



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

JUL 06 2009 News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
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DOCKET FILE COPY ORIGINAL DA 09-1376
June 26, 2009

AUCTION OF BROADBAND RADIO SERVICE (BRS) LICENSES SCHEDULED FOR OCTOBER 27, 2009

Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86

AU Docket No. 09-56
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I. GENERAL INFORMATION

A. Introduction

1. By this Public Notice, we announce the procedures and minimum opening bid amounts for the upcoming auction of licenses for unassigned Broadband Radio Service (“BRS”) spectrum. This auction, which is designated as Auction 86, is scheduled to commence on October 27, 2009. Auction 86 will offer 78 licenses.

1. Background of Proceeding

2. The spectrum associated with licenses to be auctioned in Auction 86 was previously allocated and made available under the Multipoint Distribution Services (“MDS”) and Multichannel Multipoint Distribution Service (“MMDS”), the predecessor services to BRS. In Auction 6, which was completed in 1996, the Commission conducted competitive bidding for 493 Basic Trading Area (“BTA”) licenses to provide access to all BRS spectrum nationwide that was not covered by pre-existing MDS or MMDS site-based licenses.² Overlay licenses for 75 of the BTAs originally offered in Auction 6 are available now as a result of default, cancellation, or termination. In one case, BTA 396, the available license does not cover the entire BTA due to a previous partitioning. Underlying, pre-existing incumbent BRS licenses within these geographic areas remain intact. This auction will also include three additional licenses for BRS service areas in the Gulf of Mexico.

3. On April 24, 2009, in accordance with Section 309(j)(3) of the Communications Act of 1934, as amended,³ the Wireless Telecommunications Bureau (“Bureau”) released a public notice seeking comment on competitive bidding procedures to be used in Auction 86.⁴ Interested parties submitted 7 comments and 4 reply comments in response to the *Auction 86 Comment Public Notice*.⁵

¹ BTAs are material copyright © 1992 Rand McNally & Company. Rights granted pursuant to a license from Rand McNally & Company (“Rand McNally”) through an agreement with the Federal Communications Commission. Rand McNally’s BTA specification contains 487 geographic areas covering the 50 states and the District of Columbia. See Rand McNally, *1992 Commercial Atlas and Marketing Guide*, 123rd Edition, at 38-39 (1992). See also 47 C.F.R. § 27.1208.

² Such licenses are commonly referred to as geographic “overlay” licenses. See 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, *Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, FCC 08-83, 23 FCC Rcd 5992, 6002 n. 38 (2008) (“BRS/EBS 4th MO&O & 2nd FNPRM”).

³ 47 U.S.C. § 309(j)(3)(E)(i) (requirement to seek comment on proposed auction procedures); see also 47 U.S.C. § 309(j)(4)(F) (authorization to prescribe reserve price or minimum bid); 47 C.F.R. §§ 1.2104(c) and (d).

⁴ “Auction of Broadband Radio Service (BRS) Licenses Scheduled for October 27, 2009; Comment Sought on Competitive Bidding Procedures For Auction 86,” *Public Notice*, DA 09-843, 24 FCC Rcd 4605 (2009) (“*Auction 86 Comment Public Notice*”).

⁵ See Comments filed by Ad Hoc BRS Applicants Association, dated May 15, 2009 (“Ad Hoc Applicants Comments”); Inforum Communications, Inc., dated May 15, 2009 (“Inforum Comments”); The Public Interest Spectrum Coalition, dated May 15, 2009 (“PISC Comments”); SAL Spectrum, LLC, dated May 15, 2009 (“SAL Comments”); Satellite Signals of New England, Inc., dated May 15, 2009 (“SSNE Comments”); Utopian Wireless Corporation, dated May 15, 2009 (“Utopian Comments”); Wireless Communications Association International, Inc., dated May 15, 2009 (“WCAI Comments”). See Reply Comments filed by Ad Hoc BRS Applicants Association, dated May 29, 2009 (“Ad Hoc Applicants Reply Comments”); Clearwire Corporation, dated May 29, 2009 (“Clearwire Reply Comments”); Utopian Wireless Corporation, dated May 29, 2009 (“Utopian Reply Comments”); Wireless Communications Association International, Inc., dated May 29, 2009 (“WCAI Reply Comments”). Cathleen A. Massey, Vice President, Regulatory Affairs and Public Policy of Clearwire Corporation, submitted an *ex parte* filing on June 11, 2009, on behalf of Clearwire, Xanadoo, and Digital Bridge Corporation (“WCAI members *ex parte* filing”).

2. Licenses to be Offered in Auction 86

4. The licenses to be offered in Auction 86 consist of the available spectrum in 78 BRS service areas. BRS service areas are BTAs or additional service areas similar to BTAs adopted by the Commission.⁶ In the *BRS/EBS 4th MO&O*, the Commission amended its rules to establish Gulf of Mexico service areas for BRS, and Auction 86 therefore includes licenses for three BRS service areas in the Gulf of Mexico.⁷ A complete list of licenses available for Auction 86 is included as Attachment A of this Public Notice.

5. Two commenters seek the removal of certain licenses from the Auction 86 inventory. Inforum Communications, Inc. (“Inforum”) asks the Bureau to remove the license for the Sarasota-Bradenton, Florida, BTA 408 that was formerly held by Inforum.⁸ Similarly, Satellite Signals of New England, Inc. (“SSNE”) seeks the removal of the licenses for the Burlington, Vermont, BTA 063 and Rutland-Bennington, Vermont, BTA 388 that were formerly held by SSNE.⁹ Each license automatically cancelled when the former licensee failed to make timely payments of its installment debts.¹⁰ Inforum and SSNE argue that these licenses should not be included in the inventory because the Commission has not yet acted on their petitions for reconsideration of decisions denying earlier requests for waiver of the installment payment rules and reinstatement of the licenses.

6. We do not believe that the public interest would be served by the removal of the licenses from the auction. Pending administrative and judicial appeals may often be associated with licenses offered at auction.¹¹ We note that the Bureau has already denied the former licensees’ requests for waiver and reinstatement of the licenses.¹² Offering the licenses in Auction 86 will have no effect on the power of the Commission to decide Inforum’s and SSNE’s petitions for reconsideration or to grant appropriate

⁶ The Commission established additional BRS service areas in places where Rand McNally has not defined BTAs: American Samoa; Guam; Gulf of Mexico Zone A; Gulf of Mexico Zone B; Gulf of Mexico Zone C; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The Mayaguez/Aguadilla-Ponce, PR, service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, Maricao, Maunabo, Mayaguez, Moca, Patillas, Penuelas, Ponce, Quebradillas, Rincón, Sabana Grande, Salinas, San German, Santa Isabel, Villalba and Yauco. The San Juan service area consists of all other municipios in Puerto Rico. 47 C.F.R. § 27.1208.

⁷ The boundaries of Gulf of Mexico Zone A are from an area twelve nautical miles from the shoreline at mean high tide on the north and east, to the limit of the Outer Continental Shelf to the south, and to longitude 91°00’ to the west. The boundaries of Gulf of Mexico Zone B are from an area twelve nautical miles from the shoreline at mean high tide on the north, to the limit of the Outer Continental Shelf to the south, to longitude 91°00’ to the east, and to longitude 94°00’ to the west. The boundaries of Gulf of Mexico Zone C are from an area twelve nautical miles from the shoreline at mean high tide on the north and west, to longitude 94°00’ to the east, and to a line 281 kilometers from the reference point at Linares, N.L., Mexico on the southwest. *See* 47 C.F.R. § 27.1208. *See also*, *BRS/EBS 4th MO&O & 2nd FNPRM*, 23 FCC Rcd 5992, 6040 ¶ 127.

⁸ Inforum Comments at 1-3.

⁹ SSNE Comments at 1-2.

¹⁰ *See* Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment, *Order*, DA 04-20, 19 FCC Rcd 83 (2004) (“Inforum Petition for Reconsideration”); Satellite Signals of New England, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 and Reinstatement of Licenses, *Order*, DA 07-482, 22 FCC Rcd 1937 (2007) (“SSNE Request for Waiver”).

¹¹ Alpine PCS, Inc., Request for Stay of Auction 78 for the Broadband PCS C Block Licenses in the San Luis Obispo, CA and the Santa Barbara-Santa Maria, CA Basic Trading Areas, *Order*, DA 08-1602, 23 FCC Rcd 10485, 10491-2 ¶ 22 and n. 50 (2008) (“Alpine”).

¹² Inforum Petition for Reconsideration, *supra* n.13; SSNE Request for Waiver, *supra* n.13.

relief if the parties were to ultimately prevail on the merits of the petitions. As a matter of policy, if the Bureau were to refrain from offering at auction licenses associated with spectrum that remains subject to a petition for reconsideration or judicial appeal, the Bureau would risk delay of future auctions for review by the Commission and courts of the myriad issues parties could raise in attempts to circumvent auctions for their individual purposes.¹³ Such delaying action could frustrate the business plans of entities intending to acquire licenses at auction and provide service to the public. For these reasons, we decline to remove these three licenses from the Auction 86 inventory.

B. License Descriptions

7. Where unencumbered, the licenses to be auctioned consist of 76.5 megahertz of spectrum at 2496-2502, 2602-2615, and 2616-2673.5 MHz. We note that the licenses issued pursuant to this auction will be issued pursuant to the post-transition band plan contained in Section 27.5(i)(2) of the Commission's rules.¹⁴ A table showing the channelization of this spectrum is included as Attachment B of this Public Notice.

C. Rules and Disclaimers

1. Relevant Authority

8. Prospective applicants must familiarize themselves thoroughly with the Commission's general competitive bidding rules set forth in Title 47, Part 1, Subpart Q of the Code of Federal Regulations, including all amendments and clarifications; rules relating to the Broadband Radio Service and emerging technologies contained in Title 47, Part 27 of the Code of Federal Regulations; and rules relating to applications, environment, practice and procedure contained in Title 47, Part 1, Subpart I of the Code of Federal Regulations.¹⁵ Prospective applicants must also be thoroughly familiar with the procedures, terms and conditions (collectively, "terms") contained in this Public Notice and the Commission's decisions in proceedings regarding competitive bidding procedures, application requirements, and obligations of Commission licensees.¹⁶

9. SAL Spectrum, LLC ("SAL") and the Ad Hoc BRS Applicants Association ("the Ad Hoc Applicants") seek a revision of the performance requirement set forth in the BRS service rules.¹⁷ Section 27.14(o) of the Commission's rules provides that a BRS licensee must demonstrate "substantial service" in its service area no later than May 1, 2011.¹⁸ Clearwire and the Wireless Communications Association International, Inc. ("WCAI") oppose SAL's proposal, contending that it would not be in the public

¹³ Compare Alpine at ¶ 22.

¹⁴ See 47 C.F.R. § 27.5(i)(2).

¹⁵ 47 C.F.R. Parts 1 and 27.

¹⁶ See, e.g., Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, PP Docket No. 93-253, *Second Report and Order*, FCC 94-61, 9 FCC Rcd 2348 (1994) ("*Competitive Bidding Second Report and Order*"); 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*, FCC 00-274, 15 FCC Rcd 15,293 (2000) (modified by Erratum, DA 00-2475, 15 FCC Rcd 24,501) ("*Part 1 Fifth Report and Order*"); Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, WT Docket No. 97-82, *Seventh Report and Order*, FCC 01-270, 16 FCC Rcd 17,546 (2001) ("*Part 1 Seventh Report and Order*") (amending the anti-collusion rule, which is codified at 47 C.F.R. § 1.2105(c)).

¹⁷ Specifically, SAL requests a change to the rule, or in the alternative, that the Commission adopt the procedures for the auction and thus amend the rule to allow Auction 86 licensees a full ten years from license grant to demonstrate substantial service. SAL Comments at 2-3. The Ad Hoc Applicants assert that they had assumed that any new licenses issued pursuant to Auction 86 would be subject to extended ten-year substantial service deadlines. Ad Hoc Reply Comments at 2.

¹⁸ 47 C.F.R. § 27.14(o).

interest to give new licensees ten years to demonstrate substantial service because the spectrum could lie fallow during that period.¹⁹ The requests made in comments filed to the *Auction 86 Comment Public Notice* to change the BRS service rules are beyond the scope of this public notice regarding the procedures for Auction 86. Any such rule change would require action by the full Commission, which could address this issue in a rule making proceeding. Absent such action, new licensees will be subject to the requirements set forth in the current rules. We also note that the Bureau, under its delegated authority, has discretion to entertain requests for extension of the substantial service deadline pursuant to section 1.946 of the Commission's rules.²⁰

10. The terms contained in the Commission's rules, relevant orders, and public notices are not negotiable. The Commission may amend or supplement the information contained in our public notices at any time, and will issue public notices to convey any new or supplemental information to applicants. It is the responsibility of all applicants to remain current with all Commission rules and with all public notices pertaining to this auction. Copies of most auctions-related Commission documents, including public notices, can be retrieved from the FCC Auctions Internet site at <http://wireless.fcc.gov/auctions>. Additionally, documents are available for public inspection and copying between 8:00 a.m. and 4:30 p.m. Eastern Time (ET) Monday through Thursday or 8:00 a.m. to 11:30 a.m. ET Fridays at the FCC Reference Information Center, 445 12th Street, SW, Room CY-A257, Washington, DC 20554. Documents may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. ("BCPI"), 445 12th Street, SW, Room CY-B402, Washington, DC 20554, 800-378-3160 or at <http://www.bcpiweb.com>.²¹

2. Prohibition of Collusion; Compliance with Antitrust Laws

11. To ensure the competitiveness of the auction process, Section 1.2105(c) of the Commission's rules prohibits auction applicants for licenses in any of the same geographic license areas from communicating with each other about bids, bidding strategies, or settlements unless such applicants have identified each other on their short-form applications (FCC Form 175) as parties with whom they have entered into agreements pursuant to Section 1.2105(a)(2)(viii).²²

a. Entities Subject to Section 1.2105

12. The anti-collusion rule will apply to any applicants that submit short-form applications seeking to participate in a Commission auction and select licenses in the same markets. In Auction 86, the rule would prohibit any applicants that have selected any of the same licenses in their short form applications from communicating absent an agreement.²³

¹⁹ WCAI Reply Comments at 4; Clearwire Reply Comments at 3. WCAI recommends that any additional time "be an appropriate balance between the goal of ensuring that the spectrum is put to good use and permitting winners a reasonable opportunity to construct." WCAI Reply Comments at 4. Clearwire argues that the existing May 1, 2011 substantial service deadline should apply, while noting that licensees could request an extension of the deadline "if they make a particularized showing justifying an extension under the Commission's rules." Clearwire Reply Comments at 3 and n.5. Clearwire asks that any additional time to demonstrate substantial service be limited to two years from the date of license grant. *Id.*

²⁰ 47 C.F.R. § 1.946.

²¹ When ordering documents from BCPI, please provide the appropriate FCC document number (for example, DA 09-843 for the *Auction 86 Comment Public Notice*, or DA 09-1376 for this Public Notice).

²² 47 C.F.R. §§ 1.2105(a)(2)(viii), 1.2105(c)(1). See also *Part 1 Seventh Report and Order*, 16 FCC Rcd 17,546; *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,297-98 ¶¶ 7-8.

²³ See "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," *Public Notice*, DA 95-2244, 11 FCC Rcd 9645 (1995).

13. Under the terms of the rule, applicants that have applied for licenses covering the same markets – unless they have identified each other on their short form applications as parties with whom they have entered into agreements under Section 1.2105(a)(2)(viii) – must affirmatively avoid all communications with or disclosures to each other that affect or have the potential to affect bids or bidding strategy, which may include communications regarding the post-auction market structure.²⁴ **This prohibition applies to all applicants regardless of whether such applicants become qualified bidders or actually bid.**²⁵

14. For purposes of this prohibition, Section 1.2105(c)(7)(i) defines “applicant” as including all officers and directors of the entity submitting a short-form application to participate in the auction, all controlling interests of that entity, as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application.²⁶

15. As described in Section IV.A.2., below, information concerning applicants’ license selections will not be available to the public. Therefore, the Commission will inform each applicant by letter of the identity of each of the other applicants that has applied for licenses covering any of the same geographic areas as the licenses that it has selected in its short-form application.²⁷

16. Entities and parties subject to the anti-collusion rule should take special care in circumstances where their employees may receive information directly or indirectly from a competing applicant relating to any competing applicant’s bids or bidding strategies. In situations where the anti-collusion rule views the same person as the applicant with respect to two different entities filing competing applications, under Bureau precedent the bids and bidding strategies of one applicant are necessarily conveyed to the other and, absent a disclosed bidding agreement, an apparent violation of the anti-collusion rule occurs.²⁸ The Bureau has not addressed situations where employees who do not qualify as the applicant (e.g., are not officers or directors) receive information regarding a competing applicant’s bids or bidding strategies and whether that information might be deemed to be necessarily conveyed to the applicant. We note that the exception to the anti-collusion rule providing that non-controlling interest holders may have interests in more than one competing bidder without violating the

²⁴ See, e.g., “Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E, and F Block Bidders,” *Public Notice*, DA 96-1460, 11 FCC Rcd 10,134.

²⁵ See, e.g., *Star Wireless, LLC, Forfeiture Order*, DA 04-3026, 19 FCC Rcd 18,626, 18,628 ¶ 4, n.19 (2004) (“*Star Wireless Order*”) (collusion rule applies to applicants regardless of whether they are qualified to bid), upheld on review, *Star Wireless, LLC and Northeast Communications of Wisconsin, Inc., Order on Review*, FCC 07-80, 22 FCC Rcd 8943 (2007), affirmed *Star Wireless, LLC v. FCC*, D.C. Cir. No. 07-1190 (decided April 22, 2008); Letter to Robert Pettit, Esquire, from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 00-2905, 16 FCC Rcd 10,080 (2000) (declining to exempt an applicant’s controlling interest from coverage by the anti-collusion rule, even though the applicant never made an upfront payment for the auction and was not listed as a qualified bidder).

²⁶ 47 C.F.R. § 1.2105(c)(7)(i).

²⁷ Section IV.A.2. “Information Available to Bidders Before and During the Auction,” below, especially ¶ 163.

²⁸ Letter to John Cooper, Aurora Communications, Inc., from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, DA 06-157, 21 FCC Rcd 523 (2006); Letter to Howard A. Kalmenson, Lotus Communications Corp., from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, DA 06-156, 21 FCC Rcd 520 (2006); Letter to Colby M. May from Barbara A. Kreisman, Chief, Video Division, Media Bureau, and Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, DA 05-2445, 20 FCC Rcd 14,648 (2005) (“*May Letter*”).

anti-collusion rule, provided specified conditions are met (including a certification that no prohibited communications have occurred or will occur), does not extend to controlling interest holders.²⁹

b. Prohibition Applies Until Down Payment Deadline

17. Section 1.2105(c)'s anti-collusion prohibition begins at the short-form application filing deadline and ends at the down payment deadline after the auction.³⁰

c. Prohibited Communications

18. Applicants for the upcoming Auction 86 and other parties that may be engaged in discussion with such applicants are cautioned on the need to comply with the Commission's anti-collusion rule, Section 1.2105(c).³¹ The anti-collusion rule prohibits not only a communication about an applicant's own bids or bidding strategy, but also a communication of another applicant's bids or bidding strategy.³² While the anti-collusion rule provisions do not prohibit business negotiations among auction applicants, applicants must remain vigilant so as not to communicate directly or indirectly information that affects, or could affect, bids or bidding strategy, or the negotiation of settlement agreements.

19. The Commission remains vigilant about prohibited communications taking place in other situations. For example, the Commission has warned that prohibited "communications concerning bids and bidding strategies may include communications regarding capital calls or requests for additional funds in support of bids or bidding strategies to the extent such communications convey information concerning the bids and bidding strategies directly or indirectly."³³

20. Applicants are hereby placed on notice that public disclosure of information relating to bidder interests and bidder identities that is confidential at the time of disclosure may violate the anti-collusion rule.³⁴ This is so even though similar types of information were revealed prior to and during other Commission auctions subject to different information procedures. Bidders should use caution in their dealings with other parties, such as members of the press, financial analysts, or others who might become a conduit for the communication of prohibited bidding information. For example, where limited information disclosure procedures are in place, as for Auction 86, a qualified bidder's statement to the press that it has lost bidding eligibility and stopped bidding in the auction could give rise to a finding of an anti-collusion rule violation.³⁵ Similarly, an applicant's public statement of intent not to participate in Auction 86 bidding could also violate the rule.

21. Applicants selecting licenses for any of the same geographic license areas must not communicate directly or indirectly about bids or bidding strategy.³⁶ Accordingly, such applicants are

²⁹ 47 C.F.R. § 1.2105(c)(4).

³⁰ 47 C.F.R. § 1.2105(c)(1).

³¹ 47 C.F.R. § 1.2105(c).

³² See Western PCS BTA 1 Corp., *Memorandum Opinion and Order*, FCC 99-383, 14 FCC Rcd 21,571 (1999).

³³ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order*, FCC 94-295, 9 FCC Rcd 7684, 7689 ¶ 12 (1994) ("*Memorandum Opinion and Order*").

³⁴ Thus, communication by an applicant of its license selections to another applicant for one or more of the same licenses, or communication of the fact that an applicant does or does not hold provisionally winning bids on particular licenses, may well violate the anti-collusion rule.

³⁵ Compare "Wireless Telecommunications Bureau Responds to Questions about the Local Multipoint Distribution Service Auction," *Public Notice*, DA 98-37, 13 FCC Rcd 341, 347-48 (1998) ("Public statements can give rise to collusion concerns. This has occurred in the antitrust context, where certain public statements can support other evidence which tends to indicate the existence of a conspiracy.").

³⁶ *Part I Seventh Report and Order*, 16 FCC Rcd at 17,549-50 ¶ 6.

encouraged not to use the same individual as an authorized bidder. A violation of the anti-collusion rule could occur if an individual acts as the authorized bidder for two or more competing applicants, and conveys information concerning the substance of bids or bidding strategies between such applicants. Also, if the authorized bidders are different individuals employed by the same organization (e.g., law firm or engineering firm or consulting firm), a violation similarly could occur.³⁷ In such a case, at a minimum, applicants should certify on their applications that precautionary steps have been taken to prevent communication between authorized bidders and that applicants and their bidding agents will comply with the anti-collusion rule.³⁸

22. A violation of the anti-collusion rule could occur in other contexts, such as an individual serving as an officer for two or more applicants.³⁹ Moreover, the Commission has found a violation of the anti-collusion rule where a bidder used the Commission's bidding system to disclose "its bidding strategy in a manner that explicitly invited other auction participants to cooperate and collaborate in specific markets,"⁴⁰ and has placed auction participants on notice that the use of its bidding system "to disclose market information to competitors will not be tolerated and will subject bidders to sanctions."⁴¹

23. In addition, when completing short-form applications, applicants should avoid any statements or disclosures that may violate the Commission's anti-collusion rule, particularly in light of the limited information procedures in effect for Auction 86.⁴² Specifically, applicants should avoid including any information in their short-form applications that might convey information regarding their license selection, such as using applicant names that refer to licenses being offered, referring to certain licenses or markets in describing bidding agreements, or including any information in attachments that may otherwise disclose applicants' license selections.

d. Disclosure of Bidding Agreements and Arrangements

24. The Commission's rules do not prohibit applicants from entering into otherwise lawful bidding agreements before filing their short-form applications, as long as they disclose the existence of the agreement(s) in their short-form application.⁴³ If parties agree in principle on all material terms prior to the short-form filing deadline, each party to the agreement must identify the other party or parties to the agreement on its short-form application under Section 1.2105(c), even if the agreement has not been reduced to writing. If the parties have not agreed in principle by the short-form filing deadline, they should not include the names of parties to discussions on their applications, and they may not continue negotiations, discussions or communications with any other applicants for licenses covering any of the same geographic areas after the short-form filing deadline.⁴⁴

³⁷ Application of Nevada Wireless for a License to Provide 800 MHz Specialized Mobile Radio Service in the Farmington, NM-CO Economic Area (EA-155) Frequency Band A, *Memorandum Opinion and Order*, DA 98-1137, 13 FCC Rcd 11,973, 11,977 ¶ 11 (1998) ("*Nevada Wireless Order*").

³⁸ *Id.*

³⁹ See, e.g., *May Letter* (finding apparent violation of anti-collusion rule where applicants with mutually exclusive applications reported sharing same individual as an officer and director and reported having no bidding agreement).

⁴⁰ Mercury PCS II, LLC, *Notice of Apparent Liability for Forfeiture*, FCC 97-388, 12 FCC Rcd 17,970, 17,976 ¶ 12 (1997).

⁴¹ Mercury PCS II, LLC, *Memorandum Opinion and Order*, FCC 98-203, 13 FCC Rcd 23,755, 23,760 ¶ 11 (1998).

⁴² See Section IV.A.2. "Information Available to Bidders Before and During the Auction," below.

⁴³ 47 C.F.R. § 1.2105(c)(7)(i).

⁴⁴ "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," *Public Notice*, DA 95-2244, 11 FCC Rcd 9645 (1995) ("*Anti-Collusion Public Notice*").

e. Anti-Collusion Certification

25. By electronically submitting a short-form application following the electronic filing procedures set forth in Attachment C to this Public Notice, each applicant certifies its compliance with Section 1.2105(c). However, the Bureau cautions that merely filing a certifying statement as part of an application will not outweigh specific evidence that collusive behavior has occurred, nor will it preclude the initiation of an investigation when warranted.⁴⁵ The Commission has stated that it “intend[s] to scrutinize carefully any instances in which bidding patterns suggest that collusion may be occurring.”⁴⁶ Any applicant found to have violated the anti-collusion rule may be subject to sanctions.⁴⁷

f. Antitrust Laws

26. Applicants are also reminded that, regardless of compliance with the Commission’s rules, they remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace.⁴⁸ Compliance with the disclosure requirements of the Commission’s anti-collusion rule will not insulate a party from enforcement of the antitrust laws.⁴⁹ For instance, a violation of the antitrust laws could arise out of actions taking place well before any party submits a short-form application.⁵⁰ The Commission has cited a number of examples of potentially anticompetitive actions that would be prohibited under antitrust laws: for example, actual or potential competitors may not agree to divide territories in order to minimize competition, regardless of whether they split a market in which they both do business, or whether they merely reserve one market for one and another for the other.⁵¹ Similarly, the Bureau has long reminded potential applicants and others that “[e]ven where the applicant discloses parties with whom it has reached an agreement on the short-form application, thereby permitting discussions with those parties, the applicant is nevertheless subject to existing antitrust laws.”⁵² To the extent the Commission becomes aware of specific allegations that suggest that violations of the federal antitrust laws may have occurred, the Commission may refer such allegations to the United States Department of Justice for investigation.⁵³ If an applicant is found to have violated the antitrust laws or the Commission’s rules in connection with its participation in the competitive bidding process, it may be

⁴⁵ *Nevada Wireless Order*, 13 FCC Rcd at 11,978 ¶ 13.

⁴⁶ *Memorandum Opinion and Order*, 9 FCC Rcd at 7689 ¶ 12.

⁴⁷ 47 C.F.R. §§ 1.2105(c), 1.2107(d), and 1.2109(d).

⁴⁸ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Third Further Notice of Proposed Rule Making*, FCC 99-384, 14 FCC Rcd 21,558, 21,560 ¶ 4 and n.4 (1999) *citing* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order*, 9 FCC Rcd at 7689 ¶ 12 (1994) (“[W]e wish to emphasize that all applicants and their owners continue to be subject to existing antitrust laws. Applicants should note that conduct that is permissible under the Commission's Rules may be prohibited by the antitrust laws.”); Implementation of Section 309(j) of the Communications Act-Competitive Bidding, PP Docket No. 93-253, *Fourth Memorandum Opinion & Order*, FCC 94-624, 9 FCC Rcd 6858, 6869 n.134 (1994)(“[A]pplicants will also be subject to existing antitrust laws.”). (“*Fourth Memorandum Opinion and Order*”).

⁴⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 226. *See also* “Justice Department Sues Three Firms Over FCC Auction Practices,” *Press Release* 98-536 (DOJ Nov. 10, 1998).

⁵⁰ The Commission has cited a number of examples of such anticompetitive behavior. *See, e.g., Fourth Memorandum Opinion & Order*, 9 FCC Rcd at 6869 n.134.

⁵¹ *Id.*; *see also Anti-Collusion Public Notice*.

⁵² *Anti-Collusion Public Notice*.

⁵³ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 226.

subject to forfeiture of its upfront payment, down payment, or full bid amount and may be prohibited from participating in future auctions, among other sanctions.⁵⁴

g. Duty to Report Prohibited Communications; Reporting Procedure

27. If an applicant makes or receives a communication that appears to violate the anti-collusion rule, it must report such communication in writing to the Commission immediately, and in no case later than five business days after the communication occurs.⁵⁵ Section 1.2105(c)(6) provides that any applicant that makes or receives a communication prohibited by Section 1.2105(c) must report such communication to the Commission in writing immediately, and in no case later than five business days after the communication occurs.⁵⁶ The Commission has clarified that each applicant's obligation to report any such communication continues beyond the five-day period after the communication is made, even if the report is not made within the five day period.⁵⁷

28. In addition, Section 1.65 of the Commission's rules requires an applicant to maintain the accuracy and completeness of information furnished in its pending application and to notify the Commission within 30 days of any substantial change that may be of decisional significance to that application.⁵⁸ Thus, Section 1.65 requires an auction applicant to notify the Commission of any substantial change to the information or certifications included in its pending short-form application. Applicants are therefore required by Section 1.65 to report to the Commission any communications of bids or bidding strategies that result in a bidding arrangement, agreement, or understanding after the short-form filing application deadline.⁵⁹

29. Parties reporting communications pursuant to Sections 1.65 or 1.2105(c)(6) must take care to ensure that any such reports of prohibited communications do not themselves give rise to a violation of the anti-collusion rule. For example, a party's report of a prohibited communication could violate the rule by communicating prohibited information to other applicants through the use of Commission filing procedures that would allow such materials to be made available for public inspection. A party seeking to report such prohibited communications should consider submitting its report with a request that the report or portions of the submission be withheld from public inspection.⁶⁰ Such parties

⁵⁴ 47 C.F.R. § 1.2109(d); *see also* *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 226.

⁵⁵ 47 C.F.R. § 1.2105(c)(6).

⁵⁶ 47 C.F.R. § 1.2105(c)(6); *see also* *Part 1 Seventh Report and Order*, 16 FCC Rcd at 17555 ¶ 17.

⁵⁷ *See* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule, WT Docket No. 07-166, *Second Report and Order*, FCC 07-132, 22 FCC Rcd 15,289, 15,403-04 ¶¶ 285-86 (2007) (“700 MHz Second Report and Order”) *recon. pending*.

⁵⁸ 47 C.F.R. § 1.65.

⁵⁹ *See* *Part 1 Seventh Report and Order*, 16 FCC Rcd at 17552 ¶ 12.

⁶⁰ *See* 47 C.F.R. § 0.459 (procedures for requesting that materials or information submitted to the Commission be withheld from public inspection). If an applicant requests confidential treatment of a document, the cover page of the filing must prominently display that the applicant is seeking confidential treatment for that document. For example, a filing might include a cover page stamped with “Request for Confidential Treatment Attached” or “Not

are also encouraged to consult with the Auctions and Spectrum Access Division staff if they have any questions about the procedures for submitting such reports.⁶¹ This Public Notice provides additional guidance on procedures for submitting application-related information below.⁶²

30. Applicants must be aware that failure to comply with the Commission's rules can result in enforcement action.

h. Winning Bidders Must Disclose Terms of Agreements

31. Applicants that are winning bidders will be required to disclose in their long-form applications the specific terms, conditions, and parties involved in any bidding consortia, joint ventures, partnerships, and other arrangements entered into relating to the competitive bidding process.⁶³

i. Additional Information Concerning Anti-Collusion Rule

32. A summary listing of documents issued by the Commission and the Bureau addressing the application of the anti-collusion rule may be found in Attachment F. These documents are available on the Commission's auction anti-collusion web page.⁶⁴

3. Incumbency Issues

33. There are pre-existing BRS site-based incumbent licenses. The service area for each of those incumbent licenses is a 35-mile circle centered at the station's reference coordinates, and is bounded by the chord(s) drawn between the intersection points of the licensee's previous protected service area and those of respective adjacent market, co-channel licensees.⁶⁵ Any licenses granted pursuant to this auction will not include the geographic service areas of any co-channel incumbent site-based licenses.⁶⁶ If a site-based incumbent license cancels or is forfeited, however, the right to operate within that area shall revert to the overlay licensee that holds the license for the BRS service area that encompasses that BTA.⁶⁷ BRS incumbent licenses are entitled to interference protection in accordance with the applicable technical rules.⁶⁸ BRS licenses have previously been awarded through auction (Auction 6) for BTAs other than those in this auction, and the previously-awarded licenses may have since been assigned or partitioned. Such BRS geographic area licenses authorize operation within a BTA and provide the licensee with rights similar to those being offered in Auction 86.

34. In addition, on the E and F channel groups, grandfathered Educational Broadband Service ("EBS") licenses originally issued on those channels prior to 1983 may continue to operate indefinitely.⁶⁹ Such grandfathered EBS licenses must be protected in accordance with the applicable technical rules.⁷⁰

for Public Inspection." Any such request must cover all of the material to which the request applies. See 47 C.F.R. § 0.459(a).

⁶¹ See Section VI. "Contact Information," below.

⁶² See Section II.J. "Maintaining Current Information in Short-Form Applications," below.

⁶³ 47 C.F.R. § 1.2107(d).

⁶⁴ See <http://wireless.fcc.gov/auctions/anticollusion>

⁶⁵ See 47 C.F.R. § 27.1206(a)(1).

⁶⁶ See 47 C.F.R. § 27.1206(a)(2).

⁶⁷ See 47 C.F.R. § 27.1206(b).

⁶⁸ See 47 C.F.R. §§ 27.50(h), 27.53(m), 27.55(a)(4), 27.1221.

⁶⁹ See 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; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and

35. Operations within the 2614-2618 MHz band are secondary to adjacent channel operations.⁷¹

36. Finally, in the 2496-2500 MHz band, BRS licensees must share the band on a co-primary basis with the Code Division Multiple Access (“CDMA”) Mobile Satellite Service (“MSS”),⁷² grandfathered Broadcast Auxiliary Service (“BAS”) stations,⁷³ and grandfathered land mobile and microwave licenses licensed under Parts 90 and 101 of the Commission’s rules, respectively.⁷⁴ In addition, the 2400-2500 MHz band is allocated for use by Industrial, Scientific, and Medical equipment under Part 18 of the Commission’s rules.⁷⁵

37. The WCAI filed comments noting that in certain markets, the transition to the new band plan is not yet complete, and in those markets, new licensees may not be able to operate on some or all of their spectrum until the transition process is completed.⁷⁶ Under our rules, until a transition has been completed in a BTA, existing licensees operating under the pre-transition band plan are entitled to interference protection in accordance with the applicable technical rules.⁷⁷ Potential bidders can check on the status of transition in a market by checking the Commission’s Electronic Comment Filing System and reviewing WT Docket No. 06-136. If a post-transition notification has been filed for a BTA, the transition has been completed in that BTA.⁷⁸ In a BTA where no transition initiation plan had been filed by January 21, 2009, for a BTA, existing licensees in the BTA could file notifications with the Commission by April 21, 2009, of an intent to self-transition.⁷⁹ Once a licensee completes a self-transition, it is required to modify its license to reflect its operation pursuant to the new band plan.⁸⁰ Potential bidders can review the Universal Licensing System to see if a license has been modified to operate pursuant to the new band plan.

38. WCAI also asks that potential bidders be reminded of obligations to reimburse certain licensees of their costs in transitioning to the new BRS/EBS band plan.⁸¹ Under the Commission’s rules, BRS licensees are responsible for reimbursing transition proponents or self-transitioning EBS licensees in

74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; WT Docket Nos. 03-66, 03-67, 02-68, MM Docket No. 97-217, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, FCC 06-46, 21 FCC Rcd 5606, 5749-5751 ¶¶ 347-354 (2006) (*BRS/EBS 3rd MO&O* or *Big LEO Spectrum Sharing Reconsideration Order*, as appropriate); 47 C.F.R. § 27.1216.

⁷⁰ See 47 C.F.R. §§ 27.50(h), 27.53(m), 27.55(a)(4), 27.1221.

⁷¹ See 47 C.F.R. § 27.1222.

⁷² See *Big LEO Spectrum Sharing Reconsideration Order*, 21 FCC Rcd at 5623-5627 ¶¶ 29-34. CDMA MSS licensees are not entitled to interference protection from fixed and mobile services operating in the 2495-2500 MHz band. *Id.* at 5623 ¶ 29.

⁷³ See *id.* at 5628-5630 ¶¶ 38-42.

⁷⁴ See *id.* at 5631-4632 ¶¶ 44-47.

⁷⁵ See 47 C.F.R. § 18.301.

⁷⁶ See WCAI Comments at 8-9.

⁷⁷ See 47 C.F.R. §§ 27.50(h), 27.53(m), 27.55(a)(4), 27.1221.

⁷⁸ See 47 C.F.R. § 27.1235.

⁷⁹ See 47 C.F.R. § 27.1236.

⁸⁰ See *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5674 ¶ 143.

⁸¹ WCAI Comments at 8.

accordance with the Commission's rules.⁸² Potential bidders should be aware that in BTAs where the transition to the new band plan has not yet been completed as of the date licenses are issued pursuant to this auction, they may be required to reimburse eligible licensees for a *pro rata* share of transition costs.⁸³

a. International Coordination

39. BRS licensees must individually apply for and receive a separate license for each transmitter if the proposed operation requires coordination with either Mexico or Canada.⁸⁴ Potential bidders seeking licenses in Auction 86 for geographic areas that are near the Canadian or Mexican borders are encouraged to consult all international agreements with Canada and Mexico.⁸⁵ We also note that the current agreement with Mexico does not provide for two-way operation in the border area. If the agreements with Mexico or Canada are modified in the future, licensees must likewise comply with these modifications.

b. Quiet Zones

40. BRS licensees must individually apply for and receive a separate license for each transmitter if the proposed operation would affect the radio quiet zones set forth in the Commission's rules.⁸⁶

4. Due Diligence

41. We caution potential applicants formulating their bidding strategies to investigate and consider the extent to which these frequencies are occupied. For example, as stated above, there are incumbent operations already licensed and operating in the band that must be protected. These limitations may restrict the ability of BRS licensees to use certain portions of the electromagnetic spectrum or provide service to certain areas in their geographic license areas. Bidders should become familiar with the status of these operations and applicable Commission rules, orders and any pending proceedings related to the service, in order to make reasoned, appropriate decisions about their participation in this auction and their bidding strategy.

42. Potential bidders are reminded that they are solely responsible for investigating and evaluating all technical and marketplace factors that may have a bearing on the value of the licenses being offered in this auction. The Commission makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that a Commission auction represents an opportunity to become a licensee subject to certain conditions and regulations. The auction does not constitute an endorsement by the Commission of any particular service, technology, or product, nor does a Commission license constitute a guarantee of business success. Applicants should perform their individual due diligence before proceeding as they would with any new business venture.

43. Potential bidders are strongly encouraged to conduct their own research prior to the beginning of bidding in Auction 86 in order to determine the existence of any pending legislative, administrative or judicial proceedings that might affect their decision regarding participation in the auction. Participants in Auction 86 are strongly encouraged to continue such research throughout the auction. In addition, potential bidders should perform technical analyses sufficient to assure themselves that, should they prevail in competitive bidding for a specific license, they will be able to build and

⁸² See 47 C.F.R. §§ 27.1237-27.1239.

⁸³ See *id.*

⁸⁴ See 47 C.F.R. § 27.1207(b)(1)(i).

⁸⁵ For information on the agreements with Canada and Mexico, prospective bidders should go to <http://www.fcc.gov/ib/sand/agree/welcome.html>.

⁸⁶ 47 C.F.R. §§ 1.924, 27.1207(b)(1)(ii).

operate facilities that will fully comply with the Commission's technical and legal requirements as well as other applicable Federal, state, and local laws.

44. Applicants should also be aware that certain pending and future proceedings, including rulemaking proceedings or petitions for rulemaking, applications (including those for modification), requests for special temporary authority, waiver requests, petitions to deny, petitions for reconsideration, informal oppositions, and applications for review, before the Commission may relate to particular applicants or incumbent licensees or the licenses available in Auction 86. Pending and future judicial proceedings may also relate to particular applicants or incumbent licensees, or the licenses available in Auction 86. Prospective bidders are responsible for assessing the likelihood of the various possible outcomes, and considering their potential impact on spectrum licenses available in this auction.

45. Applicants should perform due diligence to identify and consider all proceedings that may affect the spectrum licenses being auctioned and that could have an impact on the availability of spectrum for Auction 86. In addition, although the Commission may continue to act on various pending applications, informal objections, petitions, and other requests for Commission relief, some of these matters may not be resolved by the beginning of bidding in the auction.

46. Applicants are solely responsible for identifying associated risks and for investigating and evaluating the degree to which such matters may affect their ability to bid on, otherwise acquire, or make use of licenses being offered.

47. Applicants may obtain information about licenses available in Auction 86 through the Bureau's online licensing databases at <http://wireless.fcc.gov/uls>. Applicants may query the database online and download a copy of their search results if desired. Detailed instructions on using License Search (including frequency searches and the GeoSearch capability) and downloading query results are available online by selecting the "?" button at the upper right-hand corner of the "License Search" screen or by going to the Universal Licensing System ("ULS") support site at <http://esupport.fcc.gov/licensing.htm>. Applicants should direct questions regarding the ULS search capabilities to the FCC ULS Technical Support hotline at (877) 480-3201, option two. The hotline is available to assist with questions Monday through Friday, from 8:00 a.m. to 6:00 p.m. ET. In order to provide better service to the public, all calls to the hotline are recorded.

48. The Commission makes no representations or guarantees regarding the accuracy or completeness of information in its databases or any third party databases, including, for example, court docketing systems. To the extent the Commission's databases may not include all information deemed necessary or desirable by an applicant, applicants may obtain or verify such information from independent sources or assume the risk of any incompleteness or inaccuracy in said databases. Furthermore, the Commission makes no representations or guarantees regarding the accuracy or completeness of information that has been provided by incumbent licensees and incorporated into its databases.

49. Potential applicants are strongly encouraged to physically inspect any prospective sites located in, or near, the geographic area for which they plan to bid, and also to familiarize themselves with the environmental review obligations described below in Section I.C.7.

5. Use of Integrated Spectrum Auction System

50. The Commission will make available a browser-based bidding system to allow bidders to participate in Auction 86 over the Internet using the Commission's Integrated Spectrum Auction System ("ISAS" or "FCC Auction System"). The Commission makes no warranty whatsoever with respect to the FCC Auction System. In no event shall the Commission, or any of its officers, employees or agents, be liable for any damages whatsoever (including, but not limited to, loss of business profits, business interruption, loss of business information, or any other loss) arising out of or relating to the existence, furnishing, functioning or use of the FCC Auction System that is accessible to qualified bidders in

connection with this auction. Moreover, no obligation or liability will arise out of the Commission's technical, programming or other advice or service provided in connection with the FCC Auction System.

6. Fraud Alert

51. As is the case with many business investment opportunities, some unscrupulous entrepreneurs may attempt to use Auction 86 to deceive and defraud unsuspecting investors. Common warning signals of fraud include the following:

- The first contact is a "cold call" from a telemarketer, or is made in response to an inquiry prompted by a radio or television infomercial.
- The offering materials used to invest in the venture appear to be targeted at IRA funds, for example, by including all documents and papers needed for the transfer of funds maintained in IRA accounts.
- The amount of investment is less than \$25,000.
- The sales representative makes verbal representations that: (a) the Internal Revenue Service, Federal Trade Commission ("FTC"), Securities and Exchange Commission ("SEC"), FCC, or other government agency has approved the investment; (b) the investment is not subject to state or federal securities laws; or (c) the investment will yield unrealistically high short-term profits. In addition, the offering materials often include copies of actual FCC releases, or quotes from FCC personnel, giving the appearance of FCC knowledge or approval of the solicitation.
- Information about deceptive telemarketing investment schemes is available from the Commission as well as the FTC and SEC. Additional sources of information for potential bidders and investors may be obtained from: (i) the FCC by going to <http://wireless.fcc.gov/csinfo#fraud> or by telephone at (888) 225-5322 (FCC's Consumer Call Center); (ii) the FTC by telephone at (877) FTC-HELP ((877) 382-4357) or by going to <http://ftc.gov/bcp/edu/pubs/consumer/invest/inv03.shtm>; and (iii) the SEC by telephone at (202) 942-7040 or by going to <http://sec.gov/cgi-bin/txt-srch-sec?text=fraud§ion=Investor+Information&x=8&y=5>. Complaints about specific deceptive telemarketing investment schemes should be directed to the FTC, the SEC, or the National Fraud Information Center at (800) 876-7060.

7. Environmental Review Requirements

52. Licensees must comply with the Commission's rules regarding implementation of the National Environmental Policy Act and other federal environmental statutes.⁸⁷ The construction of a wireless antenna facility is a federal action and the licensee must comply with the Commission's environmental rules for each such facility.⁸⁸ The Commission's environmental rules require, among other things, that the licensee consult with expert agencies having environmental responsibilities, including the U.S. Fish and Wildlife Service, the State Historic Preservation Office, the Army Corps of Engineers and the Federal Emergency Management Agency (through the local authority with jurisdiction over floodplains). In assessing the effect of facilities construction on historic properties, the licensee must follow the provisions of the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process.⁸⁹ The licensee must prepare environmental assessments for facilities that may have a significant impact in or on wilderness areas, wildlife preserves, threatened or endangered species or designated critical habitats, historical or archaeological sites, Indian religious sites, floodplains, and surface features. The licensee also must prepare environmental assessments for facilities

⁸⁷ 47 C.F.R. Ch. 1, Subpart I.

⁸⁸ 47 C.F.R. §§ 1.1301-1.1319.

⁸⁹ 47 C.F.R. Part 1, Appendix C.

that include high intensity white lights in residential neighborhoods or excessive radio frequency emission.

D. Auction Specifics

1. Auction Start Date

53. Bidding in Auction 86 will begin on Tuesday, October 27, 2009, as announced in the *Auction 86 Comment Public Notice*.⁹⁰ The initial schedule for bidding will be announced by public notice at least one week before the start of the auction.

54. Unless otherwise announced, bidding on all licenses will be conducted on each business day until bidding has stopped on all licenses.

2. Auction Title

55. Auction 86 – Broadband Radio Service

3. Bidding Methodology

56. As discussed in more detail below, the bidding methodology for Auction 86 will be simultaneous multiple round (“SMR”) bidding.⁹¹ The Commission will conduct this auction over the Internet using the FCC Auction System, and telephonic bidding will be available as well. Qualified bidders are permitted to bid electronically via the Internet or by telephone. All telephone calls are recorded.

4. Pre-Auction Dates and Deadlines

57. The following dates and deadlines apply:

Auction Seminar.....	August 5, 2009
Short-Form Application (FCC Form 175)	
Filing Window Opens.....	August 5, 2009; 12:00 noon ET
Short-Form Application (FCC Form 175)	
Filing Window Deadline	August 18, 2009; prior to 6:00 p.m. ET
Upfront Payments (via wire transfer).....	September 24, 2009; 6:00 p.m. ET
Mock Auction.....	October 23, 2009
Auction Begins.....	October 27, 2009

5. Requirements for Participation

58. Those wishing to participate in this auction must:

- Submit a short-form application (FCC Form 175) electronically prior to 6:00 p.m. ET, August 18, 2009, following the electronic filing procedures set forth in Attachment C to this Public Notice.
- Submit a sufficient upfront payment and an FCC Remittance Advice Form (FCC Form 159) by 6:00 p.m. ET, September 24, 2009, following the procedures and instructions set forth in Attachment D to this Public Notice.
- Comply with all provisions outlined in this Public Notice and applicable Commission rules.

⁹⁰ *Auction 86 Comment Public Notice* at ¶ 1.

⁹¹ See Section IV.A.1. “Simultaneous Multiple Round Auction,” below.

II. SHORT-FORM APPLICATION (FCC FORM 175) REQUIREMENTS

A. General Information Regarding Short-Form Applications

59. An application to participate in an FCC auction, referred to as a short-form application or FCC Form 175, provides information used in determining whether the applicant is legally, technically, and financially qualified to participate in Commission auctions for licenses or permits.⁹² The short-form application is the first part of the Commission's two-phased auction application process. In the first phase of this process, parties desiring to participate in the auction must file streamlined, short-form applications in which they certify under penalty of perjury as to their qualifications.⁹³ Eligibility to participate in bidding is based on the applicants' short-form applications and certifications as well as their upfront payments, as explained below.⁹⁴ In the second phase of the process, winning bidders must file a more comprehensive long-form application (FCC Form 601) and have a complete and accurate ownership disclosure information report (FCC Form 602) on file with the Commission.⁹⁵

60. Entities seeking licenses available in Auction 86 must file a short-form application electronically via the FCC Auction System prior to 6:00 p.m. ET on August 18, 2009, following the procedures prescribed in Attachment C to this Public Notice. Applicants filing a short-form application are subject to the Commission's anti-collusion rules beginning on the deadline for filing, as described above. The information provided in its short-form application will be used in determining, among other things, if the applicant is eligible for a bidding credit.

61. Applicants bear full responsibility for submitting accurate, complete and timely short-form applications. All applicants must certify on their short-form applications under penalty of perjury that they are legally, technically, financially and otherwise qualified to hold a license.⁹⁶ Applicants should read the instructions set forth in Attachment C to this Public Notice carefully and should consult the Commission's rules to ensure that, in addition to the materials described below, all the information that is required under the Commission's rules is included with their short-form applications.

62. An entity may not submit more than one short-form application for a single auction. If a party submits multiple short-form applications, only one application may become qualified to bid.

63. Applicants also should note that submission of a short-form application (and any amendments thereto) constitutes a representation by the certifying official that he or she is an authorized representative of the applicant, that he or she has read the form's instructions and certifications, and that the contents of the application, its certifications, and any attachments are true and correct. An applicant cannot change the certifying official to its application.⁹⁷ Submission of a false certification to the Commission may result in penalties, including monetary forfeitures, license forfeitures, ineligibility to participate in future auctions, and/or criminal prosecution.

B. License Selection

64. An applicant must select the licenses on which it wants to bid from the "Eligible Licenses" list on its short-form application. To assist applicants in identifying licenses of interest that will be available in Auction 86, the FCC Auction System includes a filtering mechanism that allows an applicant to filter the "Eligible Licenses" list. The applicant will make selections for one or more of the

⁹² 47 C.F.R. § 1.2105.

⁹³ *Id.*; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2376 ¶ 163.

⁹⁴ Section III.D. "Upfront Payments – Due September 24, 2009," below.

⁹⁵ 47 C.F.R. § 1.2107.

⁹⁶ 47 C.F.R. § 1.2105(a)(2)(v).

⁹⁷ 47 C.F.R. § 1.2105(b).

filter criteria and the system will produce a list of licenses satisfying the specified criteria. The applicant may select all the licenses in the customized list or select individual licenses from the list. Applicants also will be able to select licenses from one customized list and then create additional customized lists to select additional licenses.

65. Applicants will not be able to change their license selections after the short-form application filing deadline.⁹⁸ Applicants interested in participating in Auction 86 must have selected license(s) available in the respective auction by the short-form application deadline. Applicants must confirm their license selections before the deadline for submitting short-form applications. The FCC Auction System will not accept bids from an applicant on licenses that the applicant has not selected on its short-form application.

C. Disclosure of Bidding Arrangements

66. Applicants will be required to identify in their short-form application all parties with whom they have entered into any agreements, arrangements, or understandings of any kind relating to the licenses being auctioned, including any agreements relating to post-auction market structure.⁹⁹

67. Applicants also will be required to certify under penalty of perjury in their short-form applications that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified in the application, regarding the amount of their bids, bidding strategies, or the particular licenses on which they will or will not bid.¹⁰⁰ If an applicant has had discussions, but has not reached an agreement by the short-form application filing deadline, it would not include the names of parties to the discussions on its application and may not continue such discussions with any applicants after the deadline.¹⁰¹

68. After the filing of short-form applications, the Commission's rules do not prohibit a party holding a non-controlling, attributable interest in one applicant from acquiring an ownership interest in or entering into a joint bidding arrangement with other applicants, provided that: (i) the attributable interest holder certifies that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has entered into a joint bidding arrangement; and (ii) the arrangements do not result in a change in control of any of the applicants.¹⁰² While the anti-collusion rules do not prohibit non-auction-related business negotiations among auction applicants, applicants are reminded that certain discussions or exchanges could touch upon impermissible subject matters because they may convey pricing information and bidding strategies.¹⁰³ Further, as discussed above, compliance with the disclosure requirements of the Commission's anti-collusion rule will not insulate a party from enforcement of the antitrust laws.¹⁰⁴

D. Ownership Disclosure Requirements

69. All applicants must comply with the uniform Part 1 ownership disclosure standards and provide information required by Sections 1.2105 and 1.2112 of the Commission's rules.¹⁰⁵ Specifically,

⁹⁸ 47 C.F.R. § 1.2105(b)(2).

⁹⁹ 47 C.F.R. §§ 1.2105(a)(2)(viii), (c)(1).

¹⁰⁰ 47 C.F.R. § 1.2105(a)(2)(ix).

¹⁰¹ Section I.C.2. "Prohibition of Collusion; Compliance with Antitrust Laws," above.

¹⁰² 47 C.F.R. §§ 1.2105(c)(4)(i), (ii).

¹⁰³ Section I.C.2. "Prohibition of Collusion; Compliance with Antitrust Laws," above.

¹⁰⁴ *Id.*

¹⁰⁵ Section 1.2105 requires the disclosure on the short-form application of the applicant's ownership information set forth in both Sections 1.2105 and 1.2112. 47 C.F.R. §§ 1.2105, 1.2112.

in completing the short-form application, applicants will be required to fully disclose information on the real party or parties-in-interest and ownership structure of the applicant. The ownership disclosure standards for the short-form application are prescribed in Sections 1.2105 and 1.2112 of the Commission's rules.¹⁰⁶ Each applicant is responsible for information submitted in its short-form application being complete and accurate.

70. An applicant's most current ownership information on file with the Commission, if in an electronic format compatible with the short-form application (FCC Form 175) (such as information submitted with an ownership disclosure information report (FCC Form 602) or in a short-form application (FCC Form 175) filed for a previous auction using ISAS) will automatically be entered into the applicant's short-form application. An applicant is responsible for ensuring that the information submitted in its short-form application for Auction 86 is complete and accurate. Accordingly, applicants should carefully review any information automatically entered to confirm that it is complete and accurate as of the Auction 86 deadline for filing the short-form application. If any information that was entered automatically needs to be changed, applicants must do so directly in the short-form application.

E. Designated Entity Provisions

71. Eligible applicants in Auction 86 may claim designated entity status, as an entrepreneur, a small business, or very small business eligible for bidding credits. In addition to the information provided below, applicants should review carefully the Commission's recent decisions regarding the designated entity provisions.¹⁰⁷

1. Bidding Credits for Small and Very Small Businesses

72. A bidding credit represents the amount by which a bidder's winning bid will be discounted. For Auction 86, bidding credits will be available to entrepreneurs, small businesses and very small businesses, and consortia thereof.

a. Bidding Credit Eligibility Criteria

73. The level of bidding credit is determined as follows:

- A bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years ("small business") will receive a 15 percent discount on its winning bid.¹⁰⁸
- A bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years ("very small business") will receive a 25 percent discount on its winning bid.¹⁰⁹
- A bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years ("entrepreneur") will receive a 35 percent discount on its winning bid.¹¹⁰

¹⁰⁶ 47 C.F.R. §§ 1.2105, 1.2112.

¹⁰⁷ See, e.g., 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*, FCC 06-4, 21 FCC Rcd 891 (2006) ("*CSEA/Part 1 Report and Order*"); Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 06-52, 21 FCC Rcd 4753 (2006) ("*Designated Entity Second Report and Order*"), recon. pending; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Order on Reconsideration of the Second Report and Order*, FCC 07-68, 21 FCC Rcd 6703 (2006) ("*Order on Reconsideration of the Designated Entity Second Report and Order*").

¹⁰⁸ See 47 C.F.R. §§ 1.2110(f)(2)(ii), 27.1218.

¹⁰⁹ See 47 C.F.R. §§ 1.2110(f)(2)(ii), 27.1218.

74. Bidding credits are not cumulative. A qualifying applicant may claim either a 15 percent, 25 percent, or 35 percent bidding credit on its winning bid.

b. Revenue Disclosure on Short-Form Application

75. An entity applying as an entrepreneur, small business, or very small business must provide gross revenues for the preceding three years of each of the following: (1) the applicant, (2) its affiliates, (3) its controlling interests, (4) the affiliates of its controlling interests, and (5) the entities with which it has an attributable material relationship.¹¹¹ Certification that the average annual gross revenues of such entities and individuals for the preceding three years do not exceed the applicable limit is not sufficient. Additionally, if an applicant is applying as a consortium of entrepreneurs, small businesses, or very small businesses, this information must be provided for each consortium member.¹¹²

2. Attributable Interests

a. Controlling Interests

76. Controlling interests of an applicant include individuals and entities with either *de facto* or *de jure* control of the applicant. Typically, ownership of greater than 50 percent of an entity's voting stock evidences *de jure* control. *De facto* control is determined on a case-by-case basis.¹¹³ The following are some common indicia of *de facto* control:

- the entity constitutes or appoints more than 50 percent of the board of directors or management committee;
- the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee;
- the entity plays an integral role in management decisions.¹¹⁴

77. Applicants should refer to Section 1.2110(c)(2) of the Commission's rules and Attachment C of this Public Notice to understand how certain interests are calculated in determining control. For example, pursuant to Section 1.2110(c)(2)(ii)(F), officers and directors of an applicant are considered to have controlling interest in the applicant.¹¹⁵

b. Affiliates

78. Affiliates of an applicant or controlling interest include an individual or entity that: (1) directly or indirectly controls or has the power to control the applicant; (2) is directly or indirectly controlled by the applicant; (3) is directly or indirectly controlled by a third party that also controls or has the power to control the applicant; or (4) has an "identity of interest" with the applicant.¹¹⁶ The Commission's definition of an affiliate of the applicant encompasses both controlling interests of the

¹¹⁰ See 47 C.F.R. §§ 1.2110(f)(2)(i), 27.1218.

¹¹¹ 47 C.F.R. §§ 1.2110(b)(1)(i), 1.2110(b)(3)(iv)(B). See also *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,323-27 ¶¶ 59-67.

¹¹² 47 C.F.R. §§ 1.2110(b)(3)(i), 1.2110(b)(6), 1.2110(k).

¹¹³ For further guidance on the issue of *de facto* control, see the Commission's affiliation rule at 47 C.F.R. § 1.2110(b)(5); see also *Intermountain Microwave, Public Notice*, 12 FCC 2d. 559, 560 (1963), and *Application of Baker Creek Communications, L.P., for Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas, Memorandum Opinion and Order*, DA 98-1921, 13 FCC Rcd 18,709 (1998).

¹¹⁴ 47 C.F.R. § 1.2110(c)(2)(i)(A)-(C).

¹¹⁵ 47 C.F.R. § 1.2110(c)(2)(ii)(F).

¹¹⁶ 47 C.F.R. § 1.2110(c)(5).

applicant and affiliates of controlling interests of the applicant.¹¹⁷ For more information regarding affiliates, applicants should refer to Section 1.2110(c)(5) and Attachment C to this Public Notice.

c. Material Relationships

79. The Commission requires the consideration of certain leasing and resale (including wholesale) relationships – referred to as “material relationships” – in determining designated entity eligibility, i.e., for bidding credits. Material relationships fall into two categories: impermissible and attributable.

80. An applicant or licensee has an “impermissible material relationship” when it has agreements with one or more other entities for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 50 percent of the spectrum capacity of any of its licenses. If an applicant or a licensee has an impermissible material relationship, it is, as a result, (i) ineligible for the award of designated entity benefits, and (ii) subject to unjust enrichment on a license-by-license basis.¹¹⁸

81. An applicant or licensee has an “attributable material relationship” when it has one or more agreements with any individual entity for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license held by the applicant or licensee. The attributable material relationship will cause the gross revenues of that entity and its attributable interest holders to be attributed to the applicant or licensee for the purposes of determining the applicant’s or licensee’s (i) eligibility for designated entity benefits and (ii) liability for unjust enrichment on a license-by-license basis.¹¹⁹

82. The Commission grandfathered material relationships in existence before the release of the *Designated Entity Second Report and Order*, meaning that those preexisting relationships alone would not cause the Commission to examine a designated entity’s ongoing eligibility for benefits or its liability for unjust enrichment. The Commission did not, however, grandfather preexisting material relationships for determinations of an applicant’s or licensee’s designated entity eligibility for future auctions or in the context of future assignments, transfers of control, spectrum leases, or other reportable eligibility events. Rather, the occurrence of any of those eligibility events after the release date of the *Designated Entity Second Report and Order* triggers a reexamination of the applicant’s or licensee’s designated entity eligibility, taking into account all existing material relationships, including those previously grandfathered.¹²⁰

d. Gross Revenue Exceptions

83. In recent years the Commission has also made other modifications to its rules governing the attribution of gross revenues for purposes of determining designated entity eligibility. For example, the Commission has clarified that, in calculating an applicant’s gross revenues under the controlling

¹¹⁷ *Id.*

¹¹⁸ *Designated Entity Second Report and Order*, 21 FCC Rcd at 4759-60 ¶ 15, 4763-65 ¶¶ 25-30, 4765-68 ¶¶ 31-41; see also *Order on Reconsideration of the Designated Entity Second Report and Order*, 21 FCC Rcd at 6712-13 ¶¶ 24-26; and 47 C.F.R. §§ 1.2110(b)(3)(iv)(A), 1.2111(d).

¹¹⁹ *Designated Entity Second Report and Order*, 21 FCC Rcd at 4759-60 ¶ 15, 4763-65 ¶¶ 25-30, 4765-68 ¶¶ 31-41; see also *Order on Reconsideration of the Designated Entity Second Report and Order*, 21 FCC Rcd at 6712-13 ¶¶ 24-26; and 47 C.F.R. §§ 1.2110(b)(3)(iv)(B), 1.2111(d).

¹²⁰ 47 C.F.R. § 1.2110(b)(3)(iv)(C); *Designated Entity Second Report and Order*, 21 FCC Rcd at 4764 ¶¶ 28-29; see also *Order on Reconsideration of the Designated Entity Second Report and Order*, 21 FCC Rcd at 6713-14 ¶¶ 27-29; but see the additional grandfathering provision in Section 1.2110(b)(3)(iv)(C)(2) for the material relationships of those entities that are an applicant’s affiliates based solely on Section 1.2110(c)(5)(i)(C) of the Commission’s rules. 47 C.F.R. § 1.2110(b)(3)(iv)(C)(2); see also *Designated Entity Second Report and Order*, 21 FCC Rcd at 4764-65 ¶ 30.

interest standard, it will not attribute the personal net worth, including personal income, of its officers and directors to the applicant.¹²¹

84. The Commission has also exempted from attribution to the applicant the gross revenues of the affiliates of a rural telephone cooperative's officers and directors, if certain conditions specified in Section 1.2110(b)(3)(iii) of the Commission's rules are met.¹²² An applicant claiming this exemption must provide in an attachment an affirmative statement that the applicant, affiliate and/or controlling interest is an eligible rural telephone cooperative within the meaning of Section 1.2110(b)(3)(iii), and must supply any additional information as may be required to demonstrate eligibility for the exemption from the attribution rule.¹²³ Applicants seeking to claim this exemption must meet all of the conditions.¹²⁴ Additional guidance on claiming this exemption may be found in Attachment C to this Public Notice.

e. Bidding Consortia

85. A consortium of small businesses, very small businesses, or entrepreneurs is a conglomerate organization composed of two or more entities, each of which individually satisfies the definition of a small business, very small business, or entrepreneur.¹²⁵ Thus, each member of a consortium of small businesses, very small businesses, or entrepreneurs that applies to participate in Auction 86 must individually meet the criteria for small businesses, very small businesses, or entrepreneurs, as set forth above.¹²⁶ Each consortium member must disclose its gross revenues along with those of its affiliates, its controlling interests, the affiliates of its controlling interests, and any entities having an attributable material relationship with the member. Although the gross revenues of the consortium members will not be aggregated for purposes of determining the consortium's eligibility as a small business, very small business, or entrepreneur¹²⁷ this information must be provided to ensure that each individual consortium member qualifies for any bidding credit awarded to the consortium.¹²⁸

3. Installment Payments

86. Installment payment plans will not be available for licenses offered in Auction 86.

¹²¹ See 47 C.F.R. § 1.2110(c)(2)(ii)(F). See also *Order on Reconsideration of the Part 1 Fifth Report and Order*, 18 FCC Rcd at 10,185-86 ¶¶ 8-9. However, to the extent that the officers and directors of the applicant are controlling interest holders of other entities, the gross revenues of those entities will be attributed to the applicant.

¹²² *Order on Reconsideration of the Part 1 Fifth Report and Order*, 18 FCC Rcd at 10,186-94 ¶¶ 10-18; Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Second Order on Reconsideration of the Fifth Report and Order*, FCC 04-295, 20 FCC Rcd 1942, 1945-46 ¶ 9 (2004) (“*Second Order on Reconsideration of the Fifth Report and Order*”).

¹²³ 47 C.F.R. § 1.2110(b)(3)(iii). See also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, FCC 03-98, 18 FCC Rcd 10,180 (2003); *Second Order on Reconsideration of the Fifth Report and Order*, 20 FCC Rcd at 1949 ¶ 18.

¹²⁴ See *Order on Reconsideration of the Part 1 Fifth Report and Order*, 18 FCC Rcd at 10,186-94 ¶¶ 10-18; see also *Second Order on Reconsideration of the Fifth Report and Order*, 20 FCC Rcd at 1945-46 ¶ 9.

¹²⁵ 47 C.F.R. § 1.2110(e)(6).

¹²⁶ *Id.*

¹²⁷ 47 C.F.R. § 1.2110(b)(3)(i).

¹²⁸ The *CSEA/Part 1 Report and Order* modified the procedure by which a consortium that is a winning bidder will apply for a license. See *CSEA/Part 1 Report and Order*, 21 FCC Rcd at 911-12 ¶¶ 51-52. Applicants applying as consortia should review the *CSEA/Part 1 Report and Order* and Sections 1.2107(g) and 1.2110(b)(3) of the Commission's rules to understand how the members of the consortia will apply for a license in the event they are winning bidders.

F. Tribal Lands Bidding Credit

87. To encourage the growth of wireless services in federally recognized tribal lands, the Commission has implemented a tribal lands bidding credit. Applicants do not provide information regarding tribal lands bidding credits on their short-form applications. Instead, winning bidders may apply for the tribal lands bidding credit after the auction when they file their more detailed, long-form applications. This process is described in Section V.E. “Tribal Lands Bidding Credit,” below.

G. Provisions Regarding Former and Current Defaulters

88. Current defaulters are not eligible to participate in Auction 86, but former defaulters can participate so long as they are otherwise qualified and, as discussed in Section III.D.3. below, make upfront payments that are fifty percent more than the normal upfront payment amounts.¹²⁹ An applicant is considered a “current defaulter” when it, its affiliates, its controlling interests, or the affiliates of its controlling interests, are in default on any payment for any Commission license (including down payments) or are delinquent on any non-tax debt owed to any Federal agency as of the filing deadline for short-form applications. An applicant is considered a “former defaulter” when it, its affiliates, its controlling interests, or the affiliates of its controlling interests, have defaulted on any Commission license or been delinquent on any non-tax debt owed to any Federal agency, but have since remedied all such defaults and cured all of the outstanding non-tax delinquencies.

89. On the short-form application, an applicant must certify under penalty of perjury that it, its affiliates, its controlling interests, and the affiliates of its controlling interests, as defined by Section 1.2110 of the Commission’s rules,¹³⁰ are not in default on any payments for Commission licenses (including down payments) and that they are not delinquent on any non-tax debt owed to any Federal agency.¹³¹ Each applicant must also state under penalty of perjury whether or not it, its affiliates, its controlling interests, and the affiliates of its controlling interests, have ever been in default on any Commission licenses or have ever been delinquent on any non-tax debt owed to any Federal agency.¹³² Prospective applicants are reminded that submission of a false certification to the Commission is a serious matter that may result in severe penalties, including monetary forfeitures, license revocations, exclusion from participation in future auctions, and/or criminal prosecution. These statements and certifications are prerequisites to submitting an application to participate in an FCC auction.

90. Applicants are encouraged to review the Bureau’s previous guidance on default and delinquency disclosure requirements in the context of the short-form application process.¹³³ For example, it has been determined that to the extent that Commission rules permit late payment of regulatory or application fees accompanied by late fees, such debts will become delinquent for purposes of Sections 1.2105(a) and 1.2106(a) only after the expiration of a final payment deadline.¹³⁴ Therefore, with respect

¹²⁹ 47 C.F.R. §§ 1.2105(a)(2)(x), 1.2105(b)(1), and 1.2106(a); see *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,317 ¶ 42 and n.142 (“If any one of an applicant’s controlling interests or their affiliates...is in default on any Commission licenses or is delinquent on any non-tax debt owed to any Federal agency at the time the applicant files it[s] FCC Form 175, the applicant will not be able to make the certification required by Section 1.2105(a)(2)(x)...and will not be eligible to participate in Commission auctions.”).

¹³⁰ 47 C.F.R. § 1.2110.

¹³¹ 47 C.F.R. § 1.2105(a)(2)(x); see also *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,317 ¶ 42.

¹³² 47 C.F.R. § 1.2105(a)(2)(xi); see also *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,317 ¶ 42 and n.149.

¹³³ “WTB Reminds Prospective Broadband PCS Spectrum Auction Applicants of Default and Delinquency Disclosure Requirements,” *Public Notice*, DA 04-3491, 19 FCC Rcd 21,920 (2004) (“*Auction Default Disclosure Public Notice*”).

¹³⁴ Letter to Cheryl A. Tritt, Esq., Morrison and Foerster, LLP, from Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, DA 04-3685, 19 FCC Rcd 22,907 (2004) (clarifying the term “debt” or “non-tax debt” as referenced in 47 C.F.R. §§ 1.2105(a) and 1.2106(a)).

to regulatory or application fees, the provisions of Sections 1.2105(a) and 1.2106(a) regarding default and delinquency in connection with competitive bidding are limited to circumstances in which the relevant party has not complied with a final Commission payment deadline.¹³⁵ Parties are also encouraged to coordinate with the Commission's Office of Managing Director or the Bureau's Auctions and Spectrum Access Division staff if they have any questions about default and delinquency disclosure requirements.

91. The Commission considers outstanding debts owed to the United States Government, in any amount, to be a serious matter. The Commission adopted rules, including a provision referred to as the "red light rule," that implement the Commission's obligations under the Debt Collection Improvement Act of 1996, which governs the collection of claims owed to the United States.¹³⁶ Under the red light rule, the Commission will not process applications and other requests for benefits filed by parties that have outstanding debts owed to the Commission. In the same rulemaking order, the Commission explicitly declared, however, that the Commission's competitive bidding rules "are not affected" by the red light rule.¹³⁷ As a consequence, the Commission's adoption of the red light rule does not alter the applicability of any of the Commission's competitive bidding rules, including the provisions and certifications of Sections 1.2105 and 1.2106, with regard to current and former defaults or delinquencies.

92. Applicants are reminded, however, that the Commission's Red Light Display System, which provides information regarding debts owed to the Commission, may not be determinative of an auction applicant's ability to comply with the default and delinquency disclosure requirements of Section 1.2105.¹³⁸ Thus, while the red light rule ultimately may prevent the processing of long-form applications by auction winners, an auction applicant's "red light" status is not necessarily determinative of its eligibility to participate in an auction or of its upfront payment obligation.

H. Optional Applicant Status Identification

93. Applicants owned by members of minority groups and/or women, as defined in Section 1.2110(c)(3),¹³⁹ and rural telephone companies, as defined in Section 1.2110(c)(4),¹⁴⁰ may identify themselves in filling out their short-form applications regarding this status. This applicant status information is collected for statistical purposes only and assists the Commission in monitoring the participation of "designated entities" in its auctions.¹⁴¹

¹³⁵ Even where Commission rules expressly permit late payment, subject to payment of an additional late fee, and do not impose a final payment deadline, the Commission may in some cases issue a demand for payment by a date certain. See 47 C.F.R. § 1.1164(a). Failure to comply with the terms of a particular demand letter in the time period provided may render the subject debt delinquent, notwithstanding rules generally permitting late payment.

¹³⁶ Amendment of Parts 0 and 1 of the Commission's Rules; Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors, MD Docket No. 02-339, *Report and Order*, FCC 04-72, 19 FCC Rcd 6540 (2004) (implementing Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996)) ("*Debt Collection Report and Order*").

¹³⁷ *Debt Collection Report and Order*, 19 FCC Rcd at 6541 n.11 (specifically mentions 47 C.F.R. §§ 1.2105(a)(2)(x) and (xi)).

¹³⁸ *Auction Default Disclosure Public Notice*, 19 FCC Rcd at 21,920 (addressing relationship between Commission's Red Light Display System and short-form application default and delinquency disclosure requirements for auction applicants).

¹³⁹ 47 C.F.R. § 1.2110(c)(3).

¹⁴⁰ 47 C.F.R. § 1.2110(c)(4).

¹⁴¹ Designated entities are defined as small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies. See 47 C.F.R. § 1.2110(a).