



# PUBLIC NOTICE

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February 4, 2010

## **Closed Auction of Broadcast Construction Permits Scheduled for July 20, 2010**

### **Auction 88 Applicants Must Provide Supplemental Information by March 12, 2010**

### **Comment Sought on Competitive Bidding Procedures for Auction 88**

AU Docket No. 10-31

Comments Due: February 25, 2010

Reply Comments Due: March 11, 2010

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## I. INTRODUCTION

1. By this Public Notice, the Wireless Telecommunications and the Media Bureaus (the “Bureaus”) announce an auction of certain broadcast FM, AM, and FM Translator construction permits, and seek comment on the procedures to be used for this auction. This Public Notice also establishes a deadline for the submission to the Commission of an FCC Registration Number (“FRN”) by each applicant to permit access to the Commission’s electronic short-form application filing and auction bidding systems, and provides for dismissal of those application(s) where the applicant fails to provide its FRN by March 12, 2010. This auction, which is designated Auction 88, is scheduled to commence on July 20, 2010. Auction 88 will be a “closed” auction; only those entities listed in Attachment A to this Public Notice will be eligible to participate in this auction.

## II. BACKGROUND

2. Auction 88 will resolve pending closed groups of mutually exclusive applications for full-power FM and FM translator construction permits, that have been the subject of various Commission and judicial decisions.<sup>1</sup> Included in these groups are twelve applications that were recently amended<sup>2</sup> to specify operation as commercial broadcast stations.<sup>3</sup> Auction 88 will also resolve mutual exclusivity between applications for new AM stations on 640 kHz and 1230 kHz in the Terre Haute, Indiana, area.<sup>4</sup>

<sup>1</sup> The construction permits for the FM and FM translator stations in this auction are the subject of pending, closed groups of mutually exclusive applications. See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, *First Report and Order*, 13 FCC Rcd 15920, 15950-52 ¶¶ 80-87, 15958-61 ¶¶ 105-111, FCC 98-194 (1998) (“*Broadcast First Report and Order*”), on recon., *Memorandum Opinion and Order*, 14 FCC Rcd 8724, FCC 99-74 (1999), on further recon., *Memorandum Opinion and Order*, 14 FCC Rcd 12541, FCC 99-201 (1999). The applications for the three AM stations in this auction were filed during two filing windows announced by separate public notices. See Permanent and Interim Authority Procedures Announced for Applications for Stations Formerly Licensed to Entities Controlled by Michael Rice, *Public Notice*, 16 FCC Rcd 12832, DA 01-1441 (MB/WTB 2001) (“*Supplemental Terre Haute Window Notice*”); AM Auction Filing Window and Application Freeze, *Public Notice*, 14 FCC Rcd 19490, DA 99-2585 (MMB/WTB 1999) (“*AM Auction 32 Window Notice*”).

<sup>2</sup> In October 2009, applicants in those groups that had applied for noncommercial educational stations and which were mutually exclusive with applications for commercial stations (“Mixed Groups”) were provided with a one-time opportunity to amend their applications. Window Opened to October 30, 2009, to Permit Amendment of Applications for Noncommercial Educational Stations in Pending, Closed Mixed Groups, *Public Notice*, 24 FCC Rcd 12188, DA 09-2148 (MB 2009) (“*October 2009 NCE Amendment Public Notice*”). Attachment A to the *October 2009 NCE Amendment Public Notice* identified the applications in each of the Mixed Groups. 24 FCC Rcd at 12190-91.

<sup>3</sup> Twenty-five noncommercial educational (“NCE”) applications in 17 Mixed Groups were identified in the *October 2009 NCE Amendment Public Notice*. Twelve NCE applications were amended. One Mixed Group (TV - Davenport, Iowa) was removed from the Auction 88 inventory. See note 5, below. Two Mixed Groups that consisted of two applications each dissolved as a result of either withdrawal by the NCE applicant or failure to amend by the NCE applicant. (FM Mixed Group - Canadian, Texas, and FM Translator Mixed Group - Reading, Pennsylvania). As a result, 10 NCE applications were then dismissed for failure to amend.

<sup>4</sup> AM applications in each mutually exclusive group propose to serve different communities, and therefore an analysis under Section 307(b) of the Communications Act of 1934, as amended, is required (“Section 307(b”). 47 U.S.C. § 307(b). In order to evaluate Section 307(b) considerations, on January 13, 2010, the Media Bureau sent a letter to each applicant in closed MX Group MM-AM039-460 and MX Group MM-AM040-1230, directing that the Section 307(b) information be submitted on or before February 16, 2010. If no Section 307(b) determination is (continued....)

The 13 FM application groups and the two FM Translator application groups (all of which are former Mixed Groups), and the three closed AM application groups identified in Attachment A will now proceed to auction.<sup>5</sup>

### III. CONSTRUCTION PERMITS IN AUCTION 88

3. Auction 88 will offer construction permits for 13 commercial FM stations, two commercial FM translator stations, and three commercial AM stations as listed in Attachment A. Attachment A also sets forth proposed minimum opening bids and upfront payments for permits being offered in this auction.

4. An applicant listed in Attachment A may become qualified to bid only if it submits an FRN pursuant to the instructions set forth below and meets the additional filing, qualification and payment requirements, as will be further described in future public notices.<sup>6</sup> Each qualified bidder will be eligible to bid on only those construction permits specified for that qualified bidder in Attachment A to this Public Notice. All applicants within these groups of mutually exclusive applications (“MX groups”) are directly mutually exclusive with one another, therefore no more than one construction permit will be awarded for each MX group.

### IV. DUE DILIGENCE

5. 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 construction permits for broadcast facilities they are seeking in this auction. Bidders are responsible for assuring themselves that, if they win a construction permit, they will be able to build and operate facilities in accordance with the Commission’s rules. **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 construction permittee in a 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.**

6. Applicants should perform their due diligence research and analysis 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.<sup>7</sup> *Reports and Orders* adopted in FM allotment rulemaking proceedings often include anomalies such as site restrictions or expense reimbursement requirements.<sup>8</sup> Additionally, potential bidders should perform technical analyses and/or refresh their previous analyses to assure themselves that, should they be a winning bidder for any Auction 88 construction permit, they will be able to build and operate facilities that will fully comply with the Commission’s current 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, confirm

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dispositive, the applicants in closed MX Group MM-AM039-460 and MX Group MM-AM040-1230 will be included in Auction 88. See *Broadcast First Report and Order*, 13 FCC Rcd at 15965.

<sup>5</sup> The Davenport, Iowa, television Mixed Group identified in the *October 2009 NCE Amendment Public Notice* will be addressed separately and the Davenport television applications are not included in this auction.

<sup>6</sup> All AM applicants listed in Attachment A previously filed short-form applications (FCC Form 175) in either the *AM Auction 32 Window Notice* or the *Supplemental Terre Haute Window Notice*. A forthcoming Auction 88 public notice will describe further processing requirements concerning these pending short-form applications.

<sup>7</sup> See 47 C.F.R. § 73.202.

<sup>8</sup> See, e.g., *Circleville, Ohio*, Docket No. 16662, *Second Report and Order*, 8 FCC 2d 159, FCC 67-578 (1967); *Charlotte Amalie, Frederiksted, and Christiansted, U.S. Virgin Islands*, MM Docket No. 00-102, *Report and Order*, 19 FCC Rcd 30, DA 03-4120 (MB 2004); *Cheyenne, Wyoming and Gering, Nebraska*, MM Docket No. 97-106, *Report and Order*, 15 FCC Rcd 7528, DA 00-865 (MMB 2000).

the availability of such sites, and also to familiarize themselves with the Commission's rules regarding the National Environmental Policy Act.<sup>9</sup>

7. Applicants are strongly encouraged to conduct their own research prior to Auction 88 in order to determine the existence of pending administrative or judicial proceedings, including pending allocations rulemaking proceedings that might affect their decisions regarding participation in the auction. Participants in Auction 88 are strongly encouraged to continue such research throughout the auction. The due diligence considerations mentioned in this Public Notice do not comprise an exhaustive list of steps that should be undertaken prior to participating in this auction. As always, the burden is on the potential bidder to determine how much research to undertake, depending upon specific facts and circumstances.

## V. FCC REGISTRATION NUMBER INFORMATION REQUIRED

8. Each applicant is required to submit its FCC Registration Number ("FRN") by no later than 5:00 PM Eastern Time (ET) on Friday, March 12, 2010, in order to be able and eligible to participate in Auction 88. **Failure to submit an FRN pursuant to the instructions in this Public Notice will result in dismissal of the applicant's application(s) and will result in disqualification of the applicant from Auction 88.**

9. The Commission's rules require all persons and entities doing business with the Commission to obtain a unique identifying number called the FRN and to provide the FRN with all applications or feeable filings, as well as with other transactions with the Commission involving payment of money.<sup>10</sup> Accordingly, use of an FRN is mandatory for all applicants for Auction 88. Submission of an FRN is necessary to permit each applicant to log in to the FCC's Integrated Spectrum Auction System ("ISAS" or "FCC Auction System") and continue to participate in the auction process.<sup>11</sup>

10. Applicants that do not have an FRN must obtain one by registering using the FCC's Commission Registration System (CORES). To access CORES, point your web browser to the FCC Auctions page at <http://wireless.fcc.gov/auctions/> and click the CORES link under Related Sites. Next, follow the directions provided to register and receive your FRN. Be sure to retain this number and password and keep such information strictly confidential.

11. To submit an FRN, each applicant listed in Attachment A must provide its applicant name and FRN in an e-mail to [auction88@fcc.gov](mailto:auction88@fcc.gov) or fax this information to Kathryn Hostetter at (717) 338-2850. Each applicant's FRN submission also must describe the submitter's relationship to the applicant or must describe the basis for the submitter's authorization to submit an FRN on behalf of the applicant. We note that, in some cases, an individual or entity may have obtained multiple FRNs during the time that the applications in Attachment A have been pending. For those applicants listed in Attachment A with a short-form application (FCC Form 175) on file (i.e., the closed AM application groups MM-AM039-640, MM-AM040-1230 and MM-AM041-750), the applicant must submit the FRN associated with the Taxpayer Identification Number (TIN) that it used in connection with the submission of its initially filed short-form application.

12. For further information, contact the FCC ULS Customer Support Hotline at (877) 480-3201 option 2, (717) 338-2888, or (717) 338-2824 (TTY). The hotline is available to assist with questions Monday through Friday 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.

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<sup>9</sup> 47 C.F.R. Chapter 1, Part 1, Subpart I.

<sup>10</sup> See Amendment of Parts 1, 21, 61, 73, 74, and 76 of the Commission's Rules, Adoption of a Mandatory FCC Registration Number, MD Docket No. 00-205, *Report and Order*, 16 FCC Rcd 16138, FCC 01-246 (2001). See also 47 C.F.R. Chapter 1, Part 1, Subpart W – FCC Registration Number.

<sup>11</sup> See 47 C.F.R. § 1.8002(a)(3) (FRN must be obtained by spectrum auction participants). See also 47 C.F.R. § 1.8004(a) (electronic filing systems for filings that require an FRN will not accept a filing without the appropriate FRN).

## VI. SUBMISSION OF AUCTION SHORT-FORM APPLICATIONS

13. The Bureaus will specify procedures for Auction 88 applicants to electronically file short-form applications (FCC Form 175) in ISAS in a future public notice. Those procedures will include instructions for reporting changes pursuant to Section 1.65 of the Commission's rules.<sup>12</sup> Applicants are reminded that certain changes may be considered a "major modification" of an application and could result in dismissal of the application and disqualification of an applicant from participation in Auction 88.<sup>13</sup>

## VII. BUREAUS SEEK COMMENT ON AUCTION PROCEDURES

14. Section 309(j)(3)(E)(i) 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 . . ." <sup>14</sup> 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 delegated authority, to seek comment on a variety of auction-specific procedures prior to the start of each auction.<sup>15</sup> The Bureaus therefore seek comment on the following issues relating to the conduct of Auction 88.

### A. Auction Structure

#### 1. Simultaneous Multiple-Round Auction Design

15. The Bureaus propose to auction all construction permits included in Auction 88 using the Commission's standard simultaneous multiple-round ("SMR") auction format.<sup>16</sup> 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. Typically, bidding remains open on all construction permits until bidding stops on every construction permit. The Bureaus seek comment on this proposal.

#### 2. Round Structure

16. The Commission will conduct Auction 88 over the Internet, and telephonic bidding will be available as well. The toll-free telephone number for the Auction Bidder Line will be provided to

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<sup>12</sup> 47 C.F.R. § 1.65 (making applicants responsible for the continuing accuracy and completeness of information furnished in a pending application).

<sup>13</sup> See 47 C.F.R. §§ 1.2105(b)(2), 73.5002(b).

<sup>14</sup> 47 U.S.C. § 309(j)(3)(E)(i).

<sup>15</sup> See Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 447-49 ¶¶ 124-25, FCC 97-413 (1997) ("*Part 1 Third Report and Order*") (directing WTB 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 ¶¶ 127-28 (consistent with the Part 1 rules, the Commission delegated authority to the Media Bureau to seek comment and establish an appropriate auction design methodology prior to the start of each broadcast auction). See generally 47 C.F.R. § 0.131; Amendment of Part 1 of the Commission's Rules — Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5697-98 ¶ 16, FCC 97-60 (1997) ("*Part 1 Order*").

<sup>16</sup> See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2378-79 ¶¶ 171-76, FCC 94-61 (1994) (*Competitive Bidding Second Report and Order*) for a general discussion of competitive bidding design.

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.

17. The auction 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.

18. The Bureaus propose to retain 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. Under this proposal, the Bureaus may change the amount of time for the bidding rounds, the amount of time between rounds, or the number of rounds per day, depending upon bidding activity and other factors. The Bureaus seek comment on this proposal. Commenters may wish to address the role of the bidding schedule in managing the pace of the auction and the tradeoffs in managing auction pace by bidding schedule changes, by changing the activity requirements or bid amount parameters, or by using other means.

### **3. Stopping Rule**

19. The Bureaus have discretion "to establish stopping rules before or during multiple round auctions in order to terminate the auction within a reasonable time."<sup>17</sup> For Auction 88, 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 withdraws any provisionally winning bids (if bid withdrawals are permitted in this auction).<sup>18</sup> Thus, unless the Bureaus announce alternative procedures, bidding will remain open on all construction permits until bidding stops on every construction permit. Consequently, it is not possible to determine in advance how long the auction will last.

20. Further, the Bureaus propose to retain the discretion to exercise any of the following options during Auction 88:

- a) 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, withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or places 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.
- b) Declare that the auction will end after a specified number of additional rounds ("special stopping rule"). If the Bureaus invoke this special stopping rule, they will accept bids in the specified final round(s), after which the auction will close.
- c) Keep the auction open even if no bidder places any new bids, applies a waiver, or withdraws any provisionally winning bids (if withdrawals are permitted in this auction). In this event, the effect will be the same as if a bidder had applied a waiver. The activity rule will apply as usual, and a bidder with insufficient activity will either lose bidding eligibility or use a waiver.

21. The Bureaus propose to exercise these options only in certain circumstances, for example, where the auction is proceeding unusually slowly or quickly, there is minimal overall bidding

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<sup>17</sup> 47 C.F.R. § 1.2104(e).

<sup>18</sup> Proactive waivers are described in Section VII.B.3. "Activity Rule Waivers and Reducing Eligibility," provisionally winning bids are defined in Section VII.B.6. "Provisionally Winning Bids," and bid withdrawals are described in Section VII.B.7. "Bid Removal and Bid Withdrawal," below.

activity, or it appears likely that the auction will not close within a reasonable period of time or will close prematurely. Before exercising these options, the Bureaus are likely to attempt to change the pace of the auction by, for example, changing the number of bidding rounds per day and/or changing minimum acceptable bids. The Bureaus propose to retain the discretion to exercise any of these options with or without prior announcement during the auction. The Bureaus seek comment on these proposals.

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

22. For Auction 88, the Bureaus 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, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding.<sup>19</sup> 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. The Bureaus 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. The Bureaus seek comment on this proposal.

### **B. Auction Procedures**

#### **1. Upfront Payments and Bidding Eligibility**

23. The Bureaus have delegated authority and discretion to determine an appropriate upfront payment for each construction permit being auctioned, taking into account such factors as the efficiency of the auction process and the potential value of similar spectrum.<sup>20</sup> As described further below, the upfront payment is a refundable deposit made by each bidder to establish eligibility to bid on 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.<sup>21</sup> With these considerations in mind, the Bureaus propose the upfront payments set forth in Attachment A to this Public Notice. The Bureaus seek comment on this proposal.

24. The Bureaus further propose that the amount of the upfront payment submitted by a bidder will determine the bidder's initial bidding eligibility in bidding units. The Bureaus propose that each construction permit be assigned a specific number of bidding units equal to the upfront payment listed in Attachment A, on a bidding unit per dollar basis. The number of bidding units for a given construction permit is fixed and does not change during the auction as prices change. A bidder may place bids on multiple construction permits, provided that (1) each such construction permit is designated for that bidder in Attachment A of this Public Notice, and (2) the total number of bidding units associated with those construction permits does not exceed the bidder's current eligibility. Eligibility cannot be increased during the auction; it can only remain the same or decrease. Thus, in calculating its upfront payment amount and hence its initial bidding eligibility, an applicant must determine the maximum number of bidding units on which it may wish to bid (or hold provisionally winning bids) in any single round, and submit an upfront payment amount covering that total number of bidding units. Provisionally winning bids are bids that would become final winning bids if the auction were to close in that given round.<sup>22</sup>

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<sup>19</sup> 47 C.F.R. § 1.2104(i).

<sup>20</sup> See *Part 1 Order*, 12 FCC Rcd at 5697-98 ¶ 16. See also *Part 1 Third Report and Order*, 13 FCC Rcd at 425 ¶ 86; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2378-79 ¶¶ 171-75.

<sup>21</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2378-79 ¶¶ 171-76.

<sup>22</sup> See Section VII.B.6. "Provisionally Winning Bids," below.

## **2. Activity Rule**

25. In order to ensure that the 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.

26. The Bureaus propose a single stage auction with the following activity requirement: In each round of the auction, a bidder desiring to maintain its current bidding eligibility is required to be active on one hundred (100) percent of its bidding eligibility. A bidder's activity in a round will be the sum of the bidding units associated with any construction permits 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. 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 additional bids in the auction.<sup>23</sup> The Bureaus seek comment on this proposal.

## **3. Activity Rule Waivers and Reducing Eligibility**

27. 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, 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 bidding in a particular round.

28. The FCC Auction System assumes that a bidder that does not meet the activity requirement would prefer to use 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 in which a bidder's activity level is below the minimum required unless (1) the bidder has no activity rule waivers remaining; or (2) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the activity requirement. If a bidder that is eligible to bid on only one construction permit has no waivers remaining and does not satisfy the required activity level, its eligibility will be permanently reduced, eliminating the bidder from the auction. If a bidder that is eligible to bid on more than one construction permit has no waivers remaining and does not satisfy the required activity level, its current eligibility will be permanently reduced, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction.

29. A bidder that is eligible to bid on more than one construction permit and has 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 rule 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.

30. Under the proposed simultaneous stopping rule, 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 are placed or withdrawn (if bid withdrawals are permitted in this auction), 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, withdrawals (if bid withdrawals are permitted in this auction), or proactive waivers will not keep the auction open. A bidder cannot apply a proactive waiver after bidding in a round, and applying a proactive waiver will preclude a bidder from

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<sup>23</sup> See Section VII.B.3. "Activity Rule Waivers and Reducing Eligibility," below.

placing any bids in that round.<sup>24</sup> Applying a waiver is irreversible; once a proactive waiver is submitted, that waiver cannot be unsubmitted, even if the round has not yet closed.

31. The Bureaus propose that each bidder in Auction 88 be provided with three activity rule waivers that may be used as set forth above at the bidder's discretion during the course of the auction. The Bureaus seek comment on this proposal.

#### **4. Reserve Price or Minimum Opening Bids**

32. Section 309(j) asks 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.<sup>25</sup> 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.<sup>26</sup>

33. 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, 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. It is possible for the minimum opening bid and the reserve price to be the same amount.

34. In light of Section 309(j)'s requirements, the Bureaus propose to establish minimum opening bid amounts for Auction 88. The Bureaus believe a minimum opening bid amount, which has been used in other broadcast auctions, is an effective bidding tool for accelerating the competitive bidding process.<sup>27</sup> The Bureaus do not propose to establish a separate reserve price for the construction permits to be offered in Auction 88.

35. For Auction 88, the Bureaus propose minimum opening bid amounts determined by taking into account the type of service and class of facility offered, market size, population covered by the proposed broadcast facility, and recent broadcast transaction data. A proposed minimum opening bid amount for each construction permit available in Auction 88 is set forth in Attachment A of this Public Notice.<sup>28</sup> The Bureaus seek comment on these proposals.

36. If commenters believe that these minimum opening bid amounts will result in unsold construction permits, are not reasonable amounts, or should instead operate as reserve prices, 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 amounts or formulas for reserve prices or minimum opening bids. In establishing the minimum opening bid amounts, the Bureaus particularly seek comment on factors that could reasonably have an impact on valuation of the broadcast spectrum, including the type of service and class of facility offered, market size, population covered by the proposed broadcast FM, AM and FM Translator station and any other relevant factors.

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<sup>24</sup> In general, once a bidder places a proactive waiver during a round, the FCC Auction System does not allow the bidder to take any other bidding-related action in that round, including placing bids or withdrawing bids (if bid withdrawals are permitted in this auction).

<sup>25</sup> 47 U.S.C. § 309(j)(4)(F). *See also* 47 C.F.R. §§ 1.2104(c) and (d).

<sup>26</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15971 ¶ 134; *Part 1 Third Report and Order*, 13 FCC Rcd at 455-56 ¶ 141. *See* 47 C.F.R. § 1.2104(c).

<sup>27</sup> *See, e.g.*, Auction of 800 MHz SMR Upper 10 MHz Band, Minimum Opening Bids or Reserve Prices, *Order*, 12 FCC Rcd 16354, DA 97-2147 (WTB 1997); Auction of the Phase II 220 MHz Service Licenses, Auction Notice and Filing Requirements for 908 Licenses Consisting of Economic Area (EA), Economic Area Grouping (EAG), and Nationwide Licenses, Scheduled for September 15, 1998, Minimum Opening Bids and Other Procedural Issues, *Public Notice*, 13 FCC Rcd 16445, DA 98-1010 (WTB 1998).

<sup>28</sup> *See* note 31 (concerning rounding), below.

## 5. Bid Amounts

37. The Bureaus propose that, in each round, eligible bidders be able to place a bid on a given construction permit in any of up to nine different amounts.<sup>29</sup> Under this proposal, the FCC Auction System interface will list the acceptable bid amounts for each construction permit.<sup>30</sup>

38. The first of the 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 a certain percentage higher. That is, the minimum acceptable bid amount will be calculated by multiplying the 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.<sup>31</sup> If bid withdrawals are permitted in this auction, in the case of a construction permit for which the provisionally winning bid has been withdrawn, the minimum acceptable bid amount will equal the second highest bid received for the construction permit.<sup>32</sup>

39. 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 5 percent, the calculation is (minimum acceptable bid amount) \* (1 + 0.05), rounded, or (minimum acceptable bid amount) \* 1.05, 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) \* 1.10, rounded; etc. The Bureaus will round the results using the Commission's standard rounding procedures for auctions.<sup>33</sup>

40. For Auction 88, 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. To calculate the additional acceptable bid amounts, the Bureaus propose to use a bid increment percentage of 5 percent.

41. The Bureaus retain the discretion to change the minimum acceptable bid amounts, the minimum acceptable bid percentage, the bid increment percentage, and the number of acceptable bid amounts if the Bureaus determine that circumstances so dictate. Further, the Bureaus retain the discretion to do so on a construction permit-by-construction permit basis. The Bureaus also retain the discretion to limit (a) the amount by which a minimum acceptable bid for a construction permit may increase compared with the corresponding provisionally winning bid, and (b) the amount by which an additional bid amount may increase compared with the immediately preceding acceptable bid amount. For example, the Bureaus could set a \$10,000 limit on increases in minimum acceptable bid amounts over provisionally winning bids. Thus, if calculating a minimum acceptable bid using the minimum acceptable bid percentage results in a minimum acceptable bid amount that is \$12,000 higher than the provisionally

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<sup>29</sup> Bidders must have sufficient eligibility to place a bid on the particular construction permit. *See* Section VII.B.1. "Upfront Payments and Bidding Eligibility," above.

<sup>30</sup> 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.

<sup>31</sup> Results are rounded using the Commission's standard rounding procedure for auctions: 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.

<sup>32</sup> *See* Section VII.B.7. "Bid Removal and Bid Withdrawal," below.

<sup>33</sup> *See* note 31 (concerning rounding), above.

winning bid on a construction permit, the minimum acceptable bid amount would instead be capped at \$10,000 above the provisionally winning bid. The Bureaus seek comment on the circumstances under which the Bureaus should employ such a limit, factors the Bureaus should consider when determining the dollar amount of the limit, and the tradeoffs in setting such a limit or changing other parameters, such as changing the minimum acceptable bid percentage, the bid increment percentage, or the number of acceptable bid amounts. If the Bureaus exercise this discretion, they will alert bidders by announcement in the FCC Auction System during the auction. The Bureaus seek comment on these proposals.

## **6. Provisionally Winning Bids**

42. Provisionally winning bids are bids that would become final winning bids if the auction were to close in that given round. At the end of a bidding round, a provisionally winning bid for each construction permit will be determined based on the highest bid amount received for the construction permit. In the event of identical high bid amounts being submitted on a construction permit in a given round (i.e., tied bids), the Bureaus 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 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.

43. A provisionally winning bid will remain the provisionally winning bid until there is a higher bid on the construction permit at the close of a subsequent round, unless the provisionally winning bid is withdrawn (if bid withdrawals are permitted in this auction). Bidders are reminded that provisionally winning bids count toward activity for purposes of the activity rule.<sup>34</sup>

## **7. Bid Removal and Bid Withdrawal**

44. For Auction 88, the Bureaus 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. The Bureaus seek comment on this bid removal proposal.

45. The Bureaus also seek comment on whether bid withdrawals should be permitted in Auction 88. When permitted in an auction, bid withdrawals provide a bidder with the option of withdrawing bids placed in prior rounds that have become provisionally winning bids. A bidder may withdraw its provisionally winning bids using the “withdraw bids” function in the FCC Auction System. If permitted, a bidder that withdraws its provisionally winning bid(s) is subject to the bid withdrawal payment provisions of the Commission rules.<sup>35</sup>

46. In Auction 88, bidders will have limited opportunity to aggregate construction permits because of the pre-established closed MX Groups.<sup>36</sup> Moreover, bid withdrawals, particularly those made late in Auction 88, could result in delays in licensing new broadcast FM, AM and FM Translator stations and attendant delays in the offering of new broadcast service to the public. The Commission also has noted that in some instances bidders may seek to withdraw bids for improper purposes. Based on this Commission guidance, on the experience of the Bureaus with past broadcast auctions, and on the potential for delays in providing broadcast service to the public, for this auction the Bureaus propose to prohibit

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<sup>34</sup> See Section VII.B.2. “Activity Rule,” above.

<sup>35</sup> 47 C.F.R. §§ 1.2104(g) and 1.2109.

<sup>36</sup> See *Part 1 Third Report and Order*, 13 FCC Rcd at 459-60 ¶ 150 (explaining that a bid withdrawal could facilitate the efficient aggregation of licenses and the pursuit of license switching bidding backup strategies as information becomes available during the course of an auction).

bidders from withdrawing any bids after the round has closed in which bids were placed. The Bureaus seek comment on this proposal.

## **C. Post-Auction Payments**

### **1. Interim Withdrawal Payment Percentage**

47. If withdrawals are allowed in this auction, the Bureaus seek comment on the appropriate percentage of a withdrawn bid that should be assessed as an interim withdrawal payment, 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 a subsequent auction.<sup>37</sup> However, if a construction permit for which a bid has been withdrawn does not receive a subsequent higher bid or winning bid in the same auction, the final withdrawal payment cannot be calculated until a corresponding construction permit receives a higher bid or winning bid 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 be applied toward any final bid withdrawal payment that is ultimately assessed.<sup>38</sup>

48. The Commission's rules provide that, in advance of each auction, a percentage shall be established between three percent and twenty percent of the withdrawn bid to be assessed as an interim bid withdrawal payment.<sup>39</sup> The Commission has 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 construction permits being offered.<sup>40</sup> The Commission noted that it may impose a higher interim withdrawal payment percentage to deter the anti-competitive use of withdrawals when, for example, there are few synergies to be captured by combining construction permits.<sup>41</sup>

49. Applying the reasoning that a higher interim withdrawal payment percentage is appropriate when aggregation of construction permits is not expected, as with the construction permits subject to competitive bidding in Auction 88, if the Bureaus allow bid withdrawals in this auction, the Bureaus propose the maximum interim withdrawal payment allowed under the current rules. Specifically, the Bureaus propose to establish an interim bid withdrawal payment of twenty percent of the withdrawn bid for this auction. The Bureaus seek comment on this proposal.

### **2. Additional Default Payment Percentage**

50. 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.

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<sup>37</sup> 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.*

<sup>38</sup> *Id.*

<sup>39</sup> 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, 903-04 ¶¶ 30-32, FCC 06-4 (2006) ("CSEA/Part 1 Report and Order").

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

51. The Commission's rules provide that, in advance of each auction, a percentage shall be established between three percent and twenty percent of the applicable bid to be assessed as an additional default payment.<sup>42</sup> The Commission has indicated that the level of the additional payment in a particular auction will be based on the nature of the service and the inventory of the construction permits being offered.<sup>43</sup> 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.<sup>44</sup>

52. For Auction 88, 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 auction 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.<sup>45</sup> In light of these considerations for Auction 88, the Bureaus propose an additional default payment of twenty percent of the relevant bid. The Bureaus seek comment on this proposal.

## VIII. DEADLINES AND FILING PROCEDURES

53. Comments are due on or before February 25, 2010, and reply comments are due on or before March 11, 2010. All filings related to procedures for Auction 88 must refer to AU Docket No. 10-31. Comments may be submitted using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies.<sup>46</sup> The Bureaus strongly encourage interested parties to file comments electronically.

54. *Electronic Filers:* 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 number, AU Docket No. 10-31. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto: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.

55. *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. 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 the FCC Headquarters building located at 445 12<sup>th</sup> SW, Room TW-A325, Washington, DC 20554. The filing hours at this location are 8:00 a.m. to 7:00 p.m. 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 must be addressed to 445 12th Street, SW, Washington DC 20554.

56. *Auction 88 E-mail Box:* The Bureaus also request that a copy of all comments and reply comments be submitted electronically to the following address: [auktion88@fcc.gov](mailto:auktion88@fcc.gov).

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<sup>42</sup> See 47 C.F.R. § 1.2104(g)(2).

<sup>43</sup> *Id.*

<sup>44</sup> See *CSEA/Part 1 Report and Order*, 21 FCC Rcd at 903-04 ¶¶ 30-31.

<sup>45</sup> *Id.* at 902-03 ¶ 29.

<sup>46</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, FCC 98-56, *Report and Order*, 13 FCC Rcd 11322, FCC 98-56 (1998).

57. 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>.

58. This proceeding has been designated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>47</sup> 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. 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.

59. To request materials in accessible formats (Braille, large print, electronic files, audio format) for people with disabilities, send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Government Affairs Bureau at (202) 418-0530 or (202) 418-0432 (TTY).

## **IX. CONTACTS**

60. For further information concerning this proceeding, contact the offices listed below:

### **Audio 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 general auction questions: Jeff Crooks at (202) 418-2074 or Linda Sanderson at (717) 338-2868

For auctions legal questions: Lynne Milne or Howard Davenport at (202) 418-0660

### **Office of Communications Business Opportunities**

For questions concerning small business inquiries: (202) 418-0990

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<sup>47</sup> 47 C.F.R. §§ 1.1200(a), 1.1206.