

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

In the Matter of)	
)	
Implementation of the Commercial Spectrum)	
Enhancement Act and Modernization of the)	WT Docket No. 05-211
Commission’s Competitive Bidding Rules and)	
Procedures)	
)	
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DECLARATORY RULING AND NOTICE OF PROPOSED RULE MAKING

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. With this Declaratory Ruling and Notice of Proposed Rule Making (“*Declaratory Ruling*” and “*Notice*”), we begin a proceeding to implement rules and procedures needed to comply with the recently enacted Commercial Spectrum Enhancement Act (“CSEA”).¹ We also propose a number of changes to our competitive bidding rules that are necessary, apart from CSEA, to bring them in line with the current requirements of our auctions program.

2. CSEA establishes a mechanism to use spectrum auction proceeds to reimburse federal agencies operating on the 216-220 MHz, 1432-1435 MHz, 1710-1755 MHz, and 2385-2390 MHz bands, and certain other frequency bands that may be reallocated from federal to non-federal use, for the cost of relocating operations. In the *Declaratory Ruling*, we interpret the meaning of the term “total cash proceeds” as used in CSEA, because we find that an interpretation is necessary for us to be able to implement the statute. We determine that “total cash proceeds” for purposes of CSEA means winning bids net of any applicable bidding credit discounts. Should we determine that additional provisions of CSEA must be interpreted in order to comply with the statute, we will make those interpretations in subsequent actions.

3. In the *Notice*, we seek comment on changes to our competitive bidding rules necessary to implement CSEA. Specifically, we propose to:

- Change the Commission reserve price rule as mandated by CSEA; and
- Change the Commission tribal land bidding credit rules in auctions subject to CSEA or to a reserve price requirement unrelated to CSEA in order to determine whether auction results satisfy any revenue requirement at or near the completion of bidding;

4. We also consider in the *Notice* a number of other measures to update our competitive bidding rules and procedures, including steps to (1) ensure that our general auction rules are consistent with the use of combinatorial (or package) bidding methodologies, (2) conform the payment rules and procedures for broadcast construction permits won at auction to our Part 1

¹ Commercial Spectrum Enhancement Act, Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004) (codified in scattered sections of Title 47 of the United States Code) (“CSEA”).

general competitive bidding rules and recent procedures, and (3) determine whether certain existing competitive bidding provisions should be modified in order to achieve their intended purposes. Specifically, we propose to:

- Change the Commission’s default payment rule to clarify its application in certain situations;
- Change the Commission’s interim withdrawal and additional default payment rules to replace the current interim withdrawal and additional default payments of 3 percent of the relevant bid with an amount up to 20 percent of the relevant bid, with the precise amount for each auction established in advance of the auction;
- Adopt new Commission rules to establish procedures in advance of each auction for apportioning bid amounts in the auction among licenses in a package or among components of a license to determine the amount of an individual bid or a portion of a bid when needed for calculations pursuant to Commission rules or procedures;
- Change Commission payment rules and procedures for broadcast construction permits won at auction to conform to the payment rules and procedures for non-broadcast licenses won at auction; and
- Change Commission rules and procedures for consortia of designated entities and entrepreneurs to improve the licensing process for such entities.

II. DECLARATORY RULING

5. CSEA, signed into law on December 23, 2004, establishes a Spectrum Relocation Fund (“SRF”) to reimburse federal agencies operating on certain frequencies that have been reallocated from federal to non-federal use for the cost of relocating their operations.² The SRF will be funded from cash proceeds attributable to “eligible frequencies” in an auction involving such frequencies. The statute identifies four bands (the 216-220 MHz, 1432-1435 MHz, 1710-1755 MHz and 2385-2390 MHz bands) as eligible frequencies in which SRF funds will be used to relocate federal entities.³ In addition, the statute designates as “eligible frequencies” any other band of frequencies reallocated from federal use to non-federal use after January 1, 2003, and assigned by the Commission through competitive bidding.⁴

6. Pursuant to CSEA, the National Telecommunications and Information Administration (“NTIA”) must notify the Commission of estimated relocation costs and timelines for relocation from eligible frequencies by eligible federal entities at least six months in advance of a scheduled auction of eligible frequencies.⁵ CSEA further requires that the “total cash proceeds” from any

² CSEA §§ 201-209.

³ *Id.* § 202 (codified at 47 U.S.C. § 923(g)(2)(A)).

⁴ *Id.* § 202 (codified at 47 U.S.C. § 923(g)(2)(B)). Bands of frequencies previously identified by the National Telecommunications and Information Administration in the Spectrum Reallocation Final Report, NTIA Special Publication 95-32 (1995), are excluded. *Id.* § 202 (codified at 47 U.S.C. § 923(g)(2)(B)).

⁵ *Id.* § 202 (codified at 47 U.S.C. § 923(g)(4)).

auction of eligible frequencies must equal at least 110 percent of estimated relocation costs of eligible federal entities.⁶ CSEA prohibits the Commission from concluding any auction of eligible frequencies that falls short of this revenue requirement:

The Commission shall not conclude any auction of eligible frequencies . . . if the total cash proceeds attributable to such spectrum are less than 110 percent of the total estimated relocation costs provided to the Commission If the Commission is unable to conclude an auction for the foregoing reason, the Commission shall cancel the auction, return within 45 days after the auction cancellation date any deposits from participating bidders held in escrow, and absolve such bidders from any obligation to the United States to bid in any subsequent reauction of such spectrum.⁷

7. As a threshold matter, in order to implement this requirement, we must determine the meaning of the term “total cash proceeds” as used in the statute. Under our competitive bidding rules, winning bids in an auction do not necessarily translate into amounts actually owed by bidders. The discrepancy between gross and net winning bid amounts arises from the award of bidding credits. Pursuant to our statutory authority for designing competitive bidding systems, we have established rules granting bidding credits – i.e., discounts on gross winning bids – to eligible designated entities and new entrants into the marketplace.⁸ We also have established rules providing bidding credits to winning bidders that undertake to serve previously underserved tribal lands.⁹ In this context, the plain language of the statute appears to refer to an auction’s net winning bids rather than gross winning bids. The word “cash” is defined as “money or its equivalent;”¹⁰ or “ready money”¹¹ and “proceeds” is defined as “the money obtained from a commercial transaction.”¹² In addition to the language of the statute, the purpose underlying the revenue requirement of CSEA supports a determination that “total cash proceeds” is based on winning bids net of bidding credits. Given that Congress’s purpose in establishing the SRF was to provide a mechanism for making sufficient funds available to relocating federal agencies,¹³ it is reasonable to assume that Congress did not intend the Commission, in determining whether the

⁶ *Id.* § 203(b) (codified incorrectly at 47 U.S.C. § 309(j)(15); should have been codified at 47 U.S.C. § 309(j)(16)).

⁷ *Id.* § 203(b) (codified at 47 U.S.C. § 309(j)(15)(B)).

⁸ *See* 47 C.F.R. § 1.2110(f)(1)-(2) (designated entities); *id.* § 73.5007 (new entrants). New entrant bidding credits are available only in auctions of broadcast construction permits.

⁹ *See id.* § 1.2110(f)(3).

¹⁰ Black’s Law Dictionary 208 (7th ed.1999).

¹¹ Webster’s II New College Dictionary 172 (1999).

¹² *Id.* at 881.

¹³ *See* CSEA § 202 (codified at 47 U.S.C. § 923(g)(1)):

Any Federal entity that operates a Federal Government station assigned to a band of frequencies specified in paragraph (2) and that incurs relocation costs because of the reallocation of frequencies from Federal use to non-Federal use shall receive payment for such costs from the Spectrum Relocation Fund, in accordance with section 118 of this Act.

“total cash proceeds” requirement has been met, to count those portions of winning bids for which the bidder would receive credit and not have to pay. Accordingly, we do not read CSEA to equate the amount of the gross winning bids with the total cash proceeds of the auction.

9. While the statute appears quite clear with respect to gross winning bids, we acknowledge that there is some degree of ambiguity as to whether an auction would meet the 110 percent requirement once the net winning bids exceed this percentage of NTIA’s estimated relocation costs, in light of the fact that defaults and disqualifications may also reduce auction revenues, at least in the short-term. In other words, it is possible that the government may not be able to collect the entire net amount of the winning bids by the time final payment is due, and that the insolvency of a disqualified or defaulting bidder may prevent the government from ever collecting this entire amount. Despite these possibilities, however, there are several reasons to conclude that, under the most reasonable reading of the statute, the Commission is permitted to equate the first winning bid to the Commission’s auction’s total cash proceeds. ultimately will be compensated for at least the net amount of any bids subject to a post-auction default or disqualification. As we discuss in detail later, section 1.2104(g) of the Commission’s rules requires a high bidder that defaults or is disqualified after the close of an auction to make a default payment equaling the difference between the amount of the defaulter’s bid and the amount of the winning bid the next time a license covering the same spectrum is won in an auction. The defaulter also must make an additional payment equal to 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulter’s bid or of the subsequent winning bid, whichever is less.¹⁴ Second, the alternative reading of the phrase “total cash proceeds” would create an unreasonable burden on the administration of the auction in that the Commission would be forced to wait until cash proceeds were received before “concluding” the auction pursuant to CSEA. Such an approach would create risk for winning bidders, whose licenses might be cancelled or never granted due to another winning bidder’s default. This lack of certainty could interfere with financing and service roll-out and would conflict with the Commission’s statutory objective of licensing spectrum without administrative delay pursuant to the public interest.¹⁵ We do not believe that Congress intended such a result. Consequently, we believe that it is appropriate to calculate net winning bids once bidding has ended, before payment is required of CSEA bidders. The Commission to revise its reserve price regulations to prescribe methods by which CSEA’s auction revenue requirement will be met.¹⁶ Accordingly, in the *Notice* below, we propose a change to our rules to comply with this mandate. In addition, in light of our interpretation of “total cash proceeds,” we believe that we need to revise our tribal land bidding credit rules. These rules provide for a discount to be applied to winning bids when the winning bidder makes the required showing that it will undertake to serve previously underserved tribal lands.¹⁷ However, pursuant to our rules, the process for determining whether a winning bidder is eligible to receive a tribal land bidding credit may take more than 180 days

¹⁴ *Id.* § 1.2104(g)(2)-(3).

¹⁵ *See* 47 U.S.C. § 309(j)(3)(A).

¹⁶ CSEA § 203(b) (codified at 47 U.S.C. § 309(j)(15)(A)).

¹⁷ 47 C.F.R. § 1.2110(f)(3).

after the end of bidding.¹⁸ Thus, at the end of bidding, we may not be able to calculate the potential discount attributable to tribal land bidding credits with any reliability. To prevent the lengthy process of determining tribal land bidding credits from delaying the determination of whether a reserve price or prices mandated by CSEA or any other revenue requirement have been met, we propose, in the *Notice* below, modifications to our tribal land bidding credit rules.

13. We note that several additional issues involved with implementing reserve prices for auctions subject to CSEA may arise. One such issue is whether the total cash proceeds attributable to eligible frequencies can be assessed on a license-by-license basis, so that the auction might be deemed to meet the CSEA revenue threshold for one license but not another. Another unresolved issue is whether, where an auction involves both CSEA-eligible frequencies and other spectrum, the full amount or only a portion of winning bids should be considered when measuring whether auction results satisfy the CSEA revenue requirement. Whether such issues will actually arise in an auction, and what the best possible resolutions may be, may depend upon the characteristics of the specific spectrum licenses to be auctioned and the circumstances under which the auction is conducted. Accordingly, we will leave consideration of such issues to later actions, including possible auction- or service-specific rule making proceedings, subsequent declaratory rulings regarding questions of statutory interpretation, or adoption of specific auction procedures by the Commission.

III. NOTICE OF PROPOSED RULE MAKING

A. Implementing CSEA

1. Complying with CSEA's Reserve Price Requirement

14. From the inception of the Commission's auctions program in 1994, Commission rules have allowed for the use of reserve (or "reservation") prices.¹⁹ The Balanced Budget Act of 1997 added paragraph 309(j)(4)(F) to the Communications Act, requiring the Commission to "prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest."²⁰ Our current reserve price rule for all auctionable services, section 1.2104(c), states that we "may establish a reservation price, either disclosed or undisclosed, below which a license subject to CSEA auction will not be awarded."²¹ This rule requires the total cash proceeds from any auction of eligible frequencies to equal at least 110 percent of the total estimated relocation costs provided to the Commission by NTIA. To implement this requirement, CSEA directs the Commission to revise its reserve price regulations adopted pursuant to Section 309(j)(4)(F) of the Communications Act. Thus, in contrast to our current reserve price rule, the reserve price rule we must adopt for

¹⁸ *Id.* § 1.2110(f)(3)(ii).

¹⁹ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2384 ¶¶ 206-07, 2387 ¶ 224 (1994) ("*Competitive Bidding Second Report and Order*"); 47 C.F.R. § 1.2104(c) (1994-present).

²⁰ Balanced Budget Act of 1997, Pub. L. No. 105-33, 88 Stat. 259, § 3002 (codified at 47 U.S.C. § 309(j)(4)(F)) ("*Balanced Budget Act*").

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

auctions subject to CSEA cannot be discretionary. We propose, therefore, to modify section 1.2104(c) to add a requirement that, for any auction of eligible frequencies under CSEA, we will establish a reserve price (or prices) that ensures that the total cash proceeds (as defined in the *Declaratory Ruling* above) attributable to such spectrum will equal at least 110 percent of the total estimated relocation costs provided to the Commission by NTIA. We seek comment on this proposal.

2. Modifying Tribal Land Bidding Credit Rules

16. In an effort to encourage carriers to provide telecommunications services to tribal lands with historically low telephone service penetration rates, the Commission makes tribal land bidding credits available to auction winners that serve qualifying tribal lands.²² The amount of a bidding credit is determined according to a formula set forth in our rules and is subject to a cap based on a sliding scale according to the amount of the high bid.²³ To apply for a tribal land bidding credit, an auction winner must indicate on its long-form application (FCC Form 601) that it intends to serve a qualifying tribal land within a particular market.²⁴ The applicant must then amend its long-form application by attaching a certification from the tribal government authorizing the applicant to provide service on its tribal land, certifying that the area to be served by the winning bidder is indeed qualifying tribal land, and assuring that it has not and will not enter into an exclusive contract with the applicant and will not unreasonably discriminate among wireless carriers seeking to provide service on the qualifying tribal land.²⁵ The applicant must also attach its own certification that it will comply with construction requirements for tribal land and consult with the tribal government regarding the siting of facilities and service deployment.²⁶

17. The deadline for submitting these certifications is not until 180 days after the filing deadline for long-form applications.²⁷ Accordingly, in auctions that include spectrum covering qualifying tribal lands, the Commission may not know for at least 180 days after the long-form deadline how much of a discount on the auction's winning bids it will have to allow for tribal land bidding credits. In auctions subject to CSEA, this situation could lead to a potentially

²² 47 C.F.R. § 1.2110(f)(3). See *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 11,794 (2000). "Qualifying tribal land" is "any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act . . . and Indian allotments, that has a wireline telephone subscription rate equal to or less than eighty-five (85) percent based on the most recently available U.S. Census Data." 47 C.F.R. § 1.2110(f)(3)(i). Not all Commission auctions include licenses covering qualifying tribal lands. See, e.g., "Auction of Lower 700 MHz Band Licenses Scheduled for July 20, 2005," *Public Notice*, DA 05-737, at 13 (rel. Mar. 22, 2005).

²³ 47 C.F.R. § 1.2110(f)(3)(iii)-(iv).

²⁴ *Id.* § 1.2107(e). The Commission requires that winning bidders intending to apply for tribal land bidding credits do so by the filing deadline for long-form applications and does not permit applicants to amend their applications after the filing deadline to indicate their intention to seek a credit. See, e.g., "Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58," *Public Notice*, 20 FCC Rcd 3703, 3736-37 (2005).

²⁵ 47 C.F.R. § 1.2110(f)(3)(ii)(A).

²⁶ *Id.* § 1.2110(f)(3)(ii)(B).

²⁷ *Id.* § 1.2110(f)(3)(ii)(A)-(B).

substantial post-auction delay in calculating whether “total cash proceeds” meet the 110 percent revenue requirement. Thus, our current tribal land bidding credit procedures could prevent the Commission from concluding the auction expeditiously after the cessation of bidding and might even (should award of the credits reduce the auction’s net winning bids to below the 110 percent revenue requirement) lead to cancellation of the auction long after the bidding has ended.

18. We, therefore, seek comment on different possible methods of ensuring that the Commission will be able to promptly calculate “total cash proceeds” while at the same time preserving the availability of tribal land bidding credits in auctions subject to CSEA. One possibility in such auctions is to award tribal land bidding credits on a pro rata basis out of the funds exceeding the reserve price. Under this option, the amounts that could be discounted by tribal land bidding credits in an auction subject to CSEA would be limited to net bids in excess of the reserve price or 110 percent of the total estimated relocation costs. If this amount were insufficient to pay all of the tribal land bidding credits for which auction winners were eligible, then each eligible tribal land bidding credit recipient would receive a pro rata credit in proportion to the amount the applicant would have received had the auction not been subject to a reserve price. 19. A second option on which we seek comment is to award tribal land bidding credits on a first-come, first-served basis in auctions subject to CSEA. Under this alternative, winning bidders would still have to file the certifications for a tribal land bidding credit no later than 180 days after the filing deadline for long-form applications. However, bidding credits up to the full amount determined by the existing formula would be awarded to eligible applicants in the order in which they had filed the certifications for such credits, but only to the extent that funds were available. As with the first alternative, the money available for tribal land bidding credits would be limited to the net winning bids exceeding 110 percent of the total estimated relocation costs (or another specified reserve price). This alternative offers the appeal of encouraging the early filing of tribal land bidding credit certifications but might exclude applicants that encountered delays through no fault of their own in submitting the required certifications. 20. We also seek comment on whether we should require applicants to specify on their short-form applications the licenses, if any, for which they intend to seek a tribal land bidding credit, should they win. Under this option, the Commission would determine whether the CSEA reserve price had been met, insofar as tribal land bidding credits are concerned, by deducting the maximum amount of tribal land bidding credits for which winning bidders that had indicated on their short-form applications an interest in receiving such credits could be eligible. While this alternative would facilitate prompt determination of whether, taking tribal land bidding credits into account, the CSEA-required reserve price had been met, it could create an additional burden for short-form applicants. It could also overstate the potential impact of tribal land bidding credits on auction revenues in the event that license winners that had indicated an interest in receiving tribal land bidding credits ultimately did not receive such credits for any reason. 21. We also invite commenters to propose other methods to enable the Commission to determine promptly total cash proceeds while preserving the availability of tribal land bidding credits. We encourage those offering proposals or commenting on the proposals presented here to consider the practical implications of each approach, and we request that commenters discuss, in particular, how a given approach might best promote the dual purposes of facilitating CSEA compliance and encouraging service on tribal lands through the award of tribal land bidding credits. We also seek comment on whether we should adopt the same or similar approach for

²⁸ See *id.* § 1.2110(f)(3).

any non-CSEA auctions for which the Commission, pursuant to section 309(j)(4)(F) of the Communications Act, establishes a reserve price based on winning bids net of all discounts.²⁹

B. Updating Competitive Bidding Rules and Procedures

1. Clarifying the Default Rule

22. Section 1.2104(g) of our rules provides that a bidder that withdraws a high bid during the course of an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction. In the event that a bidding credit applies to any of the bids, the bid withdrawal payment equals the difference between either the net withdrawn bid and the subsequent net winning bid or the gross withdrawn bid and the subsequent gross winning bid, whichever difference is less.³⁰

However, no withdrawal payment is assessed for a withdrawn bid if either the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the original withdrawn bid.³¹ Under section 1.2104(g), a high bidder that defaults or is disqualified after the close of an auction is subject to the payment just described for withdrawn bids (the “deficiency payment” or “deficiency portion”) plus an additional payment equal to 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulting bidder’s bid or the subsequent winning bid, whichever is less.³² The 3 (or 25) percent payment must be calculated using the same bid amounts and basis (i.e., net or gross bids) as used in calculating the deficiency payment.³³

24. The rule does not, however, anticipate the anomaly that might result from calculating the additional 3 or 25 percent payment for a bidder that defaults or is disqualified after the close of an auction, when, in a subsequent auction, there is a higher withdrawn bid, but no winning

²⁹ We note that, in auctions where reserve prices are based on gross winning bid amounts, rather than on winning bids net of discounts, it will not be necessary to follow the procedures for which we seek comment in this section. *See* “Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002; Further Modification of Package Bidding Procedures and Other Procedures for Auction No. 31,” *Public Notice*, 17 FCC Rcd 5140, 5175-78 (2002) (“*Auction No. 31 Procedures Public Notice*”), modified by *erratum*, 17 FCC Rcd 7049 (2002).

³⁰ We note that for purposes of calculating the withdrawal payment amount, net bids would not include any discounts resulting from tribal land bidding credits.

³¹ An intervening subsequent withdrawn bid less than the original withdrawn bid may limit the amount of the withdrawal payment. *See* 47 C.F.R. § 1.2104(g)(1) (“In the case of multiple bid withdrawals on a single license, the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn in the same or subsequent auction(s).”), particularly, examples 2 and 3. However, it is only possible to determine the final amount of a withdrawal payment once there is a higher intervening subsequent withdrawn bid or a subsequent winning bid.

³² In this *Notice* and in our rules, bidders that are disqualified after the close of an auction are referred to as “defaulting bidders,” just as are bidders that default after an auction’s close. Similarly, the payment owed by a disqualified bidder is referred to as a “default payment.” *See id.* §§ 1.2104(g)(2)-(3); 1.2109. Currently, the deficiency payment for a default or disqualification following a package bidding auction is, in most instances, calculated differently from the way in which the deficiency payment is calculated for a default or disqualification following a non-package bidding auction. *See id.* § 1.2104(g)(3).

³³ *Id.* § 1.2104(g)(2).

bid, for a license corresponding to the defaulted license.³⁴ A literal reading of section 1.2104(g) might seem to dictate that, while the defaulter's deficiency obligation would be calculated as the difference between the defaulter's bid and the higher withdrawn bid in the subsequent auction (thus resulting in no deficiency payment), the defaulter's additional 3 or 25 percent payment obligation, which is based upon the lesser of the defaulter's bid or the subsequent *winning* bid, could not be calculated until the corresponding license had been won in a still later auction. Yet such a reading conflicts with the explicit assumption in our default payment rule that the deficiency payment and the additional payment are calculated using the same bids: "If either bid amount is subject to a bidding credit, the 3 percent [payment] will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the [withdrawal] payment. . . ."³⁵ Moreover, reading the rule this way would prolong the period before the final amount of the default payment obligation could be assessed and payment could be collected.

25. To remove any ambiguity associated with this possible occurrence, we believe that a clarification of the rule is needed. Therefore, we propose that when, in a subsequent auction, there is a higher withdrawn bid but no winning bid for a license that corresponds to a defaulted license, the additional default payment be determined as 3 percent (or 25 percent) of the defaulting bidder's bid.³⁶ The additional payment would, as always, be calculated using the same basis, i.e., net or gross bids, as used in the calculation of the deficiency payment.³⁷ We believe that adopting this proposal would simplify and accelerate the calculation of final default payments in applicable situations by allowing use of the same subsequent bid in calculating both the deficiency payment portion and the additional payment portion of the final default payment and by allowing an earlier determination of the additional payment amount.

26. Further, we believe that clarification of the additional payment portion of the default payment rule is needed for certain situations in which no deficiency payment is owed. As noted, normally the additional payment is a percentage of either the defaulting bidder's bid or the subsequent applicable bid, whichever is less, using the same basis – net or gross bids – as used in calculating the deficiency payment. However, when the defaulted bid was subject to a bidding

³⁴ By "corresponding license," we mean a license with the same, or similar, geographic and spectral components as the defaulted license.

³⁵ 47 C.F.R. § 1.2104(g)(2). *See also id.* § 1.2104(g)(3)(ii) (calculating the additional 25 percent payment for defaults and disqualifications after the close of a combinatorial bidding auction). We note that the quoted sentence of section 1.2104(g)(2) actually reads: "If either bid amount is subject to a bidding credit, the 3 percent *credit* will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the payment in paragraph (g)(1) of this section." (emphasis added) The use of the word "credit" in this sentence was in error. Our proposed clarifications of section 1.2104 would eliminate the error.

³⁶ In the event that there are no intervening subsequent withdrawn bids that are higher than the defaulted bid but there are intervening subsequent withdrawn bids that are higher than the subsequent winning bid, the highest such intervening subsequent withdrawn bid will be used to calculate both portions of the final default payment. For example, if the defaulted bid were for \$100 and the subsequent winning bid were for \$80 but there were an intervening subsequent withdrawn bid for \$90, the default payment (both the deficiency portion and the additional payment) would be calculated using the \$100 defaulted bid and the \$90 intervening subsequent withdrawn bid.

³⁷ As in the calculation of withdrawal payments, net bids for purposes of calculating default deficiency and additional payments would not include discounts resulting from tribal land bidding credits.

credit and the subsequent applicable bid equals or exceeds the defaulted bid, regardless of which basis – net or gross bids – is used, it is not clear whether the additional payment should be based on the net defaulted bid or on the gross defaulted bid. We propose that, in such a situation, the additional payment be 3 (or 25) percent of the net defaulted bid amount, thus basing the default payment on what the defaulter was obligated to pay at the close of bidding. We seek comment on these proposals.³⁸

2. Raising the Limit on Withdrawal and Default Payments

a. Background

27. *Withdrawals.* As we have discussed, our rules provide that a bidder that withdraws a high bid during an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction(s).³⁹ In the event that a license for which there has been a withdrawn high bid is not subject to a subsequent higher bid or won in the same auction, the final withdrawal payment cannot be calculated until a corresponding license is subject to a higher bid or won in a subsequent auction. In such a case, the bidder responsible for the withdrawn high bid is assessed an interim bid withdrawal payment equal to 3 percent of the amount of its withdrawn bid, and this interim payment is applied toward any final bid withdrawal payment that is ultimately assessed.⁴⁰

28. The Commission adopted the withdrawal payment rules in 1994 to discourage insincere bidding, which, whether done for frivolous or strategic purposes, distorts price information generated by the auction process and may reduce the efficiency of the auction.⁴¹ The Commission anticipated that strategic withdrawals – such as when a bidder attempts to deter a rival from acquiring a license by bidding up the price of the license and then withdrawing – would be particularly damaging to competitive

³⁸ As previously noted, in most instances, we use a different calculation to determine the amount of the deficiency portion of a default payment in the context of combinatorial bidding. See 47 C.F.R. § 1.2104(g)(3). However, in a subsequent section of this *Notice*, we propose changes to our rules that would instead require use of the “conventional” default rule (i.e., the default rule used where neither the initial nor the subsequent winning bid is for a license won as part of a package) for combinatorial bidding situations. Accordingly, we further propose to extend the clarification discussed here to determinations of the amount of default payments in situations where the initial bid, the subsequent winning bid, or any intervening withdrawn bid is for a license that is part of a package. Adoption of this further proposal, however, would be contingent upon our concurrent or prior adoption of a rule change that would allow use of the “conventional” default rule in such situations.

³⁹ 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.*

⁴⁰ *Id.*

⁴¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-74 ¶¶ 146-53.

bidding.⁴² The Commission added the 3 percent interim bid withdrawal payment to the rules to help ensure that the withdrawal payment could be collected if one ultimately were assessed.⁴³

29. *Defaults and Disqualifications.* As discussed above, our rules also provide that if, after the close of an auction, a high bidder defaults on a down payment or final payment obligation or is disqualified, the bidder is liable for a default payment.⁴⁴ This payment consists of a deficiency portion, equal to the difference between the amount of the bidder's bid and the amount of the winning bid the next time a license covering the same spectrum is won in an auction, plus an additional payment equal to 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulter's bid or of the subsequent winning bid, whichever is less.⁴⁵ The Commission adopted the default payment rule in 1994. In 1997, the Commission extended to all auctionable services a policy, earlier adopted for broadband personal communications services ("PCS"), of assessing initial default deposits.⁴⁶ Pursuant to this policy, the Commission, in instances in which the amount of a default payment cannot yet be determined, assesses an initial default deposit of between 3 percent and 20 percent of the defaulted bid amount.⁴⁷ Requiring an additional payment in the case of post-auction defaults is intended to provide an incentive to bidders wishing to withdraw their bids to do so prior to the close of an auction, because a default or disqualification after an auction is generally more harmful to the auction process than a withdrawal during the auction.⁴⁸ The Commission set the additional

⁴² *Id.*

⁴³ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,302 ¶ 15 (2000) ("Part 1 Fifth Report and Order").

⁴⁴ See 47 C.F.R. § 1.2104(g); see also *id.* § 1.2109. As noted earlier, in this *Notice* and in our rules, bidders that are disqualified after the close of an auction are referred to as "defaulting bidders," just as are bidders that default after an auction's close. Similarly, the payment owed by a disqualified bidder is referred to as a "default payment."

⁴⁵ *Id.* § 1.2104(g)(2)-(3).

⁴⁶ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 434 ¶ 102 (general initial default deposit policy) (1998) (rel. Dec. 31, 1997) ("Part 1 Third Report and Order"); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5563 n.51 (1994) ("Competitive Bidding Fifth Report and Order") (initial default deposit policy for broadband PCS); see also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2382-83 ¶ 197.

⁴⁷ See *Part 1 Third Report and Order*, 13 FCC Rcd. 374, 434 ¶ 102; *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5563 n.51; see also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2382-83 ¶ 197. For defaults and disqualifications following combinatorial bidding auctions, the Commission assesses an initial default deposit of 25 percent. Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, WT Docket No. 97-82, *Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd 10,180, 10,203-204 ¶¶ 25-31 (2003) ("Part 1 Order on Reconsideration of the Fifth Report and Order")

⁴⁸ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2374 ¶ 154 (citation omitted):

The additional [3 percent] penalty is intended to provide an incentive for bidders wishing to withdraw their bids to do so prior to the close of the auction. It is appropriate to create such an

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payment at 3 percent, estimating that amount as the transaction cost of selling a license in the “after-market.”⁴⁹ The Commission posited that if it were to establish a significantly higher additional default payment, most bidders would, rather than default, sell unwanted licenses individually in the secondary market.⁵⁰ The Commission determined that such a result would not only be unfair to entities subject to resale restrictions but also would be a less efficient mechanism for assigning defaulted licenses than would Commission auctions of such licenses.⁵¹

b. Discussion

31. We have observed a disproportionate number of withdrawals late in our auctions, indicating that some bidders have been placing and then withdrawing bids primarily to discourage potential or existing market competitors from seeking to acquire licenses.⁵² Moreover, bidders continue to default on their payment obligations.⁵³ Withdrawals and defaults weaken the integrity of the auctions process and impede the deployment of service to the public and could prove particularly troublesome in auctions with a specific cash proceeds or reserve price requirement, such as auctions subject to CSEA.⁵⁴

32. Based on our experience in administering auctions, we believe that changes to our existing withdrawal and default payment rules may be necessary in order to more effectively minimize the occurrence of withdrawals, defaults, and disqualifications. Accordingly, we propose to increase the current limits on the interim withdrawal payment and the additional

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incentive because a withdrawal that occurs after an auction closes (default) is likely to be more harmful than one that occurs before closing. First, default reduces the efficiency of the assignment process. If withdrawal occurs before the auction closes other bidders will have greater opportunities to revise their bidding strategies to account for the availability of the withdrawn license. Once the auction closes, however, only those licenses on which bidders defaulted (plus any licenses not sold during the auction) will be put up for re-auction, so other bidders will have little opportunity to revise their strategies. Thus, default would reduce the likelihood that licenses will be assigned to those who value them the most. Second, default imposes extra costs on the government. If a bidder defaults, the government must generally incur the additional expense of re-auctioning the license. In contrast, the administrative cost of announcing a bid withdrawal prior to the close of an auction and accepting additional bids would be minimal.

See also id. at 2382-83 ¶ 197.

⁴⁹ *Id.* at 2374 ¶ 155.

⁵⁰ *Id.*

⁵¹ *Id.* *See also id.* at 2374 ¶ 153.

⁵² *See, e.g.*, round results for Auctions No. 33 (700 MHz Guard Bands) and No. 37 (FM Broadcast). Links to these round results may be found on the Commission’s Web site at, respectively, <http://wireless.fcc.gov/auctions/33/> and <http://wireless.fcc.gov/auctions/37/>. Software to assist with viewing round results may be downloaded from <http://wireless.fcc.gov/auctions/data/trackingtools.html>.

⁵³ For example, three bidders defaulted on a total of 13 licenses following Auction No. 40 (Lower and Upper Paging Bands); three bidders defaulted on a total of 6 licenses following Auction No. 37 (FM Broadcast); two bidders defaulted on a total of five licenses following Auction No. 35 (C and F Block Broadband PCS); and a single bidder defaulted on 10 licenses following Auction No. 34 (800 MHz Specialized Mobile Radio Service).

⁵⁴ *See* 47 U.S.C. § 309(j)(4)(F), (15)(B).

default payment. In the case of defaults on “unwanted” licenses, the Commission’s rationale for limiting the additional payment to 3 percent no longer holds the same validity that it did eleven years ago when the payment was established. Resale restrictions have since been reduced,⁵⁵ and secondary market tools for the redistribution of access to spectrum have been rapidly developing, due, in part, to Commission innovation and encouragement.⁵⁶ In cases where defaults result from the failure of bidders realistically to assess in advance their ability to pay for their bids, a larger payment requirement may provide added incentive for bidders to conduct the necessary analysis and refrain from placing bids they cannot afford or at least for them to withdraw such bids rather than defaulting on them.

33. Accordingly, we propose to modify section 1.2104(g) of our rules to raise the current 3 percent limits on the interim withdrawal payment and the additional default payment to 20 percent each. The Commission would, as part of its determination of competitive bidding procedures in advance of each auction, establish the appropriate level, from 3 percent up to a maximum of 20 percent, at which to set each of the two payments. This 3 to 20 percent range mirrors the parameters long used for determining initial default deposit amounts. In light of the potentially greater harm resulting from defaults in combinatorial bidding auctions, we do not propose to change the size of the 25 percent additional payment for defaults or disqualifications following combinatorial bidding auctions. We seek comment on these proposals.

3. Apportioning Bid Amounts

a. Apportionment Among the Licenses in a Package

34. Our competitive bidding rules and procedures assume that the amount of each bid on an individual license is always known. This assumption makes sense only when licenses are won individually. However, in combinatorial (or “package”) bidding, bidders place single all-or-nothing bids on groups (or packages) of licenses. Thus, there may be no identifiable bid amounts on the individual licenses comprising packages of more than one license.

35. The Commission employed package bidding for the first time in Auction No. 51, an auction of regional narrowband PCS licenses that was held on September 24 and 25, 2003.⁵⁷ The Commission announced in 2000 that a combinatorial bidding system would be used for Auction No. 31, the planned auction of licenses in the Upper 700 MHz bands.⁵⁸ In addition, the

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

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

⁵⁷ See “Regional Narrowband PCS Spectrum Auction Closes; Winning Bidder Announced,” *Public Notice*, 18 FCC Rcd 19,689 (2003); “Auction of Regional Narrowband PCS Licenses Scheduled for September 24, 2003; Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments, Package Bidding and Other Auction Procedures,” *Public Notice*, 18 FCC Rcd 11,974 (2003) (“*Auction No. 51 Procedures Public Notice*”).

⁵⁸ “Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000; Procedures Implementing Package Bidding for Auction No. 31; Bidder Seminar Scheduled for July 24, 2000,” *Public Notice*, 15 FCC Rcd 8809, 8813 (2000). Auction No. 31 has been postponed from its original planned start

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Commission recently announced its launch of a new auction bidding software system – the Integrated Spectrum Auction System or “ISAS” – which, among other things, will facilitate package bidding.⁵⁹ We believe that the use of combinatorial bidding methodology makes it necessary for us modify our rules to allow the apportionment of package bids among the individual licenses comprising a package whenever an individual bid amount is needed to administer a Commission rule or procedure. As we discuss below, there are several situations in which the need for an individual bid amount could arise.

36. *Small Business and New Entrant Bidding Credits.* Under our rules, small business and new entrant bidding credits are awarded as percentage discounts on winning bid amounts for specific licenses.⁶⁰ In the event that an entity entitled to such a bidding credit places a bid on a package of licenses in an auction with combinatorial bidding, it may be necessary to apportion the bid among the licenses comprising the package. For example, if the entity bids on a package of licenses not all of which entitle the winner to a bidding credit or to the same percentage bidding credit, it will be necessary to apportion the bid among the individual licenses comprising the package in order to calculate the amount of the bidding credits. Moreover, as discussed below, in the case of small business bidding credits, even if the small business is entitled to a uniform bidding credit on all licenses in a package, it may be necessary to apportion the package bid among individual licenses in order to determine the amount of an unjust enrichment payment obligation.³⁷ 37. *Unjust Enrichment Payment Obligations.* Under our existing rules, an unjust enrichment payment is due when a licensee that received a small business bidding credit for a license transfers control of, or fully or partially assigns, the license within the first five years of the license term to an entity not qualifying for a bidding credit, or for as favorable a bidding credit as the licensee’s.⁶¹ The amount of an unjust enrichment payment, determined according to a declining schedule, is a percentage of either the bidding credit or the difference between the bidding credit the licensee received and the bidding credit for which the transferee or assignee would qualify, up to 100 percent, plus interest.⁶² Unjust enrichment payment obligations for partitioned license areas are calculated based upon the ratio of the population of the partitioned area to the overall population of the original license area.⁶³ Correspondingly, unjust enrichment

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date, and a new start date has not yet been announced. “Auction of Licenses in the 747-762 and 777-792 MHz Bands (Auction No. 31) is Rescheduled,” *Public Notice*, 17 FCC Rcd 14,546 (2002).

⁵⁹ See “FCC Announces New Integrated Spectrum Auction System,” *Public Notice*, DA 05-454 (rel. Feb. 18, 2005). In addition to providing bidding functionality for multiple types of auctions, the new system also comprises an FCC Form 175 electronic filing system, combining auction application, bidding, and administration processes into a single software system.

⁶⁰ See 47 C.F.R. § 1.2110(f)(1)-(2) (designated entities); *id.* § 73.5007 (new entrants). New entrant bidding credits are available only in auctions of broadcast construction permits. *Id.*

⁶¹ *Id.* § 1.2111(d)(1); see 47 U.S.C. § 309(j)(3)(C), (4)(E). In this *Notice*, we refer only to unjust enrichment payment obligations involving small business bidding credits; however, unjust enrichment payment obligations can result from other circumstances, as well. See 47 C.F.R. § 1.2111(b), (c), and (e).

⁶² 47 C.F.R. § 1.2111(d).

⁶³ *Id.* § 1.2111(e)(3).

payment obligations for disaggregated spectrum are calculated based upon the ratio of the amount of spectrum disaggregated to the total amount of spectrum of the original license.⁶⁴ In the case of combined partitioning and disaggregation, unjust enrichment payment obligations are calculated based upon the ratio of “MHz-pops” in the partial license to the total “MHz-pops” in the original license, where “MHz-pops” is defined as the number of megahertz of spectrum multiplied by the population of the covered area.⁶⁵ This MHz-pops ratio is a generalization of the ratios used for simple partitions and disaggregations, taking into account both the license area and the bandwidth being assigned. If a bidder wins a package of licenses in an auction with combinatorial bidding and subsequently seeks to transfer or fully or partially assign an individual license that comprises part of the package, calculating any required unjust enrichment payment will require a determination of the price and applicable bidding credit for the individual license.

38. *Tribal Land Bidding Credits.* As discussed above, the size of a tribal land bidding credit is subject to a limit which is set using the amount of the high bid on the license in question.⁶⁶ Accordingly, in order to calculate a tribal land bidding credit for a license won as part of a package, it will be necessary to determine how much of the winning bid amount for the package to allocate to that license.

39. *Default and Withdrawal Payments.* As we have also discussed, calculating the amount of a default or withdrawal payment involves a comparison between the withdrawing or defaulting bidder’s bid and a subsequent bid.⁶⁷ The Commission already has in place a rule for calculating default payment obligations in connection with combinatorial bidding auctions. Initially adopted as part of the service-specific Part 27 competitive bidding rules in anticipation of package bidding in auctions of the Upper 700 MHz band,⁶⁸ the rule later was incorporated into the Part 1 rules as section 1.2104(g)(3), applicable to all defaults on licenses won in a combinatorial bidding auction.⁶⁹ In addition to specifying the method of calculating the

⁶⁴ *Id.*

⁶⁵ See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21,831, 21,866 ¶ 66 (1996).

⁶⁶ 47 C.F.R. § 1.2110(f)(3)(iv).

⁶⁷ *Id.* § 1.2104(g).

⁶⁸ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 99-168, *Second Memorandum Opinion and Order*, 15 FCC Rcd 21,070, 21,074-79 ¶¶ 11-17 (2000) (“700 MHz Second Memorandum Opinion and Order”).

⁶⁹ *Part 1 Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd at 10,198-204 ¶¶ 25-31; 47 C.F.R. § 1.2104(g)(3). Under the rule, when a winning bidder defaults on paying for a license won in a combinatorial bidding auction and/or won in a subsequent combinatorial bidding auction, its default payment obligations are calculated as follows:

- (1) Where a defaulting bidder held winning bids on individual licenses (i.e., not as part of a package), and in a subsequent auction the licenses are also won individually, the deficiency portion will be calculated by subtracting the subsequent winning bid from the defaulted bid. The deficiency portion for such bids will be calculated on a license-by-license basis (i.e., in the event of defaults on multiple bids, the differences between the amounts originally bid and the amounts subsequently bid will not be aggregated to determine a net amount owed). If the subsequent winning bid(s) exceed the defaulted bid(s), no deficiency portion will be assessed. Even in the absence of a deficiency portion, however, an additional 25% payment will be due.

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deficiency portion of default payments after package bidding auctions, this rule increases the additional payment required of package bidding defaulters from 3 percent to 25 percent. In raising the amount of the additional default payment, the Commission reasoned that defaults following a combinatorial bidding auction have the potential to cause greater disruption to the auction and licensing process than do defaults following other types of auctions.⁷⁰ Section

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(2) Where a defaulting bidder won licenses in package(s), and in a subsequent auction the licenses are won either (a) in the same package(s), or (b) in smaller packages or as individual licenses that correlate to the defaulted package(s), the deficiency portion will be determined on a package-by-package basis. In the event a defaulting bidder defaults on more than one such bid, the differences between the amount originally bid and the amount(s) subsequently bid will not be aggregated to determine a net amount owed. Thus, in this situation, the deficiency portion will be calculated in a manner analogous to where the licenses are sold individually. However, with regard to each individual package, where the licenses are subsequently sold individually or as part of smaller packages, the amounts received in the subsequent auction will be aggregated in order to determine any deficiency.

(3) Where a defaulting bidder or bidders won licenses either individually or as part of packages, and in a subsequent auction the licenses are won as larger packages or different packages (not including the situation described in preceding paragraph), the deficiency portion will be calculated by subtracting the aggregate amount originally bid for the licenses from the aggregate amount bid in the subsequent auction for the licenses. Thus, in this situation, the deficiency portion will not be calculated on a bid-by-bid basis.

(4) If, in a situation requiring that bids be aggregated in order to determine the deficiency portion of the default payments for bids, there are multiple defaulting bidders, the default payment (both the deficiency portion and the additional 25% payment portion) will be allocated to the defaulting bidders in proportion to their share of the aggregated default bids.

(5) In the event that a bidding credit applies to any applicable bids(s), the deficiency portion of the default payment will be assessed using the lesser of the difference between gross bids and the difference between net bids. (In the event that a bidder does not have a bidding credit, the bidder's gross bid and net bid are the same.) In other words, (i) the sum of the gross defaulted bid(s) minus the gross subsequent winning bid(s) will be compared to (ii) the sum of the net defaulted bid(s) minus the net subsequent winning bid(s). The lesser of (i) and (ii) will be used to calculate the deficiency portion of the default payment.

(6) The default payment consists of the deficiency portion *and* an additional 25% payment. The additional payment will be 25% of the lesser of the subsequent winning bids(s) and the defaulted bid(s). The Commission will use the same gross or net bid(s) that were used to calculate the deficiency portion when assessing the additional 25% payment. That is, the Commission will compare the defaulted and subsequent bid(s) according to the methods described above for calculation of the deficiency portion of the default payment when determining whether the defaulted bid(s) or the subsequent winning bid(s) is the lesser amount. Should there be no difference between the gross or net bid(s) for purposes of assessing the deficiency portion, the Commission will assess the additional 25% payment using the lesser of the gross or net bid(s).

(7) In the case of combinatorial bidding defaults, the Commission will assess a 25% interim default payment pending assessment of the final default payment after a subsequent auction. This procedure is appropriate because even under the most favorable set of circumstances for the defaulting bidder, i.e., where the bid price for the package at the subsequent auction exceeds defaulted bid, the final default payment would be 25% of the defaulted bid.

⁷⁰ 700 MHz Second Memorandum Opinion and Order, 15 FCC Rcd at 21,078-79 ¶ 17:

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1.2104(g)(3) accommodates situations in which all relevant licenses won in one or more subsequent auctions correspond to licenses originally made available in the same initial auction. However, it does not allow for situations in which the corresponding licenses are made available in one or more subsequent auctions that include licenses that were not won in the same initial auction. Consequently, rather than use section 1.2104(g)(3) to calculate a default payment obligation when one or both of the involved licenses is part of a package, we believe that it would be preferable to use a method to apportion the package bid amount among the individual licenses comprising the package.

40. The procedures for the two package bidding auctions announced to date have not permitted withdrawals,⁷¹ and, accordingly, the Commission has never adapted its withdrawal payment rule to package bidding situations. Nevertheless, it may happen that, after a withdrawal in a non-package bidding auction, the license on which the bid was withdrawn is not won in the same auction but, instead, a corresponding license is won in a subsequent auction as part of a package. Moreover, new package bidding designs may at some point make it practicable for the Commission to allow withdrawals in package bidding auctions. For these reasons, we believe it necessary to amend section 1.2104(g) to provide for calculating withdrawal payments in all possible situations involving combinatorial bidding. We propose that the Commission specify in advance of each auction that uses a combinatorial bidding design or includes spectrum previously subject to a combinatorial auction a method for apportioning the bid on a package among the individual licenses comprising the package. We propose further that the portion of the total bid attributed to an individual license pursuant to the selected method – to be known as the “apportioned package bid” or “APB” – serve as a stand-in for the bid on that license whenever the individual bid amount is needed for one of our regulatory calculations, such as calculating the size of a bidding credit, a small business bidding credit unjust enrichment payment obligation, a tribal land bidding credit limit, or a withdrawal or default payment obligation. There are at least two available methods by which the Commission could apportion package bids to the individual licenses comprising a package. One possible method is to use a “MHz-pops” ratio, just as is currently done for unjust enrichment calculations involving partitioning or disaggregation. For Auction No. 51, the Commission decided that MHz-pops would be used should it be necessary to calculate the upper limit on a tribal land bidding credit for a license won as part of a package.⁷² Another possible method is to use current price

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[T]he effects of a default in a package bidding auction require a strong deterrent against insincere bidding and strategic default. In an auction without package bidding, a default on a license mostly affects only the bidders for that license; if the defaulting bidder had not bid, the other licenses in the auction likely still would have been won by the same bidders. In an auction with package bidding, however, a default may reasonably be expected to affect multiple licenses (and perhaps every license in the auction) . . . if the defaulting bidder had not bid, the licenses may well have been sold in different packages.

⁷¹ See *Auction No. 51 Procedures Public Notice*, 18 FCC Rcd at 12,007; Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002; *Auction No. 31 Procedures Public Notice*, 17 FCC Rcd at 5185-86. Auction No. 31 has not yet occurred.

⁷² “Regional Narrowband PCS Spectrum Auction; 2 Qualified Bidders,” *Public Notice*, 18 FCC Rcd 18,570, 18,577 (2003).

estimates (“CPEs”), which are estimates of the prices of individual licenses comprising a package in a combinatorial bidding auction.⁷³ The Commission developed a methodology for determining CPEs as part of the combinatorial bidding procedures established for Auctions No. 31 and 51. CPEs were calculated after every round of Auction No. 51 as part of the mathematical optimization process used to determine the winning bids and were also used in determining the minimum acceptable bid amounts for each subsequent round.⁷⁴ The same use of CPEs was announced for Auction No. 31.⁷⁵

43. CPEs determined for the final round of an auction (“final price estimates” or “FPEs”) can serve as a valid proxies for the market values of individual licenses won as parts of a package, because they take into account the minimum opening bids for the licenses as well as all the bids placed in the auction and, therefore, reflect all available information about the relative demand for the licenses. In addition, because the sum of all of the FPEs for the component licenses of a package is mathematically constrained to equal the winning bid for the package,⁷⁶ the ratios of these estimates to the package bid amount have a natural role as indicators of the relative weights of the different licenses in the market value of the package.

44. While we consider the use of either MHz-pops ratios or FPEs to be acceptable for determining APBs, we do not wish now to limit the Commission to any given method, including these two. Instead, we believe that it is in the best interest of the auction program and bidders for the Commission to have the flexibility to select the method best suited to a particular auction, including being able to take advantage of any developments in auction design that might provide other ways to apportion package bids among the individual component licenses of a package.⁷⁷

45. Adoption of our proposal that APBs be determined for each combinatorial bidding auction would allow calculation of how much of a total bidding credit to attribute to a license won as part of a package and determination, according to our existing rules, of the amount of an unjust enrichment payment obligation, the upper limit on a tribal land bidding credit for a license won as part of a package, or a withdrawal payment obligation. Further, substituting an APB for the unknown amount of a winning bid on an individual license won as part of a package would allow use of the “conventional” default rule (i.e., the default rule used where neither the initial nor the subsequent winning bid is for a license won as part of a package) for combinatorial bidding situations, including situations not covered by the existing Part 1 combinatorial bidding default rule.⁷⁸ Indeed, using an APB as a substitute for the amount of a bid on a license won as

⁷³ The mathematical derivation of current price estimates is described in detail in the *Auction No. 51 Procedures Public Notice*, 18 FCC Rcd at 12,003-04, 12,029-34, and in the *Auction No. 31 Procedures Public Notice*, 17 FCC Rcd at 5178-81, 5193-99.

⁷⁴ See *Auction No. 51 Procedures Public Notice*, 18 FCC Rcd at 12,003-04, 12,029-34.

⁷⁵ *Auction No. 31 Procedures Public Notice*, 17 FCC Rcd at 5178-81, 5193-99.

⁷⁶ *Auction No. 51 Procedures Public Notice*, 18 FCC Rcd at 12,003; *Auction No. 31 Procedures Public Notice*, 17 FCC Rcd at 5198.

⁷⁷ Pursuant to our proposal, the method for apportioning bids in combinatorial bid auctions would be included in the Commission’s pre-auction notice and comment process.

⁷⁸ In returning to our “conventional” default rule, we propose to retain the higher (25 percent) additional payment amount for combinatorial bidding defaults adopted as part of the existing combinatorial bidding default payment rule, because the rationale for having the higher payment amount remains valid. See *700 MHz Second*

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part of a package would allow us to fairly perform any Commission calculation requiring the amount of the individual bid. Consequently, we seek comment on these proposals.

b. Apportionment Among the Components of a License

46. Implicit in our rules for determining the amount of a withdrawal or default payment – determinations that involve a comparison between the withdrawing or defaulting bidder’s bid and a subsequent bid – is the assumption that the subsequent bid will be for a license with the same geographic and spectral components as the original license. However, when there have been intervening rule changes involving the relevant spectrum, the second license may not be identical in geography and spectrum to the first. For example, such rule changes occurred last year when, in order to provide greater flexibility and a more functional band plan for licensees, the Commission restructured the rules governing the Multipoint Distribution Service and the Instructional Television Fixed Service in the 2495 – 2690 MHz band.⁷⁹ We can expect that, as radio technology continues to evolve and services become more sophisticated, there will be other instances where our band plans are updated. Therefore, for purposes of calculating a withdrawal or default payment – or for any comparison of a bid for one license with a bid for another license in a subsequent auction when the second license is similar to but not exactly the same as the first in terms of geography or spectrum – we need a procedure for apportioning the bid placed on the reconfigured license in the second auction.

47. We accordingly propose that, prior to auctions involving reconfigured licenses, the Commission specify, as necessary, a method for apportioning the bid on a reconfigured license among the license’s component parts. Using a MHz-pops ratio would be suitable for such an apportionment, as the Commission has successfully employed the ratio to apportion small business bidding credit amounts in order to calculate unjust enrichment payments. However, we propose to retain the flexibility to select another method of apportionment should we identify a method that we believe would better suit the particular licenses involved. Further, we propose to use methods for package bid apportionment and individual license bid apportionment in concert when circumstances warrant. We seek comment on these proposals.

4. Conforming Broadcast Construction Permit Payment Procedures with Part 1 Rules

48. Our Part 1 rules currently provide that, unless otherwise specified by public notice, auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following the release of a public notice establishing the payment deadline.⁸⁰

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Memorandum Opinion and Order, 15 FCC Rcd at 21,078-79 ¶ 17. In addition, in the case of combinatorial bidding defaults, we propose to continue our practice of assessing a 25 percent interim default deposit pending assessment of the final default payment after a subsequent auction. *See Part 1 Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd at 10,204 ¶ 31.

⁷⁹ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, RM-10586, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14,165 (2004).

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

In recent wireless spectrum auctions, the Commission has required each winning bidder to submit the balance of the net amount of its winning bid(s) within ten (10) business days after the deadline for submitting down payments.⁸¹ This procedural change was necessary to guard against payment defaults that may then lead to bankruptcy filings and litigation that tie up the availability of the defaulted licenses.⁸² Specific Part 73 and 74 rules, however, provide that winning bidders in broadcast service auctions must render their final payment for construction permits won through competitive bidding after their long-form applications have been processed, any petitions to deny have been dismissed or denied, and the public notice announcing that broadcast construction permits are ready to be granted has been released.⁸³ Recognizing the discrepancy between these auction payment procedures, the Commission, in the *Auction No. 37 Procedures Public Notice*, noted that it would consider future changes to the broadcast rules to conform the broadcast final payment procedures to the analogous Part 1 rules.⁸⁴

49. One of the primary objectives of our auction rules is to ensure that only serious, financially qualified applicants receive licenses and construction permits so that the provision of service to the public is expedited.⁸⁵ The Commission has determined that the timely payment of auction obligations is one of the means by which it can be assured of the financial qualifications, and thus the seriousness, of a winning bidder.⁸⁶ Moreover, the Commission has consistently stated that those entities that plan to participate in an auction must have the appropriate financing

⁸¹ See, e.g., “Auction of Licenses in the Multichannel Video Distribution and Data Service Rescheduled for January 14, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures,” *Public Notice*, 18 FCC Rcd 17,553, 17,588 (2003). The Commission has also provided for this payment procedure in Auctions No. 52, No. 55, No. 56, No. 57, No. 58 and No. 59.

⁸² See *FCC v. Nextwave Personal Communications, Inc.*, 537 U.S. 293 (2003) (“*Nextwave*”) (holding that Section 525 of the Bankruptcy Code, 11 U.S.C. § 525, prohibits the cancellation of a Commission-issued license held by a licensee in bankruptcy proceedings where the cancellation is based upon the licensee's failure to make full and timely payment on the license).

⁸³ See, e.g., 47 C.F.R. §§ 73.3571(h)(4)(ii); 73.3573(f)(5)(ii); 73.5006(d); 74.1233(d)(5)(ii). Broadcast service auctions include FM radio, AM radio, television, low power television (LPTV), and FM and television translator stations.

⁸⁴ See “Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures,” *Public Notice*, 19 FCC Rcd 10,570, 10,605 (2004) (“*Auction No. 37 Procedures Public Notice*”).

⁸⁵ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2375 (1994) (“*Part 1 Second Report and Order*”); *Mountain Solutions LTD, Inc.*, 12 FCC Rcd 5904, 5907-08 (1997), *aff'd*, 13 FCC Rcd 21,983 (1997), *review denied in part and dismissed in part*, *Mountain Solutions LTD, Inc. v. F.C.C.*, 197 F.3d 512 (D.C. Cir. 1999) (“*Mountain Solutions*”).

⁸⁶ See *Delta Radio, Inc.*, 18 FCC Rcd 16,889 (2003), *aff'd*, 387 F.3d 897 (D.C. Cir. 2004) (financial qualifications of winning bidders established by timely auction payments). See also *BDPCS, Inc.*, 15 FCC Rcd 17,590 (2000) (default payment rules provide strong incentives to ensure the financial qualifications of potential bidders), *aff'd*, 351 F.3d 1177 (D.C. Cir. 2003) (affirming the Commission's imposition of default payments to winning bidders who fail to make required payments post-auction). As the Commission has stated, awarding licenses to those who value them the most encourages growth while maintaining safeguards against anticompetitive behavior. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2349-50 ¶ 5. See also *Mountain Solutions*, 197 F.3d 512.

in place before the start of the auction.⁸⁷ Recent judicial clarifications of the relationship between the Commission's authority under Section 309(j) of the Communications Act and creditor protections under the Bankruptcy Code have shifted significant risk to the government in the event an auction payment defaulter attempts to tie up the unpaid licenses won at auction in bankruptcy litigation.⁸⁸ Accordingly, when establishing the payment schedule for licenses won at auction, the Commission protects the integrity of the auction program and the availability of licenses by ensuring timely full payment and minimizing the opportunity to "game" the auction and license assignment processes.⁸⁹ By harmonizing the broadcast auction payment procedures with our Part 1 rules, we seek to apply our rules consistently in furtherance of the public interest.⁹⁰

50. While the Part 73 and Part 74 broadcast auction rules reference the Part 1 final payment rule, the more specific payment provisions in the broadcast rules preclude application of the Part 1 final payment procedures.⁹¹ To conform the Part 73 and Part 74 broadcast rules and make them consistent with the existing competitive bidding and payment procedures contained in Part 1 of our rules, we propose to adopt for broadcast auctions the final payment procedures in our Part 1 rules. Specifically, we propose to incorporate into our Part 73 and Part 74 broadcast auction rules the Part 1 rule requiring that, unless otherwise specified by public notice, winning bidders in a broadcast auction are required to pay the balance of their winning bids in a lump sum within ten (10) business days following the release of a public notice establishing the payment deadline.⁹² We seek comment on this proposal. Under our current practice, the Commission informs prospective bidders of final payment procedures in a public notice announcing the procedures for the auction. As noted above, we believe that amending the final payment deadline for broadcast auctions to conform to our existing procedures for wireless auctions will provide consistency throughout our competitive bidding rules and help to achieve our objective that only sincere, financially qualified applicants participate in competitive bidding. We further believe that providing greater certainty to all winning bidders regarding when final payment will be due will also benefit them as they compete with other sincere bidders that have also secured the financing necessary to participate in an auction and pay for their licenses. In wireless spectrum auctions, winning bidders, including small businesses, have been able to comply with the Commission's new final payment procedure without difficulty. We therefore believe that winning bidders in broadcast auctions should be able to comply with this change with similar ease. We seek comment on this proposal.

See 47 C.F.R. § 1.2105(a)(2)(v). See also Requests for Extension of the Commission's Initial Non-Emergency Period for E and F Block Installment Payments, Order, 15 FCC Rcd 22,071, 22,072 (1998).

⁸⁸ See *NextWave*, 537 U.S. 293.

⁸⁹ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2381-82 ¶ 192.

⁹⁰ However, should the Commission determine that such post-processing payment procedures are in the best interests of the potential bidders, it retains the discretion to employ the current payment schedule for broadcast licenses.

⁹¹ See, e.g., 47 C.F.R. §§ 73.3571; 73.3573; 73.5006; 74.1233.

⁹² See *id.* § 1.2109(a). We note that in 2002 the Commission directed Media Bureau staff to issue public notices announcing that construction permits are ready for grant promptly after dismissing or denying petitions to deny. Application of Abundant Life, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 4006, 4007 n.5 (2002). To the extent that in future auctions winning bidders are required to make their final payments prior to initial resolution of petitions to deny, a ready-to-grant public notice would not be necessary.

5. Improving Procedures for Using the Consortium Exception to the Designated Entity and Entrepreneur Aggregation Rule

51. For purposes of determining whether an applicant or licensee is eligible for small business or broadband PCS entrepreneur status, the Commission attributes to the applicant the gross revenues (and, when determining broadband PCS entrepreneur eligibility, the total assets⁹³) of the applicant's affiliates, its controlling interests, and the affiliates of its controlling interests, and aggregates these amounts with the applicant's own gross revenues (and total assets).⁹⁴ Calculated in this manner, the applicant's gross revenues (and total assets) must not exceed the caps established by the Commission for particular services. However, under an exception to this aggregation rule, where an applicant or licensee is a consortium comprised exclusively of members eligible for small business bidding credits or broadband PCS entrepreneur status, or both, the gross revenues (and total assets) of the consortium members are not aggregated.⁹⁵ In other words, so long as each member of a consortium individually meets the financial caps for small business bidding credits (or broadband PCS entrepreneur status), the consortium will be eligible for such credits (or for entrepreneur-only broadband PCS licenses), regardless of whether the gross revenues (or total assets) of all consortium members would, if aggregated, exceed the caps. The consortium exception, originally adopted on a service-by-service basis where capital costs of auction participation were high, is intended to enable small businesses or entrepreneurs to pool their resources to help them overcome this challenge to capital formation.⁹⁶ The Commission has provided some direction as to how the consortium exception should be implemented by parties wishing to establish such consortia, but we are concerned that there remains uncertainty about the operation of the exception in certain situations. For example, the Commission has said that, before or during the auction individual members of a bidding consortium may withdraw from the consortium with regard to some licenses selected on the consortium's short-form application, while remaining a part of the consortium for purposes of bidding on all other licenses specified.⁹⁷ If consortium members agree that any of their members may withdraw in this fashion, such an agreement must be disclosed on an original or amended short-form application. Should

⁹³ In the context of this *Notice*, "entrepreneur" refers to an entity eligible to hold certain broadband PCS C and F block licenses won in closed bidding. See 47 C.F.R. §§ 1.2110 and 24.709. Generally speaking, an applicant or licensee qualifies as an entrepreneur if it, together with its affiliates, persons or entities that hold interests in the applicant or licensee, and their affiliates, has combined total assets of less than \$500 million and has had combined gross revenues of less than \$125 million in each of the last two years. *Id.* § 24.709(a)(1).

⁹⁴ *Id.* § 1.2110(b)(1).

⁹⁵ *Id.* § 1.2110(b)(3)(i).

⁹⁶ See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7276-78 ¶¶ 81-85 (1994); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5591 ¶ 133, 5601 ¶ 158, 5610 ¶ 179 (1994).

⁹⁷ Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2679 ¶ 105 (1995); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Ninth Report and Order*, 11 FCC Rcd. 14,769, 14,789-90 ¶ 42 (1996).

the consortium win licenses, its members must file, in conjunction with their long-form application, requests to transfer or assign licenses as necessary to comply with the consortium arrangement.⁹⁸

53. Apart from this guidance, the Commission has not explained how consortia should proceed once they have won licenses, nor has it considered the problems that allowing consortia to become licensees may cause. The consortium exception has been seldom used, and we suspect that one reason for this infrequent use has been the absence of clear direction from the Commission as to how consortium members should be formally organized or how (and when) members should allocate and own the licenses they win. For example, contractual disputes may arise between members of consortia, with a resulting delay in buildout and the provision of service. Similarly, problems may occur should one or more members of a licensed consortium file for bankruptcy protection. And if consortium members agree after the auction to divide their license holdings among themselves without first applying for Commission approval, they may be held accountable for unauthorized assignments or transfers of control. Not only would such difficulties impede service to the public and consume Commission resources, they would prove expensive and time consuming for the small businesses involved.

54. In order to provide additional guidance to those interested in taking advantage of the consortium exception and to reduce the likelihood of complications resulting from the exception's use, we seek comment on possible policy options for improving the pre- and post-auction procedures governing the consortium exception to facilitate its use among small businesses facing capital formation constraints. For example, we seek comment on whether we should adopt a new requirement that each member of the consortium file an individual long-form application for its respective, mutually agreed-upon license(s), following an auction in which a consortium has won one or more licenses. To comply with this requirement, consortium members would, prior to filing their short-form application, have reached an agreement as to how they would allocate among themselves any licenses (or disaggregated or partitioned portions of licenses) they might win, and they would have disclosed this agreement on their short-form application as required by our disclosure rules.⁹⁹ We further seek comment on whether, in order for two or more consortium members to be licensed together for the same license(s) (or disaggregated or partitioned portions thereof), they should be required to form a legal business entity, such as a corporation, partnership, or limited liability company, after having disclosed this intention on their short-form and long-form applications. In particular, we seek comment on whether such new entities would have to meet our small business or entrepreneur financial limits and whether allowing these entities to exceed the limits would be consistent with our existing designated entity and broadband PCS entrepreneur rules, as well as our obligations under the Communications Act. As commenters address these issues and any other options proposed by **IV. CONCLUSION** are particularly interested in their views about how these approaches might work in the context of package bidding and to what extent adopting these proposals might encourage wider use of the consortium exception.

55. For the reasons stated, we adopt the interpretation of "total cash proceeds" set forth in the *Declaratory Ruling* above and seek comment on the foregoing proposed changes in our competitive bidding rules set forth in the *Notice of Proposed Rule Making*.

⁹⁸ Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2679 ¶ 105 (1995); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Ninth Report and Order*, 11 FCC Rcd. 14,769, 14,789-90 ¶ 42 (1996).

⁹⁹ See 47 C.F.R. § 1.2105(a)(2)(viii).

V. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. *Ex Parte* Rules – Permit-But-Disclose Proceeding

56. For purposes of this permit-but-disclose notice and comment proceeding, members of the public are advised that *ex parte* presentations are permitted, except during the sunshine Agenda period, provided that the presentations are disclosed pursuant to the Commission's rules.¹⁰⁰

B. Paperwork Reduction Act

57. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget ("OMB") to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due 60 days after the date of publication in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

C. Initial Regulatory Flexibility Analysis

58. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities of the proposals suggested in the *Notice*. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to the *Notice*, and must have a separate and distinct heading designating them as responses to the IRFA.

D. Comment Filing Procedures

59. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R §§ 1.415, 1.419, interested parties may file comments on or before **30 days after publication in the Federal Register** and may file reply comments on or before **45 days after publication in the Federal Register**. **All filings related to this Declaratory Ruling and Notice of Proposed Rule Making should refer to WT Docket No. 05-211.** Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

60. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each

¹⁰⁰ *See generally id.* §§ 1.1202, 1.1203, 1.1206(a).

docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, “get form.” A sample form and directions will be sent in response.

61. Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

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

E. Accessible Formats

62. To request copies of this Declaratory Ruling and Notice of Proposed Rule Making in accessible formats (Braille, large print, electronic files, audio format) for people with disabilities, send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0531 or (202) 418-7365 (TTY).

F. Further Information

63. For further information concerning this Declaratory Ruling and Notice of Proposed Rule Making, contact Audrey Bashkin, Auctions and Spectrum Access Division, (202) 418-0660, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554.

G. Ordering Clauses

64. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(r), and 309(j), this Declaratory Ruling and Notice of Proposed Rule Making is hereby ADOPTED.

65. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A**Proposed Rules****PART 1 – PRACTICE AND PROCEDURE**

Part 1 of Title 47 of the Code of Federal Regulations is revised to read as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

2. Amend § 1.2103 to add new paragraphs (b)(1) and (b)(2) to read as follows:

§ 1.2103 Competitive bidding design options.

* * * * *

(b) * * *

(1) *Apportioned package bid.* The apportioned package bid on a license is an estimate of the price of an individual license included in a package of licenses in an auction with combinatorial (package) bidding. Apportioned package bids shall be determined by the Commission according to a methodology it establishes in advance of each auction with combinatorial bidding.

(2) *Substitute for bid amount.* The apportioned package bid on a license included in a package shall be used in place of the amount of an individual bid on that license when the bid amount is needed to determine the size of a designated entity bidding credit (see § 1.2110(f)(1)-(2)), a new entrant bidding credit (see § 73.5007), a bid withdrawal or default payment obligation (see § 1.2104(g)), a tribal land bidding credit limit (see § 1.2110(f)(3)(iv)), or a size-based bidding credit unjust enrichment payment obligation (see § 1.2111(d),(e)(2)-(3)), or for any other determination required by the Commission's rules or procedures.

* * * * *

3. Amend § 1.2104 by revising paragraphs (c), (g)(1), and (g)(2); removing paragraph (g)(3); and adding paragraph (j) to read as follows:

§ 1.2104 Competitive bidding mechanisms.

* * * * *

(c) Reserve Price. The Commission may establish a reserve price or prices, either disclosed or undisclosed, below which a license or licenses subject to auction will not be awarded. For any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2)), the Commission will establish a reserve price or prices pursuant to which the total cash proceeds from any auction of eligible frequencies shall equal at least 110 percent of the total estimated relocation costs provided to the Commission by the National Telecommunications and Information Administration pursuant to section 113(g)(4) of such Act (47 U.S.C. § 923(g)(4)).

* * * * *

(g) * * *

(1) Bid withdrawal prior to close of auction. A bidder that withdraws a high bid during the course of an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction(s). In the event that a bidding credit applies to any of the bids, the bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less. No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids equals or exceeds that withdrawn bid. The withdrawal payment amount is deducted from any upfront payments or

down payments that the withdrawing bidder has deposited with the Commission. In the case of multiple bid withdrawals on a single license, the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn in the same or subsequent auction(s). In the event that a license for which there have been withdrawn bids is not won in the same auction, those bidders for which a final withdrawal payment cannot be calculated will be assessed an interim bid withdrawal payment of between 3 and 20 percent of their withdrawn bids, according to a percentage (or percentages) established by the Commission in advance of the auction. The interim bid withdrawal payment will be applied toward any final bid withdrawal payment that will be assessed at the close of a subsequent auction of the corresponding license.

Example 1 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$90 and withdraws. In that same auction, Bidder C wins the license at a bid of \$95. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100-\$95). Bidder B owes nothing.

Example 2 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$95 and withdraws. In that same auction, Bidder C wins the license at a bid of \$90. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100-\$95). Bidder B owes \$5 (\$95-\$90).

Example 3 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, in that same auction, Bidder B places a bid of \$90 and withdraws. In a subsequent auction, Bidder C places a bid of \$95 and withdraws. Bidder D wins the license in that auction at a bid of \$80. Assuming that the Commission established an interim bid withdrawal payment of 3 percent in advance of the auction, withdrawal payments are assessed as follows: At the end of the first auction, Bidder A and Bidder B are each assessed an interim withdrawal payment equal to 3 percent of their

withdrawn bids pending Commission assessment of a final withdrawal payment (Bidder A would owe 3% of \$100, or \$3, and Bidder B would owe 3% of \$90, or \$2.70). At the end of the second auction, Bidder A would owe \$5 (\$100-\$95) less the \$3 interim withdrawal payment for a total of \$2. Because Bidder C placed a subsequent bid that was higher than Bidder B's \$90 bid, Bidder B would owe nothing. Bidder C would owe \$15 (\$95-\$80).

(2) Default or disqualification after close of auction. A bidder assumes a binding obligation to pay its full bid amount upon acceptance of the high bid at the close of an auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to a default payment consisting of a deficiency payment, described in § 1.2104(g)(2)(i), and an additional payment, described in § 1.2104(g)(2)(ii)-(iii). The default payment will be deducted from any upfront payments or down payments that the defaulting bidder has deposited with the Commission.

(i) *Deficiency payment.* The deficiency payment will equal the difference between the amount of the defaulted bid and the amount of the winning bid in a subsequent auction, so long as there have been no intervening withdrawn bids that equal or exceed the defaulted bid or the subsequent winning bid. If the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the defaulted bid, no deficiency payment will be assessed. If there have been intervening subsequent withdrawn bids that are lower than the defaulted bid and higher than the subsequent winning bid, but no intervening withdrawn bids that equal or exceed the defaulted bid, the deficiency payment will equal the difference between the amount of the defaulted bid and the amount of the highest intervening subsequent withdrawn bid. In the event that a bidding credit applies to any of the applicable bids, the deficiency payment will be based solely on net bids or solely on gross bids, whichever results in a lower payment.

(ii) *Additional payment – applicable percentage.* When the default or disqualification follows an auction without combinatorial bidding, the additional payment will equal between 3 and 20 percent of the applicable bid, according to a percentage (or percentages) established by the Commission in advance of the auction. When the default or disqualification follows an auction with combinatorial bidding, the additional payment will equal 25 percent of the applicable bid.

(iii) *Additional payment – applicable bid.* When no deficiency payment is assessed, the applicable bid will be the net amount of the defaulted bid. When a deficiency payment is assessed, the applicable bid will be the subsequent winning bid, using the same basis – i.e., net or gross – as was used in calculating the deficiency payment.

* * * * *

(j) Bid apportionment. Prior to each auction of reconfigured licenses (i.e., licenses having similar, but not identical, geographic and spectral components as licenses made available in one or more prior auctions), the Commission will specify, as necessary, a method for apportioning a bid on a reconfigured license among the license's component parts. The Commission may use such an apportionment for purposes of comparing a bid on the original license with a bid on a reconfigured license.

PART 73 – RADIO BROADCAST SERVICES

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

4. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

5. Amend § 73.3571 by revising paragraph (h)(4)(ii) to read as follows:

§ 73.3571 Processing AM broadcast station applications

* * * * *

(h)(4) * * *

* * * * *

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to §1.2109(a). Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served.

6. Amend § 73.3573 by revising paragraph (f)(5)(ii) to read as follows:

§ 73.3573 Processing FM broadcast station applications.

* * * * *

(f) * * *

* * * * *

(5)

* * * * *

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to §1.2109(a). Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served.

7. Amend § 73.5003 by revising this section to read as follows:

§ 73.5003 Submission of full payments.

Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to §1.2109(a). If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five (5) percent of the amount due in accordance with §1.2109(a). Broadcast construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees and in accordance with the provisions of this subsection.

8. Amend § 73.5006 by revising paragraph (d) to read as follows:

§ 73.5006 Filing of petitions against long-form applications.

* * * * *

(d) Broadcast construction permits will be granted by the Commission only if the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, and after full and timely payment of winning bids and any applicable late fees. See 47 CFR 73.5003. Construction of broadcast stations shall not commence until the grant of such permit or license to the winning bidder and only after full and timely payment of winning bids and any applicable late fees.

9. Amend § 74.1233 by revising paragraph (d)(5)(ii) to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

* * * * *

(d) * * *

(5)

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(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to §1.2109(a). Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served. If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five (5) percent of the amount due in accordance with Section 1.2109(a). Construction of the FM translator station shall not commence until the grant of such permit to the winning bidder and only after full and timely payment of winning bids and any applicable late fees.

APPENDIX B

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rule Making (“*Notice*”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in paragraph 56 of this NPRM. The Commission will send a copy of this *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the *Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

This *Notice* proposes modifications to existing Commission rules for the purposes of implementing the recently enacted Commercial Spectrum Enhancement Act (“CSEA”).⁴ CSEA establishes a mechanism to use spectrum auction proceeds to reimburse federal agencies operating on certain frequencies that have been reallocated from federal to non-federal use for the cost of relocating their operations. The *Notice* also proposes a number of changes to the Commission’s competitive bidding rules that are necessary, apart from CSEA, to bring the rules in line with the current requirements of the Commission’s auctions program.

Reserve price rule. CSEA requires the total cash proceeds from any auction of eligible frequencies to equal at least 110 percent of the total estimated relocation costs provided to the Commission by National Telecommunications and Information Administration (“NTIA”).⁵ To implement this requirement, CSEA directs the Commission to revise its reserve price regulations adopted pursuant to Section 309(j)(4)(F) of the Communications Act. The

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ Commercial Spectrum Enhancement Act, Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004) (codified in scattered sections of Title 47 of the United States Code) (“CSEA”).

⁵ The statute identifies four bands (the 216-220 MHz, 1432-1435 MHz, 1710-1755 MHz and 2385-2390 MHz bands) as “eligible frequencies.” See CSEA § 202 (codified at 47 U.S.C. § 923(g)(2)(A)). In addition, the statute designates as “eligible frequencies” any other band of frequencies reallocated from federal use to non-federal use after January 1, 2003, and assigned by the Commission through competitive bidding. See *id.* § 202 (codified at 47 U.S.C. § 923(g)(2)(B)). Bands of frequencies previously identified by the National Telecommunications and Information Administration in the Spectrum Reallocation Final Report, NTIA Special Publication 95-32 (1995), are excluded. *Id.* § 202 (codified at 47 U.S.C. § 923(g)(2)(B)).

Commission proposes, therefore, to modify its existing reserve price rule (section 1.2104(c))⁶ to add a requirement that, for any auction of eligible frequencies under CSEA, the Commission will establish a reserve price (or prices) that ensures that the “total cash proceeds” attributable to such spectrum will equal at least 110 percent of the total estimated relocation costs provided to the Commission by NTIA.

Tribal land bidding credit rule. In an effort to encourage carriers to provide telecommunications services to tribal lands with historically low telephone service penetration rates, the Commission makes tribal land bidding credits available to auction winners that serve qualifying tribal lands.⁷ Under the Commission’s current rules, in auctions that include spectrum covering qualifying tribal lands, the Commission may not know for at least 180 days after the long-form application deadline how much of a discount on the auction’s winning bids it will have to allow for tribal land bidding credits. In auctions subject to CSEA, this timing could lead to substantial post-auction delay in calculating whether total cash proceeds meet the 110 percent revenue requirement. Accordingly the Commission seeks comment on possible methods of ensuring that the Commission will be able to promptly calculate total cash proceeds while at the same time preserving the availability of tribal land bidding credits in auctions subject to CSEA. Specifically, in the *Notice*, the Commission seeks comment on (1) awarding tribal land bidding credits on a pro rata basis out of the funds exceeding 110 percent of the total estimated relocation costs, (2) awarding tribal land bidding credits on a first-come, first-served basis out of the funds exceeding 110 percent of the total estimated relocation costs, and (3) requiring applicants to specify on their short-form applications any licenses for which they intend to seek a tribal land bidding credit, should they win, so that the Commission can calculate the amount necessary to satisfy CSEA’s reserve price requirement if winning bidders receive the maximum tribal land bidding credits for which they indicate an interest on their short-form applications. The *Notice* also invites commenters to propose other methods and seeks comment on adopting the same method as that used for auctions subject to CSEA, or a similar approach, for other, non-CSEA auctions for which the Commission establishes a reserve price based on winning bids net of all bidding credits.

Default payment rule clarification. Under section 1.2104(g), a high bidder that defaults or is disqualified after the close of an auction is subject to a default payment consisting of two parts – a “deficiency payment” and an “additional payment.”⁸ The deficiency payment is equal to the payment required for a withdrawn high bid, i.e., the difference between the amount of the defaulted (or withdrawn) bid and the amount of a lower winning bid in the same or a subsequent

⁶ 47 C.F.R. § 1.2104(c).

⁷ *Id.* § 1.2110(f)(3). See *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 11,794 (2000). “Qualifying tribal land” is “any federally recognized Indian tribe’s reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act . . . and Indian allotments, that has a wireline telephone subscription rate equal to or less than eighty-five (85) percent based on the most recently available U.S. Census Data.” 47 C.F.R. § 1.2110(f)(3)(i). Not all Commission auctions include licenses covering qualifying tribal lands. See, e.g., “Auction of Lower 700 MHz Band Licenses Scheduled for July 20, 2005,” *Public Notice*, DA 05-737, at 13 (rel. Mar. 22, 2005).

⁸ 47 C.F.R. § 1.2104(g).

auction. In the event that a bidding credit applies to any of the bids, the deficiency payment equals the difference between either the net defaulted bid and the subsequent net winning bid or the gross defaulted bid and the subsequent gross winning bid, whichever difference is less. The additional payment is equal to 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulting bidder's bid or the subsequent winning bid, whichever is less.⁹

No deficiency payment is assessed when either the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the original defaulted bid. It is unclear from the existing rule whether, in such a situation, the additional payment should be a percentage of the higher intervening subsequent withdrawn bid or of the subsequent winning bid. To clarify the rule, the Commission proposes that when, in a subsequent auction, there is a higher withdrawn bid but no winning bid for a license that corresponds to a defaulted license, the additional default payment will be determined as 3 percent (or 25 percent) of the defaulting bidder's bid. The Commission also proposes a further clarification of the additional payment rule for certain situations in which no deficiency payment is owed, because, under the current rule, it is unclear under the current rule whether the additional payment should be based on the net defaulted bid or on the gross defaulted bid. Pursuant to the Commission's proposal, the additional payment in such a situation would be 3 (or 25) percent of the net defaulted bid amount.

Interim withdrawal and additional default payment rules. When a license for which there has been a withdrawn high bid is neither subject to a subsequent higher bid nor won in the same auction, the final withdrawal payment cannot be calculated until a corresponding license is either subject to a higher bid or won in a subsequent auction. In such a case, under the Commission's existing rule, the bidder responsible for the withdrawn high bid is assessed an interim bid withdrawal payment equal to 3 percent of the amount of its withdrawn bid, and this interim payment is applied toward any final bid withdrawal payment that is ultimately assessed. As noted in the previous paragraph, a high bidder that defaults or is disqualified after the close of an auction is subject to a default payment consisting of a deficiency payment and an additional payment. Currently, the additional payment is calculated as 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulting bidder's bid or the subsequent winning bid, whichever is less, except that no deficiency payment is assessed when either the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the original defaulted bid. In an effort to discourage withdrawals and defaults, both of which pose an ongoing threat to the integrity of the auctions process, the Commission proposes to increase the current limits on the interim withdrawal payment and the additional default payment from 3 percent to 20 percent each, with the specific percentage to be set by the Commission in advance of each auction.

⁹ In this *Notice* and in our rules, bidders that are disqualified after the close of an auction are referred to as "defaulting bidders," just as are bidders that default after an auction's close. Similarly, the payment owed by a disqualified bidder is referred to as a "default payment." See *id.* §§ 1.2104(g)(2)-(3); 1.2109. Currently, the deficiency payment for a default or disqualification following a package bidding auction is, in most instances, calculated differently from the way in which the deficiency payment is calculated for a default or disqualification following a non-package bidding auction. See *id.* § 1.2104(g)(3).

Package bid and license apportionment. In combinatorial (package) bidding, bidders place single all-or-nothing bids on groups (or packages) of licenses. Thus, there are no identifiable bid amounts on the individual licenses composing packages of more than one license. Similarly, when the Commission reconfigures licenses, with respect to either geographic or spectral dimensions, following an initial auction, there may not be identifiable bid amounts on licenses comparable to those offered in the initial auction. However, there are several situations in which an individual bid amount is needed for one of the Commission's regulatory calculations, such as calculating a small business bidding credit, an unjust enrichment payment obligation related to such a credit, a tribal land bidding credit limit, or a withdrawal or default payment obligation. Accordingly, the Commission proposes to specify a method for apportioning bids either among the individual licenses composing a package and/or among a license's component parts in advance of each auction that (a) uses a combinatorial bidding design, (b) includes spectrum previously subject to a combinatorial auction, or (c) includes licenses that have been reconfigured following an initial auction.

Broadcast construction permit rules. The Commission's Part 1 competitive bidding rules provide that, unless otherwise specified by public notice, auction winners are required to pay the balance of their winning bids in a lump sum within ten business days following the release of a public notice establishing the payment deadline. In recent wireless spectrum auctions, winning bidders have been required to submit the balance of the net amount of their winning bids within ten business days after the deadline for submitting down payments. This procedure is necessary to guard against payment defaults that may then lead to bankruptcy filings and litigation that tie up the availability of the defaulted licenses. Specific Part 73 and 74 rules, however, provide that winning bidders in broadcast service auctions must render their final payment for construction permits won through competitive bidding only after their long-form applications have been processed, any petitions to deny have been dismissed or denied, and the public notice announcing that broadcast construction permits are ready to be granted has been released. In order to provide consistency throughout the Commission's competitive bidding rules and help to ensure that only sincere, financially qualified applicants participate in competitive bidding, the Commission proposes to adopt for broadcast auctions the final payment procedures in its Part 1 competitive bidding rules.

Consortium exception to the designated entity and entrepreneur aggregation rule. For purposes of determining whether an applicant or licensee is eligible for small business or broadband personal communications services ("PCS") entrepreneur status, the Commission attributes to the applicant the gross revenues (and, when determining entrepreneur eligibility, the total assets) of the applicant's affiliates, its controlling interests, and the affiliates of its controlling interests, and aggregates these amounts with the applicant's own gross revenues (and total assets). However, under an exception to this aggregation rule, when an applicant or licensee is a consortium comprised exclusively of members eligible for small business bidding credits or broadband PCS entrepreneur status, or both, the gross revenues (and total assets) of the consortium members are not aggregated. The consortium exception has been seldom used, perhaps because of the absence of clear direction from the Commission as to how consortium members should be formally organized and how (and when) members should allocate and own the licenses they win. In order to provide additional guidance to those interested in taking advantage of the consortium exception and to reduce the likelihood of complications resulting from the exception's use, the Commission seeks comment on possible policy options for

improving the pre- and post-auction procedures governing the exception. These options include requiring each member of a consortium to file an individual long-form application for its respective, mutually agreed-upon license(s) and requiring two or more consortium members seeking to be licensed together to form a legal business entity, such as a corporation, partnership, or limited liability company.

B. Legal Basis

The proposed actions are authorized under Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(r), and 309(j).

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹⁰ The RFA generally defines the term “small entity” as having the same meaning as the terms “small organization,” “small business,” and “small governmental jurisdiction.”¹¹ The term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹² A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”¹³ Nationwide, as of 2002, there were approximately 1.6 million small organizations.¹⁴ The term “small governmental jurisdiction” is defined as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹⁵ As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.¹⁶ This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.¹⁷ The changes and additions to the Commission’s Part 1 rules proposed in this *Notice* would be of general applicability to all services, applying to all entities of any size that apply to participate in Commission auctions. The changes proposed to Parts 73 and 74 of the Commission’s rules would apply to all entities of any size that win broadcast construction permits in future competitive bidding. Accordingly, this IRFA provides a general analysis of the impact of the proposals on small businesses rather than a service by service analysis. The number of entities that may apply to participate in future Commission auctions is unknown. The

¹⁰ 5 U.S.C. § 603(b)(3).

¹¹ *Id.* § 601(6).

¹² *Id.* § 601(3) (incorporating by reference the definition of “small business concern in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” *Id.* § 601(3).

¹³ *Id.* § 601(4).

¹⁴ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

¹⁵ 5 U.S.C. § 601(5).

¹⁶ U.S. Census Bureau, *Statistical Abstract of the United States: 2000*, Section 9, pages 299-300, Tables 490 and 492.

¹⁷ See SBA, *Programs and Services*, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

number of small businesses that have participated in prior auctions has varied. In all of our auctions held to date, 1927 out of a total of 2498 qualified bidders either have claimed eligibility for small business bidding credits or have self-reported their status as small businesses as that term has been defined under rules adopted by the Commission for specific services. These figures do not generally include applicants for auctions of broadcast construction permits where sized-based bidding preferences have not been available.

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

Pursuant to one of the options set forth to change the tribal land bidding credit rule, the Commission would award tribal land bidding credits on a first-come, first-served basis in auctions subject to a CSEA or other reserve price. This option, if adopted, would not alter the burdens on auction winners of licenses covering qualifying tribal land with regard to reporting or recordkeeping; however, it might encourage them to submit the required certifications sooner than they otherwise would have. Pursuant to another option to change the tribal land bidding credit rule, auction applicants of all sizes would be required to indicate on their short-forms any intention to seek tribal land bidding credits should they win qualifying licenses. While this requirement would increase the reporting burden on applicants planning to seek such credits, the burden would likely be as minimal as checking off a box.

The proposal to increase the current limits on the interim withdrawal payment and the additional default payment from 3 percent to 20 percent each would, to the extent that the respective payment had been set at more than 3 percent, increase the financial burden on entities of any size that withdrew a high bid or defaulted on a payment obligation. However, by refraining from withdrawing high bids and defaulting on payment obligations, entities could avoid any such increased financial burden.

Adopting for broadcast auctions the final payment procedures of the Commission's Part 1 competitive bidding rules might require future winners of broadcast construction permits, both large and small, to submit their final payments for such permits sooner than would have been required in the absence of the proposed rule changes.

Requiring each member of a consortium to file an individual long-form application for its respective, mutually agreed-upon license(s) or requiring two or more consortium members seeking to be licensed together to form a legal business entity might increase the reporting requirements and/or regulatory compliance burdens on auction applicants using the consortium exception, all of which would be small businesses or broadband PCS entrepreneurs. However, adopting these requirements might also increase use of the consortium exception, thus increasing the availability of small business bidding credits and entrepreneur eligibility.

None of the other proposals in the *Notice* would alter reporting, recordkeeping, or other compliance requirements.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule or any part thereof for small entities.¹⁸ The Commission has considered the economic impact on small entities of the following rule changes and additions proposed in the *Notice* and has taken steps to minimize the burdens on small entities.

The Commission has sought comment on several options for modifying its tribal land bidding credit rule in order to determine which of the options best ensures that the Commission will be able to comply with CSEA's reserve price requirement while at the same time preserving the availability of tribal land bidding credits in auctions subject to CSEA.

Adoption of the proposed increases to the current limits on the interim withdrawal payments and additional default payments would benefit small entities more than it would burden them. For example, the proposal to provide the Commission with the option of increasing the size of the interim withdrawal payment is intended to discourage strategic withdrawals. Such bid withdrawals could have a significant adverse effect on the competitiveness of small entities in the auctions process. Moreover, to the extent that the proposed increase in the additional default payment encourages bidders to realistically assess in advance their ability to pay for their bids, a larger payment requirement may prevent bidders from placing bids they cannot afford.

With regard to its proposal to modify its payment rules for broadcast construction permits, the Commission believes that amending the final payment deadline for broadcast auctions to conform to its existing procedures for wireless auctions would provide consistency throughout its competitive bidding rules and help to achieve its objective that only sincere, financially qualified applicants participate in competitive bidding. The Commission further believes that providing greater certainty to all winning bidders regarding when final payment will be due will also benefit them as they compete with other sincere bidders that have also secured the financing necessary to participate in an auction and pay for their licenses. The Commission notes that in wireless spectrum auctions, winning bidders, including small businesses, have been able to comply with the Commission's new final payment procedure without difficulty, and it therefore surmises that winning bidders of all sizes in broadcast auctions should be able to comply with this change with similar ease.

The Commission's goal in requesting comment on possible modifications to the consortium exception to the small business and entrepreneur aggregation rule is to promote wider use of the exception and thus to increase the competitive bidding opportunities available to small entities facing capital formation constraints. To that end, the Commission has specifically requested that commenters address whether adopting the rule changes discussed might encourage wider use of the consortium exception.

¹⁸See 5 U.S.C. § 603.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

None.