PUBLIC NOTICE

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AUCTION OF FM BROADCAST CONSTRUCTION PERMITS SCHEDULED FOR MARCH 7, 2007

COMMENT SOUGHT ON COMPETITIVE BIDDING PROCEDURES FOR AUCTION No. 70

AU Docket No. 06-170

Comments Due: October 5, 2006 **Reply Comments Due: October 13, 2006**

Report No. AUC-06-70-A (Auction No. 70)

By this Public Notice, the Wireless Telecommunications Bureau ("WTB") and the Media Bureau ("MB") (collectively referred to as the "Bureaus") announce the auction of certain FM broadcast construction permits (Auction No. 70). This auction is scheduled to commence on March 7, 2007.

I. CONSTRUCTION PERMITS TO BE OFFERED IN AUCTION NO. 70

As discussed in greater detail herein, Auction No. 70 will offer 124 construction permits in the FM broadcast service as listed in Attachment A.

Attachment A lists vacant FM allotments, reflecting FM channels assigned to the Table of FM Allotments, 47 C.F.R. § 73.202(b), pursuant to the Commission's established rulemaking procedures, designated for use in the indicated community. Pursuant to the policies established in the *Broadcast First Report and Order*, applicants may apply for any vacant FM allotment, as specified in Attachment A.[1] Applications specifying the same FM allotment will be considered mutually exclusive and, thus, the construction permit for the FM allotment will be awarded by competitive bidding procedures.[2] The reference coordinates for each vacant FM allotment are also listed in Attachment A.[3]

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[1] *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order* in MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-264, 13 FCC Rcd 15920, 15961, 15974-15975 (1998) ("*Broadcast First Report and Order*"), *on recon., Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999), *on further recon., Memorandum Opinion and Order*, 14 FCC Rcd 14521 (1999).

[2] When two or more short-form applications (FCC Form 175) are accepted for filing within a group of mutually exclusive permits (an "MX Group"), mutual exclusivity exists for auction purposes. *Broadcast First Report and Order*, 13 FCC Rcd at 15978-80 ¶¶ 149-154. *See also* Implementation of Section 309(j) of the Communications Act

II. BUREAUS SEEK COMMENT ON AUCTION PROCEDURES

Section 309(j)(3) of the Communications Act of 1934, as amended, requires the Commission to "ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed . . . before issuance of bidding rules, to permit notice and comment on proposed auction procedures . . . ."[4] Consistent with the provisions of Section 309(j)(3) and to ensure that potential bidders have adequate time to familiarize themselves with the specific rules that will govern the day-to-day conduct of an auction, the Commission directed the Bureaus, under existing delegated authority, to seek comment on a variety of auction-specific procedures prior to the start of each auction.[5] We therefore seek comment on the following issues relating to Auction No. 70.

A. Auction Structure

1. Simultaneous Multiple Round Auction Design

We propose to auction all construction permits included in Auction No. 70 in a simultaneous multiple-round auction. As described further below, this type of auction offers every construction permit for bid at the same time and consists of successive bidding rounds in which eligible bidders may place bids on individual construction permits. A bidder may bid on, and potentially win, any number of construction permits. Typically, bidding remains open on all construction permits until bidding stops on every construction permit, unless a modified stopping rule is invoked. We seek comment on this proposal.[6]

– Competitive Bidding, PP Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 2348, 2376, ¶ 165 (1994) (*"Second Report and Order"*). Once mutual exclusivity exists for auction purposes, even if only one applicant within an MX Group submits an upfront payment, that applicant is required to submit a bid in order to obtain the construction permit. Any applicant that submits a short-form application that is accepted, but fails to timely submit an upfront payment, will retain its place in the MX Group but, having purchased no bidding eligibility, will not be eligible to bid.

[3] With regard to the FM service, in the *Broadcast First Report and Order*, the Commission gave applicants the opportunity to submit a set of preferred site coordinates as an alternative to the reference coordinates for the vacant FM allotment upon which they intend to bid. Detailed instructions for specifying preferred site coordinates will be given in a future Public Notice announcing the procedures for Auction No. 70, which will provide guidelines for completing FCC Form 175 and exhibits. *See Broadcast First Report and Order*, 13 FCC Rcd at 15974 and n.153.

[4] 47 U.S.C. § 309(j)(3)(E)(i).

[5] *See* Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 448 ¶¶ 124-25 (1997) ("*Part 1 Third Report and Order*") (directing the Bureaus to seek comment on specific mechanisms related to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension or cancellation). *See also Broadcast First Report and Order*, 13 FCC Rcd at 15967-15968 (consistent with the Part 1 rules, the Commission delegated authority to the Mass Media Bureau [now Media Bureau] to seek comment on and establish an appropriate auction design methodology prior to the start of each broadcast auction).

[6] *See Second Report and Order*, 9 FCC Rcd at 2378-79 ¶¶ 171-176 for a general discussion of competitive bidding design.

2. Round Structure

The Commission will conduct Auction No. 70 over the Internet. Alternatively, telephonic bidding will also be available via the Auction Bidder Line. The toll-free telephone number for telephonic bidding will be provided to qualified bidders.

The initial bidding schedule will be announced in a public notice to be released at least one week before the start of the auction. The simultaneous multiple-round format will consist of sequential bidding rounds, each followed by the release of round results. Details on viewing round results, including the location and format of downloadable round results files, will be included in the same public notice.

The Bureaus have the discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. The Bureaus may increase or decrease the amount of time for the bidding rounds and review periods, or the number of rounds per day, depending upon the bidding activity level and other factors. We seek comment on this proposal.

3. Stopping Rule

The Bureaus have discretion "to establish stopping rules before or during multiple round auctions in order to terminate the auction within a reasonable time."[7] For Auction No. 70, the Bureaus propose to employ a simultaneous stopping rule approach. A simultaneous stopping rule means that all construction permits remain available for bidding until bidding closes simultaneously on all construction permits. More specifically, bidding will close simultaneously on all construction permits after the first round in which no bidder submits any new bids, applies a proactive waiver, or, if applicable, withdraws any provisionally winning bids.[8] Thus, unless circumstances dictate otherwise, bidding will remain open on all construction permits until bidding stops on every construction permit.

The Bureaus propose to retain the discretion to exercise any of the following options during Auction No. 70:

1. Use a modified version of the simultaneous stopping rule. The modified stopping rule would close the auction for all construction permits after the first round in which no bidder applies a waiver or submits any new bids on any construction permit for which it is not the provisionally winning bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a construction permit for which it is the provisionally winning bidder would not keep the auction open under this modified stopping rule.

2. Keep the auction open even if no bidder submits any new bids or applies a waiver. In this event, the effect will be the same as if a bidder had applied a waiver. The activity rule, therefore, will apply as usual and a bidder with insufficient activity will either lose bidding eligibility or use a remaining activity rule waiver.

3. Declare that the auction will end after a specified number of additional rounds ("special stopping rule"). If the Bureaus invoke this special stopping rule, it will accept bids in the specified final round(s) and the auction will close.

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[7] *See* 47 C.F.R. § 1.2104(e).

[8] Provisionally winning bids are bids that would become final winning bids if the auction were to close in that given round. *See* Section II.B.6. "Provisionally Winning Bids," below.

The Bureaus propose to exercise these options only in certain circumstances, for example, where the auction is proceeding very slowly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time. Before exercising these options, the Bureaus are likely to attempt to increase the pace of the auction by, for example, increasing the number of bidding rounds per day, and/or changing the minimum acceptable bids. We seek comment on these proposals.

4. Information Relating to Auction Delay, Suspension, or Cancellation

For Auction No. 70, we propose that, by public notice or by announcement during the auction, the Bureaus may delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, evidence of an auction security breach, unlawful bidding activity, administrative or weather necessity, or for any other reason that affects the fair and efficient conduct of competitive bidding.[9] In such cases, the Bureaus, in their sole discretion, may elect to resume the auction starting from the beginning of the current round, resume the auction starting from some previous round, or cancel the auction in its entirety. Network interruption may cause the Bureaus to delay or suspend the auction. We emphasize that exercise of this authority is solely within the discretion of the Bureaus, and its use is not intended to be a substitute for situations in which bidders may wish to apply their activity rule waivers. We seek comment on this proposal.

B. Bidding Procedures

1. Upfront Payments and Bidding Eligibility

The Bureaus have delegated authority and discretion to determine an appropriate upfront payment for each FM construction permit being auctioned, taking into account such factors as the efficiency of the auction process and the potential value of similar spectrum.[10] As described further below, the upfront payment is a refundable deposit made by each bidder to establish eligibility to bid on FM construction permits. Upfront payments related to the specific spectrum subject to auction protect against frivolous or insincere bidding and provide the Commission with a source of funds from which to collect payments owed at the close of the auction.[11] With these guidelines in mind, we propose the schedule of upfront payments for each construction permit as set forth in Attachment A to this Public Notice. We seek comment on this proposal.

We further propose that the amount of the upfront payment submitted by a bidder will determine the maximum number of bidding units on which a bidder may place bids. This limit is a bidder's initial bidding eligibility. Each FM construction permit is assigned a specific number of bidding units equal to the upfront payment listed in Attachment A, on a bidding unit per dollar basis. Bidding units for a given construction permit do not change as prices rise during the auction. A bidder's upfront payment is not attributed to specific construction permits. Rather, a bidder may place bids on any combination of construction permits that it selected in its Form 175 application, as long as the total number of bidding units associated with those construction permits does not exceed the bidder's current eligibility. In order to bid on a construction permit, qualified bidders must have an eligibility level that meets or exceeds the number of bidding units assigned to that construction permit. Eligibility cannot be increased during the auction; it can only remain the same or decrease. Thus, in calculating its upfront payment amount, an applicant must determine the **maximum** number of bidding units it may wish to bid on (or hold provisionally winning bids on) in any single round, and submit an upfront payment amount covering that total number of bidding units. We seek comment on this proposal.

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[9] 47 C.F.R. § 1.2104(i).

[10] *See Broadcast First Report and Order*, 13 FCC Rcd at 15971 ¶ 134.

[11] *Second Report and Order*, 9 FCC Rcd at 2378-79.

2. Activity Rule

In order to ensure that an auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. A bidder's activity in a round will be the sum of the bidding units associated with any construction permit upon which it places bids during the current round and the bidding units associated with any construction permits for which it holds provisionally winning bids. Bidders are required to be active on a specific percentage of their current bidding eligibility during each round of the auction. Failure to maintain the requisite activity level will result in the use of an activity rule waiver, if any remain, or a reduction in the bidder's eligibility, possibly curtailing or eliminating the bidder's ability to place bids in the auction.[12]

We propose to divide the auction into two stages, each characterized by a different activity requirement. The auction will start in Stage One. We propose that the auction generally will advance from Stage One to Stage Two when the auction activity level, as measured by the percentage of bidding units receiving new provisionally winning bids, is approximately twenty percent or below for three consecutive rounds of bidding. However, we further propose that the Bureaus retain the discretion to change stages unilaterally by announcement during the auction. In exercising this discretion, the Bureaus will consider a variety of measures of bidder activity, including, but not limited to, the auction activity level, the percentage of construction permits (as measured in bidding units) on which there are new bids,[13] and the number of new bids.

For Auction No. 70, we propose the following activity requirements:

Stage One: In each round of the first stage of the auction, a bidder desiring to maintain its current bidding eligibility is required to be active on construction permits representing at least 75 percent of its current bidding eligibility. Failure to maintain the requisite activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). During Stage One, a bidder's reduced eligibility for the next round will be calculated by multiplying the bidder's current round activity by four-thirds (4/3).

Stage Two: In each round of the second stage, a bidder desiring to maintain its current bidding eligibility is required to be active on 95 percent of its current bidding eligibility. Failure to maintain the requisite activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). During Stage Two, a bidder's reduced eligibility for the next round will be calculated by multiplying the bidder's current round activity by twenty-nineteenths (20/19).

We seek comment on this proposal. Commenters that believe this activity rule should be modified should explain their reasoning and comment on the desirability of an alternative approach. We also invite comment on, in the alternative, conducting the auction with a single stage that would use an activity requirement of 100 percent. Commenters are advised to support their claims with analyses and suggested alternative activity rules.

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[12] *See* Section II.B.3. "Activity Rule Waivers and Reducing Eligibility," below.

[13] For example, when monitoring activity for determining when to change stages, we may consider the percentage of bidding units of the construction permits receiving new provisionally winning bids, excluding any FCC-held construction permits.

3. Activity Rule Waivers and Reducing Eligibility

Use of an activity rule waiver preserves the bidder's eligibility despite the bidder's activity in the current round being below the required minimum level. An activity rule waiver applies to an entire round of bidding and not to a particular construction permit. Activity rule waivers can be either proactive or automatic and are principally a mechanism for auction participants to avoid the loss of bidding eligibility in the event that exigent circumstances prevent them from placing a bid in a particular round.

The Commission's Integrated Spectrum Auction System ("ISAS" or "FCC Auction System") assumes that a bidder that does not meet the activity requirement would prefer to apply an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver at the end of any bidding round where a bidder's activity level is below the minimum required unless: (1) the bidder has no activity rule waivers available; or (2) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the minimum requirement. If a bidder has no waivers remaining and does not satisfy the required activity level, its eligibility will be permanently reduced, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction.

A bidder with insufficient activity may wish to reduce its bidding eligibility rather than use an activity rule waiver. If so, the bidder must affirmatively override the automatic waiver mechanism during the bidding round by using the "reduce eligibility" function in the FCC Auction System. In this case, the bidder's eligibility is permanently reduced to bring the bidder into compliance with the activity rules as described above. Reducing eligibility is an irreversible action. Once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility, even if the round has not yet closed.

A bidder may apply an activity rule waiver proactively as a means to keep the auction open without placing a bid. If a bidder proactively applies an activity rule waiver (using the "apply waiver" function in the FCC Auction System) during a bidding round in which no bids or withdrawals (if permitted) are submitted, the auction will remain open and the bidder's eligibility will be preserved. An automatic waiver applied by the FCC Auction System in a round in which there are no new bids or withdrawals (if permitted) will not keep the auction open. A bidder cannot submit a proactive waiver after submitting a bid in a round, and submitting a proactive waiver will preclude a bidder from placing any bids in that round. Applying a waiver is irreversible; once a proactive waiver is submitted, that waiver cannot be unsubmitted, even if the round has not yet closed.

We propose that each bidder in Auction No. 70 be provided with three activity rule waivers that may be used at the bidder's discretion during the course of the auction as set forth above. We seek comment on this proposal.

4. Reserve Price or Minimum Opening Bid

Section 309(j) calls upon the Commission to prescribe methods for establishing a reasonable reserve price or a minimum opening bid amount when FCC licenses or construction permits are subject to auction, unless the Commission determines that a reserve price or minimum opening bid amount is not in the public interest.[14] Consistent with this mandate, the Commission has directed the Bureaus to seek comment on the use of a minimum opening bid amount and/or reserve price prior to the start of each auction of broadcast construction permits.[15]

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[14] 47 U.S.C. § 309(j) (as amended by the Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (1997), Section 3002(a)). The Commission's authority to establish a reserve price or minimum opening bid is set forth in 47 C.F.R. §§ 1.2104(c) and (d).

[15] *See Broadcast First Report and* Order, 13 FCC Rcd at 15971 ¶ 134; *Part 1 Third Report and Order*, 13 FCC Rcd at 454-55 ¶ 141.

Normally, a reserve price is an absolute minimum price below which an item will not be sold in a given auction. Reserve prices can be either published or unpublished. A minimum opening bid amount, on the other hand, is the minimum bid price set at the beginning of the auction below which no bids are accepted. It is generally used to accelerate the competitive bidding process. The auctioneer has the discretion to lower minimum opening bid amounts during the course of the auction. It is also possible for the minimum opening bid amount and the reserve price to be the same amount.

In light of Section 309(j)'s requirements, the Bureaus propose to establish minimum opening bid amounts for Auction No. 70. The Bureaus believe a minimum opening bid amount, which has been used in other auctions, is an effective bidding tool for accelerating the competitive bidding process.[16] The Bureaus do not propose a separate reserve price for the construction permits to be made available in Auction No. 70.

For Auction No. 70, the proposed minimum opening bids were determined by taking into account various factors, including the type of service and class of facility offered, market size, population covered by the proposed FM broadcast facility, and recent broadcast transaction data. The specific minimum opening bid for each construction permit available in Auction No. 70 is set forth in Attachment A of this Public Notice. We seek comment on this proposal.

If commenters believe that these minimum opening bid amounts will result in unsold construction permits, or are not reasonable amounts, they should explain why this is so, and comment on the desirability of an alternative approach. Commenters are advised to support their claims with valuation analyses and suggested reserve prices or minimum opening bid amount levels or formulas. In establishing the minimum opening bid amounts, we particularly seek comment on such factors as the potential value of the spectrum being auctioned including the type of service and class of facility offered, market size, population covered by the proposed FM broadcast facility and other relevant factors that could reasonably have an impact on valuation of the broadcast spectrum. We also seek comment on whether, consistent with Section 309(j), the public interest would be served by having no minimum opening bid amount or reserve price.

5. Bid Amounts

We propose that, in each round, eligible bidders be able to place bids on a given construction permit in any of nine different amounts.[17] Under this proposal, the FCC Auction System interface will list the nine acceptable bid amounts for each construction permit.[18]

The first of the nine acceptable bid amounts is called the minimum acceptable bid amount. The minimum acceptable bid amount for a construction permit will be equal to its minimum opening bid amount until there is a provisionally winning bid for the construction permit. After there is a provisionally winning bid for a construction permit, the minimum acceptable bid amount will be calculated by multiplying the

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[16] *See, e.g.*, "Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005, Auction No. 62," *Public Notice*, 20 FCC Rcd 10492 (2005); "Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004, Auction No. 37," *Public Notice*, 19 FCC Rcd 10570 (2004); "Closed Broadcast Auction – Notice and Filing Requirements for Auction of AM, FM, TV, LPTV and FM and TV Translator Construction Permits – Minimum Opening Bids and Other Procedural Issues, Auction No. 25," *Public Notice*, 14 FCC Rcd 10632 (1999).

[17] Bidders must have sufficient eligibility to place a bid on the particular construction permit. *See* Section II.B.1. "Upfront Payments and Bidding Eligibility," above.

[18] In the event of duplicate bid amounts due to rounding, the FCC Auction System will omit the duplicates and will list fewer than nine acceptable bid amounts for the construction permit.

provisionally winning bid amount times one plus the minimum acceptable bid percentage. If, for example, the minimum acceptable bid percentage is 10 percent, the minimum acceptable bid amount will equal (provisionally winning bid amount) * (1.10), rounded.[19]

The eight additional bid amounts are calculated using the minimum acceptable bid amount and a bid increment percentage, which need not be the same as the percentage used to calculate the minimum acceptable bid amount. The first additional acceptable bid amount equals the minimum acceptable bid amount times one plus the bid increment percentage, rounded. If, for example, the bid increment percentage is 10 percent, the calculation is (minimum acceptable bid amount) * (1 + 0.10), rounded, or (minimum acceptable bid amount) * 1.10, rounded; the second additional acceptable bid amount equals the minimum acceptable bid amount times one plus two times the bid increment percentage, rounded, or (minimum acceptable bid amount) * 1.20, rounded; the third additional acceptable bid amount equals the minimum acceptable bid amount times one plus three times the bid increment percentage, rounded, or (minimum acceptable bid amount) * 1.30, rounded; etc. We will round the result using our standard rounding procedures.[20]

For Auction No. 70, the Bureaus propose to use a minimum acceptable bid percentage of 10 percent. This means that the minimum acceptable bid amount for a construction permit will be approximately 10 percent greater than the provisionally winning bid amount for the construction permit. The Bureaus also propose to use a bid increment percentage of 10 percent to calculate the eight additional acceptable bid amounts.

The Bureaus retain the discretion to change the minimum acceptable bid amounts, the minimum acceptable bid percentage, and the bid increment percentage if they determine that circumstances so dictate. The Bureaus will do so by announcement in the FCC Auction System during the auction. We seek comment on these proposals.

6. Provisionally Winning Bids

At the end of a bidding round, a provisionally winning bid amount for each construction permit will be determined based on the highest bid amount received for the construction permit. Provisionally winning bids are bids that would become final winning bids if the auction were to close in that given round. In the event of identical high bid amounts being submitted on a construction permit in a given round (*i.e.*, tied bids), we will use a random number generator to select a single provisionally winning bid from among the tied bids. (Each bid is assigned a random number, and the tied bid with the highest random number wins the tiebreaker.) The remaining bidders, as well as the provisionally winning bidder, can submit higher bids in subsequent rounds. However, if the auction were to end with no other bids being placed, the winning bidder would be the one that placed the selected provisionally winning bid. If any bids are received on the construction permit in a subsequent round, the provisionally winning bid again will be determined by the highest bid amount received for the construction permit.

A provisionally winning bid will remain the provisionally winning bid until there is a higher bid on the same construction permit at the close of a subsequent round. Bidders are reminded that provisionally winning bids count toward activity for purposes of the activity rule.[21]

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[19] Results are rounded as follows under our standard rounding procedures: results above $10,000 are rounded to the nearest $1,000; results below $10,000 but above $1,000 are rounded to the nearest $100; and results below $1,000 are rounded to the nearest $10.

[20] *Id.*

[21] *See* Section II.B.2. "Activity Rule," above.

7. Bid Removal and Bid Withdrawal

For Auction No. 70, we propose the following bid removal procedures. Before the close of a bidding round, a bidder has the option of removing any bid placed in that round. By removing selected bids in the FCC Auction System, a bidder may effectively "unsubmit" any bid placed within that round. In contrast to the bid withdrawal provisions described below, a bidder removing a bid placed in the same round is not subject to a withdrawal payment. Once a round closes, a bidder may no longer remove a bid.

We also seek comment on bid withdrawal procedures to be used for Auction No. 70. Where permitted, bid withdrawals provide a bidder with the option of withdrawing bids placed in prior rounds that have become provisionally winning bids. A bidder that withdraws any of its provisionally winning bids is subject to the bid withdrawal payment provisions of the Commission rules.[22]

In the *Part 1 Third Report and Order*, the Commission explained that allowing bid withdrawals facilitates efficient aggregation of licenses and the pursuit of backup strategies as information becomes available during the course of an auction.[23] The Commission noted, however, that in some instances bidders may seek to withdraw bids for improper reasons. The Bureaus, therefore, have discretion in managing the auction to limit the number of withdrawals to prevent any bidding abuses. The Commission stated that the Bureau should exercise its discretion, consider limiting the number of rounds in which bidders may withdraw bids, and prevent bidders from bidding on a particular market if the Bureau finds that a bidder is abusing the Commission's bid withdrawal procedures.[24]

Applying this reasoning, for Auction No. 70, we propose to prohibit bidders from withdrawing any bids after the round in which bids were placed has closed. Our proposal is made in recognition of the site-specific nature and wide geographic dispersion of the permits available in this auction, which suggests that FM broadcast interests may have fewer incentives to aggregate permits through the auction process (as compared with bidders in many auctions of wireless licenses). We also remain mindful that withdrawals, particularly those made in late stages of an auction, could result in delays in licensing new FM stations and attendant delays in the offering of new broadcast service to the public.

As an alternative, we seek comment on whether to permit each bidder to withdraw provisionally winning bids in no more than one round during the course of the auction. To permit a bidder to withdraw bids in more than one round may encourage insincere bidding or the use of withdrawals for anti-competitive purposes. The round in which a withdrawal may be used would be at the bidder's discretion; bid withdrawal otherwise must be in accordance with the Commission's rules.[25] Should this approach be adopted, there would no limit on the number of provisionally winning bids that may be withdrawn in the round in which a withdrawal is used. Any withdrawal would remain subject to the bid withdrawal payment provisions specified in the Commission's rules.

If permitted, a bidder would have the option to withdraw its provisionally winning bids using the "withdraw bids" function in the FCC Auction System. A bidder that withdraws its provisionally winning bid(s) would be subject to the bid withdrawal payment provisions of the Commission rules.[26]

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[22] 47 C.F.R. §§ 1.2104(g), 1.2109.

[23] *Part 1 Third Report and Order*, 13 FCC Rcd at 459-60 ¶ 150.

[24] *Id.*

[25] *See* 47 C.F.R. § 1.2104(g).

[26] 47 C.F.R. §§ 1.2104(g), 1.2109.

C. Due Diligence

Potential bidders are solely responsible for investigating and evaluating all technical and market place factors that may have a bearing on the value of the broadcast facilities in this auction. **The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC permittee in the broadcast service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular service, technology, or product, nor does an FCC construction permit or license constitute a guarantee of business success.** Applicants should perform their individual due diligence before proceeding as they would with any new business venture. In particular, potential bidders are strongly encouraged to review all underlying Commission orders, such as the specific *Report and Order* amending the FM Table of Allotments and allotting the FM channel(s) on which they plan to bid.[27] *Reports and Orders* adopted in FM allotment rulemaking proceedings often include anomalies such as site restrictions or expense reimbursement requirements.[28] Additionally, potential bidders should perform technical analyses sufficient to assure them that, should they prevail in competitive bidding for a given FM construction permit, they will be able to build and operate facilities that will fully comply with the Commission's technical and legal requirements. **Applicants are strongly encouraged to inspect any prospective transmitter sites located in, or near, the service area for which they plan to bid, and also to familiarize themselves with the Commission's rules regarding the National Environmental Policy Act.**[29]

Potential bidders are strongly encouraged to conduct their own research prior to Auction No. 70 in order to determine the existence of pending proceedings, including pending rulemaking proceedings that might affect their decisions regarding participation in the auction. Participants in Auction No. 70 are strongly encouraged to continue such research during the auction.

D. Post-Auction Procedures

1. Establishing the Interim Withdrawal Payment Percentage

As noted above, the Bureaus propose not to permit bids to be withdrawn in Auction No. 70. However, in the event that Bureaus choose to permit bidders to withdraw bids in Auction No. 70, we seek comment on the appropriate percentage of a withdrawn bid that should be assessed as an interim withdrawal payment, which is an amount that is assessed in the event that a final withdrawal payment cannot be determined at the close of the auction. In general, the Commission's 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).[30] However, if a permit 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 permit 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, which will

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[27] *See* 47 C.F.R. § 73.202.

[28] *See, e.g., Charlotte Amalie, Frederiksted, and Christiansted, U.S. Virgin Islands*, 19 FCC Rcd 30 (MB 2004); *Cheyenne, Wyoming and Gering, Nebraska*, 15 FCC Rcd 7528 (MMB 2000); *Circleville, Ohio*, 9 FCC 2d 159 (1967).

[29] 47 C.F.R. Chapter 1, Part 1, Subpart I.

[30] 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.*

be applied toward any final bid withdrawal payment that is ultimately assessed.[31] The Commission's recently adopted rules provide that in advance of the auction, the Commission shall establish the percentage of the withdrawn bid to be assessed as an interim bid withdrawal payment between three percent and twenty percent.[32]

When it adopted the new rule, the Commission indicated that the level of the interim withdrawal payment in a particular auction will be based on the nature of the service and the inventory of the authorizations being offered.[33] The Commission noted that it may impose a higher interim withdrawal payment percentage to deter the anti-competitive use of withdrawals when, for example, bidders likely will not need to aggregate permits offered, such as when few permits are offered that are not on adjacent frequencies or in adjacent areas, or there are few synergies to be captured by combining permits.[34]

The Commission has observed that it may be appropriate to impose a higher interim withdrawal payment percentage to deter the anti-competitive use of withdrawals in auctions where it is much less likely that bidders will need to assemble complete sets of licenses. With respect to the permits being offered in Auction No. 70, the Bureaus have little evidence that bidders have a significant need to use withdrawals to avoid incomplete combinations of licenses. Citing experience with FM Auction No. 37, among others, the Commission has "observed 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."[35] Consistent with our interest in deterring strategic withdrawals, we propose to establish the percentage of the withdrawn bid to be assessed as an interim bid withdrawal payment at the maximum twenty percent permitted under the Commission's rules. We seek comment on this proposal.

2. Establishing the Additional Default Payment Percentage

Any winning bidder that defaults or is disqualified after the close of an auction (*i.e.*, fails to remit the required down payment within the prescribed period of time, fails to submit a timely long-form application, fails to make full payment, or is otherwise disqualified) is liable for a default payment under 47 C.F.R. § 1.2104(g)(2). This payment consists of a deficiency payment, equal to the difference between the amount of the bidder's bid and the amount of the winning bid the next time a construction permit covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less. Until recently, this additional payment for most auctions has been set at three percent of the defaulter's bid or of the subsequent winning bid, whichever is less.

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[31] *Id.*

[32] *See* 47 C.F.R. § 1.2104(g)(2), as amended by 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,* 21 FCC Rcd 891, 903 ¶ 30 (2006) ("*CSEA/Part 1 Report and Order*").

[33] *See* 47 C.F.R. § 1.2104(g)(2).

[34] *See CSEA/Part 1 Report and Order*, 21 FCC Rcd at 904 n 57.

[35] 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, 11,280 ¶ 31 (2005). We note that this apparent pattern of late withdrawals continued in FM Auction No. 62, and that certain bidders that withdrew high bids during Auction No. 62 had also withdrawn high bids on the same permits in the Commission's initial FM auction (Auction No. 37). *See* round results for Auction No. 62 (FM Broadcast). Links to these round results may be found on the Commission's Web site at http://wireless.fcc.gov/auctions/62/. Software to assist with viewing round results may be downloaded from http://wireless.fcc.gov/auctions/data/trackingtools.html.

The *CSEA/Part 1 Report and Order* modified Section 1.2104(g)(2) by, among other changes, increasing the three percent limit on the additional default payment for non-combinatorial auctions to twenty percent.[36] *Under the modified rule, the Commission will, in advance of each auction, establish an* additional default payment for that auction of three percent up to a maximum of twenty percent.[37] As the Commission has indicated, the level of this payment in each case will be based on the nature of the service and the inventory of the construction permits being offered.[38]

For Auction No. 70, the Bureaus propose to establish an additional default payment of twenty percent. As noted in the *CSEA/Part 1 Report and Order,* defaults weaken the integrity of the auctions process and may impede the deployment of service to the public, and an additional default payment of more than the previous three percent will be more effective in deterring defaults.[39] In light of our proposal for the interim bid withdrawal payment amount as discussed above, the Bureaus are concerned that setting an additional default payment of less than the twenty percent maximum amount may encourage post-auction defaults, which further undermine the integrity of the auction process.[40] In light of these considerations for Auction No. 70, the Bureaus propose an additional default payment of twenty percent of the relevant bid. We seek comment on this proposal.

III. CONCLUSION

Comments are due on or before **October 5, 2006**, and reply comments are due on or before **October 13, 2006**. **All filings related to the auction of FM broadcast construction permits should refer to AU Docket No. 06-170**. Comments may be submitted using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[41] The Bureaus encourage interested parties to file electronically.

Electronic Filers: Parties who choose to file electronically through ECFS need submit only one copy. Comments may be filed electronically using the Internet by accessing the ECFS at http://www.fcc.gov/cgb/ecfs/. Filers should follow the instructions provided on the website for submitting comments. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal

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[36] 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,* 21 FCC Rcd 891 (2006) ("*CSEA/Part 1 Report and Order*").

[37] *Id.* at ¶ 31.

[38] *Id.*

[39] *Id.* at ¶ 29.

[40] *See* In the Matter of BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block C, In re BDPCS, Inc., *Memorandum, Opinion & Order*, 15 FCC Rcd 17,590, 17,580-81 ¶17 (2000) (default payment rule intended to eliminate incentive for defaults in light of greater harms that may result from post-auction withdrawals).

[41] *See* Electronic Filing of Documents in Rulemaking Proceedings, GC Docket No. 97-113, *Report and Order*, 13 FCC Rcd 11322 (1998).

Service mail). All filings must be addressed to the Commission's Secretary Attn: WTB/ASAD, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. Eastern Time (ET). All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

The Bureaus also request that a copy of all comments and reply comments be submitted electronically to the following address: auction70@fcc.gov.

Copies of comments and reply comments will be available for public inspection between 8:00 a.m. and 4:30 p.m. ET Monday through Thursday or 8:00 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, Room CY-A257, 445 12th Street, SW, Washington, DC 20554, and will also be accessible through the search function on the ECFS web page at http://www.fcc.gov/cgb/ecfs/.

This proceeding has been designated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[42] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[43] Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in Section 1.1206(b) of the Commission's rules.[44]

[42] 47 C.F.R. §§ 1.1200(a), 1.1206.

[43] 47 C.F.R. § 1.1206(b).

[44] *Id.*

For further information concerning this proceeding, contact:

Audio Services Division, Media Bureau

For service rules questions: Lisa Scanlan or Tom Nessinger at (202) 418-2700

Auctions and Spectrum Access Division, Wireless Telecommunications Bureau

For legal questions: Lynne Milne at (202) 418-0660

For general auction questions: Jeff Crooks at (202) 418-0660 or Linda Sanderson at (717) 338-2868

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