



# PUBLIC NOTICE

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## **AUCTION OF FM BROADCAST CONSTRUCTION PERMITS SCHEDULED FOR MARCH 26, 2013**

### **COMMENT SOUGHT ON COMPETITIVE BIDDING PROCEDURES FOR AUCTION 94**

AU Docket No. 12-239

Comments Due: October 10, 2012

Reply Comments Due: October 24, 2012

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## I. INTRODUCTION

1. By this Public Notice, the Wireless Telecommunications and Media Bureaus (the Bureaus) announce an auction of certain FM broadcast construction permits and seek comment on the procedures to be used for this auction. This auction is scheduled to commence on March 26, 2013, and is designated as Auction 94.

## II. CONSTRUCTION PERMITS IN AUCTION 94

2. As discussed in greater detail below, Auction 94 will offer 117 construction permits in the FM broadcast service.<sup>1</sup> The construction permits to be auctioned are for 117 new FM allotments, including 26 construction permits that were offered but not sold or were defaulted upon in prior auctions.<sup>2</sup> Attachment A lists the specific vacant FM allotments for which the Federal Communications Commission (FCC or Commission) will offer construction permits, along with the reference coordinates for each vacant FM allotment.<sup>3</sup> These comprise FM channels added to the Table of FM Allotments, 47 C.F.R. § 73.202(b), pursuant to the Commission's established rulemaking procedures, and designated for use in the indicated communities. Under the policies established in the *Broadcast First Report and Order*, an applicant may apply for any vacant FM allotment listed in Attachment A.<sup>4</sup> If two or more short-form applications (FCC Form 175) specify the same FM allotment, they will be considered mutually exclusive, and the construction permit for that FM allotment will be awarded by competitive bidding procedures.<sup>5</sup>

## III. DUE DILIGENCE

3. Each potential bidder is 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 that it is seeking in this auction. Each bidder is responsible for assuring that, if it wins a construction permit, it 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. Each applicant should be aware that an FCC auction represents an opportunity to become an FCC permittee in the broadcast service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular**

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<sup>1</sup> 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*, FCC 98-194, 13 FCC Rcd 15920, 15923-24 ¶¶ 7-9, 15961 ¶ 112 (1998) (“*Broadcast First Report and Order*”), on recon., *Memorandum Opinion and Order*, FCC 99-74, 14 FCC Rcd 8724 (1999) (“*Broadcast First Reconsideration Order*”), on further recon., *Memorandum Opinion and Order*, FCC 99-201, 14 FCC Rcd 12541 (1999), *aff'd*, *Orion Communications Ltd. v. FCC*, 221 F.3d 196, No. 98-1424, slip op. (D.C. Cir. June 13, 2000) (unpublished opinion available at 2000 WL 816046 (D.C. Cir.); *aff'd*, *Orion Communications Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000).

<sup>2</sup> Attachment A to this Public Notice identifies those previously-offered permits and the auctions in which they were offered.

<sup>3</sup> In the *Broadcast First Report and Order*, the Commission gave each applicant in the FM service the opportunity to submit a set of preferred site coordinates as an alternative to the reference coordinates for the vacant FM allotment upon which the applicant intends to bid. A future Public Notice announcing the procedures for Auction 94 will provide guidelines for completing FCC Form 175 and exhibits, including detailed instructions for specifying preferred site coordinates. See *Broadcast First Report and Order*, 13 FCC Rcd at 15974-75 ¶ 142 & nn.152-53.

<sup>4</sup> See *Broadcast First Report and Order*, 13 FCC Rcd at 15974-15975 ¶¶ 141-42.

<sup>5</sup> When two or more short-form applications (FCC Forms 175) are submitted for a construction permit for the same allotment in Auction 94, mutual exclusivity exists for auction purposes. See *Broadcast First Report and Order*, 13 FCC Rcd at 15974 ¶ 142, 15978-80 ¶¶ 149-53. Once mutual exclusivity exists for auction purposes, then, even if only one applicant is qualified to bid for a particular construction permit in Auction 94, that applicant is required to submit a bid in order to obtain the construction permit. Any applicant that submits a short-form application, but fails to timely submit an upfront payment, will retain its status as an applicant in Auction 94 and will remain subject to the rules prohibiting certain communications but, having purchased no bidding eligibility, will not be eligible to bid.

**service, technology, or product, nor does an FCC construction permit or license constitute a guarantee of business success.**

4. An applicant should perform its due diligence research and analysis before proceeding, as it would with any new business venture. In particular, we strongly encourage each potential bidder 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 it plans to bid.<sup>6</sup> A *Report and Order* adopted in an FM allotment rulemaking proceeding may include anomalies such as site restrictions or expense reimbursement requirements.<sup>7</sup> Additionally, each potential bidder should perform technical analyses and/or refresh any previous analyses to assure itself that, should it become a winning bidder for any Auction 94 construction permit, it will be able to build and operate facilities that will fully comply with all applicable technical and legal requirements. We strongly encourage each applicant to inspect any prospective transmitter sites located in, or near, the service area for which it plans to bid; confirm the availability of such sites; and familiarize itself with the Commission's rules regarding the National Environmental Policy Act.<sup>8</sup>

5. We strongly encourage each applicant to conduct its own research prior to Auction 94 in order to determine the existence of pending administrative or judicial proceedings, including pending allocations rulemaking proceedings, that might affect its decisions regarding participation in the auction.

6. We strongly encourage participants in Auction 94 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 the specific facts and circumstances related to its interests.

#### **IV. BUREAUS SEEK COMMENT ON AUCTION PROCEDURES**

7. Consistent with the provisions of section 309(j)(3)(E)(i) of the Communications Act of 1934, as amended, 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>9</sup> We therefore seek comment on the following issues relating to the conduct of Auction 94.

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<sup>6</sup> See 47 C.F.R. § 73.202.

<sup>7</sup> See, e.g., Charlotte Amalie, Frederiksted, and Christiansted, [U.S.] Virgin Islands, *Report and Order*, DA 03-4120, 19 FCC Rcd 30 (MB 2004); Cheyenne, Wyoming and Gering, Nebraska, *Report and Order*, DA 00-865, 15 FCC Rcd 7528 (MMB 2000); Circleville, Ohio, *Second Report and Order*, FCC 67-578, 8 FCC 2d 159 (1967).

<sup>8</sup> 47 C.F.R. Chapter 1, Part 1, Subpart I.

<sup>9</sup> 47 U.S.C. § 309(j)(3)(E)(i). See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 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 also 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*, FCC 97-60, 12 FCC Rcd 5686, 5697-98 ¶ 16 (1997) (“*Part 1 Order*”).

## **A. Auction Structure**

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

8. We propose to auction all construction permits included in Auction 94 using the Commission's standard simultaneous multiple-round auction format.<sup>10</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. We seek comment on this proposal.

### **2. Bidding Rounds**

9. Auction 94 will consist of sequential bidding rounds, each followed by the release of round results. The initial bidding schedule will be announced in a public notice to be released at least one week before the start of the auction. Details on viewing round results, including the location and format of downloadable round results files, will be included in the same public notice.

10. The Commission will conduct Auction 94 over the Internet using the Commission's Integrated Spectrum Auction System (FCC Auction System). Bidders will also have the option of placing bids by telephone through a dedicated Auction Bidder Line. The toll-free telephone number for the Auction Bidder Line will be provided to qualified bidders prior to the start of the auction.

11. We 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, we 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. We seek comment on this proposal. Commenters on this issue should address the role of the bidding schedule in managing the pace of the auction, specifically discussing 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**

12. The Bureaus have discretion to establish stopping rules before or during multiple round auctions in order to complete the auction within a reasonable time.<sup>11</sup> For Auction 94, we propose to employ a simultaneous stopping rule approach, which means all construction permits remain available for bidding until bidding stops on every construction permit. More specifically, bidding will close 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>12</sup> Thus, unless we announce alternative procedures, the simultaneous stopping rule will be used in this auction, and 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 bidding in this auction will last.

13. Further, we propose to retain the discretion to exercise any of the following options during Auction 94:

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<sup>10</sup> See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, FCC 94-61, 9 FCC Rcd 2348, 2360-75 ¶¶ 68-159 (1994) (“*Second Report and Order*”) for a general discussion of competitive bidding design.

<sup>11</sup> 47 C.F.R. § 1.2104(e).

<sup>12</sup> Provisionally winning bids are bids that would become final winning bids if the auction were to close in that given round. They are discussed in Section IV.B.6. “Provisionally Winning Bids.” Proactive waivers are described in Section IV.B.3. “Activity Rule Waivers and Reducing Eligibility,” and bid withdrawals are described in Section IV.B.7. “Bid Removal and Bid Withdrawal,” below.

- a) Use a modified version of the simultaneous stopping rule that 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 a 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) Use a modified version of the simultaneous stopping rule that 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 a construction permit that is not FCC held. Thus, absent any other bidding activity, a bidder placing a new bid on a construction permit that does not already have a provisionally winning bid (an “FCC-held” construction permit) would not keep the auction open under this modified stopping rule.
- c) Use a modified version of the simultaneous stopping rule that combines (a) and (b) above.
- d) Declare 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.
- e) 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.

14. We 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 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, we are likely to attempt to change the pace of the auction. For example, the Bureaus may adjust the pace of bidding by changing the number of bidding rounds per day and/or the minimum acceptable bids. We propose to retain the discretion to exercise any of these options with or without prior announcement during the auction. We seek comment on these proposals.

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

15. For Auction 94, we propose that the Bureaus may delay, suspend, or cancel the auction in the event of a 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>13</sup> We will notify participants of any such delay, suspension or cancellation by public notice and/or through the FCC Auction System’s announcement function. If the auction is delayed or suspended, we may, in our sole discretion, elect to resume the auction starting from the beginning of the current round or from some previous round, or cancel the auction in its entirety. Network interruption may cause the Bureaus to delay or suspend the auction. We emphasize that we will exercise this authority solely at our discretion, and not as a substitute for situations in which bidders may wish to apply their activity rule waivers. We seek comment on this proposal.

### **B. Auction Procedures**

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

16. 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

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<sup>13</sup> 47 C.F.R. § 1.2104(i).

of the auction process and the potential value of similar construction permits.<sup>14</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 that are related to the specific construction permits being auctioned 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>15</sup> With these considerations in mind, we propose the upfront payments set forth in Attachment A to this Public Notice. We seek comment on the upfront payments specified in Attachment A.

17. The Bureaus further propose that the amount of the upfront payment submitted by a bidder will determine its initial bidding eligibility in bidding units. We propose to assign each construction permit a specific number of bidding units, equal to one bidding unit per dollar of the upfront payment listed in Attachment A. 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 the total number of bidding units associated with those construction permits does not exceed its current eligibility. A bidder cannot increase its eligibility during the auction; it can only maintain its eligibility or decrease its eligibility. 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. We request comment on these proposals.

<b>Example: Upfront Payments, Bidding Eligibility, and Bidding Flexibility</b>			
<b>Construction Permit</b>	<b>Market Name</b>	<b>Bidding Units</b>	<b>Upfront Payment</b>
MM-FM664-A	Harrison, MI	7,500	\$7,500
MM-FM742-A	Tigerton, WI	5,000	\$5,000

If a bidder wishes to bid on both construction permits in a round, it must have selected both on its FCC Form 175 and purchased at least 12,500 bidding units (7,500 + 5,000) of bidding eligibility. If it only wishes to bid on one, but not both, purchasing 7,500 bidding units would meet the eligibility requirement for either construction permit. The bidder would be able to bid on either construction permit, but not both at the same time. If the bidder purchased only 5,000 bidding units, the bidder would have enough eligibility for the Tigerton, WI construction permit but not for the Harrison, MI construction permit.

## 2. Activity Rule

18. 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. We 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 percent (100%) 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

<sup>14</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; *Second Report and Order*, 9 FCC Rcd at 2377-79 ¶¶ 169-75.

<sup>15</sup> See *Second Report and Order*, 9 FCC Rcd at 2377-79 ¶¶ 169-76.

place additional bids in the auction.<sup>16</sup> We seek comment on this proposal. If commenters believe the auction should be conducted with multiple stages, they should explain the reason for doing so.

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

19. When a bidder's eligibility in the current round is below the required minimum level, it may preserve its current level of eligibility through an activity rule waiver. 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. Activity rule waivers are principally a mechanism for a bidder to avoid the loss of bidding eligibility in the event that exigent circumstances prevent it from bidding in a particular round.

20. 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 has no waivers remaining and does not satisfy the required activity level, the bidder's current eligibility will be permanently reduced, possibly curtailing or eliminating the ability to place additional bids in the auction.

21. A bidder with insufficient activity may wish to reduce its bidding eligibility rather than use an activity rule waiver. If so, the bidder must affirmatively override the automatic waiver mechanism during the bidding round by using the "reduce eligibility" function in the FCC Auction System. In this case, the bidder's eligibility is permanently reduced to bring it into compliance with the activity rule 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.

22. 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 it from placing any bids in that round.<sup>17</sup> Applying a waiver is irreversible; once a proactive waiver is submitted, it cannot be unsubmitted, even if the round has not yet closed.

23. Consistent with recent FCC auctions, the Bureaus propose that each bidder in Auction 94 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**

24. Consistent with the statutory mandate of section 309(j),<sup>18</sup> 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>19</sup>

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<sup>16</sup> See Section IV.B.3. "Activity Rule Waivers and Reducing Eligibility," above.

<sup>17</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>18</sup> 47 U.S.C. § 309(j)(4)(F). See also 47 C.F.R. § 1.2104(c), (d).

<sup>19</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15971 ¶ 134; *Part 1 Third Report and Order*, 13 FCC Rcd at 454-56 ¶ 139-41. See 47 C.F.R. § 1.2104(c), (d).

25. Normally, a reserve price is an absolute minimum price below which an item will not be sold in a given auction. 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.

26. The Bureaus propose to establish minimum opening bid amounts for Auction 94. The Bureaus believe that 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>20</sup> The Bureaus do not propose to establish separate reserve prices for the construction permits to be offered in Auction 94.

27. For Auction 94, 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. Attachment A to this Public Notice lists a proposed minimum opening bid amount for each construction permit available in Auction 94. The Bureaus seek comment on the minimum opening bid amounts specified in Attachment A.

28. 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. We ask commenters 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, we 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 FM broadcast facility and any other relevant factors.

## 5. Bid Amounts

29. We propose that, in each round, an eligible bidder will be able to place a bid on a given construction permit in any of up to nine different amounts.<sup>21</sup> Under this proposal, the FCC Auction System interface will list the acceptable bid amounts for each construction permit.<sup>22</sup>

30. 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 FCC will calculate the minimum acceptable bid amount 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>23</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,

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<sup>20</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>21</sup> Bidders must have sufficient eligibility to place a bid on the particular construction permit. See Section IV.B.1. "Upfront Payments and Bidding Eligibility," above.

<sup>22</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>23</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.



the minimum acceptable bid amount will equal the second highest bid received for the construction permit.<sup>24</sup>

31. The FCC will calculate the eight additional bid amounts 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>25</sup>

32. For Auction 94, 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. The Bureaus seek comment on these proposals.

33. 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 winning bid on a construction permit, the minimum acceptable bid amount would instead be capped at \$10,000 above the provisionally winning bid. We 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 we exercise this discretion, we will alert bidders by announcement in the FCC Auction System during the auction.

## **6. Provisionally Winning Bids**

34. 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, the FCC Auction System determines a provisionally winning bid for each construction permit based on the highest bid amount received. If identical high bid amounts are submitted on a construction permit in any given round (i.e., tied bids), the FCC Auction System will use a random number generator to select a single provisionally winning bid from among the tied bids. (The Auction System assigns a random number to each bid when the bid is entered. 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 the construction permit receives any bids in a subsequent round, the provisionally winning bid again will be determined by the highest bid amount received for the construction permit.

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<sup>24</sup> See Section IV.B.7. "Bid Removal and Bid Withdrawal," below.

<sup>25</sup> See note 23 (concerning rounding), above.

35. A provisionally winning bid will be retained 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). We remind bidders that provisionally winning bids count toward activity for purposes of the activity rule.<sup>26</sup>

#### 7. Bid Removal and Bid Withdrawal

36. For Auction 94, 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 a selected bid in the FCC Auction System, a bidder may effectively “unsubmit” any bid placed within that round. In contrast to the bid withdrawal provisions described below, a bidder removing a bid placed in the same round is not subject to a withdrawal payment. Once a round closes, a bidder may no longer remove a bid. We seek comment on this bid removal proposal.

37. The Bureaus also seek comment on whether bid withdrawals should be permitted in Auction 94. 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. A bidder that withdraws its provisionally winning bid(s), if permitted, is subject to the bid withdrawal payment provisions of the Commission rules.<sup>27</sup>

38. In the *Part 1 Third Report and Order*, the Commission explained that it had found in prior auctions that allowing bid withdrawals risks encouraging insincere bidding and the use of withdrawals for anti-competitive strategic purposes, such as signaling other bidders.<sup>28</sup> In a more recent rulemaking proceeding, the Commission emphasized the anti-competitive effects of bid withdrawals, especially late in an auction.<sup>29</sup> In managing the auction, we, therefore, have discretion to limit the number of withdrawals to prevent bidding abuses. The Commission stated that the Bureaus should exercise their discretion, consider limiting the number of rounds in which bidders may withdraw bids, and prevent bidders from bidding on a particular market if they find a bidder is abusing the Commission’s bid withdrawal procedures.<sup>30</sup>

39. Based on this guidance and on our experience with past auctions of FM broadcast construction permits, we propose to prohibit bidders from withdrawing any bids after the close of the round in which bids were placed. We make this proposal in light of the site-specific nature and wide geographic dispersion of the permits available in this auction, which suggests that potential applicants for this auction may have fewer incentives to aggregate permits through the auction process (as compared with bidders in many auctions of wireless licenses). Thus, we believe that it is unlikely that bidders will have a need to withdraw bids in this auction. We also remain mindful that bid withdrawals, particularly those made late in this auction, could result in delays in licensing new FM stations and attendant delays in the offering of new broadcast service to the public. We seek comment on our proposal to prohibit bid withdrawals.

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<sup>26</sup> See Section IV.B.2. “Activity Rule,” above.

<sup>27</sup> 47 C.F.R. §§ 1.2104(g), 1.2109.

<sup>28</sup> See *Part 1 Third Report and Order*, 13 FCC Rcd at 458-60 ¶¶ 148-50. After stating a few paragraphs later that allowing bid withdrawals facilitates efficient aggregation of licenses or construction permits and the pursuit of backup strategies as information becomes available during the course of an auction, the Commission immediately again noted that in some instances bidders may seek to withdraw bids for improper reasons. *Id.*

<sup>29</sup> See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, WT Docket No. 05-211, FCC 06-4, *Report and Order*, 21 FCC Rcd 891, 902-03 ¶¶ 29, 904 n.57 (2006) (“*CSEA/Part 1 Report and Order*”) (“[T]here have been a disproportionate number of withdrawals late in our auctions, indicating that some bidders have been placing and then withdrawing bids primarily to discourage potential or existing market competitors from seeking to acquire licenses.”).

<sup>30</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 458-60 ¶¶ 148-50.

## C. Post-Auction Payments

### 1. Interim Withdrawal Payment Percentage

40. In the event the Bureaus allow bid withdrawals in Auction 94, we propose the interim bid withdrawal payment be 20 percent of the withdrawn bid. 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>31</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 FCC cannot calculate the final withdrawal payment until that construction permit receives a higher bid or winning bid in a subsequent auction. In such cases, when that final withdrawal payment cannot yet be calculated, the FCC imposes on the bidder responsible for the withdrawn bid an interim bid withdrawal payment, which will be applied toward any final bid withdrawal payment that is ultimately assessed.<sup>32</sup>

41. The amount of the interim bid withdrawal payment may range from three percent to twenty percent of the withdrawn bid amount, with the percentage generally being higher where there is greater risk of bid withdrawals being used for anti-competitive purposes, such as when there is little need for bidders to aggregate permits. As discussed above, this is the case in Auction 94. In light of these considerations, the Bureaus propose to use the maximum interim bid withdrawal payment percentage allowed by section 1.2104(g)(1) in the event bid withdrawals are allowed. The Bureaus request comment on using twenty percent for calculating an interim bid withdrawal payment amount in Auction 94. Commenters advocating the use of bid withdrawals should also address the percentage of the interim bid withdrawal payment.

### 2. Additional Default Payment Percentage

42. 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 and timely final 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 Auction 94 bidder's winning 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.

43. The Commission's rules provide that, in advance of each auction, it will establish a percentage between three percent and twenty percent of the applicable bid to be assessed as an additional default payment.<sup>33</sup> As the Commission has indicated, the level of this additional payment in each auction will be based on the nature of the service and the construction permits being offered.<sup>34</sup>

44. For Auction 94, we 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 twenty percent default payment will be more effective in deterring defaults than the three percent used in some earlier auctions.<sup>35</sup> In light of these considerations, the Bureaus propose for Auction 94 an additional default payment of twenty percent of the

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<sup>31</sup> 47 C.F.R. § 1.2104(g)(1).

<sup>32</sup> *Id.*

<sup>33</sup> *See* 47 C.F.R. § 1.2104(g)(2).

<sup>34</sup> *See CSEA/Part 1 Report and Order*, 21 FCC Rcd at 903-04 ¶¶ 30-31.

<sup>35</sup> *Id.*, 21 FCC Rcd at 902-03 ¶ 29.

relevant bid. Moreover, a twenty percent additional default payment amount is consistent with the percentage used in recent auctions of FM permits.<sup>36</sup> The Bureaus seek comment on this proposal.

## V. DEADLINES AND FILING PROCEDURES

45. Comments are due on or before October 10, 2012, and reply comments are due on or before October 24, 2012. All filings related to procedures for Auction 94 must refer to AU Docket No. 12-239. Comments may be submitted using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies.<sup>37</sup> We strongly encourage interested parties to file comments electronically.

46. *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. 12-239. 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.

47. *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> Street, SW, Room TW-A325, Washington, DC 20554. The filing hours at this location are 8:00 a.m. to 7:00 p.m. Eastern Time (ET). All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

48. *Auction 94 E-mail Box:* We also request that a copy of all comments and reply comments be submitted electronically to the following address: [auction94@fcc.gov](mailto:auction94@fcc.gov).

49. 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>.

50. This proceeding has been designated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.<sup>38</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 provisions pertaining to oral and written *ex*

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<sup>36</sup> See, e.g., Auction of FM Broadcast Construction Permits Rescheduled for April 27, 2011; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 91, *Public Notice*, DA 10-2253, 25 FCC Rcd 16787, 16828 ¶¶ 171-72 (2010) (setting additional default payment for Auction 91 permits at twenty percent of the applicable bid.)

<sup>37</sup> See Electronic Filing of Documents in Rulemaking Proceedings, GC Docket No. 97-113, *Report and Order*, FCC 98-56, 13 FCC Rcd 11322 (1998).

<sup>38</sup> 47 C.F.R. §§ 1.1200(a), 1.1206.

*parte* presentations in permit-but-disclose proceedings are set forth in Section 1.1206(b) of the Commission's rules.<sup>39</sup>

51. 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).

## VI. CONTACTS

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

### **Audio Division, Media Bureau**

For FM 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) 418-0660 or Linda Sanderson at (717) 338-2868  
For auctions legal questions: 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>39</sup> The Commission substantially revised its *ex parte* rules in 2011. These revised rules require for example, that an *ex parte* notice must be filed for each oral *ex parte* presentation, not just for those presentations that involve new information or arguments not already in the record. Further, a filer typically must submit an *ex parte* notice electronically in machine-readable format. A filer may not submit a PDF image created by scanning a paper document, except in a situation in which a word processing version of the document is not available. See Amendment of the Commission's *Ex Parte* Rules and Other Procedural Rules, GC Docket No. 10-43, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-11, 26 FCC Rcd 4517 (2011).