6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 27

[RM-11395, GN Docket No. 12-268, WT Docket Nos. 14-170, 05-211; FCC 14-146]

Updating Competitive Bidding Rules; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Implementation of the Commercial Spectrum Enhancement Act

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) seeks comment on the revision of certain competitive bidding rules and provides notice of the Commission's intention to resolve longstanding petitions for reconsideration.

DATES: Comments are due on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], and reply comments are due on or before [INSERT DATE 65 DAYS AFTER THE PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: All filings in response to the NPRM must refer to GN Docket No. 12-268 and WT Docket Nos. 14-170 and 05-211. The Commission strongly encourages parties to develop responses to the NPRM that adhere to the organization and structure of the NPRM. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS):

- Electronic Filers: Comments may be filed electronically using the Internet by accessing ECFS: http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, or audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

FOR FURTHER INFORMATION CONTACT: Wireless Telecommunications Bureau, Auctions and Spectrum Access Division: Kathryn Hinton at (202) 418-0660.

SUPPLEMENTARY INFORMATION: This is a summary of the Competitive Bidding NPRM released on October 10, 2014. The complete text of the Competitive Bidding NPRM is available for public inspection and copying from 8:00 a.m. to 4:30 p.m. Eastern Time (ET) Monday through Thursday or from 8:00 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street SW, Room CY-A257, Washington, DC 20554. The Competitive Bidding NPRM may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW, Room CY-B402, Washington, DC 20554, telephone 202-488-5300, facsimile 202-488-5563, or by contacting BCPI on its website: http://www.BCPIWEB.com. When ordering documents from BCPI, please provide the appropriate FCC document number, for example, FCC 14-146. The complete text is also available on the Commission's website at http://wireless.fcc.gov, or by using the search function on the ECFS web page at http://www.fcc.gov/cgb/ecfs/.

Initial Paperwork Reduction Act of 1995 Analysis

The NPRM contains proposed new or modified 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. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

I. INTRODUCTION

1. The Commission proposes to reform some of its general part 1 rules governing competitive bidding for spectrum licenses to reflect changes in the marketplace, including the challenges faced by new entrants. The Commission's proposals also advance the statutory directive to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, designated entities or DEs) are given the opportunity to participate in the provision of spectrum-based services, and fulfill the commitment the Commission made in the Broadcast Television Spectrum Incentive Auction Report & Order. Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, 79 FR 48442, Aug. 15, 2014. Together these proposals will assure that the Commission's part 1 rules continue to promote the Commission's fundamental statutory objectives. The Commission expects to act on the issues it raises here soon enough to allow all parties to account for any changes while planning for the Broadcast Television Spectrum Incentive Auction (hereinafter, Incentive Auction or BIA).

2. In the Competitive Bidding NPRM, the Commission proposes to: (1) Provide small businesses greater opportunity to participate in the provision of a wide range of spectrum-based services by modifying the Commission's eligibility requirements, updating the standardized schedule of small business sizes, and eliminating duplicative reporting requirements, while also seeking comment on whether to strengthen its rules to prevent the unjust enrichment of ineligible entities; (2) Amend the Commission's former defaulter rule to balance concerns that the current rule is overly broad with the

Commission's continued need to ensure that auction bidders are financially reliable; (3) Codify an established competitive bidding procedure that prohibits the same individual or entity from becoming qualified to bid on the basis of more than one short-form (FCC Form 175) application in a specific auction; (4) Prevent entities that are exclusively controlled by a single individual or set of individuals from becoming qualified to bid on overlapping licenses based on more than one short-form application in a specific auction; and (5) Retain the current rules governing joint bidding arrangements among non-nationwide providers and prohibit joint bidding arrangements among nationwide providers.

3. The Commission also provides notice of its intention to resolve long standing petitions for reconsideration and proposes necessary clean-up revisions to its part 1 competitive bidding rules.

II. ELIGIBILITY FOR BIDDING CREDITS

4. In establishing the Commission's auction authority, Congress vested the Commission with broad discretion in balancing a number of competing objectives. These included, among other things, special provisions to ensure that DEs, including small businesses, have the opportunity to participate at auction and in the provision of spectrum-based services. Section 309(j)(4)(D) of the Communications Act (the Act) requires that when the Commission prescribes regulations in designing systems of competitive bidding, it shall "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of . . . bidding preferences." In addition, the statute directs that in designing such systems of competitive bidding, the Commission shall seek to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." At the

same time, the Act requires the Commission to "prevent unjust enrichment as a result of the methods employed to issue licenses . . . ."

5. The Commission's challenge in providing opportunities to small businesses and entrepreneurs pursuant to these provisions has always been to find a reasonable balance between the competing goals of affording such entities reasonable flexibility to obtain the capital necessary to participate in the provision of spectrum-based services and effectively preventing the unjust enrichment of ineligible entities. See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, 71 FR 26245, May 4, 2006 (DE Second Report and Order). Over the two-decade span of the auctions program, the Commission has periodically modified its rules to achieve the right balance given changing circumstances in the wireless industry.

6. The Commission takes the opportunity to consider whether its rules continue to serve their intended purposes and the public interest in an evolving mobile wireless marketplace. In the past decade, the rapid adoption of smartphones and tablet computers and the widespread use of mobile applications, combined with the increasing deployment of high-speed 3G and now 4G technologies, have driven significantly more intensive use of mobile networks. This progression from the provision of mobile voice services to the provision of mobile broadband services has increased the need for access to spectrum. In addition, in the past decade, the number of small and regional mobile wireless service providers has significantly decreased, yet regional and local service providers continue to offer consumers additional choices in the areas they serve. As the costs of spectrum and network deployment have increased in the last 20 years, especially for small and new entrants, access to capital for acquiring licenses is critical for these providers to take advantage of different opportunities to participate in the provision of spectrum-based services, including through facilities-based deployment, spectrum leasing, and mobile virtual network operator arrangements.

7. The Commission addresses the concerns of parties that argue that its current rules inhibit, rather than foster, the inclusion of small businesses in the wireless marketplace. The Commission offers

proposals to increase the opportunities for small businesses to become spectrum licensees. At the same time, the Commission remains mindful of its responsibility to ensure that benefits are provided only to qualifying entities and seeks comment on modifying its current unjust enrichment rules.

8. As a first step in reassessing how the Commission determines small business eligibility, the Commission proposes to repeal the attributable material relationship (AMR) rule and to re-examine the need for the related decade-old policy that has limited small businesses seeking bidding credits to providing primarily retail, facilities-based service directly to the public with each of their licenses. The Commission proposes to instead adopt a more flexible approach under which it would evaluate small business eligibility on a license-by-license basis, using a two-pronged test. Under this proposal, the Commission would apply existing rules requiring attribution of controlling interests in, and affiliates of, a small business venture to determine whether the applicant: (1) meets the applicable small business size standard, and (2) retains control over the spectrum associated with the individual licenses for which it seeks benefits. The Commission further proposes to modify the language of 47 CFR 1.9020 to make clear that DE lessors may fully engage in spectrum manager leasing under the same de facto control standard as non-DE lessors. With these proposals, the Commission revisits its statutory mandate under 47 U.S.C. 309(j)(4)(D) "to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services" in light of today's wireless marketplace. Alternatively, the Commission also seeks comment on retaining the policy and/or some variation of the AMR rule. The Commission also asks whether it should revisit its unjust enrichment rules to assure that the Commission maintains the right balance considering its responsibility to safeguard the award of small business benefits to only eligible entities.

9. The Commission also proposes to modify the generally applicable schedule of small business size standards and bidding credits, which has remained unchanged in the 17 years

since it was first adopted. The goal of these proposals is to encourage small business participation in spectrum license auctions and to ensure that the Commission's gross revenue definitions accurately reflect what constitutes a "small business" in today's marketplace, taking into consideration the relative size of the large, national providers. Specifically, the Commission proposes revisions to its small business definitions and seeks comment on whether to change the bidding credit percentages that would apply to those definitions. The Commission also seeks comment on whether to offer alternative bidding preferences to entities based on criteria other than business size by revenue.

10. Additionally, the Commission proposes to repeal the DE annual reporting requirement. The Commission questions whether the value of the information provided in those reports outweighs the regulatory burden that the reporting obligation places on small businesses.

11. Collectively, these proposals seek to update the Commission's rules to reflect that small businesses need greater opportunities to gain access to capital so that they may have an opportunity to participate in the provision of spectrum-based services in today's communications marketplace. The Commission recognizes that high capital costs associated with building and operating wireless broadband networks may require small businesses to find alternative revenue streams, including through secondary markets, so that they have an opportunity to acquire licenses at auction and participate in the provision of spectrum-based services. The Commission anticipates that by revising its rules to allow small businesses to take advantage of the same opportunities to utilize their spectrum capacity and gain access to capital as those afforded to larger licensees, the Commission can better achieve its statutory directives. The Commission nonetheless remains mindful of its obligation to prevent unjust enrichment of ineligible entities. The Commission describes and seeks comment on each of its specific proposals.

A. Attribution Rules and Small Business Policies

12. **Background.** As its principal means of fulfilling the statutory goals for DEs, the Commission makes auction bidding credits available to eligible small businesses. A small business is eligible for bidding credits if its gross revenues, in combination with those of its "attributable" interest

holders, fall below applicable service-specific financial caps. Since 2000, the Commission has applied a "controlling interest" standard to all services when making these attribution determinations in the small business context. Under this standard, the Commission attributes to an applicant the gross revenues of the applicant, its controlling interests, its affiliates, and the affiliates of the applicant's controlling interests. A "controlling interest" includes individuals or entities, or groups of individuals or entities, that have control of the applicant under the principles of either de jure or de facto control. Affiliates include entities or individuals that directly or indirectly control or have the power to control the applicant, directly or indirectly are controlled by the applicant, directly or indirectly are controlled by a third party that also controls the applicant, or have an "identity of interest" with the applicant.

13. In adopting secondary markets rules in the 2004 Secondary Markets Second Report and Order, the Commission sought to expand and enhance secondary markets to permit spectrum to flow more freely among users and uses in response to economic demand, to the extent consistent with its public interest objectives. Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 69 FR 77522, Dec. 27, 2004 (Secondary Markets Second Report and Order). The Commission explained that it intended for its rules to allow more flexible use of spectrum by licensees and other spectrum users, better define licensees' and spectrum users' rights and responsibilities, enable the use of spectrum across various dimensions (frequency, space, and time), promote the efficient use of spectrum, and provide for continued technological advances. While the Commission ostensibly extended the new de facto control standard for spectrum manager leasing to DE lessors, it nonetheless required that a licensee receiving DE benefits be an entity that actually provides service under the license. The Commission explained that it intended that DEs should remain primarily providers of facilities-based service directly to the public. That conclusion was based on an interpretation of the legislative history underlying the Act's

provisions regarding unjust enrichment, as well as the continued application of the Commission's controlling interest standard and affiliation rules.

14. In the Secondary Markets Second Report and Order, the Commission also advised that in examining whether a spectrum lessee would, under a spectrum manager lease, become a controlling interest or affiliate of the licensee, the licensee should look to all of the relevant circumstances, including how large a portion of its total capacity to provide spectrum-based services would be leased, what involvement it would have with the spectrum lessee as a result of the spectrum lease, and what relationship the two parties have with one another apart from the lease. The Commission concluded that a spectrum manager lease between a designated entity licensee and a spectrum lessee with a prior business relationship where substantially all of the spectrum capacity of the licensee is to be leased would cause the spectrum lessee to become an attributable affiliate of the licensee. Such affiliation would render the licensee ineligible for designated entity or entrepreneur benefits and, therefore, would make such a spectrum lease impermissible. On the other hand, the Commission reasoned that a spectrum manager lease involving a small portion of the designated entity or entrepreneur licensee's spectrum capacity where no relationship existed between the licensee and spectrum lessee apart from the lease would likely be permissible. Situations falling somewhere between these two examples would have to be evaluated according to the individual circumstances involved.

15. Subsequently in 2006, at the behest of interested parties, including Council Tree, the Commission released a further notice, which sought comment on the specific nature of the types of relationships that should trigger the attribution of revenues to determine eligibility for designated entity benefits. See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, 71 FR 6992, Feb. 10, 2006. For instance, Council Tree initially proposed that the Commission should restrict a designated entity applicant's "material relationships," including both financial and operational agreements, in order to more carefully ensure that designated entity benefits are awarded only to bona fide eligible entities. In the DE Second Report and Order, the Commission, to further protect against unjust enrichment, departed from its case-

by-case approach and instead adopted a bright-line test to require a small business applicant or licensee to automatically attribute to itself the gross revenues of any entity with which it had an "attributable material relationship." It reasoned that an agreement that concerns the actual use of the DE's spectrum capacity is one that causes the relationship to be ripe for abuse and creates the potential for the relationship to impede a DE's ability to become a facilities-based provider, as intended by Congress. The Commission concluded that an applicant or licensee has an AMR when it has one or more agreements with any individual entity for the lease (under either spectrum manager or de facto transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license held by the applicant or licensee.

16. Council Tree and others challenged the AMR rule and other aspects of the Commission's 2006 Order in the United States Court of Appeals for the Third Circuit on the grounds that they failed to take into account circumstances regarding small businesses' access to capital, among other things. In subsequent years, the Office of Advocacy in the U.S. Small Business Administration (SBA) also expressed its belief to the Commission that the 2006 changes to the small business rules had "inhibited participation by small entities and minority businesses in recent spectrum auctions," and that the changes were unnecessary in light of the availability of the audit process included in the Commission's original auction rules. In 2010, although the court ultimately upheld the AMR rule, it nonetheless questioned some of the Commission's reasoning, noting what it termed the Commission's "inattention" to the nature of the wireless wholesale business. Questioning why the Commission chose to attribute certain relationships to achieve its stated policy of DEs as facilities-based providers, the court observed that wholesaling includes an extensive provision of service component. The court said that it was therefore not obvious that the Commission needed to prohibit DEs from engaging primarily in a wholesale business in order to prevent them from simply monetizing their bidding credits with a large carrier, "so long as [DEs] do not sell or lease overly large quantities of their capacity to any single

lessee or buyer." Remarking that the Commission appeared not to have acknowledged this issue, the court commended it to the Commission's attention on remand.

17. Recently, in February 2014, the Minority Media & Telecom Council (MMTC) filed a white paper with the Commission making nine recommendations to facilitate the participation of minority- and women-owned businesses in upcoming auctions. Listed first among these is the repeal of the AMR rule. MMTC argues that the rule impedes the ability of small entities to become providers of spectrum-based service, explaining that wholesaling and leasing arrangements are important vehicles for small and minority-owned businesses to build and efficiently use capital.

18. MMTC's White Paper argues that "over the course of fifty-six wireless auctions during the past 20 years, the majority of DEs that currently hold wireless licenses are incumbent rural telephone companies, very few DEs are new entrants, and even fewer DEs are (minority-owned business enterprises) MBEs." MMTC and its supporters maintain that DE participation in spectrum auctions dramatically decreased after the Commission's adoption of its 2006 rule modifications and claim that the results from Auctions 66 and 73 "showed a precipitous drop in DE participation from the average 70% value of winning bids over previous years, to only 4.0 % and 2.6 % respectively."

19. Other parties concur with MMTC's concerns about the AMR rule, arguing that the development of the Commission's rules and policies over the last decade, including adoption of the AMR rule, have significantly hindered their ability to access capital and largely impeded their ability to acquire and use wireless spectrum licenses in today's wireless marketplace. Parties claim that the AMR rule creates insurmountable obstacles for new and existing small businesses to gain access to capital in secondary markets where they argue small businesses can play important roles in assuring that licensed spectrum is effectively and efficiently utilized. In a March 2014 request for clarification or waiver of the AMR rule, Grain Management, LLC described how the rule could prevent a small, minority-owned, new-entrant lessor of spectrum capacity on licenses acquired without DE benefits from being eligible for such benefits in future auctions. See Grain Management, LLC's Request for Clarification or Waiver of 47 CFR 1.2110(b)(3)(iv)(A); Implementation of the Commercial Spectrum Enhancement Act and Modernization

of the Commission's Competitive Bidding Rules and Procedures; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Amendment of the Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands, WT Docket No. 05-211; GN Docket Nos. 12-268 and 13-185, Order, 29 FCC Rcd 9080 (2014).

20. **Discussion**. The Commission concludes that it is appropriate to revisit its small business eligibility rules and evaluate whether to rebalance its competing goals in order to provide small businesses additional opportunities to gain access to new sources of capital necessary for participation in the provision of spectrum-based services in today's marketplace, while guarding against unjust enrichment of ineligible entities. Chief among the actions that the Commission takes in the Competitive Bidding NPRM is its proposal to repeal the AMR rule and to re-examine the related decade-old policy underlying it. In lieu of the bright-line test of the AMR rule, the Commission proposes a two-pronged approach to evaluate an entity's eligibility for small business benefits. This approach would use its existing controlling interest and affiliation standards to determine what revenues are attributable to an applicant based upon a rigorous review of all relevant relationships and agreements, which will ensure that the small business makes independent decisions about its business operation. Alternatively, the Commission also seeks comment on whether it should retain the policy but modify the AMR rule with some other attribution threshold to determine an applicant's eligibility for small business benefits.

21. Using long standing principles of control and affiliation, the Commission proposes to safeguard small business benefits by attributing the revenues of any entity that has the ability to control, or potentially control, an applicant's business venture. The Commission's existing attribution rules examine the extent to which a small business may combine its efforts, property, money, skill and knowledge with another. Further, where there is an agreement to share profits/losses proportionate to each party's contribution to the business operation, the existing

rules consider these issues as a factor in whether to attribute that party to the applicant as its affiliate. Because the Commission's proposals should allow small businesses greater flexibility to engage in business ventures that include increased forms of leasing and other spectrum use arrangements, the Commission anticipates that the combined effect of the proposals—by allowing a small business greater flexibility to adopt a more individualized business model for each license it holds—should increase the potential sources of revenue for the small business and potentially decrease the likelihood that it would be subject to undue influence by any particular user of a single license. The Commission's proposed approach would also ensure that a licensee retains control of all licenses for which it seeks bidding credits, while providing greater flexibility in potential uses for any licenses acquired without such benefits. The Commission seeks comment on this proposal and asks commenters to specifically address how and why a small business may be more or less likely to be subject to undue influence by a user of its spectrum under this approach. Additionally, the Commission proposes to modify the language of 47 CFR 1.9020 to make clear how the secondary market rules apply to DE lessors, which should provide greater flexibility to small businesses in how they choose to use their spectrum. The Commission also seeks comment on whether any corresponding changes may be warranted in its unjust enrichment rules to ensure that small business bidding credits are extended only to qualifying small businesses.

22. The AMR rule and the policy that spurred its adoption were intended to prevent unjust enrichment by establishing safeguards to ensure that entities ineligible for small business incentives could not circumvent the Commission's rules by obtaining those benefits indirectly, through their relationships with eligible entities. The Commission based its decisions, in large measure, on legislative history suggesting that anti-trafficking restrictions and unjust enrichment payment obligations were needed to deter participation in the licensing process by those who have no intention of offering service to the public. For example, in the Secondary Markets Second Report and Order, the Commission relied on the legislative history in rejecting a commenter's argument that "[t]here [was] no reason to believe that Congress intended to limit designated entities to only one form of participation in the spectrum market - construction and operation of a facilities-based network." In adopting the AMR rule, the Commission

reaffirmed that interpretation of the legislative history, concluding that the adoption of the AMR rule, along with other modifications, was necessary to strengthen its implementation of Congress's directives with regard to DEs and to ensure that, in accordance with the intent of Congress, every recipient of its DE benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public.

23. Yet, in the Commission's attempts to safeguard small business benefits from unjust enrichment, it appears that the Commission's policy and corresponding rule modifications may have had the unintended consequence of hindering the Commission's ability to satisfy its statutory goal of promoting opportunities for wireless entry by small businesses. Moreover, the Commission notes that the statute does not specifically state, nor does the House Report make clear, that Congress intended to require that "offering service to the public" be defined only as DEs directly providing facilities-based telecommunications services for the benefit of the public. The Commission may have placed undue weight on language from the House Report, given all of the various factors that the actual text of 47 CFR 309(j) gives the Commission the discretion to balance. In interpreting statutes, analysis of the statutory text, aided by established principles of interpretation, controls.

24. While the policy of requiring primarily the direct provision of facilities-based service by a small business seeking bidding credits is one way to protect against unjust enrichment, the Commission tentatively concludes that it is not the only way to ensure that benefits are provided solely to those entities that Congress intended. The Commission also recognizes that the AMR rule, which was adopted to further that policy, may inhibit the highest and best use of spectrum by preventing small businesses that lack access to traditional sources of capital from being able to acquire alternative revenue streams through leasing and other spectrum use arrangements, even in circumstances where they retain control over their business venture. MMTC argues that there has been a documented decline in DE participation and success at auction following the adoption of the Commission's rule changes in 2006, based on the relative

value of licenses won by DEs compared to non-DEs. While the Commission notes that the relative value of licenses won at auction is only one measure to gauge success of the small business program and that there are other relevant factors to consider in assessing whether the Commission has met its statutory obligations for small businesses, the Commission nonetheless concurs that over the last decade small businesses have faced various increased difficulties in becoming wireless licensees.

25. The Commission contemplates that a different approach may be more effective in balancing its competing goals of affording small businesses reasonable flexibility to obtain the capital necessary to participate in the provision of spectrum-based services and effectively preventing the unjust enrichment of ineligible entities. Inasmuch as Congress has granted the Commission the discretion to weigh the varying objectives of section 309(j), the Commission proposes rule modifications that, if adopted, could offer a more balanced approach for achieving its statutory directives. The Commission therefore proposes to repeal the AMR rule and evaluate small business eligibility in a manner that could provide DEs with greater opportunities to participate in the provision of spectrum-based services, including through secondary market transactions. The Commission anticipates that this, in turn, will help DEs gain access to capital by enabling leasing and other spectrum use arrangements. Allowing more DEs and small businesses to participate in spectrum leases and other spectrum use agreements will also promote the Commission's goals of promoting more efficient and dynamic use of the important spectrum resource through secondary market spectrum transactions.

26. The Commission seeks comment on this proposal to repeal the AMR rule, and its tentative conclusions regarding its need to re-evaluate its small business policy. Should the Commission discontinue its policy requiring small businesses seeking bidding credits to provide primarily direct, facilities-based service on each individual license? Would this proposal better promote Congress's intent for small businesses? Would the proposal to eliminate this policy and to repeal the AMR rule have the unintended effect of providing ineligible entities with access to discounted spectrum?

27. In a mature wireless industry where leasing and other spectrum use arrangements may be important tools to enable wireless providers to raise capital and participate at auction, is it appropriate to

provide small businesses seeking bidding credits with greater flexibility to enter into such spectrum use arrangements? Should the Commission consider an alternative spectrum capacity use limit for a bright-line attribution test, and if so what is the appropriate percentage and what spectrum use arrangements should it include? Would eliminating the policy that small businesses provide primarily facilities-based service with each individual license increase or decrease the risk of unjust enrichment to ineligible entities and/or the warehousing of spectrum? What safeguards should the Commission consider to ensure that bidding credits are extended only to qualifying small businesses, as Congress intended? Alternatively, should the Commission retain the AMR rule and the related policy that small businesses primarily provide facilities-based service, but stipulate that neither would kick in for a set number of years? This approach might provide small businesses with an opportunity to raise capital early in the license term but still require that they eventually become primarily facilities-based providers of service when the AMR rule kicks in. Commenters should address when the AMR rule and the related policy regarding facilities-based service should kick in and how construction build-out requirements should be measured. Commenters should also address whether the Commission's proposed shift in policy would continue to allow auctions to award licenses to those entities that value the spectrum most highly, which fosters the Commission's ability to accomplish Congress's multi-faceted policy objectives. Will rebalancing the Commission's approach to Congress's goals provide adequate safeguards against unjust enrichment to ensure that bidding credits are awarded only to qualifying small businesses?

28. Proposed Standard for Evaluating Small Business Eligibility. The Commission proposes a more focused approach to evaluate small business eligibility that looks at who controls, or has the potential to control, the applicant and any spectrum acquired with the use of small business benefits. Specifically, the Commission proposes to apply a two-pronged test using its existing controlling interest and affiliation rules to determine: (1) whether an applicant meets the applicable small business size standard, and (2) whether it retains control over the spectrum

associated with the licenses for which it seeks small business benefits. This approach will allow the Commission to separate its review of those who control, or have the power to control, the small business applicant's business venture, and are therefore attributable for purposes of determining eligibility, from those that use (and may control) its spectrum capacity, which would affect the small business's ability to retain its benefits with respect to any particular license. Consistent with the Commission's existing controlling interest and affiliation rules under 47 CFR 1.2110(c)(2)(ii)(H)-(I), it will attribute the revenues of those entities or individuals that determine or significantly influence the nature or types of services offered by the small business, the terms upon which such services are offered, and the prices charged for such services. The Commission's proposals would expand the types of services the small business might offer as part of its overall business venture, but would not alter how the Commission carefully monitors those that have the ability to control, or potentially control, the applicant or licensee and its business venture. The Commission seeks comment on these specific proposals.

29. The first prong would evaluate whether an applicant meets the applicable small business size standard and is therefore eligible for benefits. To evaluate small business eligibility, the Commission proposes to apply its existing controlling interest standard and affiliation rules to determine whether an entity should be attributable based on whether that entity has de jure or de facto control of, or is affiliated with, the applicant's overall business venture. De jure control is typically evidenced by the holding of greater than 50 percent of the voting stock of a corporation or, in the case of a partnership, general partnership interests. De facto control is determined on a case-by-case basis to determine whether the licensee has actual control over its business venture. Thus, pursuant to 47 CFR 1.2110 and consistent with the Commission's current analysis, under its proposal, control and affiliation may arise through, among other things, ownership interests, voting interests, or the terms of any agreements that create a controlling, or potentially controlling, relationship over the applicant's business venture. The Commission therefore notes that its proposal to eliminate the policy that small businesses seeking benefits primarily provide facilities-based service does not alter the rules that require it to consider whether facilities-sharing and other agreements confer control of or create affiliation with the applicant. The

proposal also does not alter the general standard by which the Commission evaluates whether a licensee has ceded de facto control and effected an unauthorized transfer of control of its spectrum authorization to a third party.

30. The Commission's continued careful and targeted examination of these issues will allow it to ensure that a small business applicant has the independent ability to direct its decision making regarding its overall business venture and how its licenses are used to offer service to the public. Moreover, those claiming small business benefits will continue to be bound by the Commission's existing rules regarding control and attribution, which should be familiar to all existing and future Commission licensees. By providing small businesses with greater opportunities to access revenue streams through leasing and other spectrum use agreements, the Commission anticipates that they will have more flexibility to employ business models that suit their individual needs and therefore will be less likely to be influenced by deep-pocketed investors or parties with which they have a spectrum use agreement. Furthermore, this approach recognizes the Commission's earlier conclusion in the Secondary Markets proceeding that the mere existence of a spectrum use agreement between a small business and another party does not, without more, cause the other party to become an attributable interest holder in the applicant. This approach, coupled with the Commission's proposed departure from the policy of requiring small businesses to provide primarily facilities-based service directly to the public with each of its licenses, should allow small businesses to gain access to capital and better enable them to participate in auctions and in the provision of spectrum-based services, so long as the terms of any spectrum use agreement do not confer control or create an affiliation that would lead to attribution of disqualifying revenues. Will this approach promote long-term investment, market participation and competition in the wireless industry by small businesses?

31. Once the first prong has been met, the Commission would evaluate eligibility under the second prong. Under the second prong, the Commission proposes to determine an entity's eligibility to retain small business benefits on a license-by-license basis, based on

whether the entity has maintained de jure and de facto control of the license. Under this proposed license-by-license approach, an entity will not necessarily lose its eligibility for all current and future small business benefits solely because of a decision associated with any particular license. Instead, while a small business might incur unjust enrichment obligations if it relinquishes de jure or de facto control of any particular license for which it claimed benefits, so long as the revenues of its attributable interest holders (i.e., the DE's affiliates, its controlling interests, and the affiliates of its controlling interests) continue to qualify under the relevant small business size standard, it could still retain its eligibility to retain current and future benefits on existing and future licenses. In other words, an applicant need not be eligible for small business benefits on each of the licenses it holds in order to demonstrate its overall eligibility for such benefits. For instance, if a small business chooses to permissibly relinquish benefits, incurring any applicable unjust enrichment obligation, and transfer de facto control of a license through a de facto transfer lease, that lease will not necessarily make the lessee an attributable interest holder in the applicant or cause the applicant to become ineligible for other small business benefits it might have or want to acquire.

32. The Commission stresses that small businesses, like all its licensees, remain subject to its rules to prevent unauthorized transfers of control of their license authorizations pursuant to section 310(d) of the Act. Accordingly, if a small business seeking benefits executes a spectrum use agreement that does not comply with the Commission's relevant standard of de facto control, it will be subject to unjust enrichment obligations for the benefits associated with that particular license. If the terms of that spectrum use agreement go so far as to confer control of, or the potential to control, the small business's overall business venture, the business could risk the attribution of revenues, which could render it ineligible for all current and future small business benefits on all licenses. Except where the leasing standard of de facto control applies under the secondary market rules, the criteria of Intermountain Microwave and Ellis Thompson will continue to apply to any Commission licensee, including a small business, for purposes of assessing whether it can demonstrate that it retains de facto control of its business venture and spectrum authorization. See Applications for Microwave Transfers to Teleprompter

Approved with Warning; Non-broadcast and General Action Report No. 1142, Public Notice (by the Commission en banc), 12 FCC 2d 559, 559–60 (1963) (Intermountain Microwave); Ellis Thompson Corporation, 60 FR 1776, Jan. 5, 1995. Small businesses will, however, be free under this proposal from the added policy requirement regarding the extent to which it must use each individual spectrum license for the provision of facilities-based service in order to retain eligibility for small business benefits.

33. The Commission seeks comment on its proposed two-pronged approach to evaluate attribution and establish eligibility for small business benefits. Will this proposal provide small businesses with the flexibility necessary to participate in an evolving wireless marketplace? Does the absence of a bright-line attribution standard hinder an applicant's ability to assess its eligibility for small business benefits? Will the Commission's proposed approach allow it to safeguard the benefits it awards and prevent ineligible entities from obtaining benefits indirectly, through arrangements with eligible small businesses? Should the Commission take additional steps to assure that ineligible entities cannot exercise undue influence over a small business, or will its proposed approach empower small businesses to make their own decisions with respect to the highest and best use of each of their licenses without risking the undue influence of their investors or spectrum users? For instance, should the Commission, in considering whether the user's revenues should be attributable to the small business applicant, consider any limits on the amount of its spectrum capacity a small business seeking benefits can allow a third party to use, even where such use is otherwise permissible under Commission rules and the agreement on its own does not create a controlling interest or affiliation in the applicant's business venture?

34. Should the Commission limit the ability of a small business seeking benefits to lease all of its spectrum capacity or should the Commission allow it to be primarily engaged in the business of leasing provided that it complies with small business eligibility rules? Would allowing a small business seeking benefits to lease 100 percent of its spectrum capacity on any

individual license, and/or on all of its licenses, increase the potential of the unjust enrichment of ineligible entities? Commenters should address how that risk increases or decreases based on the amount of spectrum capacity that may be leased. Should the Commission be concerned that a small business leasing large quantities of its spectrum capacity to a single user has allowed another entity to receive the benefit of its bidding credits?

35. Should there be a standard by which the Commission should automatically attribute the gross revenues of an entity with which a small business seeking benefits has spectrum use agreements if it has such agreements with a single entity in numerous markets? How should the Commission view small businesses that have multiple financial and/or operational arrangements with another licensee or entity where the agreements do not otherwise create a controlling interest or affiliation with the small business? Should the existence of such multiple agreements create a rebuttable presumption of affiliation similar to the kinship affiliation rule, or does the Commission's existing rule of "affiliation through contractual relationships" already adequately guard against a third party acquiring control, or the potential to control, the small business through such agreements? For instance, should the Commission permit a small business seeking benefits to have a combination of capital investments, loan, marketing, management and leasing agreements with another Commission licensee without attributing the gross revenues of that entity to the small business? Is there a combination of agreements that should cause more concern in assessing small business benefit eligibility, and should any combination of agreements with a single party create a rebuttable presumption of attribution or an ineligibility for small business benefits? Are there any specific types of agreements that are more likely to confer control or undue influence of the small business seeking benefits that should cause the Commission to automatically attribute the gross revenues of the entity to the small business or render the small business ineligible for benefits?

36. Do the Commission's proposals provide small business applicants with sufficient flexibility to access capital, compete in auctions, and participate in new and innovative ways in the provision of service in the wireless marketplace while retaining their benefits? Do the Commission's proposals make it more or less likely that a small business will be unduly influenced by the entities with

which it engages in spectrum use agreements? Commenters opposing these proposals should indicate specific concerns. Commenters supporting these proposals should offer any other suggestions the Commission should consider to revise its rules and reform its small business policies. To what extent do the Commission's proposed changes for small business eligibility positively or negatively affect auction revenues? To what extent do the Commission's proposals appropriately balance its competing statutory obligations in section 309(j) of the Act?

37. Proposed Standard for Evaluating DE Leasing. The Commission also proposes to modify the language of 47 CFR 1.9020 to comport with the Commission's proposed approach to assessing small business eligibility. Specifically, the Commission proposes to make clear that DEs may fully benefit from the same de facto control standard for spectrum manager leasing in the Commission's secondary market rules as non-DE lessors.

38. In developing its regulatory scheme for leasing generally, the Commission determined that section 310(d) of the Act did not require the continued application of the facilities-based Intermountain Microwave six-part test that had, since 1963, been applied to determine whether a licensee was exercising the requisite level of de facto control over its licensed operations. Instead, the Commission adopted a revised de facto control standard for leasing arrangements for purposes of applying the requirements of section 310(d). Under the revised standard, a spectrum manager lease does not constitute a transfer of de facto control so long as the licensee (1) maintains an active, ongoing oversight role in ensuring that the lessee complies with Commission rules and policies; (2) retains responsibility for all interactions with the Commission required under the license related to the use of the leased spectrum; and (3) remains primarily and directly accountable to the Commission for any lessee violation of these policies and rules.

39. While the Commission nominally applied the new standard to all licensees, it explained that DEs would be required to retain their eligibility under the traditional facilities-focused de facto control standard of 47 CFR 1.2110 and Intermountain Microwave. Thus, the

Commission stated that small businesses could engage in leasing only to the extent that doing so would not affect their eligibility for benefits. Further, it required that a licensee receiving DE benefits be an entity that actually provides service under the license. As explained above, the Commission expressed concern that unless it continued to require DEs to remain engaged primarily in the provision of facilities-based services to the public it would run the risk that small business incentives, particularly bidding credits, would indirectly benefit entities that would not qualify for those incentives in the primary market. To that end, the Commission specified that small businesses could not retain their benefits if they made spectrum leasing their primary business.

40. Consistent with the Commission's proposed revisions to assessing small business eligibility, including the elimination of the requirement that small businesses primarily provide facilities-based service on each license they hold, the Commission proposes a modification to its spectrum manager leasing rule. Specifically, the Commission proposes to modify the language in 47 CFR 1.9020(d)(4) to remove the conflicting reference to the control standard of 47 CFR 1.2110 in order to make clear that small business lessors are fully subject to the same de facto control standard for spectrum manager leasing that applies to all other licensees. This modification should clarify that 47 CFR 1.9010 alone defines whether a licensee, including a small business, retains de facto control of the spectrum that it leases to a spectrum lessee in the context of spectrum manager leasing. This proposal does not alter the fact that small businesses must remain eligible for benefits under 47 CFR 1.2110. Instead, the proposed modification clarifies that one de facto standard applies to determine whether the licensee has de facto control of the spectrum in the context of a spectrum manager lease (i.e., 47 CFR 1.9010), and the other applies to determine whether a third party has control, or the potential to control, the licensee and its business venture for the purposes of attribution of revenues (i.e., 47 CFR 1.2110). In sum, the Commission's proposal departs from the traditional Intermountain Microwave facilities-focused de facto control standard with regard to an individual spectrum lease agreement for a particular license. As long as the small business: (1) maintains an active, ongoing oversight role in ensuring that the lessee complies with Commission rules and policies; (2) retains responsibility for all interactions with the Commission

required under the license related to the use of the leased spectrum; and (3) remains primarily and directly accountable to the Commission for any lessee violation of these policies and rules, it will be considered to maintain de facto control of its spectrum for the purposes of that spectrum manager lease. Spectrum manager leasing applications will continue to be evaluated to determine whether control of, or affiliation with, the small business applicant and its overall business venture has arisen through any the terms of the leasing agreement that might lead to attribution and result in unjust enrichment under 47 CFR 1.2110.

41. When the Commission adopted 47 CFR 1.9010, it noted that a licensee's continued control over the licensed use of spectrum lies at the heart of what it means to retain the license and the rights thereunder and that it could no longer generally assume that the licensee must perform the non-licensed activities identified in Intermountain Microwave in order to conclude that the licensee has retained its license and all rights thereunder. The Commission proposes that its modification will make clear that this conclusion applies equally to all licensees. Are there any reasons why the Commission should retain its existing language in 47 CFR 1.9020(d)(4)? Should the Commission consider limiting the amount of spectrum a small business can lease to a single entity under 47 CFR 1.9020, in order to ensure that the small business retains control over its business venture as required in 47 CFR 1.2110? Commenters opposing the Commission's proposal should offer alternative suggestions for how it could allow small businesses to play a larger role in secondary market transactions.

B. Unjust Enrichment

42. The integrity of the small business benefit program depends on ensuring that only entities eligible for benefits receive them. To safeguard against abuse, the Commission has long relied on unjust enrichment provisions, which require a small business to pay back the benefits it accrued where appropriate, and careful vigilance in approving applications and transactions. With the proposals set forth in the Competitive Bidding NPRM, the Commission anticipates that these provisions will be as important as ever and that strong enforcement of the provisions is critical. The Commission therefore

seeks comment on whether any changes are appropriate to strengthen its unjust enrichment rules and how best the Commission can continue to scrutinize applications and proposed transactions to ensure that only eligible entities receive benefits, while not undermining the Act's directive to ensure that DEs are given the opportunity to participate in the provision of spectrum-based services.

43. Pursuant to 47 CFR 1.2111(b), small businesses are obligated to make unjust enrichment payments if they seek, inter alia, to assign or transfer control of licenses to a non-eligible party, for a period of up to five years from the initial issuance of the license. In rebalancing the Commission's policy objectives to provide small businesses greater opportunities to participate at auction and in the provision of spectrum-based services, it remains focused on its responsibility to ensure that benefits are provided only to qualifying entities.

44. The Commission therefore invites comment on whether its existing five year unjust enrichment payment schedule continues to provide a sufficient safeguard to ensure that benefits are provided only to qualifying entities. Commenters should be specific about whether there is a need to adjust its current five year unjust enrichment repayment schedule, and the appropriate length and reimbursement percentages for any repayment schedule revisions. If commenters support a different repayment period or different percentages for the repayment schedule, they should be specific about why their suggested approach would better meet its goals and balance the Commission's statutory objectives.

45. Specifically, the Commission also seeks comment on whether it should consider adopting a 10 year unjust enrichment repayment schedule for licenses acquired with bidding credits, including its benefits and costs. Extending the length of the unjust enrichment repayment schedule to 10 years may help deter speculation and prevent spectrum warehousing. At the same time, extending the length of the unjust enrichment repayment schedule could restrict small businesses' access to capital, which could limit their ability to participate in the provision of spectrum-based services, contrary to the Commission's underlying goals in this proceeding. How does the length of the repayment schedule affect a small business's capital fundraising and business planning efforts? Are there lessons the Commission can draw from based on parties' experience raising capital when the 10 year unjust enrichment period was in place

from 2006 until 2010? If the Commission repeals the AMR rule as proposed and also modifies the unjust enrichment rules, what would be the combined effect on the ability of a small business to raise capital and participate at auction and in the provision of service, particularly when compared to the existing rule?

46. Are there other unjust enrichment provisions that the Commission should consider? For example, should the Commission require full reimbursement, plus interest, if a small business loses its eligibility prior to meeting the construction requirements applicable at the end of the license term? Commenters should discuss how such an approach would impact the Commission's interest in protecting against unjust enrichment, while ensuring that small businesses have access to capital to participate at auction and in the provision of service. Is a different reimbursement percentage (something less than 100 percent) preferable? Are other safeguards sufficient to protect the Commission's interests regarding unjust enrichment?

47. The Commission seeks comment on whether it may grant small businesses greater flexibility to participate in the provision of spectrum-based services, as it has proposed, while also ensuring that only those entities Congress intended have access to benefits. The Commission asks commenters to address how the unjust enrichment rules affect their ability to secure and retain capital and whether its rules require other further modifications to safeguard the award of small business benefits. By granting small businesses greater regulatory flexibility to demonstrate eligibility, does the Commission increase or decrease the likelihood that non-eligible entities can assert undue influence over a small business's decision making for its business venture and its utilization of licenses to participate in the provision of spectrum-based services?

48. The Commission also seeks comment on how other government programs ensure that only an intended class of recipients receive benefits that are awarded to eligible entities. Are there other government programs that have greater safeguards than the Commission currently employs? How do other government agencies and small business benefit programs prevent abuse and guard against unjust enrichment of ineligible entities? Commenters should be specific about

any analogies that can be drawn between the Commission's small business benefits and similar benefits awarded by other agencies and programs.

49. The Commission's efforts to provide increased flexibility to small businesses must be balanced with vigilant enforcement to ensure that only bona fide small businesses receive benefits. The Commission has a strong interest in ensuring that truthful and accurate information is available to the Commission and the public for purposes of implementing and enforcing policies it finds to be in the public interest. Such information is imperative to the Commission's ability to safeguard the benefits it awards and to prevent unjust enrichment. To the extent the Commission modifies rules regarding its small business benefits, it will remain vigilant in undertaking careful review of all applications of those seeking to acquire or retain bidding credits to ensure that the gross revenues of all parties that control, or have the potential to control, the applicant are properly attributed in compliance with its controlling interest and affiliation rules. The Commission emphasizes that it will remain focused on ensuring that an applicant's certifications for eligibility comport with the actual terms of its agreements with relevant parties. In so doing, the Commission expects that it can properly execute its statutory responsibility to continue to prevent unjust enrichment of ineligible entities.

C. Bidding Credits

50. The Commission also takes a fresh look at the primary way that it facilitates participation by small businesses at auction through its bidding credit program. The Commission notes that the generally applicable small business definitions and corresponding bidding preferences were adopted in 1997 and finds that it is appropriate to revisit whether these standards have kept pace with an evolving wireless marketplace. Toward that end, the Commission proposes to increase the general size standards, measured by gross revenues, for purposes of determining an entity's eligibility for a bidding preference. The Commission also proposes to continue its practice of evaluating which small business definitions will apply on a service-by-service basis, based upon associated capital requirements for a particular service. In addition, the Commission seeks comment on whether to increase the bidding credit percentages applicable to associated small business categories. Finally, the Commission seeks comment on its ability

to consider bidding preferences for other types of DEs, entities that serve unserved/underserved areas or areas with persistent poverty, as well as persons and entities that have overcome disadvantages. The Commission expects that the questions raised here will provide a meaningful opportunity to evaluate whether its bidding credit program continues to achieve its objectives. The Commission seeks concrete, specific, data-driven feedback by commenters to facilitate its review. The Commission invites commenters to suggest other creative ideas that would promote its statutory objectives, but it emphasizes that for any such proposals it is imperative to provide ample supporting evidence.

51. An auction applicant may claim eligibility for a bidding credit when filing a short-form application. The Commission's short-form application is the first part of its two-phased auction application process. In the first phase, any party desiring to participate in an auction must file a streamlined short-form application in which it certifies under penalty of perjury as to its qualifications to participate in a Commission auction. In its review of the short-form applications, Commission staff presume the information and certifications contained in the short-form applications are true unless they are incomplete, internally inconsistent or contradicted by information in the Commission's records. Eligibility to participate in bidding is based on information in an applicant's short-form application and its certifications, and on its upfront payment. In the second phase of the Commission's application process, a winning bidder files a more comprehensive long-form (FCC Form 601) application. The long-form application is subject to more extensive review and is the basis for any determination that a winning bidder is qualified to hold a Commission license and for the award of any claimed bidding credit.

1. Small Business Bidding Credits

52. **Background**. Bidding credits operate as a percentage discount on the winning bid amounts of a qualifying small business. By making the acquisition of spectrum licenses more affordable for new and existing small businesses, bidding credits facilitate their access to needed capital. The Commission establishes eligibility for bidding credits for each auctionable service,

adopting one or more definitions of the small businesses that will be eligible. The Commission's small business definitions have been based on an applicant's average annual gross revenues over a three-year period. In establishing the gross revenues thresholds for the small business definitions to be applied to a specific service, the Commission takes into account the capital requirements and other characteristics of the particular service. In order to qualify for a small business bidding credit an applicant must demonstrate that its gross revenues, in combination with those of its "attributable" interest holders, fall below the applicable financial caps.

53. The Commission's rules provide a schedule of small business definitions and corresponding bidding credits. In adopting bidding credits for a particular service, the Commission has found that the use of the small business size standards and credits set forth in the part 1 schedule provides consistency and predictability for small businesses. Section 1.2110(f) sets forth three tiers of bidding credits: (1) A 35 percent bidding credit for businesses with average annual gross revenues for the preceding three years not exceeding $3 million; (2) A 25 percent bidding credit for businesses with average annual gross revenues for the preceding three years not exceeding $15 million; and (3) A 15 percent bidding credit for businesses with average annual gross revenues for the preceding three years not exceeding $40 million.

54. **Discussion.** The Commission proposes to increase the gross revenues thresholds defining the three tiers of small businesses in the part 1 schedule by which the Commission provides the corresponding available bidding credits and seeks comment on alternatives. The Commission also proposes to continue its practice of deciding which small business definitions will apply on a service-by-service basis depending on the capital requirements of the particular spectrum to be auctioned. In addition, the Commission seeks comment on whether the bidding credit percentages that apply to these small business definitions should be increased.

55. Since the inception of the Commission's DE program, and particularly in the past decade, the evolution of the mobile wireless marketplace from mobile voice to mobile broadband has increased the demands on wireless networks and the need for access to spectrum, heightening the capital-intensive

nature of the industry. Moreover, the number of small and regional mobile wireless service providers has significantly decreased, though regional and local service providers continue to offer consumers additional choices in the areas they serve. In light of these changes and statutory goals, the Commission seeks comment on how it should reconsider definitions of what constitutes a small business in the wireless industry.

56. The Commission proposes to increase the gross revenues thresholds in its part 1 schedule to reflect the changing nature of the wireless industry, including the overall increase in the size of wireless networks and the increase in capital costs to deploy them. The Commission notes that these changes have resulted in an increase in the size of the wireless service providers that can be considered to be "small" relative to the large nationwide providers. By proposing adjustments to the Commission's small business size standards, it aims to promote the effective participation of small businesses in auctions and in the provision of spectrum-based services.

57. In considering how much to adjust the gross revenues thresholds, the Commission proposes to use the price index for the U.S. Gross Domestic Product (GDP price index) published by the U.S. Department of Commerce (Commerce). The Commission notes that the SBA, as part of its size standards review, recently used the GDP price index to adjust its receipts-based industry size standards. In particular, the Commission proposes to adjust the current gross revenues thresholds with the percentage change in the GDP price index between 1997 and 2013. The indices are available on Commerce's Bureau of Economic Analysis website, under Tables 1.1.4 and 1.1.15, at http://www.bea.gov/itable.

58. The Commission believes that the GDP price index may reflect certain industry trends and a relevant range of economic activity better than the available wireless industry price indices published by the Bureau of Labor and Statistics (BLS). In barely a decade, the shift from a voice-centric to a data-centric wireless industry has seen mobile broadband data services grow from their nascent stage to become a significant share of the industry's market revenues. However, the available wireless industry price indices may under represent broadband data

services because the indices are based on voice-centric definitions of service plans. Moreover, broadband data plans are not treated as a separate category in the indices, and the BLS description of the indices is unclear about how the advent of mobile broadband services has been factored into the voice-centric consumer and producer prices indices that were introduced in 1997 and 1999, respectively. Furthermore, the wireless industry consumer and producer price indices may exclude goods and inputs that are relevant for the range of economic activity involved in the provision of wireless services. Therefore, the Commission proposes to use the broader GDP price index. The GDP price index increased by 36.4 percent from 1997 to 2013. Based on this 36.4 percent increase, the Commission proposes new gross revenues thresholds that are obtained by multiplying the current thresholds by 1.364 and rounding to the nearest million. Specifically, the Commission proposes to revise the standardized schedule in 47 CFR 1.2110(f) as follows: (1) Businesses with average annual gross revenues for the preceding three years not exceeding $4 million would be eligible for a 35 percent bidding credit; (2) Businesses with average annual gross revenues for the preceding three years not exceeding $20 million would be eligible for a 25 percent bidding credit; and (3) Businesses with average annual gross revenues for the preceding three years not exceeding $55 million would be eligible for a 15 percent bidding credit.

59. The Commission seeks comment on its proposal to adjust the current gross revenues thresholds in its small business size standards using the GDP price index. Is there a different price index that better reflects industry developments and the relevant range of economic activity? Is there an alternative method for setting new gross revenues thresholds that does not require adjusting the current gross revenues thresholds with a price index?

60. The Commission tentatively concludes that its proposed gross revenues thresholds better reflect the larger size of wireless networks today, and thus expect that they will preserve the effectiveness of the Commission's bidding credit program in the current mobile wireless marketplace. Consumer demand for widely available mobile broadband services has increased providers' need for additional capital to acquire spectrum and deploy service. This trend is reflected in the changing structure of the industry. By increasing the gross revenues thresholds that define small businesses and thereby making

bidding credits available to a larger number of entities, the Commission seeks to facilitate a higher rate of participation by entities that might otherwise find it difficult to obtain the necessary capital to participate at auction. The Commission seeks comment on whether the proposed increases in the revenues thresholds are likely to increase the percentage of entities that will benefit from its small business bidding credits, by providing better access to capital and enabling them to seek access to the spectrum necessary to meet consumer demand for mobile broadband services. At the same time, to further the statutory objectives of the auction program, the Commission must adopt revenues thresholds that will avoid including firms that have adequate access to financing for spectrum based on their revenue levels. The Commission therefore seeks to avoid setting eligibility for bidding credits at a level that is over inclusive, which would defeat the purpose of the bidding credits and undermine the statutory objectives of the program. Any new thresholds the Commission adopts should provide economic opportunity to small businesses, while maintaining good economic incentives for small businesses to seek diverse forms of financing for spectrum.

61. The Commission seeks comment on this proposal. Specifically, how have capital costs, construction costs, and administrative costs faced by wireless providers changed since the mid-1990s? Have the costs of spectrum usage rights increased significantly since the early stages of the Commission's auction program such that it is more difficult for small businesses to acquire wireless spectrum today?

62. Commenters who agree that the industry's evolution warrants new definitions for small businesses should discuss what gross revenues thresholds are appropriate for defining small businesses in the wireless context. Commenters should explain their methodologies for deriving alternative thresholds and should supply supporting data or justifications for the Commission's use in evaluating and applying such methodologies. If commenters do not provide data on wireless providers' gross revenues, what alternative factors should the Commission consider in determining what constitutes a "small business" in today's wireless marketplace?

63. The Commission also seeks comment on whether to adopt a small business size standard based on criteria other than gross revenues. As the Commission recently noted in the AWS-3 proceeding, in first adopting gross revenues-based small business size standards for eligibility for DE benefits, the Commission rejected the SBA's employee-based business size standard for cellular or other wireless telecommunications entities as a means to qualify as a DE. The Commission concluded that such a definition would be too inclusive and would allow many large telecommunications firms to take advantage of preferences not intended for them. The Commission notes that according to census data, if it adopted the SBA's small business employee-based size standard for cellular or other wireless telecommunications entities (i.e., 1,500 or fewer employees) more than 96 percent of wireless companies would be considered small businesses. The Commission therefore tentatively concludes not to reconsider its conclusion that the SBA's employee-based definition is too inclusive for the purposes of establishing DE eligibility.

64. In addition, the Commission asks commenters to consider whether it should increase the bidding credit percentages (i.e., discount amounts) currently available to small businesses in 47 CFR 1.2110(f). Should the Commission use the existing bidding credit percentages, but apply them to higher gross revenues thresholds? Should the Commission add additional small business definitions and associated tiers of bidding credits above or below the tiers proposed above? Commenters supporting additional tiers of bidding credits should propose a corresponding gross revenues threshold for each additional tier. Commenters supporting changes to the existing bidding credit percentages in the Commission's part 1 rules should explain the basis for their proposals and provide any supporting data for the Commission's use in evaluating potential changes to the part 1 schedule. Commenters should also address whether increases in the bidding credit percentages are necessary if the Commission adopts its proposal to modify the gross revenues thresholds for its small business definitions since that will have the effect of increasing the level of bidding credit a substantial number of small businesses would receive compared to its current rules. For instance, by increasing the revenues thresholds, entities previously eligible for small business bidding credits under the current schedule may become eligible for a higher

bidding credit tier under the proposed amended schedule, and entities that previously exceeded the highest revenue threshold may become eligible. Similarly, bidders that previously exceeded the thresholds as a result of attributable revenues under the AMR rule may fall below the thresholds, and thus become eligible for small business bidding credits, if the AMR rule is eliminated as proposed in the Competitive Bidding NPRM.

65. Further, the Commission proposes to continue its practice of soliciting comment on the appropriate small business size standards in connection with establishing rules for any particular service. As the Commission has done in the past and pursuant to 47 CFR 1.2110(c)(1), it would continue to take into consideration the characteristics and capital requirements of each service. The Commission seeks comment on this proposal. Alternatively, should the Commission utilize all three small business definitions and bidding credit tiers in every service? Under this approach, the Commission would make bidding credits available to any business that meets one of the small business definitions without engaging in an assessment of the likely capital requirements of the specific service for which licenses are being offered. What are the advantages and disadvantages of this alternative approach? If the Commission continues to adopt small business definitions on a service-by-service basis, are there other factors that it should consider in determining which small business definition to apply to a specific service? Alternatively, if the Commission adopts its proposed modifications to the AMR and small business size standards, should it consider reducing the level of bidding credits it awards? Commenters should provide specific suggestions on how the Commission should weigh its proposals collectively.

66. The Commission also seeks comment on whether any revisions it adopts in this proceeding to its part 1 schedule of small business size standards and associated bidding credit percentage levels should apply to the specific small business definitions and bidding credit percentages the Commission has previously adopted for specific services, and, if so, how such revisions would be implemented. In particular, the Commission proposes that any new rules

adopted in this proceeding would apply to the 600 MHz band spectrum licenses to be offered in the BIA. In the BIA proceeding, the Commission adopted a 15 percent bidding credit for small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding $40 million) and a 25 percent bidding credit for very small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding $15 million). Consistent with the increased gross revenues thresholds the Commission proposes for the standardized schedule in its part 1 competitive bidding rules, the Commission also proposes to increase the gross revenues thresholds associated with the 15 and 25 percent bidding credits adopted for the 600 MHz band. That is, for the 600 MHz band, the Commission proposes to provide a bidding credit of 25 percent for businesses with average gross revenues for the preceding three years not exceeding $20 million and a bidding credit of 15 percent for businesses with average gross revenues for the preceding three years not exceeding $55 million. The Commission seeks comment on this proposal. In addition, the Commission seeks comment on whether to adopt a third tier of small business bidding credits for the 600 MHz band that would provide a 35 percent bidding credit to businesses with average gross revenues for the preceding three years not exceeding $4 million. If the Commission re-auctions licenses for existing services, should the previously adopted service-specific small business definitions and bidding credit percentages be revised for those services to reflect any changes to its part 1 schedule in 47 CFR 1.2110(f)(2)?

2. Other Bidding Preferences

67. The Commission's primary method of fulfilling its statutory mandate regarding DEs has been to offer auction bidding credits to small business applicants. Periodically, however, interested parties have suggested that the Commission offer bidding preferences to entities based on criteria other than business size. As the Commission has explained in the past, its ability to implement suggestions to target bidding credits to other types of entities is constrained by both its statutory authority and standards of judicial review. The Commission seeks comment on these suggestions and asks commenters to specifically address the statutory authority and judicial scrutiny issues that may limit its ability to entertain recommendations to alter the focus of its current bidding preferences.

a. Minority- and Women-Owned Businesses and Rural Telephone Companies

68. Section 309(j)(4)(D) of the Act directs the Commission to consider the use of bidding preferences to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services. The Commission seeks comment on whether the current small business provisions are sufficient to promote participation by businesses owned by minorities and women, as well as rural telephone companies. To the extent that commenters propose additional provisions to ensure participation by minority-owned or women-owned businesses, they should address how such provisions could be crafted to meet the relevant standards of judicial review. The Commission asks commenters advocating for the adoption of rural bidding credits to supply data demonstrating that rural telephone companies lack access to capital or face barriers to capital formation similar to those faced by other DEs.

b. Unserved/Underserved Areas and Persistent Poverty Preferences

69. The Commission seeks comment on whether it should extend bidding credits to winning bidders that deploy facilities and provide service to unserved or underserved areas. If the Commission adopts bidding credits for service to unserved or underserved areas what criteria should it consider to determine if an area is unserved or underserved? Should any unserved/underserved area bidding credits be available in all areas lacking service, only in rural areas, or only in persistently poor counties? As required of providers awarded universal service funds through the Mobility Fund Phase I auctions, should a wireless provider awarded an unserved/underserved bidding credit be required to provide a certain level of service (e.g., 3G or 4G) by a certain time frame (e.g., two or three years) in order to retain the benefit of the bidding credit?

70. The Commission also seeks comment on whether the Commission should offer a bidding credit to winning bidders that will use their licensed spectrum to deploy service to persistent poverty counties. As defined by the Department of Agriculture's Economic Research Service (ERS), a county is persistently poor if 20 percent or more of its population was living in poverty over the last 30 years. According to the ERS, "there are currently 353 persistently poor counties in the United States (comprising 11.2 percent of all U.S. counties)." The ERS further explains that "[t]he large majority (301 or 85.3 percent) of the persistent-poverty counties are nonmetro, accounting for 15.2 percent of all nonmetro counties. Persistent poverty also demonstrates a strong regional pattern, with nearly 84 percent of persistent-poverty counties in the South, comprising of more than 20 percent of all counties in the region." The ERS information is available on the ERS website under "Geography of Poverty," at http://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/geography-of-poverty.aspx. If the Commission adopts such a bidding credit, should it impose strict performance requirements on providers awarded bidding credits for licenses covering persistent poverty counties similar to those required of winning bidders awarded Tribal land bidding credits? Should this type of bidding credit only apply to licenses covering persistent poverty counties that are only served by two or fewer wireless service providers?

71. If the Commission adopts unserved/underserved area and/or persistent poverty county bidding credits, should the bidding credits be available only to small businesses and/or other DEs, or to any applicant? How would the Commission calculate the credit amount where the unserved or underserved area or targeted counties cover a portion of a license area? Should the bidding credit be applied to the total amount of the winning bid for a license, or should it be applied to a portion of the winning bid based on a percentage of population or square miles of the license area covered by the unserved/underserved area or identified counties or some other metric? What size bidding credit would be appropriate for either an unserved/underserved area bidding credit or a persistent poverty county bidding credit? If an applicant qualifies for both bidding credits, should the Commission limit the amount of the combined credit? Similarly, if an applicant qualifies for one of these credits in addition to a small

business bidding credit, should the credits be cumulative and, if so, should there be a limit on the amount of the aggregate bidding credit provided? Should any limit be an amount greater than the maximum small business bidding credit to allow DEs eligible for the highest bidding credit tier to receive an increased benefit for also providing service to an unserved/underserved area and/or persistent poverty county? Commenters supporting cumulative bidding credits should provide data or support justifying the need for higher bidding credits in unserved/underserved and/or persistent poverty areas. Alternatively, are issues relating to lack of deployment or low levels of deployment of wireless services in rural and poor areas better addressed through means other than the Commission's bidding credit program, such as through service-specific build-out requirements or reliance on incentives through its Mobility Fund and other universal service programs?

72. The Commission seeks comment on its authority to implement these types of bidding preferences. The Commission notes that it has previously implemented bidding credits based on other criteria than business size in order to facilitate service to Tribal lands. See In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, 65 FR 47366, May 2, 2003 (Tribal Lands Report and Order). In that proceeding, the Commission found that the objectives and requirements of section 309(j) of the Act, which the Commission must consider in designing competitive bidding systems, authorized it to grant bidding credits targeted specifically to entities that commit to bringing much needed wireless telecommunications services to Tribal lands. Specifically, in the Tribal Lands Report and Order, the Commission found that Tribal Land bidding credits further the objective of section 309(j)(3)(A) to ensure "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas . . . ." and the objective of section 309(j)(3)(D) of promoting "efficient and intensive use of the electromagnetic spectrum." The Commission also found that there is no indication in section 309(j)(4)(D) or in its legislative history that the Commission's authority to award bidding preferences is limited to small businesses, rural telephone companies, and businesses owned by members of minority groups and women. As

such, the Commission tentatively concludes that section 309(j) of the Act similarly authorizes the Commission to provide bidding credits for service to unserved/underserved areas and persistent poverty poverty counties. The Commission seeks comment on its tentative conclusion.

c. Overcoming Disadvantages Preference

73. In view of renewed interest raised in the BIA proceeding, the Commission also seeks additional comment on the 2010 Recommendation by the FCC's Advisory Committee on Diversity for Communications in the Digital Age (2010 Recommendation) to implement a bidding preference for persons or entities who have overcome substantial disadvantage (referred to herein as an overcoming disadvantages preference or ODP). In that 2010 Recommendation, the Committee proposed that the Commission should provide an auction bidding credit for otherwise qualified persons or entities that have overcome substantial disadvantages, to allow them to compete on equal footing with other applicants. The Committee stated that an ODP would provide a fair opportunity for highly qualified applicants to compete for spectrum licenses, thereby expanding the pool of eligible bidders in an auction. The 2010 Recommendation is available at http://www.fcc.gov/DiversityFAC/meeting101410.html. The Media and Wireless Telecommunications Bureaus subsequently issued a public notice seeking comment on additional information that would be helpful in evaluating whether and how to pursue the Committee's proposal: the Overcoming Disadvantage Preference Public Notice, 75 FR 81274, Dec. 27, 2010.

74. Commenters should specifically address the Commission's statutory authority to adopt such a preference and how such a preference could be crafted to meet the relevant standards of judicial review. Would a preference for those who have overcome a substantial disadvantage be subject to a "rational basis" constitutional standard, as the 2010 Recommendation indicates? Additionally, the Commission seeks detailed comment on how the preference would provide additional opportunities not available under the current bidding credit program, particularly if the current program is amended as proposed in the Competitive Bidding NPRM.

75. The Commission also asks for input on how it might systematically collect and maintain data in order to implement and administer an ODP. What legal basis does it have to collect data, and what precise data would the Commission need to support such a proposal?

76. The Commission asks commenters to address how eligibility for an ODP could be demonstrated, providing specific information as to what definitions of disadvantages could qualify individuals or entities for the preference. How would it measure when any particular disadvantage had been overcome? The 2010 Recommendation provides a non-exhaustive list that includes disadvantages such as physical disabilities or psychological disorders that rendered professional or business advancement substantially more difficult than for most individuals. How could the Commission avoid subjective determinations and implement and apply an ODP on a neutral basis? The Commission asks commenters to discuss how it could establish eligibility for the preference objectively. How could the Commission render eligibility determinations for an ODP without appearing arbitrary? How could it safeguard any such benefits to ensure they are awarded only to eligible persons or entities?

77. The Commission also seeks detailed comment on how it could administer an ODP. Commenters should identify the costs and benefits associated with such a program, addressing matters such as how reviews would be conducted, and the nature of the demonstration applicants seeking a preference would be required to make, as well as how individualized evaluation for the preference would be incorporated into a time-sensitive short-form application process or whether alternatives such as pre-qualification would be necessary.

78. As acknowledged by the Advisory Committee, its ODP proposal raises a number of issues that need to be refined and resolved in order to design and implement such a preference, and comment provided to date has not provided sufficient basis or justification for doing so. Therefore, commenters that continue to support the adoption of an ODP are encouraged to provide as detailed and specific suggestions as possible regarding the Commission's authority to establish the ODP and its objectives in doing so, as well as eligibility for, and administration of,

the preference, to assist the Commission in determining a legal, neutral, and efficient way in which it could implement an ODP. Alternatively, the Commission asks commenters to consider whether the proposals the Commission has made to amend its existing DE program would obviate the need for the adoption of such a preference.

D. DE Reporting Requirements

79. **Background**. Section 1.2110(n) requires DE licensees to file an annual report with the Commission that includes, at a minimum, a list and summaries of all agreements and arrangements, extant or proposed, that relate to eligibility for DE benefits. The list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement. DEs are required to file a report for each of their licenses no later than, and up to five business days before, the anniversary of the date of license grant.

80. **Discussion**. The Commission proposes to repeal this reporting requirement. The information DEs are required to include in their annual reports is duplicative of information that they provide in their auction and license applications. See 47 CFR 1.2110(j), 1.2112(b)(2)(iii). In addition, before entering into leases or other agreements that might affect their eligibility, DEs must seek Commission approval and must list and summarize those agreements, including the parties to and the dates of the agreements. See 47 CFR 1.2114. Moreover, for licensees with multiple auction licenses, each having a different grant date, the burden of the annual reporting requirement is exacerbated by the obligation to file multiple reports each year. For these reasons, the Commission tentatively concludes that the value of the information provided in these annual reports may no longer outweigh the reporting burden that they impose on DEs.

81. The Commission seeks comment on its proposal. In particular, commenters are invited to address whether there are any benefits to retaining the annual reporting requirement that the Commission has failed to consider. Does this reporting requirement in any way help the Commission identify agreements between parties relating to small business eligibility that might otherwise escape attention?

Commenters should specifically address how other rules render this reporting requirement duplicative and how other rules adequately ensure that the Commission is aware of all agreements between parties relating to small business eligibility. Will relieving DEs of this annual reporting requirement reduce their regulatory burdens to any measurable degree? Without this reporting requirement, will the Commission continue to have the necessary tools to safeguard DE benefits from unjustly enriching ineligible entities? If the Commission adopts this proposal to eliminate this annual reporting requirement, should the Commission amend the requirement in 47 CFR 1.2114 that a small business list and summarize all existing agreements to provide context each time it reports a new eligibility event?

E. MMTC's White Paper Requests

82. **Background**. In February 2014, MMTC submitted a White Paper detailing several policy recommendations to advance minority and women spectrum license ownership. In addition to requesting the elimination of the AMR, an increase in bidding credits, and a substantive review of proposed DE rules, the White Paper requests Commission action in the following areas: (1) Reinstitute select DE-only closed spectrum auctions; (2) Incorporate diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions (M&As) and secondary market spectrum transactions; (3) Conduct ongoing recordkeeping of DE performance; (4) Complete the Adarand Studies, updating the section 257 studies released in 2000; (5) Regularize procedural requirements; and (6) Support increased funding for and statutory amendments regarding the Telecommunications Development Fund. The Commission notes that MMTC's above request with respect to "ongoing recordkeeping of DE performance" refers to retaining specific information about minority- and woman-owned business enterprise bidders, in addition to the small business status.

83. **Discussion**. The Commission seeks comment on the proposals that are not otherwise addressed in the NPRM, and to the extent that they relate to its competitive bidding rules. The Commission observes that certain proposals appear to be outside the scope of this proceeding and others may not be needed in light of other changes proposed herein. Toward that end, the Commission tentatively concludes that the following MMTC proposals are outside the scope of this proceeding, which

is focused on its competitive bidding rules, and thus will not be addressed here: (1) incorporating diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions and secondary market spectrum transactions; and (2) supporting increased funding for and statutory amendments regarding the Telecommunications Development Fund. The Commission seeks comment on MMTC's additional requests, including discussion regarding the relative costs and benefits of each proposal. Are the proposals that the Commission describes elsewhere in the NPRM, including the elimination of the AMR rule, sufficient to address the concerns identified by MMTC regarding the participation of businesses owned by members of minority groups and women in the provision of spectrum-based services?

III. OTHER PART 1 CONSIDERATIONS

84. In advance of an auction that could hold historic potential for interested applicants to acquire licenses for below-1-GHz spectrum, the Commission also explores the need for other revisions to its general part 1 competitive bidding rules to improve the transparency and efficiency of the auction and its processes. The Commission proposes changes to its former defaulter rule that seek to balance commenters' concerns that the current rules are overly broad with its continued need to ensure that auction bidders are financially reliable. The Commission also proposes to codify an existing competitive bidding procedure that prohibits the same individual or entity from filing more than one short-form application to participate in an auction and it proposes a new rule that would prevent entities that are exclusively controlled by a single individual or set of individuals from becoming qualified to bid on the basis of more than one short-form application in a specific auction. Both proposals seek to prevent duplicative filings and to avert anticompetitive bidding behavior at auction. Regarding the joint bidding rules, the Commission seeks comment on, among other issues, its tentative conclusions that it would be in the public interest to retain the current rules governing joint bidding arrangements among non-nationwide providers and to prohibit joint bidding arrangements among nationwide providers. Additionally, the Commission provides notice of its intention to resolve long standing petitions for reconsideration and proposes necessary clean-up revisions to its part 1 competitive bidding rules.

A. Former Defaulter Rule

85. **Background**. Each potential participant in a Commission auction must certify on its pre-auction short-form application whether or not the applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests have ever been in default on any Commission license or have ever been delinquent on any non-tax debt owed to any federal agency. With the exception of the Commission's upcoming auction for AWS-3 licenses (Auction 97) for which it recently granted a limited blanket waiver, an applicant is considered to be a "former defaulter" if the applicant, including any of its affiliates, its controlling interests, or any of the affiliates of its controlling interests, has defaulted on any Commission license or been delinquent on any non-tax debt owed to any federal agency, but has since remedied all such defaults and cured all of its outstanding non-tax delinquencies. Former defaulters are eligible to bid in a Commission auction provided they are otherwise qualified, but are required to pay upfront payments that are 50 percent more than the normal upfront payment amounts.

86. In the Part 1 Fifth Report and Order, the "former defaulter" policies were incorporated into the Commission's part 1 general competitive bidding rules. See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, 65 FR 52323, Aug. 29, 2000 (Part 1 Fifth Report and Order). The Commission reasoned that the integrity of the auctions program and the licensing process dictates requiring a more stringent financial showing from applicants with a poor federal financial track record. Thus, while cure of an outstanding federal default or delinquency enables the former defaulter to participate in an auction, the rules require the former defaulter to make a larger upfront payment. Other than in the recent waiver for Auction 97, the former defaulter rule has been applied without any limitation as to age or scope of an applicant's prior default or delinquency.

87. On August 29, 2014, in response to unopposed requests from wireless industry parties, the Commission granted a limited blanket waiver to narrow the circumstances under which an applicant for Auction 97 would be considered a former defaulter and required to submit

a larger upfront payment to qualify to bid. The Commission concluded that the underlying purpose of the upfront payment and former defaulter rules would not be served by their broad application in the AWS-3 auction, and that a limited waiver served the public interest. Specifically, for Auction 97, the Commission waived the former defaulter rule for applicants to exclude any cured default or delinquency for which any of the following criteria were met: (1) the notice of the final payment deadline or delinquency was received more than seven years before the Auction 97 short-form application deadline of September 12, 2014; (2) the amount of the default or delinquency falls below $100,000; (3) the default or delinquency was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding. See Petition of DIRECTV Group, Inc. and EchoStar LLC (collectively, DIRECTV/EchoStar) for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Condition Waiver; Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014 (Auction 97), RM-11395; AU Docket No. 14-78, Order, FCC 14-130, para. 1 (rel. Aug. 29, 2014) (Auction 97 Former Defaulter Waiver Order). Pursuant to the Auction 97 Former Defaulter Waiver Order, only applicants that have had a cured default or delinquency that falls outside of these exclusions would have to certify to being a "former defaulter" and submit a larger upfront payment in Auction 97. The Auction 97 Former Defaulter Waiver Order noted that the Commission's limited grant of the blanket waiver for Auction 97 was without prejudice to its further examination and disposition, based on a complete record, of the issues surrounding the former defaulter rule through a rulemaking proceeding.

88. **Discussion**. Although the former defaulter rule serves an important and necessary function to ensure that bidders are capable of meeting their financial commitments, the Commission tentatively concludes that the rule may be too far-reaching and impose unnecessary costs and burdens on auction participants. The Commission proposes a more tailored approach by balancing concerns that the current application of the rule is overbroad with its continued need to ensure that auction bidders are financially reliable. The Commission seeks comment on revising the rule to narrow the scope of the

defaults and delinquencies that will be considered in determining whether or not an auction participant is a former defaulter. Specifically, the Commission proposes to exclude any cured default on any Commission license or delinquency on any non-tax debt owed to any federal agency for which any of the following criteria are met: (1) the notice of the final payment deadline or delinquency was received more than seven years before the relevant short-form application deadline; (2) the default or delinquency amounted to less than $100,000; (3) the default or delinquency was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding. The Commission seeks comment on limiting the individuals and entities that an applicant must consider when determining its status as a former defaulter.

89. In offering these proposals to limit the former defaulter rule, the Commission keeps in mind the underlying purposes of the upfront payment rule generally, and the increased upfront payment required of former defaulters. The Commission typically requires auction participants to provide upfront payments in order to qualify to bid in an auction. Upfront payments help prevent frivolous or insincere bidding and provide the Commission with a source of funds from which to collect payments owed at the close of auction. In adopting an upfront payment requirement, the Commission also recognized that it was balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs that will be imposed on bidders. The original former defaulter rule appeared in the Commission's part 24 Broadband PCS rules in the wake of financial difficulties of participants in the C Block auctions. The Commission subsequently incorporated the part 24 former defaulter policies into the part 1 general competitive bidding rules, noting that the rule's purpose was to preserve the integrity of the auction process and ensure that bidders are capable of meeting their financial commitments to the Commission. As the Commission noted in the Auction 97 Former Defaulter Waiver Order, in the 14 years since

that Commission action, its auctions program has matured and the mobile wireless industry has grown into a major segment of the nation's economy. Accordingly, the Commission considers in the Competitive Bidding NPRM whether the current broad rule continues to strike the right balance to promote the goals of its upfront payment and former defaulter rule.

90. The parties that requested waiver of the former defaulter rule also suggest that the Commission modify the rule. For instance, in their petition, DIRECTV/EchoStar argue that, as currently written, the former defaulter rule applies too broadly to effectively advance the Commission's goal of ensuring that auction bidders are financially reliable. In their joint filing, CCA, CEA, CTIA and NTCA (the Four Associations) mirror that sentiment and suggest that the scope of the rule is unnecessary to achieve its purpose, particularly when the former defaults or delinquencies are in a relatively small amount or were cured years prior. These parties offer a variety of ways to limit the scope of the former defaulter inquiry, but all consistently contend that the rule is unnecessarily broad to serve its underlying purpose. The Commission seeks comment on its specific proposals to narrow the scope of the defaults and delinquencies that would trigger an auction applicant's former defaulter status and asks commenters to address whether, if such proposals are adopted, the Commission can still promote the important protective functions of its upfront payment and former defaulter rules.

91. Parties urge first that prior delinquencies and defaults more than a certain number of years old should be excluded from the scope of the former defaulter rule. In the Auction 97 Former Defaulter Waiver Order, the Commission excluded from consideration under the former defaulter rule any cured default or delinquency for which the notice of the final payment deadline or delinquency was received more than seven years before the Auction 97 short-form application deadline of September 12, 2014. The Commission concluded that the rule's current unlimited time period may capture former defaults and delinquencies that have lost their relevance to a bidder's current capability to meet its financial commitments to the Commission, and thus may no longer warrant a larger upfront payment for Auction 97. Initially, advocates seeking a more limited time frame for the rule's application argued that a three year period would correspond to certain federal tax statute of limitations. In seeking a waiver for Auction

97, CCA, CTIA and NTCA (the Three Associations) suggested that the Commission should define former defaulters to include only those applicants who have received notice of defaults or delinquencies within seven years before the Auction 97 short-form application deadline. In the Auction 97 Former Defaulter Waiver Order, the Commission noted that while federal tax laws have a three-year statute of limitations to determine if certain forms of additional tax are owed, the period of limitations to determine whether income was under-reported is six years and the Internal Revenue Service has a seven-year period to review a claim for a loss from worthless securities or a bad debt deduction. Likewise, the Commission acknowledged that the Fair Credit Reporting Act limits many types of reporting by consumer credit agencies for a period of seven years. In light of these longer federal limitations periods, the Commission tentatively concludes that the purposes of the upfront payment and former defaulter rules may be furthered more precisely if the Commission excludes any cured default on a Commission license or a delinquency on a non-tax debt owed to a federal agency where the notice of the final payment deadline or delinquency was received more than seven years before the short-form application deadline. In doing so, the Commission notes that the determination of a notice of a final payment deadline or delinquency depends on the origin of the federal non-tax debt giving rise to a default or delinquency and such notice may be express or implied. To the extent that the rules providing for payment of a specific federal debt permit payment after an original payment deadline accompanied by late fee(s), such debts would not be in default or delinquent for purposes of applying the former defaulter rules until after the late payment deadline. For the purposes of the certifications required on a short-form auction application, notice provided by Commission staff assessing a default payment arising out of a default on a winning bid constitutes notice of the final payment deadline with respect to a default on a Commission license. The Commission seeks comment on all aspects of this proposal—the number of years specified (seven), the triggering event (upon receipt of the notice of the final payment deadline or delinquency), and the point at which the counting of the age of the triggering event is cut off (the short-form application

deadline). To the extent commenters advocate a different length of time, an alternate triggering event, or another way of calculating how long ago the triggering event occurred, the Commission urges them to be specific as to why their proposal is more appropriate given the policies behind its rule. Should the length of time it took the defaulter to cure the debt, or how recently the cure occurred, be a factor?

92. Those favoring modification of the rule also suggest excluding former defaults or delinquencies that fall below a certain amount. The Auction 97 Former Defaulter Waiver Order excluded from consideration under the former defaulter rule for Auction 97 any former default or delinquency for which the amount of the resolved debt or delinquency fell below $100,000. Parties initially suggested excluding defaults or delinquencies of what they defined as de minimis in nature, and specifically suggested that the Commission should ignore any former default or delinquency totaling less than the lesser of $100,000 or 0.1 percent of the average annual revenues of the applicant, as computed by its competitive bidding rules. The Three Associations later suggested that the Commission exclude from the definition of former defaulter any cured defaults on a Commission license or delinquencies on a non-tax debt owed to a federal agency in an amount of less than $100,000. In the Auction 97 Former Defaulter Waiver Order, the Commission noted the $100,000 amount is used in other contexts to distinguish between less significant or material issues and more significant ones and the Commission concluded that for the purposes of Auction 97, requiring a larger upfront payment based on any cured default or delinquency that is less than $100,000 could discourage participation in Auction 97 without appreciably ameliorating the risk of bidder defaults, and thereby undermine the underlying purposes of its upfront payment and former defaulter rules.

93. For clarity and efficiency of the administration of the former defaulter rule from both the Commission's and applicants' perspectives, the Commission now proposes to adopt for future auctions generally the same bright-line standard established in the Auction 97 Former Defaulter Waiver Order that would exclude from the rule any former default on a Commission license or delinquency on a non-tax debt owed to a federal agency where the amount of the resolved debt falls below $100,000. The Commission tentatively concludes that such an exclusion will simplify the application process and

minimize implementation costs imposed on applicants by excluding former defaults and delinquencies for which consideration is no longer necessary to ensure bidders in a more mature wireless industry submit serious, qualified bids. The $100,000 threshold aligns with Commission precedent and is used in other contexts to determine the materiality or significance of various issues. See Auction 97 Former Defaulter Waiver Order at para. 18. If commenters disagree with the amount proposed, the Commission encourages them to provide specific examples of how former defaults or delinquencies of a different amount would better reflect an auction applicant's financial reliability. The Commission also seeks comment on whether its proposal adequately weighs its need to consider debts of a serious nature that are indicative of a bidder's poor federal track record with the burdens faced by many applicants in complying with the current rule, which might be considered open-ended in scope.

94. To address situations where, due to incorrect addresses, delivery problems, or internal issues, applicants may not timely pay obligations, but cure such debts when discovered, the Three Associations also contend that the Commission should for the purposes of the former defaulter rule exclude certain additional resolved debts. For Auction 97 applicants, the Commission waived the former defaulter rule to exclude any cured default or delinquency where the debt was paid within two quarters (i.e., 6 months) after receiving the notice of final payment deadline or delinquency. There, the Commission concluded that the prompt cure of such a default or delinquency sufficiently demonstrated an applicant's financial wherewithal, that therefore it was unnecessary to require a larger upfront payment from the applicant, and that a waiver under such circumstances served the public interest by encouraging prompt payment of debts owed to the government. The Commission now proposes to modify the former defaulter rule generally to exclude a default or delinquency that was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency for the same reasons articulated in the Auction 97 Former Defaulter Waiver Order. The Commission seeks comment on whether this exclusion will allow it to appropriately balance the practicalities that

may affect the applicants' ability to timely resolve their debts with the need to ensure that bidders are capable of meeting their financial commitments to the Commission. The Commission also invites commenters to address whether payment within some other time period might better strike that balance, and whether receipt of the notice of the final payment deadline or delinquency is the appropriate triggering event for this exclusion.

95. Similarly, the Three Associations also suggest for the purposes of modifying the former defaulter rule that an applicant should not be considered to be in default if any debt is the subject of a good faith dispute or a pending legal or arbitration proceeding. In the Auction 97 Former Defaulter Waiver Order, the Commission included this suggestion in part, and concluded that where the default or delinquency was the subject of a legal or arbitration proceeding and was cured upon resolution of the proceeding, an applicant has demonstrated sufficient financial credibility so that it was not necessary to require a larger upfront payment from it in Auction 97. The Commission determined that waiver under such circumstances served the public interest by encouraging prompt resolution of debts associated with legal or arbitration proceedings. The Commission declined, however, to waive the larger upfront payment requirement for debts that are subject to a "good faith dispute" because it reasoned that such a provision, even for cured debts, would be too ambiguous to be efficiently applied during the auction short-form application process. The Commission proposes to modify the former defaulter rule generally to exclude a default or delinquency that was the subject of a legal or arbitration proceeding and was cured upon resolution of the proceeding. As in the Auction 97 Former Defaulter Waiver Order, the Commission does not intend to include within the scope of this exclusion any proceedings based on requests for waiver of a rule requiring payment of a debt or delinquency. The Commission seeks comment on whether its proposed exclusion addresses parties' concerns that debts such as these are not indicative of an applicant's financial credibility such that they should require an applicant to submit a larger upfront payment. Should the Commission also exclude debts cured after resolution of a "good faith dispute," and if so, how could such "good faith disputes" be verified during the short-form application process, if necessary? Is the proposed general exclusion for debts cured upon resolution of a legal or

arbitration proceeding necessary? In the alternative, should the Commission expect financially reliable applicants to pay outstanding defaults on Commission licenses, or delinquencies on any non-tax debt owed to any federal agency, while legal or arbitration proceedings are pending, even if the applicant's liability or the amount of the debt is in dispute?

96. In their petition, DIRECTV/EchoStar also maintain that the former defaulter rule should apply only to auction participants and those individuals or entities that are in a position to affect whether such applicants meet their auction-related financial responsibilities and urge the exclusion of debts/delinquencies relating to personal obligations of officers or directors of entities that are not the auction applicant, e.g., excluding personal obligations of officers and directors of the applicant's parent companies. More recent requests to amend the former defaulter rule do not include any suggestion to limit the scope of individuals and entities that an applicant needs to consider in evaluating its former defaulter status.

97. In implementing the former defaulter provisions, the Commission has included the applicant's affiliates, its controlling interests, and affiliates of its controlling interests in determining if an applicant is a former defaulter. The Commission recognizes, however, that some of the individuals and entities that fall within these definitions may play no role in the applicant's general financial responsibilities and may not affect an applicant's ability to meet its financial obligations arising from an auction. Therefore, the Commission seeks comment on possible ways to amend the former defaulter provisions to apply only to individuals and entities that play a role in the applicant's financial responsibilities. If the Commission were to adopt DIRECTV/EchoStar's proposal to include only individuals or entities that are in a position to affect whether such applicants meet their auction-related financial responsibilities, how could it verify who would fit within such a category? In their request for waiver, DIRECTV/EchoStar suggest specifically not applying the rule to officers and directors of parent entities. Under such an option, however, what would prevent applicants from evading the rule by simply creating a shell company to be the auction applicant?

98. Another option would be to limit the former defaulter inquiry to those individuals or entities that an applicant must disclose on its short-form application pursuant to 47 CFR 1.2112. For non-DEs, this would limit the inquiry to the applicant and disclosable interest holders under 47 CFR 1.2112(a). For DEs, the Commission could, under this option, continue to include those individuals and entities that are attributable to the applicant under 47 CFR 1.2112(b)(iv) in any consideration of an applicant's form defaulter status. As such, the Commission recognizes that, while such an option may exclude some individuals and entities not directly related to an applicant's auction finances, it could also expand the scope of individuals or entities that must be considered in some respects. The Commission could limit the inquiry to, for example, the real party or parties in interest in the applicant or application, which must be disclosed pursuant to 47 CFR 1.2112(a)(1). Would this option capture the individuals and entities that are in a position to affect whether an applicant meets its auction-related financial responsibilities? Would excluding officers and directors not otherwise covered by 47 CFR1.2112(a)(1) be inconsistent with the Commission's policy to attribute them for purposes of evaluating eligibility for designated entity bidding credits in light of their potential ability to influence the management or operation of the applicant?

99. Finally, the Commission seeks comment as to other possible ways to limit the scope of the former defaulter rule. For example, the Commission could define the rules to include only defaults or delinquencies related to its auction payments, or defaults or delinquencies on debt owed only to the Commission as opposed to those owed on other government non-tax debt, such as student loans. The Commission notes, however, that such further limitations may not be necessary given the other limitations that it proposes.

B. Commonly Controlled Entities

100. The Commission proposes to codify an established competitive bidding procedure that prohibits the same individual or entity from filing more than one short-form application. Additionally, the Commission proposes a new rule that would prevent entities that are exclusively controlled by a single

individual or set of individuals from qualifying to bid on licenses in the same or overlapping geographic areas in a specific auction on more than one short-form application.

101. **Background**. The Commission's competitive bidding procedures have long prohibited the same individual or entity from submitting multiple short-form applications in any auction. This restriction prevents duplicative filings and may avert anticompetitive bidding behavior.

102. There is currently no similar procedure for commonly controlled entities. The competitive bidding rules and procedures currently contain no explicit prohibition on commonly controlled entities participating in the same auction and bidding on the same licenses. Several years ago, the Commission declined to set aside the results of an auction based on allegations relating to the participation of separate applicants that were commonly controlled. In that decision, the Commission acknowledged that auction participation by commonly controlled applicants could serve legitimate business purposes if such entities have different business plans, financing requirements, or marketing needs; however, it noted that there could be risks inherent in allowing commonly controlled bidders to participate in an auction. See Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., Memorandum Opinion and Order, 25 FCC Rcd 4036 (2010).

103. **Discussion.** The Commission proposes to amend its competitive bidding rules to codify its restriction on the filing of multiple auction applications by the same individual or entity and to adopt a new rule that would prevent entities that are controlled exclusively by the same single individual or set of individuals from qualifying to bid based on multiple auction applications for the same or overlapping geographic license areas. By proposing these amendments to its Part 1 competitive bidding rules, the Commission seeks to improve the transparency and efficiency of the auction process, by making clearer who the qualified bidders actually are and ensuring against the potential for anticompetitive auction behavior.

104. Duplicate auction applications. The Commission proposes to amend 47 CFR 1.2105 to prohibit the same individual or entity from filing more than one short-form application for an auction. The Commission observes that in contexts other than competitive bidding, its rules already limit repetitious or conflicting applications. Prohibiting the same individual or entity from filing multiple applications to participate in an auction protects the Commission against the burden of duplicative, repetitious or conflicting applications. Moreover, in this context, such applications raise potential concerns that duplicate filers may be able to manipulate the auction process—using, for example, identical bids or multiple activity waivers—to pursue potentially anticompetitive ends. The Commission seeks comment on this proposal. Are there any specific reasons the Commission should allow for the filing of more than a single short-form application from the same individual or entity? Commenters should describe any public interest benefits to support their positions.

105. Applications by entities exclusively controlled by the same individual or set of individuals. The Commission also proposes to adopt a new rule to provide that where entities are under the common, exclusive control of a single individual or set of individuals (i.e., a single individual or same set of individuals is the exclusive controlling interest of more than one entity) only one short-form application from such entities could become qualified to participate with respect to any particular geographic license area or overlapping areas. In defining the entities that would be subject to this rule, the Commission proposes to use the concepts of "control" or "controlling interest" from 47 CFR 1.2110, which also applies by its terms to DEs. Even when applicants are not identical, if more than one applicant is under the exclusive control of a single individual or set of individuals, such common control may allow the controlling individual or set of individuals to attempt to gain advantages in the bidding process based on certain coordinated bidding actions (e.g., tied bids, activity waivers). While such entities may have different business plans, financing, accounting, non-controlling interest holders or minority investors, if they are under exclusive control of a single individual or set of individuals, under the Commission's proposal those entities could not become qualified to bid in an auction with respect to the same or

overlapping geographic license areas. The Commission seeks comment on this proposal and on specific alternatives to address its concerns.

106. Multiple applicants under the common control of a single individual or set of individuals may coordinate their bidding actions in ways not available to a single bidder, and may, in some cases, derive some advantage from doing so. For example, such multiple applicants would have more activity waivers to use to ensure that the auction remains open, or would be able to submit identical bids on a license in ways intended to exploit auction bidding procedures. In addition, such multiple applicants could potentially coordinate their bidding to gain some advantage in the context of random tie-breakers or through increasing the bidding activity on a single license in order to raise minimum acceptable bids more quickly through application of the exponential smoothing formula.

107. Further, the mere presence of commonly controlled applicants making identical bids in a single auction may damage the transparency of the auction process. For example, the placing of multiple identical bids by commonly controlled applicants may mislead other bidders about the extent of bidding competition, especially in an anonymous bidding auction where competitors are unable to discern whether bids are placed by commonly controlled applicants or independent competitors. The Commission anticipates that these and other potentially problematic behaviors could be curbed by requiring such applicants to participate as a single applicant with respect to any particular geographic license area or overlapping areas.

108. Do commenters share the Commission's concern that the participation of commonly controlled applicants in an auction potentially undermines evenhandedness and transparency in the auction process? Commenters opposing the Commission's proposals should indicate how codifying its existing auction procedure and/or adopting its new proposed rule would harm the efficiency or undermine the competitiveness of the Commission's current auction process. The Commission notes that to the extent that the commonly controlled entities have an interest in holding licenses won at auction separately, such entities might consider assigning the

licenses to related entities in the secondary market. Are there legitimate business reasons for filing these types of applications that the Commission has failed to consider that could be undermined by its proposal?

C. Joint Bidding

109. The Commission initiates a review of its rules and policies governing joint bidding and other arrangements in order to ensure that they fulfill its statutory objectives, given the changes in the mobile wireless marketplace since the Commission's initial adoption of its bidding rules two decades ago, and the increasing importance of spectrum for service providers to meet consumer demand for mobile wireless services. The Commission's goal in reviewing these rules and policies is to ensure that they preserve and promote competition in the mobile wireless marketplace and facilitate competition among bidders at auction, while providing potential bidders with greater clarity regarding the types of joint bidding arrangements that would be permissible.

110. Consistent with the Commission's commitment in the Mobile Spectrum Holdings Report and Order, it seeks to develop a record on how joint bidding and other arrangements affect competition in the mobile wireless marketplace, and the appropriate policies and procedures for substantive competitive review of joint bidding. Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, 79 FR 39977, Jul. 11, 2014 (Mobile Spectrum Holdings Report and Order). In that regard, the Commission notes that the scope of its inquiry here—unlike its other proposals in the NPRM applies only to joint bidding and other arrangements in auctions of licenses likely to be used for mobile telephony/mobile broadband services.

111. To best serve the public interest and preserve and promote robust competition, the Commission also proposes to adopt policies tailored to the characteristics of joint bidding and other arrangements and the likely competitive effects on the mobile wireless marketplace. Specifically, the Commission tentatively concludes that it would best serve the public interest to retain the current rules governing joint bidding arrangements among non-nationwide providers and to prohibit joint bidding

arrangements among nationwide providers. In addition, the Commission seeks comment on whether it should revise any of its current rules as applied to arrangements between nationwide providers and other entities, including its rules governing short-form applications. Further, the Commission seeks comment on whether any revisions to its rules governing long-form applications are necessary in light of its consideration of the potential harms and benefits of joint bidding and other arrangements.

112. **Background**. Rules and Policies Governing Joint Bidding. In 1994, the Commission adopted rules to serve the objectives of the Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders. See Implementation of Section 309(j) of the Communications Act—Competitive Bidding, 59 FR 22980, May 4, 1994 (Competitive Bidding Second Report and Order). The Commission also sought to help ensure that the government receives a fair market price for the use of the spectrum. In the Competitive Bidding Second Report and Order, the Commission further concluded that adopting safeguards to prevent collusive behavior among bidders would help ensure prompt delivery of services (including to rural areas), rapid deployment of new services and technologies, development of competitive markets, and wide access to a variety of services. Moreover, the Commission observed that collusive conduct among bidders could prevent the formation of a competitive post-auction market structure. At the same time, the Commission recognized that if anticollusion rules are too strict or are not sufficiently clear, they could prevent the formation of efficiency enhancing bidding consortia that pool capital and expertise and reduce entry barriers for small firms and other entities that might not otherwise be able to compete in the auction process.

113. The Commission concluded that, in most cases, the number of bidders likely to participate in the auction, auction design safeguards, and existing antitrust law would effectively deter collusion. However, the Commission also adopted certain measures to help ensure collusion would not jeopardize the competitiveness of the auction process. Importantly, the

Commission found these safeguards sufficient in the context of other competition-related determinations it had made regarding the initial licensing of Broadband PCS licenses through competitive bidding. Specifically, the Commission had set a limit on the amount of broadband PCS spectrum that the incumbent cellular licensees in each market could acquire at the upcoming PCS auctions as well as a separate limit on the amount of such spectrum that any bidder could acquire at the upcoming Broadband PCS auctions. In 1991, the Commission had adopted a cellular cross-interest rule that substantially limited any affiliation between the two cellular licensees in an area.

114. With relatively minor changes adopted since 1994, the Commission's current rules allow potential participants in a Commission auction, prior to the short-form application deadline, to enter into various kinds of agreements related to the licenses being auctioned as long as the applicants disclose on the short-form application on both the existence (but not the terms and conditions) of any joint bidding arrangements and the real-parties-in-interest to the application. After the short-form application deadline, applicants may not enter into any additional arrangements regarding the amount of bids, bidding strategies or particular licenses on which they will or will not bid, subject to certain limited exceptions, and may not communicate bidding information to other applicants for licenses in any of the same geographic areas unless those other applicant(s) were identified on the short-form application. Post-auction, winning bidders must disclose on the long-form application the specific terms, conditions, and parties involved in any agreement into which the applicant has entered, and the winning bidder must be the same entity that files the long-form application.

115. The Commission notes that it has always made clear with respect to its rules and policies governing joint bidding that conduct that is permissible under the Commission's Rules may be prohibited by the antitrust laws, review under which is subject to other and differing standards under the Sherman and Clayton Acts. Specifically, joint bidding arrangements under section 1 of the Sherman Act are prohibited if they constitute a "contract, combination . . . , or conspiracy, in restraint of trade," whereas joint bidding arrangements subject to section 7 of the Clayton Act are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly." The Commission's auction

procedures public notices for specific auctions caution that compliance with the disclosure requirements of 47 CFR 1.2105(c) will not insulate a party from enforcement of the antitrust laws. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may be subject to forfeiture, prohibition from auction participation, and other sanctions.

116. Evolution of the Mobile Wireless Marketplace. The Commission adopted these joint bidding rules 20 years ago when the mobile wireless industry was at a nascent stage: For example, at the end of 1994, the nationwide penetration rate for mobile wireless service was approximately 9 percent, compared to 106 percent at the end of 2011. Moreover, when the Commission adopted its joint bidding rules in 1994, it had yet to hold even the first of the numerous auctions it has conducted in its history of licenses likely to be used for mobile telephony/mobile broadband services.

117. The Commission's competitive bidding rules, as adopted in 1994, reflected the developing nature of the mobile wireless industry, as the Commission sought to promote economic growth in the "new wireless services" and to enhance access to telecommunication services by encouraging broad participation in the provision of spectrum-based services and ensuring that spectrum-based services are available to a wide range of consumers. In 1998, the Commission observed again that much of the mobile telephone market was still in its infancy.

118. Since 1994, and particularly in the past decade, the marketplace has changed significantly. It is no longer nascent. Consumer demand for wireless services has exploded, with the industry focus changing from the provision of mobile voice services to the provision of mobile broadband services. The adoption of smartphones and tablet computers, and the widespread use of mobile applications, combined with the increasing deployment of high-speed 3G and now 4G technologies, is driving significantly more intensive use of mobile networks and increasing providers' need for spectrum. In addition, during the past decade, the wireless marketplace has undergone significant consolidation, with a reduction from six to four

nationwide providers, an increase in the market share of the major providers, and a smaller number of regional and local providers. Indeed, by December 2013, the top four facilities-based nationwide providers had combined market share of approximately 97 percent of subscribers. See UBS Investment Research, US Wireless 411: Version 51, Mar. 18, 2014, Figure 21 at 14.

119. Consistent with the evolution of the mobile wireless marketplace and the Commission's statutory directives and policy goals, it continues to strive to adopt policies to preserve and promote consumer choice and competition among multiple service providers, promote the efficient and intensive use of spectrum, maximize economic opportunity, and foster the deployment of innovative technologies. For instance, the Commission recently concluded in the Mobile Spectrum Holdings Report and Order that any mobile spectrum limit on the initial licensing of a spectrum band through competitive bidding should be articulated and applied prior to the start of the auction in order to provide bidders greater certainty regarding how many licenses they would be permitted to acquire.

120. In the Mobile Spectrum Holdings Report and Order, the Commission established a market-based spectrum reserve for the Incentive Auction of up to 30 megahertz in each license area, recognizing that the Incentive Auction represents a once-in-a-generation opportunity to auction significant amounts of greenfield low-band spectrum. The Commission limited nationwide providers from bidding on reserved spectrum in Partial Economic Areas (PEAs) where they hold 45 megahertz or more of suitable and available below-1-GHz spectrum. By contrast, the Commission permitted regional and local service providers to bid on reserved spectrum in all PEAs, observing that non-nationwide service providers present a significantly lower risk of effectively denying their rivals access to low band spectrum to foreclose competition or to raise rivals' costs because of their relative lack of resources. At the same time, in the Mobile Spectrum Holdings Report and Order, the Commission placed no limitation on the amount of spectrum that bidders could acquire in the AWS-3 auction.

121. In the Mobile Spectrum Holdings Report and Order, the Commission also stated it would consider in a further notice of proposed rulemaking possible changes to certain auction rules relating to joint bidding arrangements and strategies in the Incentive Auction. The Commission here undertakes a

reexamination of its auction rules on these issues, including but not limited to their application in the Incentive Auction.

122. **Discussion**. In light of the changes in the mobile wireless marketplace since the Commission adopted the current joint bidding rules 20 years ago, the Commission reviews its rules on joint bidding and other arrangements to ensure that the potential competitive harms that may arise out of such arrangements do not outweigh any public interest benefits. To best serve the public interest and preserve and promote robust competition into the foreseeable future, the Commission seeks to further its statutory objectives by adopting policies tailored to the type of arrangement and its likely competitive effect on the conduct of the auction and on the mobile wireless marketplace. Specifically, the Commission tentatively concludes that it would serve the public interest to retain the current rules governing joint bidding and other arrangements among non-nationwide providers, but to prohibit certain joint bidding and other arrangements among nationwide providers. In addition, the Commission seeks comment on whether the Commission should revise any of its current rules as applied to arrangements between nationwide providers and other entities, including its rules governing short-form applications. Further, the Commission seeks comment on whether any revisions to its rules governing long-form applications are necessary in light of its consideration of the potential harms and benefits of joint bidding and other arrangements.

123. For purposes of this proceeding, the Commission defines "joint bidding and other arrangements" to include any bidding consortia, joint venture, partnership, or agreement, understanding, or other arrangement entered into relating to the competitive bidding process, including any agreement relating to post-auction market structure or operation. In light of the Commission's focus on promoting and preserving competition, it considers this definition to include not only arrangements among entities that apply to bid in an auction, but also arrangements between entities that apply to bid in an auction and those entities that do not,

insofar as such arrangements have the potential to affect competition in the mobile wireless telephony/mobile broadband marketplace.

124. Competitive Effects of Joint Bidding and Other Arrangements. When assessing the competitive effects of joint bidding and other arrangements, the Commission must ensure that its policies and rules facilitate access to spectrum in a manner that promotes competition to the benefit of consumers. As the Commission has found in the Mobile Spectrum Holdings Report and Order, in order for there to be robust competition, multiple competing service providers must have access to or hold sufficient spectrum to be able to enter the marketplace or expand output rapidly in response to any price increase, reduction in quality, or other competitive change that would harm consumer welfare.

125. Joint conduct or competitor collaboration that is more limited in scope and does not result in a full integration of economic activity does not end all competition between participants post bidding and is analyzed differently from joint ventures that fully integrate the participants downstream competition. The latter, in certain circumstances, may be properly analyzed as a merger. Either type of competitor collaboration however may result in procompetitive benefits and/or anticompetitive effects.

126. Because some joint bidding and other competitor collaborations contemplate competition among participants post auction, they raise the risk that the spectrum acquired through a winning bid will be allocated among the joint venture participants in a manner that could harm the public interest. Because the joint venture may be comprised of same market competitors, the arrangement may require proper safeguards to prevent the exchange of competitively sensitive price and output information, ensure independent decision making or otherwise avoid lessening competition among the participants in the downstream mobile wireless marketplace.

127. Joint bidding and other arrangements, however, also have the potential to result in procompetitive benefits if they enable participation in auctions by those otherwise without sufficient financial resources to bid, or otherwise reduce entry costs into a geographic area or enable the joint bidders to compete more robustly against other competitors in the marketplace. For example, the pooling

of capital resources could allow smaller providers to better exploit financial economies of scale and enter into bidding for geographic areas that otherwise would not have been accessible, which may be particularly important given the high capital costs of network deployment and spectrum acquisition.

128. The Commission seeks comment on the foregoing analysis. The Commission's public interest review of applications for assignment of licenses through competitive bidding generally encompasses a review of the competitive effects of such assignments. In light of the changing marketplace and consistent with the Commission's recent emphasis in the Mobile Spectrum Holdings proceeding on the need for clearly-defined rules prior to the auction on the licenses a bidder would be permitted to acquire, the Commission seeks comment on how best to conduct its competitive review of joint bidding arrangements going forward.

129. Given the potential benefits and harms of different types of arrangements, the Commission seeks comment on the rules and procedures that should govern its review of joint bidding and other arrangements entered into relating to the competitive bidding process, including any agreement relating to post-auction market structure or operation. In addition, the Commission seeks comment on whether the distinctions as to arrangements among non-nationwide providers, among nationwide providers, and between nationwide providers and other entities—provide an effective framework for addressing the relative harms and benefits of joint bidding arrangements in light of its goal of providing clearly-defined rules for potential bidders in auctions. Further, the Commission seeks comment on whether these rules or procedures should differ in instances in which it has adopted a mobile spectrum holding limit for the initial licensing of a particular spectrum band through competitive bidding and, if so, how the type of mobile spectrum holding limit and the statutory goals applicable to the particular auction should affect these rules and procedures.

130. For purposes of the joint bidding rules, the Commission proposes to define "nationwide" providers to include the providers in the U.S. with networks that cover a majority of

the population and land area of the country—currently, Verizon Wireless, AT&T, Sprint and T-Mobile—with other providers being considered "non-nationwide" providers. The Commission seeks comment on how this definition of nationwide providers should take into account entities partially owned by Verizon Wireless, AT&T, Sprint and T-Mobile. Should the definition include entities that are "affiliates" (as that term is defined in its rules for attributing revenues to small businesses) of the four providers, entities with spectrum holdings that would be attributable to these four providers (as defined by its mobile spectrum holdings rules), or a category of entities defined in some other manner?

131. Arrangements among Non-Nationwide Providers. Considering the current competitive landscape and the need for access to spectrum by non-nationwide providers, the Commission tentatively concludes that its current rules are sufficient to prevent any potential competitive harm from outweighing the likely public interest benefits associated with allowing joint bidding and other arrangements among non-nationwide providers. For example, joint bidding and other arrangements among non-nationwide providers can better overcome the challenging capital costs of license acquisition to maintain or increase their competitive presence to the benefit of American consumers. In light of the relatively small size and scope of non-nationwide providers following substantial consolidation since the Commission's current rules were adopted, and the increased costs of spectrum and other capital expenditures necessary to provide mobile broadband service over large license areas, the Commission believes it is highly unlikely in most circumstances that such arrangements would lead to competitive harm or otherwise harm the public interest. Moreover, in the Mobile Spectrum Holdings Report and Order, the Commission observed that non-nationwide service providers presented a significantly lower risk of effectively denying their rivals access to spectrum in order to foreclose downstream competition or to raise rivals' costs because of their relative lack of resources. The Commission seeks comment on these views in connection with the competitive impact of joint bidding and other arrangements.

132. Commenters proposing any changes to the Commission's joint bidding rules for arrangements among non-nationwide providers should discuss why such changes are necessary to address particular competitive concerns and whether, on balance, such changes would ensure that the

procompetitive benefits and bidding flexibility arising out of its current rules remain in place. In addition, the Commission seeks comment on whether any types of arrangements between non-nationwide service providers and potential new entrants would warrant closer examination of the competitive effects and, if so, whether any changes to its joint bidding rules are necessary to address any such scenarios.

133. Arrangements among Nationwide Providers. In contrast, the Commission tentatively concludes that joint bidding arrangements between or among nationwide providers likely would raise competitive concerns, as these arrangements would have the potential to serve as a vehicle for anticompetitive conduct by altering post auction incentives to compete, and thus, would outweigh any public interest benefits from such arrangements such as the attainment of scale or scope economies. As the Commission noted in the Mobile Spectrum Holdings Report and Order, the mobile wireless marketplace today is characterized by factors—such as high market concentration, high margins and high barriers to entry—that increase the potential for anticompetitive conduct. In particular, by year end 2013, the top four facilities-based nationwide providers had a combined market share, as measured by the number of subscribers or mobile wireless service revenues, of at least 97 percent.

134. Moreover, in light of these factors, joint bidding arrangements among nationwide providers would reduce the participants' ability or incentive to compete independently, which would lessen competition in the downstream mobile wireless marketplace and could harm American consumers by increasing the price or reducing the quality of mobile wireless services. Because of these greater risks of public interest harms, the Commission believes it is unlikely that the potential benefits of joint bidding arrangements among nationwide providers would outweigh these risks. The Commission seeks comment on this analysis.

135. Further, as the Commission has emphasized recently, it is important to provide bidders with certainty and clarity in advance of the start of an auction regarding whether any limitations on their ability to acquire licenses would apply. In that regard, the Commission

observes that post-auction enforcement of antitrust law—envisioned as a safeguard by the Commission in 1994—may not be as well suited to preventing anti-competitive joint bidding arrangements as the bright-line prohibition the Commission proposes herein. In addition, the Commission notes that, while in 1994 bright-line prohibitions on certain types of bidding arrangements might not have been ideally suited for an industry at a nascent stage, the mobile wireless industry today is much more mature than it was in 1994. Moreover, the limit set by the Commission at that time on the amount of broadband PCS spectrum that the two incumbent cellular licensees in each market could acquire at the auctions effectively eliminated the incentives of those providers to enter into joint bidding arrangements, which would have raised significant competitive concerns.

136. Accordingly, the Commission tentatively concludes that it would best serve the public interest at this time to have a bright-line rule that would prohibit joint bidding and other arrangements among nationwide providers, including agreements to participate in an auction through a newly formed joint entity, given that such arrangements have a greater potential to harm the public interest by negatively affecting the competitive bidding process and downstream competition in the provision of mobile wireless services. The Commission seeks comment on the costs and benefits of prohibiting applications to participate in an auction that involve joint bidding and other arrangements, such as a new joint venture, between two or more nationwide providers. The Commission notes that its tentative conclusion to prohibit joint bidding and other arrangements between two nationwide providers would also include prohibiting arrangements among two nationwide providers, together with other entities.

137. Arrangements between A Nationwide Provider and Other Entities. The Commission seeks comment on what policies and procedures should apply to bidding arrangements between a single nationwide provider and other entities, either non-nationwide providers or potential new entrants, in order to promote competition. Under what circumstances would these arrangements raise competitive concerns? Under what circumstances would these arrangements likely result in public interest benefits, such as the expansion of mobile wireless services in additional geographic areas and increasing access to

capital by more applicants to acquire spectrum? Should any limits apply to these types of arrangements, or should the Commission continue to review these types of arrangements on a case-by-case basis?

138. If the Commission reviews these types of arrangements on a case-by-case basis, what process and factors should it use in assessing the competitive implications? The Commission's current approach for reviewing joint ventures in the context of assignment or transfer of licenses involves the determination of the appropriate market definitions and the likelihood of public interest harm from the incentive and ability of the joint venture to act anticompetitively, either unilaterally or in concert with other service providers. Should a similar approach apply to its competitive review of joint bidding arrangements? How should a case-by-case approach to review joint bidding arrangements be designed to provide clarity to potential bidders? What are the costs and benefits of Commission review of joint bidding arrangements on a case-by-case basis, including the administrative cost and burden to make such a case-by-case determination prior to the start of an auction?

139. To make case-by-case determinations regarding arrangements between nationwide providers and other entities, should the Commission modify any of its current rules that apply to the pre-auction review process? In particular, should the terms and conditions of such joint bidding arrangements be disclosed prior to the auction, in the short-form application, or even prior to the filing of that application? If so, are there changes to its rules or procedures that would be necessary to protect any confidential information? If the deadline for disclosure of terms and conditions is in advance of the short-form application deadline, how would this process be affected by the rules prohibiting certain types of communications? Commenters on this issue should include any costs or benefits to changing the rules and procedures regarding the disclosure of a joint bidding requirement.

140. If the Commission were to make a determination that the potential harms associated with a particular joint bidding arrangement outweigh the potential benefits, what

remedies should it impose either at the short-form application stage or the long-form application stage? For example, should the Commission find that a short-form application is unacceptable or incomplete and bar the applicant from bidding in the auction? Should it find that an applicant at the long-form stage is unqualified to hold the license and deemed in default? Commenters proposing particular remedies should discuss the costs and benefits of such remedies.

141. Other Issues. The Commission's current rules require the entity that filed the short-form application to be the same entity that files the long-form application seeking consent to acquire a new license. The Commission's public interest review of long-form applications generally encompasses a review of the competitive effects of such assignments, as would its review of a secondary market transaction to disseminate licenses from a joint entity to its individual members. The Commission seeks comment on whether it is necessary to modify its current joint bidding rules, standards, and procedures that apply to the post-auction review of long-form applications or review of a secondary market transaction to disseminate licenses from a joint entity to its individual members, in order to promote competition in the mobile wireless marketplace.

142. Further, the Commission proposes to clarify a provision under 47 CFR 1.2107(g) which permits DEs to participate in an auction as a non-legally-recognizable consortium, with a requirement that each member of the consortium file separate applications for licenses covered by the winning bids of the consortium. This provision is applicable only in the DE context, where there are special provisions regarding the attribution of revenues for purposes of qualifying for bidding credits. The Commission seeks comment on this clarification.

D. Miscellaneous Part 1 Revisions

143. **Background**. Part 1, Subpart Q, of the Commission's rules generally governs competitive bidding proceedings to assign spectrum licenses. The Commission proposes changes to two of its part 1, Subpart Q, rules, 47 CFR 1.2111 and 1.2112. The Commission also intends, when it resolves the issues

raised in the Competitive Bidding NPRM, to resolve long standing petitions for reconsideration to its part 1 competitive bidding rules.

144. **Discussion**. 47 CFR 1.2111. The Commission proposes to repeal the first two paragraphs of 47 CFR 1.2111. It proposes to repeal 47 CFR 1.2111(a), under which applicants for assignments or transfers during the first three years of a license term must provide the Commission with detailed contract and marketing information. The Commission believes that this requirement places a burden on licensees without a corresponding benefit to the Commission or the public. The Commission also proposes to repeal 47 CFR 1.2111(b), a never-used unjust enrichment payment requirement for broadband PCS C and F block set-aside licenses.

145. 47 CFR 1.2112. The Commission's proposed changes to this rule would clarify the auction application requirements for reporting an entity's percentage ownership in the applicant and in FCC-regulated entities. The Commission proposes further changes to specify application requirements for bidding consortia. Finally, the Commission proposes to correct two errors in the rule caused by the inadvertent substitution of an incorrect paragraph in the Code of Federal Regulations publication of the rule for the correct one published in the Federal Register summary of the DE Second Report and Order. Compare 71 FR 26245, 26253, May 4, 2006, with 47 CFR 1.2112, Oct. 1, 2006. The first error was the addition of a requirement that DE short-form applicants list and summarize all their agreements that support their DE eligibility, a requirement that the Commission intended to apply only to long-form applicants. The Commission proposes to delete the requirement with respect to the short form. The second error was the deletion of a requirement that DE short-form applicants list the parties with which they have lease or resale arrangements for any of the DE applicants' spectrum licenses. The Commission proposes to reinstate this requirement.

146. The Commission seeks comment on these proposals.

E. Initial Regulatory Flexibility Analysis

147. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in the Competitive Bidding NPRM. Written public comments are requested for this IRFA. Comments to the IRFA must be identified as responses to the IRFA and filed by the deadlines for comments on the Competitive Bidding NPRM in the Dates section. The Commission will send a copy of the Competitive Bidding NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

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

148. The NPRM proposes to: (1) Provide small businesses greater opportunity to participate in the provision of a wide range of spectrum-based services by modifying the Commission's eligibility requirements, updating the standardized schedule of small business sizes, and eliminating duplicative reporting requirements, while also seeking comment on strengthening the Commission's rules to prevent the unjust enrichment of ineligible entities; (2) Amend the Commission's former defaulter rule to balance concerns that the current rule is overly broad with the Commission's continued need to ensure that auction bidders are financially reliable; (3) Codify an established competitive bidding procedure that prohibits the same individual or entity from becoming qualified to bid on the basis of more than one short-form application in a specific auction; (4) Prevent entities that are exclusively controlled by a single individual or set of individuals from becoming qualified to bid on overlapping licenses based on more than one short-form application in a specific auction; and, (5) Retain the current rules governing joint bidding arrangements among non-nationwide providers and prohibit joint bidding arrangements among nationwide providers. The NPRM also provides notice of the Commission's intention to resolve long standing petitions for reconsideration and proposes necessary clean-up revisions to the Commission's part 1 competitive bidding rules.

149. With respect to small businesses, the Commission's proposals seek to update its rules to reflect that small businesses need greater opportunities to gain access to capital so that they may have an

opportunity to participate in the provision of spectrum-based services in today's communications marketplace. In the past decade, the rapid adoption of smartphones and tablet computers and the widespread use of mobile applications, combined with the increasing deployment of high-speed 3G and now 4G technologies, have driven significantly more intensive use of mobile networks. This progression from the provision of mobile voice services to the provision of mobile broadband services has increased the need for access to spectrum. In addition, in the past decade, the number of small and regional mobile wireless service providers has significantly decreased, yet regional and local service providers continue to offer consumers additional choices in the areas they serve. The Commission anticipates that by revising its rules to allow small businesses to take advantage of the same opportunities to utilize their spectrum capacity and gain access to capital as those afforded to larger licensees, the Commission can better achieve its statutory directives. Nonetheless, the Commission remains mindful of its obligation to prevent unjust enrichment of ineligible entities.

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

150. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 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.

151. Small Businesses, Small Organizations, and Small Governmental Jurisdictions. If adopted, the NPRM's proposals may, over time, affect small entities that are not easily categorized at present. The Commission therefore describes three comprehensive, statutory small

entity size standards under 5 U.S.C. 601(4). First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA. In addition, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 2007, there were approximately 1,621,315 small organizations. Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." U.S. Census Bureau (hereinafter, Census Bureau or Census) data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States. The Commission estimates that, of this total, as many as 88,506 entities may qualify as "small governmental jurisdictions." Thus, the Commission estimates that most governmental jurisdictions are small.

152. Licenses Assigned by Auction. The changes and additions to the Commission's rules proposed in the NPRM are of general applicability to all auctionable services. Accordingly, the 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 spectrum auctions is unknown. Moreover, the number of small businesses that have participated in prior spectrum auctions has varied. As a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of changes in control, changes in material relationships or assignments or transfers, unjust enrichment issues are implicated.

153. Wireless Telecommunications Carriers (except satellite). The Census Bureau defines this category to include establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services. The SBA has developed a small business size standard for Wireless Telecommunications Carriers (except satellite). Under the SBA's standard, a

business is small if it has 1,500 or fewer employees. For this category, Census data for 2007 show that there were 1,383 firms that operated for the entire year. Of this total, 1,368 firms (approximately 99%) had employment of 999 or fewer employees and only 15 (approximately 1%) had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by the NPRM's proposed actions.

154. Broadband Radio Service and Educational Broadband Service. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. The BRS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, based on the Commission's review of licensing records, it estimates that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent BRS licensees do not meet the small business size standard). After adding the number of small business auction licensees to the number of incumbent licensees not already counted, there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The

Commission established three small business size standards that were used in Auction 86: (i) an entity with attributed average annual gross revenues that exceeded $15 million and do not exceed $40 million for the preceding three years was considered a small business; (ii) an entity with attributed average annual gross revenues that exceeded $3 million and did not exceed $15 million for the preceding three years was considered a very small business; and (iii) an entity with attributed average annual gross revenues that did not exceed $3 million for the preceding three years was considered an entrepreneur. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses. The Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service.

155. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based educational broadcasting services. Since 2007, the Census Bureau has defined Wired Telecommunications Carriers as follows: "This industry comprises [of] establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry. The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 3,188 firms that operated for the duration of that year. Of those, 3,144 had fewer than 1,000 employees, and 44 firms had more than 1,000 employees. Thus under this category and the associated small business size standard, the majority of such firms can

be considered small. In addition to Census data, the Commission's Universal Licensing System indicates that as of July 2014, there are 2,006 active EBS licenses. The Commission estimates that of these 2,006 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.

156. Television Broadcasting. As defined by the Census Bureau, this category "comprises [of] establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public." The SBA has created the following small business size standard for Television Broadcasting firms: those having $38.5 million or less in annual receipts. The Commission has estimated the number of licensed commercial television stations to be 1,387. In addition, according to Commission staff review of the BIA/Kelsey, LLC's Media Access Pro Television Database on July 30, 2014, about 1,276 of an estimated 1,387 commercial television stations (or approximately 92 percent) had revenues of $38.5 million or less. The Commission therefore estimates that the majority of commercial television broadcasters are small entities.

157. The Commission notes, however, that in assessing whether a business concern qualifies as small, business (control) affiliations must be included. The Commission's estimates, therefore, likely overstates the number of small entities that might be affected by the NPRM's proposals because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

158. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 395. These stations are non-profit, and therefore considered to be small entities.

159. There are also 2,460 LPTV stations, including Class A stations, and 3,838 TV translator stations. Given the nature of these services, the Commission will presume that all of these entities qualify as small entities under the above SBA small business size standard.

160. Radio Broadcasting. The SBA defines a radio broadcast station as a small business if such station has no more than $38.5 million in annual receipts. As defined by the Census Bureau, business concerns in this industry are those "primarily engaged in broadcasting aural programs by radio to the public." According to review of the BIA/Kelsey, LLC's Media Access Pro Radio Database as of July 30, 2014, about 11,332 (or about 99.9 percent) of 11,343 commercial radio stations have revenues of $38.5 million or less and thus qualify as small entities under the SBA definition. The Commission notes, however, that, in assessing whether a business concern qualifies as small, business (control) affiliations must be included. This estimate, therefore, likely overstates the number of small entities that might be affected, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

161. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

3. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

162. Eligibility for Bidding Credits. The NPRM proposes changes to the Commission's process for evaluating small business eligibility for bidding credits. In particular, the NPRM proposes to repeal the AMR rule and tentatively concludes that the Commission should re-examine the need for the related decade-old policy that has limited small businesses seeking bidding credits to providing primarily retail, facilities-based service directly to the public with each of their licenses. Under the AMR, a small business applicant or licensee must automatically attribute to itself the gross revenues of any entity with which it has an "attributable material relationship." An applicant or licensee has an AMR when it has one or more agreements with any individual entity for the lease (under either spectrum manager or de facto transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license held by the applicant or licensee. The NPRM seeks comment on the proposal to repeal the AMR rule, and the Commission's tentative conclusions regarding its need to re-evaluate its small business policy. Alternatively, the NPRM also seeks comment on retaining the Commission's small business policy and/or some variation of the AMR rule. For instance, the NPRM seeks comment on whether the Commission should adopt a rule with some other spectrum capacity use limit that would render an applicant ineligible for all current and future benefits.

163. The NPRM also proposes to adopt a more flexible approach under which the Commission would evaluate small business eligibility on a license-by-license basis, using a two-pronged test. The first prong would evaluate whether an applicant meets the applicable small business size standard and is therefore eligible for benefits. To evaluate small business eligibility, the NPRM proposes to apply the Commission's existing controlling interest standard and affiliation rules to determine whether, an entity should be attributable based on whether that entity has de jure or de facto control of, or is affiliated with, the applicant's overall business

venture. Once the first prong has been met, the Commission would evaluate eligibility under the second prong. Under the second prong, the NPRM proposes to determine an entity's eligibility to retain small business benefits on a license-by-license basis, based on whether it has maintained de jure and de facto control of the license. Under this proposed license-by-license approach, an entity will not necessarily lose its eligibility for all current and future small business benefits solely because of a decision associated with any particular license. Instead, while a small business might incur unjust enrichment obligations if it relinquishes de jure or de facto control of any particular license for which it claimed benefits, so long as the revenues of its attributable interest holders (i.e., the DE's affiliates, its controlling interests, and the affiliates of its controlling interests) continue to qualify under the relevant small business size standard, it could still retain its eligibility to retain current and future benefits on existing and future licenses. The NPRM seeks comment on the proposed two-pronged approach to evaluate attribution and establish eligibility for small business benefits.

164. The NPRM also proposes to modify the Commission's secondary market rules to comport with the Commission's proposed approach to assessing small business eligibility. Specifically, the NPRM proposes to modify the language in 47 CFR 1.9020(d)(4) to remove the conflicting reference to the control standard of 47 CFR 1.2110 in order to make clear that small business lessors are fully subject to the same de facto control standard for spectrum manager leasing that applies to all other licensees. This modification should clarify that 47 CFR 1.9010 alone defines whether a licensee, including a small business, retains de facto control of the spectrum that it leases to a spectrum lessee in the context of spectrum manager leasing.

165. The NPRM seeks comment on whether any changes are appropriate to the Commission's unjust enrichment rules that provide additional safeguards by requiring repayment of small business benefits where an applicant loses eligibility for any reason. Specifically, the NPRM invites comment on, among other things, whether to adjust the Commission's current five year unjust enrichment schedule either in terms of the duration of the requirements or the percentages of the repayment schedule. The NPRM also seeks comment on how best the Commission can continue to scrutinize applications and

proposed transactions to ensure that only eligible entities receive benefits, while not undermining the Act's directive to ensure that DEs are given the opportunity to participate in the provision of spectrum-based services. Specifically, the NPRM seeks comment on adopting a 10 year unjust enrichment repayment schedule similar to the one it adopted in 2006, but vacated by the Third Circuit for lack of notice.

166. Bidding Credits. The NPRM examines the primary way that the Commission facilitates participation by small businesses at auction through its bidding credit program. Bidding credits operate as a percentage discount on the winning bid amounts of a qualifying small business. By making the acquisition of spectrum licenses more affordable for new and existing small businesses, bidding credits facilitate their access to needed capital. The Commission establishes eligibility for bidding credits for each auctionable service, adopting one or more definitions of the small businesses that will be eligible. The Commission's small business definitions have been based on an applicant's average annual gross revenues over a three-year period. The NPRM proposes to increase the general schedule of size standards in its part 1 rules, measured by gross revenues, for purposes of determining an entity's eligibility for a bidding preference. Specifically, the NPRM proposes to revise the standardized schedule in 47 CFR 1.2110(f) as follows: (1) Businesses with average annual gross revenues for the preceding three years not exceeding $4 million would be eligible for a 35 percent bidding credit; (2) Businesses with average annual gross revenues for the preceding three years not exceeding $20 million would be eligible for a 25 percent bidding credit; and (3) Businesses with average annual gross revenues for the preceding three years not exceeding $55 million would be eligible for a 15 percent bidding credit. The NPRM also asks about alternative methods for setting new gross revenues thresholds.

167. The NPRM seeks comment on whether to adopt a small business size standard based on criteria other than gross revenues, and proposes to continue the Commission's practice of evaluating which small business definitions will apply on a service-by-service basis, based

upon associated capital requirements for a particular service. In addition, the NPRM seeks comment on whether to increase the bidding credit percentages (i.e., discount amounts) applicable to associated small business categories. The NPRM also seeks comment on whether any revisions the Commission adopts in this proceeding to its part 1 schedule of small business size standards and associated bidding credit percentage levels should apply to the specific small business definitions and bidding credit percentages the Commission previously adopted for specific services, and, if so, how such revisions would be implemented. The NPRM proposes that any new rules adopted in this proceeding would apply to the 600 MHz band spectrum licenses to be offered in the BIA. In the BIA proceeding, the Commission adopted a 15 percent bidding credit for small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding $40 million) and a 25 percent bidding credit for very small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding $15 million). Accordingly, the NPRM proposes to adopt, for the 600 MHz band, increases in the gross revenues thresholds associated with the 25 percent and 15 percent bidding credits that are consistent with the increased gross revenues thresholds proposed in the NPRM for the standardized schedule in the Commission's part 1 competitive bidding rules. The NPRM also seeks comment on whether the Commission should adopt a third small business bidding credit tier for the 600 MHz band that would provide a 35 percent bidding credit to businesses with average gross revenues for the preceding three years not exceeding $4 million.

168. Further, the NPRM seeks comment on the Commission's ability to consider bidding preferences for other types of DEs, entities that serve unserved/underserved areas or areas with persistent poverty, as well as persons or entities that have overcome disadvantages. The NPRM asks commenters to specifically address the statutory authority and judicial scrutiny issues that may limit the Commission's ability to entertain recommendations to alter the focus of its current bidding preferences by offering bidding preferences to entities based on other criteria than business size.

169. The Commission expects that the questions raised in the NPRM will provide a meaningful opportunity to evaluate whether its bidding credit program continues to achieve the Commission's

objectives. To facilitate the Commission's review, the NPRM seeks concrete, specific, data-driven feedback by commenters. In addition, the NPRM invites commenters to suggest other creative ideas that would promote the Commission's statutory objectives, but emphasizes that for any such proposals it is imperative to provide ample supporting evidence.

170. DE Reporting Requirements. The NPRM proposes to eliminate the DE annual reporting requirement in 47 CFR 1.2110(n) and questions whether the value of the information provided in those reports outweighs the regulatory burden that the reporting obligation places on small businesses. The NPRM seeks comment on this proposal. Among other things, the NPRM asks if the Commission adopts the proposal to eliminate this annual reporting requirement, whether it should amend its rule for reporting eligibility events to require that a small business must list and summarize all existing agreements to provide context each time it reports a new eligibility event.

171. MMTC White Paper Requests. In February 2014, MMTC submitted a White Paper detailing several policy recommendations to advance licensing of spectrum to minority- and women-owned businesses. The NPRM raises and addresses several of these issues and seeks comments on the other proposals that are not otherwise addressed in the NPRM, and to the extent that they relate to the Commission's competitive bidding rules. The NPRM observes that certain proposals appear to be outside the scope of this proceeding and others may not be needed in light of other changes proposed in the NPRM. Toward that end, the NPRM tentatively concludes that the following MMTC proposals are outside the scope of this proceeding, which is focused on the Commission's competitive bidding rules, and thus will not be addressed in the NPRM: (1) incorporating diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions and secondary market spectrum transactions; and (2) supporting increased funding for and statutory amendments regarding the Telecommunications Development Fund.

172. Former Defaulter Rule. The NPRM proposes changes to the Commission's former defaulter rule to balance concerns that the current rule is overly broad with the

Commission's continued need to ensure that auction bidders are financially reliable. The NPRM seeks comment on revising the rule to narrow the scope of the defaults and delinquencies that will be considered in determining whether or not an auction participant is a former defaulter. Specifically, the NPRM proposes to exclude any cured default on any Commission license or delinquency on any non-tax debt owed to any federal agency for which any of the following criteria are met: (1) the notice of the final payment deadline or delinquency was received more than seven years before the relevant short-form application deadline; (2) the default or delinquency amounted to less than $100,000; (3) the default or delinquency was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding. Additionally, the NPRM seeks comment on limiting the individuals and entities that an applicant must consider when determining its status as a former defaulter.

173. Commonly Controlled Entities. The NPRM proposes to codify an established competitive bidding procedure that prohibits the same individual or entity from filing more than one short-form application to participate in an auction. The NPRM also proposes a new rule that would prevent entities that are exclusively controlled by a single individual or set of individuals from qualifying to bid on licenses in the same or overlapping geographic areas in a specific auction on more than one short-form application. These proposals seek to improve the transparency and efficiency of the auction process, by making clearer who the qualified bidders actually are and ensuring against the potential for anticompetitive auction behavior. The NPRM seeks comment on these proposals and on specific alternatives to address the Commission's concern that common control may allow the controlling individual or set of individuals to attempt to gain advantages in the bidding process based on certain coordinated bidding actions (e.g., tied bids, activity waivers).

174. Joint Bidding. The NPRM initiates a review of the Commission's rules and policies governing joint bidding and other arrangements in order to ensure that they fulfill the Commission's statutory objectives, given the changes in the mobile wireless marketplace since the initial adoption of the

bidding rules two decades ago, and the increasing importance of spectrum for service providers to meet consumer demand for mobile wireless services. The NPRM seeks comment on the Commission's tentative conclusions that it would be in the public interest to retain the current rules governing joint bidding arrangements among non-nationwide providers and to prohibit joint bidding arrangements among nationwide providers. Additionally, the NPRM seeks comment on whether the Commission should revise any of its current rules as applied to arrangements between nationwide providers and other entities, including its rules governing short-form applications. Further, the NPRM seeks comment on whether any revisions to the Commission's rules governing long-form applications are necessary in light of the Commission's consideration of the potential harms and benefits of joint bidding and other arrangements.

175. Miscellaneous Part 1 Revisions. In addition to changes that would implement the foregoing proposals, the NPRM proposes changes to two of the Commission's part 1, Subpart Q, rules, 47 CFR 1.2111 and 1.2112. 47 CFR 1.2111 – The NPRM proposes to eliminate two provisions of this rule: (1) 47 CFR 1.2111(a), under which applicants for assignments or transfers during the first three years of a license term must provide the Commission with detailed contract and marketing information, and (2) 47 CFR 1.2111(b), a never-used unjust enrichment payment requirement for broadband PCS C and F block set-aside licenses. 47 CFR 1.2112 – The NPRM's proposed changes to this rule clarify the auction application requirements for reporting an entity's percentage ownership in the applicant and in FCC-regulated entities. The NPRM proposes further changes to specify application requirements for bidding consortia. The NPRM also proposes to correct two errors in the rule caused by the inadvertent substitution of an incorrect paragraph in the Code of Federal Regulations publication of the rule for the correct one published in the Federal Register summary of the DE Second Report and Order. The first error was the addition of a requirement that DE short-form applicants list and summarize all their agreements that support their DE eligibility, a requirement that the Commission intended to apply only to long-form applicants. The NPRM proposes to delete the requirement with respect to the short-

form. The second error was the deletion of a requirement that DE short-form applicants list the parties with which they have lease or resale arrangements for any of the DE applicants' spectrum. The NPRM proposes to reinstate this requirement.

176. The NPRM seeks comments on these proposals. In addition, the NPRM notes that the Commission intends, when it resolves the issues raised in the NPRM, to resolve long standing petitions for reconsideration to the Commission's part 1 competitive bidding rules.

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

177. 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.

178. If adopted, the NPRM's proposed approach to evaluating attribution and establishing small business eligibility could provide small businesses with greater opportunities to participate in the provision of spectrum-based services. Moreover, insofar as the NPRM's proposals should allow small businesses greater flexibility to engage in business ventures that include increased forms of leasing and other spectrum use arrangements, the Commission anticipates that the combined intent of the proposals should increase the potential sources of revenue for the small business and decrease the likelihood that it would be subject to undue influence by any particular user of a single license. The NPRM's proposed two-pronged approach to establishing small business eligibility would also ensure that a licensee retains control of all licenses for which it seeks bidding credits, while providing greater flexibility for any acquired without such benefits. Further, the proposal to eliminate the AMR rule and to clarify how

spectrum manager leasing rules apply to DEs should allow small businesses greater certainty to participate in secondary markets transactions.

179. The NPRM's proposed increases in the gross revenues thresholds that define the three tiers of small businesses in the part 1 schedule by which the Commission provides the corresponding available bidding credits would encourage small business participation in spectrum license auctions. The proposed gross revenues thresholds are intended to more accurately reflect what constitutes a "small business" in today's marketplace, taking into consideration the relative size of the large, national providers. This proposal will provide an economic benefit to small entities by making it easier to acquire spectrum licenses. Moreover, the NPRM's proposal to repeal the DE reporting requirement would eliminate the burden on DEs to submit annual reports.

180. The proposed changes to the part 1 rules will apply to all entities in the same manner the Commission will apply these changes uniformly to all entities that choose to participate in spectrum license auctions. The Commission believes that applying the same rules equally to all entities in these contexts promotes fairness. The Commission does not believe that the limited costs and/or administrative burdens associated with the rule revisions will unduly burden small entities. In fact, many of the proposed rule revisions clarify the Commission's competitive bidding rules, including short-form application requirements, as well as reduce reporting requirements.

181. Finally, the NPRM's joint bidding proposals are intended to preserve and promote robust competition in the mobile wireless marketplace and facilitate competition among bidders at auction, including small entities. These proposals provide potential bidders with greater clarity regarding the types of joint bidding arrangements that would be permissible. In addition, the NPRM's proposal to retain its current rules for joint bidding arrangements among non-nationwide providers would maintain flexibility for small businesses to enter into such arrangements.

List of Subjects

47 CFR Part 1

Administrative practice and procedure.

47 CFR Part 27

Communications common carriers. Radio.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Parts 1 and 27 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 et seq.; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), 309, 1403, 1404, 1451, and 1452.

2. Section 1.2105 is amended by revising paragraphs (a)(2)(xi) and (b)(1) to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of certain communications.

* * * * *

(a) * * *

(2) * * *

(xi) An attached statement made under penalty of perjury indicating whether or not the applicant has been in default on any Commission license or has been delinquent on any non-tax debt owed to any Federal agency. For purposes of this certification, an applicant may exclude from consideration as a former default any default on a Commission license or delinquency on non-tax debt to any Federal agency that has been resolved and meets any of the following criteria:

(A) The notice of the final payment deadline or delinquency was received more than seven years before the short-form application deadline;

(B) The default or delinquency amounted to less than $100,000;

(C) The default or delinquency was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency; or

(D) The default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding.

* * * * *

(b) Modification and Dismissal of Short-Form Application (FCC Form 175).

(1) (i) Any short-form application (FCC Form 175) that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be deemed incomplete, the applicant will not be found qualified to bid, and the upfront payment, if paid, will be returned.

(ii) If (A) An individual or entity submits multiple applications in a single auction; or

(B) Entities commonly controlled by the same individual or same set of individuals submit applications for any set of licenses in the same or overlapping geographic areas in a single auction; then only one of such applications may be deemed complete, and the other such application(s) will be deemed incomplete, such applicants will not be found qualified to bid, and the associated upfront payment(s), if paid, will be returned.

* * * * *

3. Section 1.2106 is amended by revising paragraph (a) to read as follows:

§ 1.2106 Submission of upfront payments.

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. Any auction applicant that, pursuant to § 1.2105(a)(2)(xi), certifies that it is a former defaulter must submit an upfront payment equal to 50 percent more than that set for each particular license. No interest will be paid on upfront payments.

* * * * *

4. Amend §1.2110 as follows:

A. Revise paragraph (b)(1)(i) and (ii);

B. Remove paragraph (b)(3)(iv);

C. Revise paragraphs (f)(2) and (j);

D. Remove paragraph (n);

E. Redesignate paragraphs (o) and (p) as paragraphs (n) and (o)

The additions and revisions read as follows:

§ 1.2110 Designated entities.

* * * * *

(b) * * *

(1) * * *

(i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous three years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

(ii) If applicable, pursuant to § 24.709 of this chapter, the total assets of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as an entrepreneur. An applicant seeking status as an entrepreneur must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous two years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

* * * * *

(f) * * *

(2) Size of bidding credits. A winning bidder that qualifies as a small business may use the following bidding credits corresponding to its respective average gross revenues for the preceding 3 years:

(i) Businesses with average gross revenues for the preceding 3 years not exceeding $4 million are eligible for bidding credits of 35 percent;

(ii) Businesses with average gross revenues for the preceding 3 years not exceeding $20 million are eligible for bidding credits of 25 percent; and

(iii) Businesses with average gross revenues for the preceding 3 years not exceeding $55 million are eligible for bidding credits of 15 percent.

* * * * *

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and all other agreements including oral agreements, establishing as applicable, de facto or de jure control of the entity. Designated entities also must provide the date(s) on which they entered into of the agreements listed. In addition, designated entities must file with their long-form applications a copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of the license, maintain at their facilities or with their designated agents the lists, summaries, dates and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to § 1.2114.

* * * * *

5. Section 1.2111 is revised to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

(a) Unjust enrichment payment: installment financing.

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee's losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval. A licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments, debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

(3) If a licensee seeks to make any change in ownership that would result in the licensee's qualifying for a less favorable installment plan under this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status. A licensee may not switch its payment plan to a more favorable plan.

(b) Unjust enrichment payment: bidding credits.

(1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the

U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit makes any ownership change or enters into any agreement that would result in the licensee's losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the licensee would qualify after restructuring or under the agreement), plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer or of a reportable eligibility event (see § 1.2114).

(2) Payment schedule.

(i) The amount of payments made pursuant to paragraph (b)(1) of this section will be reduced over time as follows:

(A) A loss of eligibility in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A loss of eligibility in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 75 percent of the difference between the bidding credit received and the bidding credit for which it is eligible);

(C) A loss of eligibility in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 50 percent of the difference between the bidding credit received and the bidding credit for which it is eligible);

(D) A loss of eligibility in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 25

percent of the difference between the bidding credit received and the bidding credit for which it is eligible); and

(E) For a loss of eligibility in year 6 or thereafter, there will be no payment.

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, ownership change or reportable eligibility event (see § 1.2114).

(c) Unjust enrichment: partitioning and disaggregation--

(1) Installment payments. Licensees making installment payments, that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(2) Bidding credits. Licensees that received a bidding credit that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(3) Apportioning unjust enrichment payments. Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent Census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

6. Section 1.2112 is amended by revising paragraphs (a)(7), (b)(1)(iii) and (iv); adding paragraph (b)(1)(v); and revising paragraph (b)(2)(ii), (iii) and (v) to read as follows:

§ 1.2112 Ownership disclosure requirements for applications.

(a) *** * ***

(7) List any FCC-regulated entity or applicant for an FCC license, in which the applicant or any of the parties identified in paragraphs (a)(1) through (a)(5) of this section holds a 10

percent or greater ownership interest, regardless of the type of business entity, including both active and passive interests. This list must include a description of each such entity's principal business and a description of each such entity's relationship to the applicant (e.g., Company A owns 10 percent of Company B (the applicant) and 10 percent of Company C, then Companies A and C must be listed on Company B's application, where C is an FCC licensee and/or license applicant).

(b) * * *

(1) * * *

(iii) List all parties with which the applicant has entered into arrangements for the spectrum lease or resale (including wholesale arrangements) of any of the capacity of any of the applicant's spectrum.

(iv) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: The applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium.

(v) If applying as a consortium under § 1.2110(b)(3)(i), provide the information in paragraphs (b)(1)(i) through (iv) separately for each member of the consortium.

(2) * * *

(ii) List any FCC-regulated entity or applicant for an FCC license, in which any controlling interest of the applicant owns a 10 percent or greater interest or a total of 10 percent or more of any class of stock, warrants, options or debt securities. This list must include a description of each such entity's principal business and a description of each such entity's relationship to the applicant;

(iii) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto or de jure control. Such agreements and instruments include articles of incorporation and by-laws, partnership agreements, shareholder agreements, voting or other trust agreements, management

agreements, franchise agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and any other relevant agreements (including letters of intent), oral or written;

* * * * *

(v) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant, its affiliates, its controlling interests, and affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium; and

* * * * *

7. Section 1.9020 is amended by revising paragraph (d)(4) to read as follows:

§ 1.9020 Spectrum manager leasing arrangements.

*** * * * ***

(d) * * *

(4) Designated entity/entrepreneur rules. A licensee that holds a license pursuant to small business and/or entrepreneur provisions (see § 1.2110 and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (see § 1.2111 and § 24.714 of this chapter) and/or transfer restrictions (see § 24.839 of this chapter) may enter into a spectrum manager leasing arrangement with a spectrum lessee, regardless of whether the spectrum lessee meets the Commission's designated entity eligibility requirements (see § 1.2110) or its entrepreneur eligibility requirements to hold certain C and F block licenses in the broadband personal communications services (see § 1.2110 and § 24.709 of this chapter), so long as the spectrum manager leasing arrangement does not result in the spectrum lessee's becoming a “controlling interest” or “affiliate” (see § 1.2110) of the licensee such that the licensee would lose its eligibility as a designated entity or entrepreneur.

* * * * *

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

8. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302a, 303, 307, 309, 332, 336, 337, 1403, 1404, 1451, and 1452, unless otherwise noted.

9. Section 27.1301 is amended by removing the undesignated introductory text and revising paragraph (a) to read as follows:

§ 27.1301 Designated entities in the 600 MHz band.

(a) Eligibility for small business provisions.

(1) A small business is an entity that, together with its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship, has average gross revenues not exceeding $55 million for the preceding three (3) years.

(2) A very small business is an entity that, together with its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship, has average gross revenues not exceeding $20 million for the preceding three (3) years.

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