Distribution and Data Service Rescheduled for January 14, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures," *Public Notice*, 18 FCC Rcd 17,553, 17,588 (2003). The Commission has also provided for this payment procedure in Auctions No. 52, No. 55, No. 56, No. 57, No. 58 and No. 59.

[75] *See, e.g.*, 47 C.F.R. §§ 73.3571(h)(4)(ii); 73.3573(f)(5)(ii); 73.5006(d); 74.1233(d)(5)(ii). Broadcast service auctions include FM radio, AM radio, television, low power television (LPTV), and FM and television translator stations.

[76] *See* "Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures," *Public Notice*, 19 FCC Rcd 10,570, 10,605 (2004) ("*Auction No. 37 Procedures Public Notice*").

[77] Verizon Comments at 4-7.

[78] *Id.* at 7. It is unclear whether Verizon is suggesting that winning bidders pay 50 percent of their outstanding balances or, rather, an amount sufficient to bring their total deposits up to 50 percent of their winning bids.

[79] *Id.* at 6.

[80] *FCC v. Nextwave Personal Communications, Inc.*, 537 U.S. 293 (2003) ("*Nextwave*").

[81] Verizon Comments at 6-7.

45. We will adopt the proposal. As we explained in the *NPRM*, we expect (and our rules contemplate) that those entities that plan to participate in an auction will have their financing in place before the start of the auction.[82] The Commission's goal in this regard is to ensure that only serious, financially qualified applicants receive licenses and construction permits so that the provision of service to the public is expedited.[83] As we also noted in the *NPRM*, winning bidders, including small businesses, have been able to comply with the Commission's new final payment procedure without difficulty.[84] We therefore believe that, in broadcast auctions, winning bidders, regardless of size, should be able to comply with this change with similar ease. Further, we believe that both the Commission and the public benefit by having, to the extent possible, a consistent set of auction procedures across services.[85]

46. Moreover, we cannot be certain that Verizon's interpretation of *NextWave* would prevail should the issue be decided in the courts. In *NextWave*, the Supreme Court held that Section 525 of the Bankruptcy Code[86] prevented the Commission from canceling NextWave's licenses solely because of NextWave's failure to make full and timely installment payments of its auction debt pursuant to the Commission's installment payment plan. Although *NextWave* involved a default by a licensee on installment payments, the Supreme Court's construction of Section 525 of the Bankruptcy Code could be argued to apply not just to licensees' installment debt but also to any debt dischargeable in the bankruptcy case, including a license applicant's obligation to pay a winning bid. Under the Commission's auction rules, a winning bidder becomes bound to pay its full winning bid immediately upon the close of the auction, rather than at the time of the license grant.[87] Thus, the Commission is at risk for a bankruptcy filing as soon as the auction closes, and, under a broad reading of Section 525, the Commission could be forced to issue a license to a winning bidder in bankruptcy even though the winning bidder has not (and may not ever) pay its full winning bid. Accordingly, despite Verizon's argument, we believe that it is in the public interest to complete the auction process and award licenses as expeditiously as possible, including collecting the proceeds of each auction as soon as possible after the auction closes.

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[82] *See* 47 C.F.R. § 1.2105(a)(2)(v). *See also* Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22,071, 22,072 (1998). Consistent with our expectation that entities will have their financing in place before the start of the auction, the new rule will apply in all auctions where the start of bidding occurs after the rule's effective date, pursuant to publication in the Federal Register. However, the new rule will not apply with respect to auctions where the start of bidding occurs before the rule's effective date. In that case, the former rule regarding final payment will continue to apply.

[83] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2375 (1994) ("*Part 1 Second Report and Order*"); Mountain Solutions LTD, Inc., 12 FCC Rcd 5904, 5907-08 (1997), *aff'd*, 13 FCC Rcd 21,983 (1997), *review denied in part and dismissed in part*, Mountain Solutions LTD, Inc. v. F.C.C., 197 F.3d 512 (D.C. Cir. 1999) ("*Mountain Solutions*").

[84] The Commission will continue to make final determinations regarding an applicant's eligibility to hold a permit or license, including eligibility for any bidding credits, such as new entrant bidding credits, when it is ready to grant the permit or license. In the event that an applicant's eligibility changes between the final payment deadline and the date on which the Commission is ready to grant the permit or license, the applicant will be required to make any additional payment prior to the issuance of the permit or license. If an event occurs that results in the loss or diminishment of a bidding credit between the final payment deadline and grant of the permit or license, the applicant must promptly report such event.

[85] *See, e.g., Part 1 Third Report and Order*, 13 FCC Rcd at 376 (Consistent procedures across auctions "streamline our regulations and eliminate unnecessary rules . . . increas[ing] the efficiency of the competitive bidding process, and provid[ing] more specific guidance to auction participants.")

[86] 11 U.S.C. § 525.

[87] 47 C.F.R. § 1.2104(g)(2).

F. Consortium Exception for Designated Entities and Entrepreneurs

47. *We sought comment in the NPRM on several options for facilitating use of the* consortium exception to the designated entity and entrepreneur aggregation rule. Under the consortium exception, 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, when determining broadband PCS entrepreneur eligibility, the total assets[88]) of the consortium members are not aggregated.[89] In other words, so long as each member of a consortium individually meets the financial caps for small business bidding credits (or broadband PCS entrepreneur status), the consortium will be eligible for such credits (or for closed bidding in auctions of broadband PCS licenses), regardless of whether the gross revenues (or total assets) of all consortium members would, if aggregated, exceed the caps. The consortium exception, originally adopted on a service-by-service basis where capital costs of auction participation were expected to be high, is intended to enable small businesses or entrepreneurs to pool their resources to help them overcome this challenge to capital formation.[90]

48. The consortium exception has been seldom used, perhaps in part because of the lack of clear direction from the Commission as to how members of consortia that win licenses can be formally organized and how they can hold their licenses. When these structural questions are not resolved before licenses are awarded, contractual disputes may arise between members of consortia, particularly if any of the members file for bankruptcy protection. And if consortium members agree after the auction to divide among themselves the licenses they have won without first having applied for Commission approval, they may be held accountable for unauthorized assignments or transfers of control. Not only would such difficulties impede service to the public and consume Commission resources, they would prove expensive and time consuming for the small businesses involved.

49. We sought comment on three rule changes intended to minimize the likelihood of these problems. First, we asked whether we should adopt a requirement that each member of a consortium file an individual long-form application for its respective, mutually agreed-upon license(s), following an auction in which the consortium has won one or more licenses. Second, we sought comment on whether, in order for two or more consortium members to be licensed together for the same license(s), they should be required to form a legal business entity, such as a corporation, partnership, or limited liability company, after having disclosed this intention on their short-form and long-form applications. Third, we asked for comment on whether such new entities would have to meet our small business or entrepreneur financial limits and, if not, whether allowing these entities to exceed the limits would be consistent with our existing designated entity and broadband PCS entrepreneur rules, as well as our obligations under the Communications Act. We also encouraged commenters to express their views on how these approaches might work in the context of package bidding and to what extent adopting these proposals might encourage wider use of the consortium exception.

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[88] In the context of this *R&O*, "entrepreneur" refers to an entity eligible to hold certain broadband PCS C and F block licenses won in closed bidding. *See* 47 C.F.R. §§ 1.2110 and 24.709. Generally speaking, an applicant or licensee qualifies as an entrepreneur if it, together with its affiliates, persons or entities that hold interests in the applicant or licensee, and their affiliates, has combined total assets of less than $500 million and has had combined gross revenues of less than $125 million in each of the last two years. *Id.* § 24.709(a)(1).

[89] *Id.* § 1.2110(b)(3)(i).

[90] *See, e.g.*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7276-78 ¶¶ 81-85 (1994); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5591 ¶ 133, 5601 ¶ 158, 5610 ¶ 179 (1994).

50. In comments, TDS states that it does not oppose "possible changes in [the Commission's] auction procedures including the possible expanded use of its consortium bidding in package bidding situations." However, TDS warns that amending the consortium bidding rules "will not be a panacea to avoid the adverse consequences of package bidding for small bidders."[91] RTG, in reply comments, agrees with TDS' warning but expresses no opposition to the possible changes to the consortium exception set forth in the *NPRM*.[92]

51. We believe that if the consortium exception is to become a useful tool for smaller entities, while remaining faithful to the objectives and requirements of section 309(j) of the Communications Act, we should implement all of the changes we discussed in the *NPRM*. Accordingly, we adopt the following modifications to the consortium exception:

- We will require consortium members to file individual long-form applications for their respective, mutually agreed-upon license(s), following an auction in which the consortium has won one or more licenses.[93]
- In order for two or more consortium members to be licensed together for the same license(s) (or disaggregated or partitioned portions thereof), we will require them first to form a legal business entity, such as a corporation, partnership, or limited liability company.
- We will require any such entity to comply with the applicable small business or entrepreneur financial limits.[94]

52. We believe that these modifications will invest the consortium exception with greater transparency, thereby promoting clearer planning by smaller entities, while continuing to allow them to enhance their competitiveness with efficiencies of scale and strategy. Moreover, ensuring that licenses are granted only to consortium members that comprise legal business entities facilitates enforcement of the Communications Act and our policies and rules, particularly in the event of a disagreement among

[91] TDS Comments at 2.

[92] RTG Reply at 1.

[93] The dissolution of a consortium that applied to participate in an auction into its constituent members or groups of members for purposes of filing long-form applications will not constitute a "change in control" of the applicant for purposes of sections 1.927, 1.929, or 1.2105. *See* 47 C.F.R. §§ 1.927, 1.929, 1.2105. Because the Commission's application system requires that all long-form license applications for licenses won in an auction use the same FCC Registration Number ("FRN") as the auction applicant/winning bidder, the members filing separate long-form applications will continue to use the consortium's FRN on their long-form applications. However, within ten business days after release of the public notice announcing grant of a long-form application, that licensee must update its filings in the Commission's Universal Licensing System ("ULS") to substitute its individual FRN for that of the consortium. In addition, ULS accepts applications only for whole licenses won in an auction. Accordingly, if a consortium plans to partition or disaggregate a license among members after the auction, one member of the consortium will have to file the applicable long-form application and append the relevant partitioning or disaggregation agreement to the application. After the long-form application has been granted, members will have to file, pursuant to our existing rules, assignment applications to partition or disaggregate the license pursuant to the terms of the agreement attached to the original license application. *See id.* §§ 1.948(e)-(f), 1.2107(d).

[94] A newly formed legal entity comprising two or more consortium members that does not qualify for as large a size-based bidding credit as that claimed by the consortium on its short-form application will be awarded a bidding credit, if at all, based on the entity's eligibility for such credit at the long-form filing deadline. A license won by the consortium in broadband PCS closed bidding will be granted only to a legal entity whose gross revenues and total assets do not, at the long-form filing deadline, exceed the financial limits for broadband PCS closed bidding. *See id.* §§ 1.2110, 24.709.

consortium members. For this reason, we take this opportunity to remove any previous ambiguity in our rules by clarifying that the consortium exception (and, indeed, the consortium structure) is available only to short-form applicants seeking a size-based benefit for auction participation, and not to prospective lessees, assignees, or transferees.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Analysis

53. As required by the Regulatory Flexibility Act, 5 U.S.C. § 604, the Commission has prepared a Final Regulatory Flexibility Analysis, set forth below at Appendix C.

B. Paperwork Reduction Act Analysis

54. This *Report and Order* contains no new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104-13.

C. Congressional Review Act

55. The Commission will include a copy of this *Report and Order* in a report it will send to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

V. ORDERING CLAUSES

56. Accordingly, IT IS ORDERED that, pursuant to 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), this *Report and Order* is hereby ADOPTED, and sections 1.2103, 1.2104, 73.3571, 73.3573, 73.5003, 73.5006, 74.1233 of the Commission's rules, 47 C.F.R. sections 1.2103, 1.2104, 73.3571, 73.3573, 73.5003, 73.5006, 74.1233, are amended as set forth below in Appendix A, effective 60 days after publication in the Federal Register.

57. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

58. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. §§ 0.131(c) and 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein, including the authority to seek comment on and set forth mechanisms relating to the day-to-day conduct of specific auctions.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

Commenters

Comments

T-Mobile USA, Inc. ("T-Mobile")
Telephone and Data Systems, Inc. and United States Cellular Corporation ("TDS")
Verizon Wireless ("Verizon")

Reply Comments

Rural Telecommunications Group, Inc. ("RTG")

Notice of Ex Parte Presentations

Rural Telecommunications Group, Inc. ("RTG")
Wiley Rein & Fielding LLP ("Wiley Rein")

APPENDIX B

Final 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)) requiring the recovery of estimated relocation costs, 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 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 subject to withdrawal payments 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 first 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 winning bid at the close of an auction. If a 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. The Commission may specify a method for apportioning a bid among portions of the license (i.e., portions of the license's service area or bandwidth, or both) when necessary to compare a bid on the original license or portions thereof with a bid on a corresponding reconfigured license for purposes of the Commission's rules or procedures, such as to calculate a bid withdrawal or default payment obligation in connection with the bid.

4. Amend § 1.2107 by adding subparagraph (g) to read as follows:

§ 1.2107 Submission of down payment and filing of long-form applications.

* * * * *

(g) (1) (A) A consortium participating in competitive bidding pursuant to § 1.2110(b)(3)(i) that is a winning bidder may not apply as a consortium for licenses covered by the winning bids. Individual members of the consortium or new legal entities comprising individual consortium members may apply for the licenses covered by the winning bids of the consortium. An individual member of the consortium or a new legal entity comprising two or more individual consortium members applying for a license pursuant to this provision shall be the applicant for purposes of all related requirements and filings, such as filing FCC Form 602. However, the members filing separate long-form applications shall all use the consortium's FCC Registration Number ("FRN") on their long-form applications. An application by an individual consortium member or a new legal entity comprising two or more individual consortium members for a license covered by the winning bids of the consortium shall not constitute a major modification of the application or a change in control of the applicant for purposes of Commission rules governing the application.

(B) Within ten business days after release of the public notice announcing grant of a long-form application, that licensee must update its filings in the Commission's Universal Licensing System ("ULS") to substitute its individual FRN for that of the consortium.

(2) The continuing eligibility for size-based benefits, such as size-based bidding credits or set-aside

licenses, of a newly formed legal entity comprising two or more individual consortium members will be based on the size of such newly formed entity as of the filing of its long-form application.

(3) Members of a consortium intending to partition or disaggregate license(s) among individual members or new legal entities comprising two or more individual consortium members must select one member or one new legal entity comprising two or more individual consortium members to apply for the license(s). The applicant must include in its applications, as part of the explanation of terms and conditions provided pursuant to §1.2107(d), the agreement of the applicable parties to partition or disaggregate the relevant license(s). Upon grant of the long-form application for that license, the licensee must then apply to partition or disaggregate the license pursuant to those terms and conditions.

5. Amend § 1.2110 by revising paragraphs (b)(3), (f)(3)(ii)(B), and (f)(3)(ii)(C) to read as follows; adding paragraph (f)(3)(ii)(C)(v); and redesignating paragraphs (f)(3)(ii)(C)(v) through (f)(3)(ii)(C)(vii) as paragraphs (f)(3)(ii)(C)(vi) through (f)(3)(ii)(C)(viii), respectively:

§ 1.2110 Designated entities.

* * * * *

(b) Eligibility for small business and entrepreneur provisions.

* * * * *

(3) Exceptions.

(i) Consortium. Where an applicant to participate in bidding for Commission licenses or permits is a consortium either of entities eligible for size-based bidding credits an/or for closed bidding based on gross revenues and/or total assets, the gross revenues and/or total assets of each consortium member shall not be aggregated. Each consortium member must constitute a separate and distinct legal entity to qualify for this exception. Consortia that are winning bidders using this exception must comply with the requirements of § 1.2107(g) of this chapter as a condition of license grant.

* * * * *

(f) Bidding credits.

* * * * *

(2) Size of bidding credits. A winning bidder that qualifies as a small business may use the following bidding credits corresponding to its respective average gross revenues for the preceding 3 years:

* * * * *

(3) Bidding credit for serving qualifying tribal land.

* * * * *

(ii) Certification.

* * * * *

(B) In addition, within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and file a certification that it will comply with the construction requirements set forth in paragraph (f)(3)(vii) of this section and consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land.

(C) If the winning bidder fails to submit the required certifications within the 180-day period, the bidding credit will not be awarded, and the winning bidder must pay any outstanding balance on its winning bid amount.

* * * * *

(v) *Bidding credit limit in auctions subject to specified reserve price(s).* In 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) with reserve price(s) and in any auction with reserve price(s) in which the Commission specifies that this provision shall apply, the aggregate amount available to be awarded as bidding credits for serving qualifying tribal land with respect to all licenses

subject to a reserve price shall not exceed the amount by which winning bids for those licenses net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the applicable reserve price. If the total amount that might be awarded as tribal land bidding credits based on applications for all licenses subject to the reserve price exceeds the aggregate amount available to be awarded, the Commission will award eligible applicants a pro rata tribal land bidding credit. The Commission may determine at any time that the total amount that might be awarded as tribal land bidding credits is less than the aggregate amount available to be awarded and grant full tribal land bidding credits to relevant applicants, including any that previously received pro rata tribal land bidding credits. To determine the amount of an applicant's pro rata tribal land bidding credit, the Commission will multiply the full amount of the tribal land bidding credit for which the applicant would be eligible excepting this limitation ((f)(3)(v)) by a fraction, consisting of a numerator in the amount by which winning bids for licenses subject to the reserve price net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the reserve price and a denominator in the amount of the aggregate maximum tribal land bidding credits for which applicants for such licenses might have qualified excepting this limitation ((f)(3)(v)). When determining the aggregate maximum tribal land bidding credits for which applicants for such licenses might have qualified, the Commission shall assume that any applicant seeking a tribal land bidding credit on its long-form application will be eligible for the largest tribal land bidding credit possible for its bid for its license excepting this limitation ((f)(3)(v)). After all applications seeking a tribal land bidding credit with respect to licenses covered by a reserve price have been finally resolved, the Commission will recalculate the pro rata credit. For these purposes, final determination of a credit occurs only after any review or reconsideration of the award of such credit has been concluded and no opportunity remains for further review or reconsideration. To recalculate an applicant's pro rata tribal land bidding credit, the Commission will multiply the full amount of the tribal land bidding credit for which the applicant would be eligible excepting this limitation ((f)(3)(v)) by a fraction, consisting of a numerator in the amount by

which winning bids for licenses subject to the reserve price net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the reserve price and a denominator in the amount of the aggregate amount of tribal land bidding credits for which all applicants for such licenses would have qualified excepting this limitation ((f)(3)(v)).

(vi) *Application of credit.* A pending request for a bidding credit for serving qualifying tribal land has no effect on a bidder's obligations to make any auction payments, including down and final payments on winning bids, prior to award of the bidding credit by the Commission. Tribal land bidding credits will be calculated and awarded prior to license grant. If the Commission grants an applicant a pro rata tribal land bidding credit prior to license grant, as provided by paragraph (f)(3)(v) of this section, the Commission shall recalculate the applicant's pro rata tribal land bidding credit after all applications seeking tribal land biddings for licenses subject to the same reserve price have been finally resolved. If a recalculated tribal land bidding credit is larger than the previously awarded pro rata tribal land bidding credit, the Commission will award the difference.

(vii) *Post-construction certification.* Within fifteen (15) days of the third anniversary of the initial grant of its license, a recipient of a bidding credit under this section shall file a certification that the recipient has constructed and is operating a system capable of serving seventy-five (75) percent of the population of the qualifying tribal land for which the credit was awarded. The recipient must provide the total population of the tribal area covered by its license as well as the number of persons that it is serving in the tribal area.

(viii) *Performance penalties.* If a recipient of a bidding credit under this section fails to provide the post-construction certification required by paragraph (f)(3)(vii) of this section, then it shall repay the bidding credit amount in its entirety, plus interest. The interest will be based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted. Such payment shall be made within thirty (30) days of the third anniversary of the initial grant of its license. Failure to repay the bidding credit amount and interest within the required time period will result in automatic termination of the license without

specific Commission action. Repayment of bidding credit amounts pursuant to this provision shall not affect the calculation of amounts available to be awarded as tribal land bidding credits pursuant to (f)(3)(v) of this section.

PART 73 – RADIO BROADCAST SERVICES

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

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

2. 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.

3. 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.

4. 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.

5. 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.

6. 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 C

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act ("RFA"),[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated into the *Notice of Proposed Rule Making* ("*NPRM*") in WT Docket No. 05-211, which, in combination with a *Declaratory Ruling*, began this proceeding. The Commission sought written public comment in the *NPRM* on possible changes to its competitive bidding rules, as well as on the IRFA. The Commission received three comments, one reply comment, and two *ex parte* comments on the *NPRM*, none of which addressed the IRFA.[2] This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.

A. Need for, and Objectives of, the Report and Order

This *Report and Order* ("*R&O*") adopts modifications to existing Commission rules for the purposes of implementing the recently enacted Commercial Spectrum Enhancement Act ("CSEA").[3] 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 *R&O* also adopts a number of changes to the Commission's competitive bidding rules that are necessary, apart from CSEA, to enhance the effectiveness 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").[4] 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. Accordingly, the Commission has adopted a proposal, which received no comment, to add a requirement to its existing reserve price rule (section 1.2104(c))[5] such that, for any auction of eligible frequencies requiring the recovery of estimated relocation costs under CSEA, the Commission will establish a reserve price (or prices) 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.

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[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] Appendix A contains a list of full and abbreviated names of commenting parties.

[3] Commercial Spectrum Enhancement Act, Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004) (codified in various sections of Title 47 of the United States Code) ("CSEA").

[4] 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)).

[5] 47 C.F.R. § 1.2104(c).

Tribal land bidding credit rule for CSEA auctions. In an effort to encourage carriers to provide telecommunications services to tribal lands with low historical telephone service penetration rates, the Commission makes tribal land bidding credits available to auction winners that serve qualifying tribal lands.[6] 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 sought comment on three alternative methods of ensuring that it would 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. T-Mobile, the only commenter to address these alternatives, approved of two of them. The Commission has adopted one of these two alternatives, the "pro rata" option. Under this rule, the Commission will award tribal land bidding credits out of the amount by which net winning bids at the close of bidding exceed the reserve price(s) applicable to that auction. If this amount is insufficient to pay all of the tribal land bidding credits for which auction winners are eligible, then each eligible tribal land bidding credit applicant will receive a pro rata credit based on the credit the applicant would have received had the auction not been subject to a reserve price.

Tribal land bidding credit rule for non-CSEA auctions. The Commission sought comment in the *NPRM* on whether to extend the same or a similar approach as the one it selected for allocating tribal land bidding credits to auctions with a CSEA-mandated reserve price (or prices) to those non-CSEA auctions for which it established a reserve price or prices based on winning bids net of discounts. No commenter addressed this aspect of the issue. Believing that the pro rata approach the Commission had chosen for auctions with a CSEA-mandated reserve price would, in non-CSEA auctions, best allow both a speedy auction conclusion and an equitable allocation of available tribal land bidding credits among all qualified applicants, the Commission adopted a rule to extend, at Commission discretion, the pro rata approach to non-CSEA auctions with reserve prices.

Default payment rule clarification. Under section 1.2104(g), a winning 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."[7] The deficiency payment is equal to the payment required for a withdrawn 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

[6] *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).

[7] 47 C.F.R. § 1.2104(g).

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.[8]

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, if there is a subsequent withdrawn bid equal to or exceeding the defaulted bid, the Commission must wait until there is a subsequent winning bid before calculating the additional payment. To clarify the rule, the Commission proposed that when, in a subsequent auction, there was a higher withdrawn bid on a license that corresponded to a defaulted license, the additional default payment would be determined as 3 percent (or 25 percent) of the defaulting bidder's bid. The Commission also proposed a further clarification of the additional payment rule for certain situations in which no deficiency payment is owed. The existing rule leaves unclear 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. Having received no objections to these clarifications, the Commission adopted its proposals.

Interim withdrawal and additional default payment rules. When a license for which there has been a withdrawn 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 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 winning 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 deter improper withdrawals and defaults, both of which pose an ongoing threat to the integrity of the auctions process, the Commission proposed to set the upper limits on both the interim withdrawal payment and the additional default payment at 20 percent, with the specific percentage to be established by the Commission in advance of each auction. The two commenters that spoke to this issue, T-Mobile and Verizon, both endorsed the proposal. The Commission adopted the proposal, noting that the 3 to 20 percent range would allow it to use more than one percentage in an auction for either the interim withdrawal payment or the additional default payment, or both. The Commission did not alter the size of the 25 percent additional payment for defaults or disqualifications following combinatorial bidding auctions.

[8] In the *R&O* and in the Commission's 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. Under a rule superseded in relevant part by rules adopted in the *R&O*, the deficiency payment for a default or disqualification following a package bidding auction was, in most instances, to have been calculated using a different method from that used to calculate the deficiency payment for a default or disqualification following a non-package bidding auction. *See id.* § 1.2104(g)(3) (2005). However, no such calculations have ever been necessary.

Package bid and license apportionment. In combinatorial (package) bidding, bidders may 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, it may not be appropriate to compare bids on licenses before the reconfiguration to post-reconfiguation bids on corresponding licenses. 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. In some situations, such as when determining withdrawal or default payment obligations, bids in different auctions must be compared. Accordingly, the Commission proposed to specify a method for apportioning bids among the individual licenses composing a package and/or among a license's component parts in advance of each auction that (a) used a combinatorial bidding design, (b) included spectrum previously subject to a combinatorial auction, or (c) included licenses that had been reconfigured following an initial auction.

Verizon, the only commenter on this issue, fully supported the proposals, and the Commission adopted them with the following modification. Because any license, not just a reconfigured license, might at some point need to be apportioned in order to compare it to one or more other licenses or license components, the Commission decided that it would apportion a license among its component parts whenever it was necessary to compare bids on corresponding yet non-identical licenses.

Broadcast construction permit rules. The Commission's Part 1 competitive bidding rules provide that, unless otherwise specified by public notice, auction winners must 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 helps guard against defaults and bankruptcy filings that may 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 proposed to adopt for broadcast auctions the final payment procedures in its Part 1 competitive bidding rules.

Verizon, discounting the Commission's concerns about the potential for bankruptcy filings to interfere with payment obligations, opposed the proposal. Verizon recommended that the Commission instead conform its Part 1 final payment rule to the payment procedures for broadcast auctions or, alternatively, require only "a 50 percent down payment, rather than payment in full." Verizon argued that the Part 1 final payment rule is disproportionately burdensome to smaller carriers.[9] Disagreeing with Verizon, the Commission adopted the rule as proposed. With particular regard to the effect on smaller carriers, the Commission noted, as it had in the *NPRM*, that winning bidders, including small businesses, have been able to comply with the Commission's new final payment procedure without difficulty. Accordingly, the Commission believed that, in broadcast auctions, winning bidders, regardless of size, should be able to comply with this change with similar ease.

[9] Verizon Comments at 6.

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 sought comment on three possible policy options for improving the pre- and post-auction procedures governing the exception. These options included, first, requiring each member of a consortium to file an individual long-form application for its respective, mutually agreed-upon license(s); second, 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; and, third, not considering such a newly formed legal business entity a consortium for purposes of evaluating its eligibility for small business or entrepreneur status at the long-form application stage. There was no opposition to these options.[10] Believing that they will promote use of the consortium exception, the Commission adopted all three options. The Commission also clarified that the consortium exception, and, indeed, the consortium structure, is available only to short-form applicants seeking a size-based benefit for auction participation and not to prospective lessees, assignees, or transferees.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

No comments were filed in response to the IRFA; however, comments addressing small business concerns with regard to changes in the payment rules for broadcast auctions and changes in the consortium exception to the designated entity and entrepreneur aggregation rule were filed in response to the *NPRM.* Verizon opposed the proposal to conform the Part 73 and Part 74 payment rules applicable to broadcast construction permits won at auction to the final payment procedures in Part 1 of the Commission's rules. Verizon argued that the Part 1 final payment rule, which permits the Commission to require full license payment before being prepared to grant the licenses, is disproportionately burdensome to smaller carriers. Moreover, winning bidders, including small businesses, have been able to comply with the Part 1 final payment procedure without difficulty. The Commission explained that it was in the public interest to require final payments soon after the close of an auction in that such a rule allowed the Commission to limit the risk that bankruptcy filings might interfere with payment obligations and well as with the provision of service to the public.

With regard to modifying the consortium exception, TDS warned that such changes would not eliminate the adverse consequences of package bidding for small bidders, and RTG, in reply comments, agreed. Neither TDS nor RTG, however, opposed adoption of the rule changes.

[10] While TDS did not oppose the options, it cautioned the Commission that amending the consortium rules would not eliminate the adverse consequences of package bidding for small bidders. In reply comments, RTG agreed with TDS' warning but expressed no opposition to the possible changes to the consortium exception set forth in the *NPRM.*

C. Description and Estimate of the Number of Small Entities to Which the 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.[11] The RFA generally defines the term "small entity" as having the same meaning as the terms "small organization," "small business," and "small governmental jurisdiction."[12] The term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.[13] 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."[14] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[15] 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."[16] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[17] 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, the Commission estimates 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.[18]

The changes and additions to the Commission's Part 1 rules adopted in the *R&O* are of general applicability to all services, applying to all entities of any size that apply to participate in Commission auctions. The changes adopted in the *R&O* 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 FRFA 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, 1973 out of a total of 3303 qualified bidders either have claimed eligibility for small business bidding credits or have self-reported their status as small businesses as that term has been defined under rules adopted by the Commission for specific

[11] 5 U.S.C. § 603(b)(3).

[12] *Id.* § 601(6).

[13] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 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).

[14] *Id.* § 601(4).

[15] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[16] 5 U.S.C. § 601(5).

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

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

services.[19] In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

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

Modifying the tribal land bidding credit rule adopted in the *R&O* is the least burdensome of all methods contemplated for complying with the CSEA revenue requirement or implementing a non-CSEA reserve price while permitting both a speedy auction conclusion and an equitable allocation of available tribal land bidding credits among all qualified applicants.

The increase in the limits on the interim withdrawal payment and the additional default payment from 3 percent to 20 percent each will, to the extent that the respective payment has been set at more than 3 percent, increase the financial burden on entities of any size that withdraw a bid or default on a payment obligation. However, by refraining from withdrawing bids and defaulting on payment obligations, entities will be able to avoid entirely 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. License winners of all sizes in all recent non-broadcast auctions have, however, been able to comply with the Part 1 procedure without difficulty.

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 will be small businesses or broadband PCS entrepreneurs. However, adopting these requirements clarifies parties' obligations without necessarily increasing them and is expected to increase use of the consortium exception, thus increasing the availability of small business bidding credits and entrepreneur eligibility.

None of the other rules adopted in the *R&O* will 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 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.[20] The

[19] In auctions for licenses for certain services, including auctions of broadcast construction permits, size-based bidding credits have not been available.

[20] *See* 5 U.S.C. § 603.

Commission has considered the economic impact on small entities of the rule changes adopted in the *R&O* and has taken steps to minimize the burdens on small entities.

The Commission sought comment on several options for modifying its tribal land bidding credit rule in order to determine which of the options would best ensure that the Commission would 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. The Commission selected the pro rata option, described above, as the best method of equitably apportioning tribal land bidding credits among the largest number of qualified applicants, while still allowing a speedy determination of whether the CSEA reserve price had been met in auctions of eligible frequencies.

Adoption of the increased limits for interim withdrawal payments and additional default payments is expected to benefit small entities more than it is expected to burden them. For example, the rule change providing the Commission with the option of increasing the size of the interim withdrawal payment is intended to discourage strategic withdrawals. Such bid withdrawals can have a significant adverse effect on the competitiveness of small entities in the auctions process. Moreover, to the extent that the increase in the additional default payment encourages bidders to realistically assess in advance their ability to pay for their bids, a larger payment requirement will help deter bidders from placing bids they cannot afford.

The Commission believes that adopting the modifications to its payment rules for broadcast construction permits to conform to them to the rules for non-broadcast auctions will provide consistency throughout its competitive bidding rules and promote 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 is 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. As noted above, the Commission has observed 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 will be able to comply with this change with similar ease.

The Commission has adopted modifications and clarifications to the consortium exception to the small business and entrepreneur aggregation rule with the goal of promoting wider use of the exception and thus of increasing the competitive bidding opportunities available to small entities facing capital formation constraints.

F. Report to Congress

The Commission will send a copy of the *R&O*, including this FRFA, in a report to be sent to Congress pursuant to the SBREFA.[21] In addition, the Commission will send a copy of the *R&O*, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *R&O* and the FRFA (or summaries thereof) will also be published in the Federal Register.[22]

[21] *See id.* § 801(a)(1)(A).

[22] *See id.* § 604(b).