

prior to closing the auction would facilitate finding a backup bidder if the winning bidder is unwilling or unable to make the down payment. Bidders would be on notice that auction results are not yet final and that bidding on some or all properties could be reopened if some high bidders fail to tender their down payments. We conclude, however, that requiring immediate payment of remaining deposits by auction winners would place an unreasonable burden on the auction process and on bidders, who would not know until the bidding ends exactly what down payment amount will be required of them. We also reject suggestions that we should allow a "flexible" period between auction and payment. Such a procedure could give winning bidders the opportunity to "game" our processes by making an upfront payment, bidding on a license, and then assessing afterwards whether to go forward with the award of the license. Furthermore, a substantial delay between auction and down payment would subvert our objective of reducing speculative bidding because it would provide financially unqualified bidders with an opportunity to "shop" a winning bid in an effort to obtain financing for a down payment. This would undermine the integrity of the auction itself. We therefore will require that a high bidder submit the required down payment by cashier's check or wire transfer to our lock-box bank by a specified date, generally within five (5) business days following the close of bidding.

193. In the NPRM, we tentatively concluded that the Commission should not allow licensees to satisfy their payment obligations to the Commission through the payment of royalties.¹⁴⁶ Nothing in the comments has convinced us to change this conclusion. Royalties, if based on a firm's revenues, would function as a tax and tend to reduce output. Further, a royalty program would require us to adopt complex accounting rules for identifying the share of a firm's revenues that is attributable to a particular license. We continue to believe that this would be extremely intrusive and difficult to implement. Indeed, considering the degree of regulatory oversight that this agency exercises over its licensees, a royalty program that makes government revenues dependent on the success of a regulated service may give rise to potential conflicts. We therefore will not allow licensees to satisfy their auction payment obligations through the payment of royalties.

194. In the NPRM, we proposed to require all auction winners, except those with respect to which we have given special consideration pursuant to Section 309(j)(4), to make full payment of their winning bids by a lump sum. NPRM at ¶ 68. The comments generally supported this proposal. See, e.g., comments of AT&T at 36, Richard L. Vega Group at 4. We continue to believe that, except with respect to those designated entities to which we decide to give special consideration pursuant to Section 309(j)(4) (see Section VI, infra), full

license is granted.

¹⁴⁶ The Commission noted that royalties are used by the Department of the Interior for outer continental shelf oil and gas leases. NPRM at ¶ 70.

payment of the remainder of the winning bid in a lump sum is the best course of action.¹⁴⁷ This will leave financing to the private sector and eliminate the need for the Commission to conduct detailed credit checks. In addition, it will allow us to confer the benefit of paying by installments to eligible designated entities, in accordance with the wishes of Congress. Accordingly, unless otherwise specified by the Commission, auction winners will be required to make full payment of the balance of their winning bids within five (5) business days following award of the license. Grant of the license will be conditioned on this payment.

D. Default and Disqualification

195. In the Notice, we sought comment on the Commission's authority to retain upfront payments and down payments in the event that an auction winner subsequently is found ineligible or unqualified or does not pay the balance of its bid at the appropriate time. NPRM at ¶ 109. We noted that Section 309(j)(4)(B) specifically directs the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures ... to promote investment in and rapid deployment of new technologies and services."¹⁴⁸ We tentatively concluded that some strong incentives must be in place to deter frivolous bids or unqualified bidders that could leave the Commission without an auction winner that is qualified and eligible to receive a license. NPRM at ¶ 109.

196. There was substantial support in the comments for the notion that the Commission is authorized to and should order forfeiture of upfront and down payments if the auction winner later defaults or is disqualified. See, e.g., comments of CTIA at 29-30, AT&T at 35, n.43, PageNet at 35-36, Cook Inlet at 47, and BellSouth at 42-44. A few commenters suggested, however, that retention of deposits in the event of disqualification would be "draconian." Comments of the Association of Independent Designated Entities at 7, n. 7. See also comments of Richard L. Vega Group at 9-10.

¹⁴⁷ There was some opposition to lump sum payments. See comments of Sprint at 16-17, and Rochester Telephone Corporation at 13-14. These commenters would prefer that the Commission allow all winning bidders to pay for their licenses on an installment schedule, and argue that such a result would allow licensees to focus more of their resources on deploying new services. While we are sensitive to these considerations, we believe that a lump sum payment requirement is necessary to avoid speculative bidding. Furthermore, affording installment payment schedules to all winning bidders would tend to undercut our policies with respect to eligible designated entities. See Section VI.C., infra.

¹⁴⁸ See also H. R. Rep. No. 103-111 at 257 (Commission authorized to impose payments to prevent unjust enrichment from trafficking; House Committee on the Budget anticipates Commission will use this authority to deter participation in licensing process by those who have no intention of offering service to the public).

197. As we discussed in Section III.F. above, it is critically important to the success of our system of competitive bidding that potential bidders understand that there will be a substantial penalty assessed if they withdraw a high bid, are found not to be qualified to hold licenses or default on a balance due. We therefore are adopting penalties to be assessed in the event of default or disqualification. These penalties will provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction.¹⁴⁹ We believe, however, that requiring the forfeiture of all funds on deposit with the Commission could, in some cases, be too severe a penalty. In order to carry out spectrum auctions successfully, the penalty for default or disqualification should be rationally related to the harm caused, yet be set high enough to deter unwanted conduct. Accordingly, we will require any auction winner who defaults by failing to remit the required down payment within the prescribed time to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission. In addition, a defaulting auction winner will be assessed a penalty of three percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the three percent penalty will be calculated based on the defaulting bidder's bid amount. The three percent additional penalty will encourage bidders, if they are to withdraw their bids, to do so before bidding ceases. This additional penalty will also apply if an auction winner is disqualified or fails to remit the balance of its winning bid after having made the required down payment. We will hold deposits made by defaulting or disqualified auction winners to help ensure that the penalty is paid. (During the period that deposits are held pending ultimate award of the license, any interest that accrues on deposits will be retained by the government.)

198. We believe that these penalties will adequately discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. We further believe that this approach is well within our authority under both Section 309(j)(4)(B) and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), as it is clearly necessary to carry out the rapid deployment of new technologies through the use of auctions. In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission also may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it may deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant.¹⁵⁰

¹⁴⁹ In connection with the sale of government property, it is customary for the government to provide such incentives by retaining down payment monies rendered. Both the Federal Deposit Insurance Corporation and the Resolution Trust Company retain a bidder's down payment if a bidder is unable to close on a property it ostensibly purchased at auction.

¹⁵⁰ See, e.g., Character Qualifications Policy Statement, 102 FCC 2d 1179 (1986).

199. If the high bidder makes the down payment in a timely manner, a long-form application¹⁵¹ will be required to be filed by a specified date, generally within ten (10) business days after the close of the auction.¹⁵² After the Commission receives the high bidder's down payment and the long-form application, we will review the long-form application to determine if it is acceptable for filing. Upon acceptance for filing of the long-form application, the Commission will release a Public Notice announcing this fact, triggering the filing window for petitions to deny. If, pursuant to Section 309(d), the Commission denies or dismisses all petitions to deny (if any are filed), and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner.

200. With regard to petitions to deny, we will adopt expedited procedures consistent with the provisions of section 309(i)(2) to resolve substantial and material issues of fact concerning qualifications.¹⁵³ This provision requires us to entertain petitions to deny the application of the auction winner if petitions to deny are otherwise provided for under the Communications Act or our Rules. See Section 309(b), (d)(1). We solicited comment on two possible schedules for entertaining petitions to deny in cases where such petitions are required: 1) eliciting petitions with respect to all applications prior to the auction; and 2) placing only the auction winner's application on Public Notice for 30 days following the auction.

201. To the extent that they addressed this issue, commenters generally agreed that only the auction winner's application should be subject to petitions to deny. See comments of AT&T at 40-42, Arch Communications at 18-19, Cellular Service, Inc. at 16. This is the procedure that the Commission has used in connection with lotteries among mutually exclusive cellular applications. See Sections 1.823 and 22.30 of the Commission's Rules. Interested parties could then file petitions and the auction winner would have an opportunity to reply.

202. We affirm our tentative conclusion that the Commission need not conduct a hearing before denial if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination. In the event that the Commission identifies substantial and material issues of fact in need of resolution, Sections 309(j)(5) and (i)(2) of the Communications Act permit in any hearing the submission of all or part of evidence in written form and allows employees other than administrative law judges to preside at the

¹⁵¹ The application form to be filed will vary depending on the service and would be specified in the rules specifically applicable to that service.

¹⁵² Ordinarily, failure by a high bidder to file the required long-form application in a timely manner will be deemed a default and subject it to default penalties. The Commission may, for good cause, determine that a late-filed long-form application should be accepted.

¹⁵³ See 47 U.S.C § 309(j)(5).

taking of written evidence.¹⁵⁴ We will incorporate these principles into our general procedural rules with respect to licenses subject to competitive bidding.

203. In the event that an auction winner defaults on its final payment or is otherwise disqualified, an issue arises as to whether the Commission should hold a new auction or simply offer the license to the second-highest bidder. Parties commenting on this issue generally favored re-auctioning the license, pointing out that changing market and even technological developments since the initial auction may change the identity of the high bidder and the value of the license, especially if the intervening period is relatively long. See, e.g., comments of BellSouth at 37. They urge that any re-auction be open to new bidders, arguing that such a procedure would reduce the incentive of losing bidders to "gang up" on the auction winner. See comments of Utilities Telecommunications Council at 21.

204. We believe that, as a general rule, when an auction winner defaults on its final payment or is otherwise disqualified after having made the required down payment, the best course of action would be to re-auction the license. Although this may cause a brief delay in the initiation of service to the public, the passage of time between the original auction and the disqualification may have seen circumstances change so significantly as to alter the value of the license and the identity of the high bidder. One of our primary concerns is that licenses be awarded to the parties that value them most highly, and in this situation this can best be assured through a re-auction. Nevertheless, if a default occurs within five (5) business days after the end of bidding, the Commission retains the right to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders at their final bid levels.

205. If a new auction becomes necessary because of disqualification or a default more than 5 business days after the end of bidding, we will afford new parties an opportunity to file applications. The passage of time and intervening events between an auction and a disqualification may have affected the market for the license to be auctioned and created new interest in the license. In addition, the applicants in the first auction may, for any number of reasons, no longer be interested in obtaining the license. One of our primary goals in conducting auctions is to assure that serious interested bidders are in the pool of qualified bidders at any re-auction. We believe that achievement of this goal outweighs the short delay that we recognize may result from allowing new applications in a re-auction. Indeed, if we were not to allow new applicants in a re-auction, interested parties may be forced into an after-market transaction to obtain the license, which would itself delay service to the public and deny recovery by the government of a reasonable portion of the value of the spectrum.

¹⁵⁴ Among the procedural models on which we solicited comment are those for mutually exclusive cellular applications in the top 30 markets (see 47 C.F.R. § 22.916(b)) and those for certain lotteries (see 47 C.F.R. § 1.822(b)).

E. Minimum Bids and Reservation Prices

206. In the NPRM, we briefly discussed whether to set a reservation price below which the license would not be awarded. The reservation price could be disclosed, in which case it would effectively constitute a minimum bid, or it could be undisclosed. In the latter case, if no bidder exceeded the reservation price, the license would not be awarded. We pointed out that the benefits of a reservation price are likely to be greatest when there are few bidders, for when competition for licenses is intense the benefits of setting a reservation price might not be worth the cost, and tentatively concluded that there should be no minimum bid. NPRM at ¶ 67.

207. The comments generally oppose minimum bids. See, e.g., comments of AT&T at 38-42, Telocator at 4-5, and the Alliance for Fair and Viable Opportunity at 10. These commenters argued that the ultimate service provider and not the Commission should establish the value of a license and that minimum bids could artificially limit the participation of potential service providers by imposing arbitrary regulatory requirements. See also comments of U.S. Intelco Networks at 12. While we generally agree with these arguments, we have decided that the Commission should retain the flexibility to utilize reservation prices if it decides that they are appropriate in a particular auction. Without knowing how many bidders are likely to bid in a particular auction, the type of license to be auctioned or the type of auction to be used, it is impossible to generalize about the desirability of using reservation prices. If, for example, the Commission had accepted many applications to bid on a particular license that was scheduled to be auctioned in an oral sequential auction, establishing a reservation price likely would be superfluous. If, however, only two or three applicants had applied to bid for a valuable license, the Commission might set a reservation price in order to prevent that license from being sold under circumstances where there would be little competition among bidders and significant incentives to collude.¹⁵⁵ Accordingly, our rules will permit the Commission to adopt a reservation price in such circumstances.

F. Procedures in Other Auction Designs

208. The above described procedures may vary somewhat depending upon the auction methods used. For example, where sealed bidding is used, in addition to the information specified above, the initial Public Notice may specify the date on which sealed bids must be submitted. In single round sealed bid auctions, we may decide to alter the upfront payment schedule or amount or waive the upfront payment requirement.¹⁵⁶ The need for an upfront

¹⁵⁵ The employment of a reservation price also might aid in reducing unjust enrichment. Thus, in circumstances where unjust enrichment might be more likely to occur, the Commission may determine that a reservation price is necessary.

¹⁵⁶ See ¶ 157, supra, for discussion of the bid withdrawal, default and disqualification penalties that would apply in single round sealed bidding.

payment in this auction design setting will be balanced against the administrative cost of processing upfront payments and returning payments to unsuccessful bidders. There may be auctions for licenses wherein the costs of requiring upfront payments outweigh the benefits. We may simply require bidders to submit the required down payment with its bid. In single round sealed bid auctions, we will usually require that bids be received on a date specified in the Public Notice and that bids clearly indicate the bidder's identification number and the auction and license to which it relates. After bids are submitted and evaluated, the Commission would issue a second Public Notice indicating all bidders who have made timely bid submissions. After release of the second Public Notice, the Commission would notify the high bidder. If the high bidder fails to submit a timely down payment, the next highest bidder normally would be notified and offered an opportunity to tender the down payment.

209. Where oral outcry bidding is employed, the general procedures described above will be followed, with one possible exception. As discussed above, we may determine that an exhibit procedure for upfront payments may be suitable for oral outcry auctions. Qualified bidders will be required to bring a cashier's check for the full amount of their upfront payment to the auction site. Bidders will be required to present their upfront payment check as a condition of being issued a bidder identification number and admittance to the bidder section of the auction site. After bidding closes on a particular license, the high bidder will be required to tender its upfront payment and sign a bid confirmation form. If the high bidder declines to tender the upfront payment and/or refuses to sign the bid confirmation form, the license would be immediately re-auctioned.¹⁵⁷

V. REGULATORY SAFEGUARDS

210. The Budget Act directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." 47 U.S.C. § 309(j)(4)(E). In this section of the Second Report and Order, the Commission adopts safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied. In the Notice, we discussed three types of safeguards for the auction process. Two of them -- measures to prevent "unjust enrichment" and performance requirements -- are expressly addressed by the statute. The third -- rules prohibiting collusion among bidders -- was one that we raised on our own motion. We proposed these safeguards to 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.

A. Unjust Enrichment and Transfer Disclosure Requirements

¹⁵⁷ See ¶ 156, *supra*, for discussion of the bid withdrawal, default and disqualification penalties that would apply in oral outcry bidding.

211. The House Report suggests that, while the Commission should keep track of all transfers of licenses issued via auctions, unjust enrichment is likely to be a problem only in auctions where special accommodations are provided to designated entities.¹⁵⁸ In an open bidding process without special accommodations, the winner is likely to pay the market price for its license. Hence resale would not involve any unjust enrichment. In the Notice, we indicated that prohibitions on license transfers, even if for a limited period of time, were likely to have the unintended effect of delaying service to the public contrary to the purpose of the statute. See NPRM at ¶ 84. Therefore, while we sought comment on transfer restrictions, we also requested comment on establishing a system of financial disincentives to prevent sellers from obtaining any windfall profit from premature transfer of a license.¹⁵⁹

212. The legislative history suggests that in the auction context Congress's directive to take steps to prevent unjust enrichment was similarly intended to prevent auction winners from acquiring licenses for less than true market value at auction¹⁶⁰ and then transferring them for a large profit prior to providing service. Such post-auction changes in ownership have the potential to delay buildout and thereby delay the provision of service to the public. The acquisition of a license through an effectively conducted competitive bidding process is in itself a strong deterrent to unjust enrichment. As we explained in the NPRM at ¶ 83, "in an unlimited bidding process, the winner is likely to pay the market price for its license. Hence resale would not involve any unjust enrichment." Accord, comments of Nextel at 8, Time Warner at 20. We noted Congress's observation in the legislative history that unjust enrichment was likely to be a problem only where participation is limited in order to ensure

¹⁵⁸ The House Report notes that "[I]n a system of open competitive bidding, trafficking in licenses should be minimal, since the winning bidder would have paid a market price for the license. Nevertheless, the Committee anticipates that the Commission will monitor trafficking in licenses issued pursuant to the provisions of section 309(j), and will impose any necessary regulations and transfer fees as may be necessary to prevent unjust enrichment. In the event that the Commission limits participation in any given competitive bidding procedure, however, there exists a significant possibility that licenses will be issued for bids that fall short of the true market value of the license. To the extent that the Commission is attempting to achieve a justifiable social policy goal--such as the reservation of appropriate licenses for small business applicants--licensees should not be permitted to frustrate that goal by selling their license in the aftermarket. In these instances, antitrafficking restrictions are necessary and appropriate." H. R. Rep. No. 103-111 at 257.

¹⁵⁹ In response to a Congressional directive, our First Report and Order in this proceeding addressed the subject of unjust enrichment with respect to licenses issued by lottery in the future. We observed that Congress's concerns of unjust enrichment appeared to stem from transactions where the licensee obtains a license at nominal cost in a lottery and then sells it for a large profit prior to providing service to the public. See First Report and Order at ¶ 4.

¹⁶⁰ See H. R. Rep. No. 103-111 at 257, expressing concerns over the possibility that "licenses will be issued for bids that fall short of the true market value of the license."

designated entities' opportunity to participate. Thus, we proposed transfer restrictions on licenses won by designated entities that receive special treatment and financial disincentives on the transfer of designated entity licenses as possible ways to ensure against unjust enrichment.

213. The comments were divided on the subject of imposing transfer restrictions to prevent unjust enrichment. See, e.g., comments of BellSouth at 30-32, reply comments of Nextel at 9, reply comments of American Personal Communications at 6, but cf. reply comments of American Wireless Communications Corporation at 12. Those supporting transfer restrictions argue that such restrictions are particularly appropriate in the context of licenses which are won by designated entities, see comments of AT&T at 27-29, or only appropriate in that context, see comments of McCaw at 22 and Palmer Communications at 7-8. Those opposing transfer restrictions argue that the auction process itself or construction requirements or both will deter speculation and obviate the need for further safeguards such as transfer restrictions. See comments of Arch Communications at 16-18 and Windsong Communications at 5.

214. As discussed below in Section VI, we have adopted specific rules governing unjust enrichment by designated entities. In addition, given the lack of previous experience with the competitive bidding process, we believe that it is important to monitor transfers of licenses awarded by competitive bidding in order to accumulate the data necessary to evaluate our auction designs and judge whether "licenses [have been] issued for bids that fall short of the true market value of the license," H.R. Rep. No. 103-111 at 257. Therefore, we will impose a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by a designated entity or not. We will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context.

215. As in the First Report and Order, the applicant will be required to file, together with its application, the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration received in return for the transfer of its license. The information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below market financing).¹⁶¹ We believe that these requirements will have minimal negative impact on competition. As we noted in the First Report and Order, transfer disclosure requirements should not be a burden on licensees inasmuch as the documents to be submitted to the Commission will be prepared

¹⁶¹ A requirement of this type was proposed in the comments of the California Public Utilities Commission at 4. We imposed a similar requirement in the First Report and Order in this proceeding with respect to transfers of licenses obtained through lotteries.

for other purposes in any event. Any competitive concerns raised by the possible disclosure of sensitive information contained in purchase agreements or similar documents can be addressed by the provisions in Sections 0.457 and 0.459 of our Rules providing for the nondisclosure of information. 47 C.F.R. §§ 0.457, 0.459. The reporting requirements will also enable us to monitor more closely than we now can the degree to which we are complying with Congress's directive in Section 309(j)(3)(B) to ensure that "new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants" See also Section 309(j)(12) (1997 Report to Congress).

B. Performance Requirements

216. In the NPRM, we noted that the Budget Act required the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."¹⁶² The House Report provided a specific example of the warehousing concern, suggesting that "an incumbent service provider could submit a bid for a license in a service that would compete with an existing business, and engage in behavior that would prevent competition from occurring. This would deny the public both the benefit of having access to the new service, and the benefits of competition."¹⁶³ We therefore sought comment on the likely extent of warehousing of spectrum, the circumstances, if any, in which warehousing was likely to occur, and whether the Commission must impose performance requirements for all licenses awarded by auction.

217. We also asked whether there were circumstances in which the likelihood of warehousing was sufficiently low that requirements were unnecessary or whether other methods, such as restricting ownership of licenses to non-incumbents, would ensure performance. Finally, we noted that for many services, our rules already include performance requirements and asked to what extent existing requirements might or might not be sufficient to ensure performance. Finally, we asked whether existing performance requirements might be relaxed for licenses to be auctioned.

218. The comments were widely divided on the question of performance requirements. Some commenters argued against performance requirements generally (although not auction financial qualification requirements). See comments of PageNet at 28. Other commenters argued that existing performance benchmarks should be retained. See

¹⁶² See Section 309(j)(4)(B) of the Communications Act, as amended.

¹⁶³ Id. at 256.

comments of Quentin L. Breen at 5. Still others argued that additional and more stringent performance requirements were required (see comments of Cellular Service, Inc. at 13), that the Commission should place restrictions on competing delivery services rather than imposing performance requirements (see comments of Comtech Associates, Inc. at 3 and of Suite 12 Group at 13), that performance requirements were only necessary in the case of licenses for which bidding was restricted (see comments of McCaw at 12), or that performance requirements should not be applied to rural telephone companies (see comments of the Rocky Mountain Telecommunications Association at 23).

219. We believe that it is unnecessary and undesirable to impose additional performance requirements on all auctionable services. As several commenters recognized (see comments of BellSouth at 33-34), the service rules for most existing services, including the new broadband and narrowband PCS services, already contain performance requirements, such as the requirement to construct within a specified period of time. See, e.g., 47 C.F.R. § 99.103 and 99.206 (Narrowband and Broadband PCS); 47 C.F.R. § 95.833 (IVDS) and 47 C.F.R. § 90.155 (Private Land Mobile Radio Service). We do not believe that performance requirements in addition to those already provided in the service rules are necessary to address Congress's concern regarding "warehousing" of spectrum. We believe that it is more appropriate to address specific warehousing concerns on a service specific basis tailoring the requirements to the circumstances at issue. For example, in certain private radio services, an applicant may not acquire additional frequencies within 40 miles of existing frequencies unless the existing frequencies are fully utilized. See 47 C.F.R. §§ 90.623 and 90.627. We believe that existing performance requirements, in conjunction with the requirement that licensees pay for spectrum use, should be adequate to prevent the warehousing of spectrum and ensure fair competition and the prompt delivery of service.¹⁶⁴

220. With respect to the few services where no performance requirements currently exist, however, we will prescribe such performance rules as are necessary at the same time we promulgate competitive bidding rules for each of those services in subsequent Reports and Orders. This service-specific approach should promote investment and economic growth by tailoring performance requirements to the specific characteristics of individual services.

C. Rules Prohibiting Collusion

221. The Notice requested comment on whether the Commission should adopt special rules prohibiting collusive conduct in the context of competitive bidding. We indicated that such rules would 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. We also noted that such rules could strengthen confidence in the oral bidding process and help ensure that the government receives a fair market price for the use of the spectrum. However, we also recognized that if

¹⁶⁴ Accord, comments of Time Warner Telecommunications.

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 who might not otherwise be able to compete in the auction process.

222. Many commenters indicated that specific Commission rules prohibiting collusion were unnecessary because existing antitrust laws are sufficient to deter most forms of collusive behavior. See, e.g., comments of PacTel at 30, PacBell at 29, Sprint at 19, and Telocator at 5. These commenters also indicated that collusion was unlikely in the context of spectrum auctions because the large number of bidders and the use of sealed bidding generally would undermine the effectiveness of collusive agreements. See, e.g., comments of PacTel at 29, and AT&T at 39. However, several commenters argued that the Commission should adopt specific rules prohibiting collusion in order to preserve the integrity and competitiveness of the auction process. See, e.g., comments of TDS at 18. These commenters favored adoption of specific rules prohibiting bidders from collaborating or otherwise discussing any information regarding the substance of their bids or bidding strategies prior to the completion of competitive bidding. In addition, some commenters recommended requiring successful bidders to file disclosure statements indicating all parties with whom they have entered into implicit or explicit arrangements relating to the competitive bidding process. See comments of UTC at 18, and Richard Myers at 7. Other commenters recommended that all bidders should be required to certify on their short form applications that they have not entered into any agreements or engaged in any conduct in violation of the Commission's rules or any applicable antitrust or criminal laws in preparing their bids and bidding strategies. See comments of TDS at 19, PacTel Paging at 29, Arch Communications at 18, and Sprint at 19.

223. Although the statute does not require special rules to prohibit collusion, the Commission is concerned that collusive conduct by bidders prior to or during the auction process could undermine the competitiveness of the bidding process and prevent the formation of a competitive post-auction market structure. While we generally agree that in most cases the number of bidders and the auction design method we select will effectively deter collusion, we believe that additional safeguards may still be necessary to ensure that collusion does not jeopardize the competitiveness of the auction process. At the same time, however, we seek to ensure that these additional safeguards do not inhibit the formation of legitimate efficiency enhancing bidding consortia, which reduce entry barriers for smaller firms, and improve their ability to compete in the auction process and in the provision of service.

224. As an initial matter, we believe that certain safeguards we have adopted in other sections of this Report and Order will reduce the opportunity for collusion. For example, we have attempted to design competitive bidding methodologies that will create an active bidder market by reducing entry barriers and encouraging all qualified bidders to participate in the auction process. As we indicated supra at ¶ 158, we have also decided to withhold bidder identities during the competitive bidding process. This safeguard should help to deter anticompetitive conduct by impeding bidders' efforts to uncover the bidding strategies of their competitors. Moreover, where bidders are unable to identify the parties against whom they

are bidding, it will be more difficult for those attempting to collude to ensure that their anticompetitive agreements are honored. This is true because the success of most collusive agreements is dependent upon a system of identifying and punishing defectors. Where bidder identities are withheld during the competitive bidding process, the ability of those attempting to collude to enforce prior agreements by punishing defectors will be frustrated. In addition, as discussed supra at ¶ 207, the Commission may establish a minimum bid or reservation price where appropriate to ensure that a fair value is received for a particular license or group of licenses or to reduce the likelihood of unjust enrichment. While we anticipate that in most cases setting a minimum bid price will be unnecessary, where bidding is expected to be less intense and thus the opportunity for collusion greater, the Commission may wish to establish a minimum bid price to ensure that the public receives a fair price for the use of the spectrum.

225. While we intend to rely primarily on these safeguards and existing antitrust laws¹⁶⁵ to prevent collusion in the competitive bidding process, we believe that the competitiveness of the auction process and of the post-auction market structure will be enhanced by certain additional safeguards designed to reinforce existing laws and facilitate detection of collusive conduct. Accordingly, bidders will be required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process. Bidders will also be required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. Winning bidders will be required to attach as an exhibit to the long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process prior to the close of bidding. All such arrangements must have been entered into prior to the filing of short-form applications. After such applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from

¹⁶⁵ Agreements between two or more actual or potential competitors to submit collusive, non-competitive or rigged bids are per se violations of the Section One of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. See, e.g., United States v. MMR Corporation (LA), 907 F.2d 489 (5th Cir.1990); United States v. W.F. Brinkley & Sons Construction Co., 783 F.2d 1157 (4th Cir. 1986); United States v. Finis P. Renest, Inc., 509 F.2d 1256 (7th Cir. 1975) , cert. denied, 423 U.S. 874. Similarly, agreements between actual or potential competitors to divide or allocate territories horizontally in order to minimize competition are per se violations of the Sherman Act (United States v. Topco, 405 U.S. 596 (1972); Affiliated Capital Corporation v. City of Houston, 700 F. 2d 226, 236), and such agreements are anticompetitive regardless of whether the parties split a market in which they both do business or whether they merely reserve one market for one and another for the other. See Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49 (1990).

cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application. We believe that these requirements are not unduly burdensome and are appropriate to deter bidders from engaging in anticompetitive behavior. These measures will also facilitate the identification and investigation of any suspect bidding behavior.

226. Where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions.

VI. TREATMENT OF DESIGNATED ENTITIES

A. Introduction

227. Several provisions of the statute concern participation in the competitive bidding process and in the provision of spectrum-based services by small businesses, rural telephone companies, and businesses owned by women and minorities (sometimes referred to collectively as "designated entities"). The principal provision at issue, Section 309(j)(4)(D) of the Act, relates to designated entities' participation in the provision of spectrum-based services and provides that, in prescribing competitive bidding regulations, the Commission shall, inter alia,

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 tax certificates, bidding preferences, and other procedures . . .

47 U.S.C. § 309(j)(4)(D). Another provision, section 309(j)(3)(B), provides that in establishing eligibility criteria and bidding methodologies the Commission shall seek to promote the objectives of "economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people 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." To promote these objectives, section 309(j)(4)(A) expressly states that the Commission is required "to consider . . . alternative payment schedules and

methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods."¹⁶⁶

228. In the Notice we requested comment on several mechanisms the Commission might employ to implement these provisions, particularly section 309(j)(4)(D). NPRM at ¶¶ 72-81. We asked for specific comment on constitutional issues that may arise when preferential measures are limited to minorities and women and whether different approaches would be appropriate to address the specific concerns applicable to each enumerated entity. We also sought comment on how we should define the eligibility criteria for entities designated by the statute -- small businesses, rural telephone companies, and businesses owned by members of minority groups and women. In addition, commenters were asked to address several specific measures that could apply to designated entities, including installment payments, tax certificates, set-aside spectrum for PCS, financial certification procedures, bidding credits, royalties, and distress sales.¹⁶⁷ Finally, the Notice asked for comment on how the Commission could achieve the objectives of the other provisions related to small businesses, rural telephone companies, and businesses owned by members of minority groups and women.

B. Overview and Objectives

229. As discussed in more detail below, we are adopting general procedures that are designed 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 both the competitive bidding process and in the provision of spectrum-based services. Specifically, we may allow small businesses (including those owned by women and minorities and rural telephone companies) that are winning bidders for certain blocks of spectrum to pay in installments over the term of their licenses. Rural telephone companies may also be eligible for bidding credits for licenses obtained in their service areas if they make an additional

¹⁶⁶ See also 47 U.S.C. § 309(j)(4)(C)(ii), requiring the Commission, when prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women; section 309(j)(3)(A), establishing the objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays"; section 309(j)(12)(D)(iv), requiring that the Commission's 1997 report to Congress evaluate, *inter alia*, whether and to what extent "small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process."

¹⁶⁷ See NPRM at ¶¶ 79-81; *id.* at nn. 60-65, seeking comment on proposals in the report: FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen. Docket 90-314, September 15, 1993 ("SBAC Report").

infrastructure build-out commitment beyond any existing performance requirements. Bidding credits may be available to other designated entities on certain frequency blocks. Finally, we may establish set-aside spectrum in certain services, in which eligibility to bid may be limited to some or all designated entities. Based on the eligibility criteria established below, some designated entities may qualify for a combination of these available preferences (e.g., eligible small entities bidding for set-aside spectrum might also be allowed installment payments). We will decide whether and how to use these preferences, or others, when we develop specific competitive bidding rules in particular services in subsequent Reports and Orders.

230. These measures will implement the congressional mandates that we promote the dissemination of licenses among a wide variety of applicants, 47 U.S.C. § 309(j)(3)(B), and that we ensure that small businesses, rural telephone companies and businesses owned by minorities and women have the opportunity to participate in spectrum-based services, 47 U.S.C. § 309(j)(4)(D). Specifically, the preferences will allow designated entities to overcome barriers that have impeded these groups' participation in the telecommunications arena, including barriers related to access to capital. They will enable the participation of a variety of entrepreneurs in the provision of wireless services and the resulting diversity of service offerings will increase customer choice and promote competition. These procedures will also promote economic opportunity by facilitating the licensing of small businesses, rural telephone companies and businesses owned by members of minority groups and women. Moreover, this program will lead to the development and rapid deployment of new services by entrepreneurs who have traditionally lacked access to the telecommunications marketplace. This enhanced access will benefit the public, including businesses and residents in rural areas, and will promote economic growth. Finally, as explained below, we institute a set of safeguards and eligibility criteria that will prevent abuses of the preference system which could undermine the statutory objectives.

C. Specific Preferences

1. Installment Payments

231. In the Notice we proposed to require full payment in a lump sum for all winning bidders, except designated entities.¹⁶⁸ We noted that allowing installment payments is equivalent to the government's extending credit to the successful bidder. This would reduce the amount of private financing needed by a prospective licensee. We requested comment on which applicants should be eligible for installment payment plans, the interest rate, if any, that should be charged, and what standards the Commission or an outside contractor might use to evaluate an applicant's creditworthiness. We also requested comment on how the Commission should treat licensees who default on payments owed the government. We asked whether, for example, licenses should be conditioned on timely payments so that a default would result in immediate license cancellation and whether there should be any grace periods

¹⁶⁸ NPRM at ¶ 68.

or an opportunity for restructuring the payment plan. We indicated that, if we allow a grace period or restructuring of the payment plan, we would follow our procedures (including the payment of penalties and interest) under the Commission's existing debt collection rules and procedures.¹⁶⁹

232. Most commenters agree that installment payments are an effective means of addressing the inability of designated entities to obtain financing and will enable them to compete more effectively for auctioned spectrum.¹⁷⁰ They claim that installment payments will minimize the effect of lack of access to capital by small businesses and female and minority owned businesses. Some commenters suggest that for all bidders who have minorities and women as equity participants, the Commission should allow proportionate installment payments equal to that amount of women or minority ownership (i.e., 25 percent minority owned business could pay 25 percent of the bid amount in installments).¹⁷¹ Other commenters argue that only small businesses should be allowed to defer payments. They assert that giving deferred payment terms to those entities that are large businesses would be unfair to other designated entities.¹⁷² Some commenters also argue for reduced upfront payments and/or deposit payments in conjunction with the installment preference.¹⁷³ If interest is charged, a few commenters suggest that designated entities should not be charged interest at a rate higher than the government's cost of money.¹⁷⁴ Other commenters argue that interest should be below the prime rate since large entities are able to borrow at short-term rates below the prime rate using debt instruments such as commercial paper.¹⁷⁵ Finally, some commenters suggest that a designated entity that defaults on installment payments should be granted a three to six month grace period before the license is cancelled to allow an opportunity to cure the default without causing an interruption in service.¹⁷⁶

¹⁶⁹ Id.

¹⁷⁰ See, e.g., comments of SBA at 20-23, Palmer Communications at 3, Rural Cellular Assoc. at 10, Call-Her at 11, Valley Management at 4, NTIA at 27, Windsong at 4.

¹⁷¹ See, e.g., comments of Venus at 4, System Engineering at 4.

¹⁷² See comments of Unique at 4.

¹⁷³ See, e.g., comments of American Wireless at 31, NAMTEC at 20-21, BellSouth at 26, Alliance for Fairness at 13, NABOB at 11, Point at 4, Telephone Assoc. of Michigan at 12, Telepoint at 3, Tri-State at 15-17, Wireless at 3-4.

¹⁷⁴ See, e.g., comments of Cook Inlet at 33-34.

¹⁷⁵ See comments of Calcell at 19, Cook Inlet at 33, NAMTEC at 15, SBA at 20-23.

¹⁷⁶ See, e.g., comments of American Wireless at 22, NAMTEC at 16, Corporate Technology Partners at 5, Venus at 4, Point at 4.

233. We conclude that for some auctions, as discussed below, small businesses will be eligible for installment payments. As we mentioned in the Notice, by allowing installments, the government will be extending credit to an eligible winning bidder, thus reducing the amount of private financing needed in advance of the auction by a prospective licensee. This will assist small entities who are likely to have difficulty obtaining adequate private financing. Moreover, because of the problems associated with using a FCC license as collateral for a loan,¹⁷⁷ small, start-up companies' access to capital markets in order to obtain a license and construct their facilities may be even more difficult. As a result, installment payments will be an effective way to efficiently promote the participation of small businesses in the provision of spectrum-based telecommunications service and an effective tool for efficiently distributing licenses and services among geographic areas.¹⁷⁸

234. We agree with those commenters that argue that only small businesses, including small businesses owned by minorities and women, should be allowed to defer payments. As discussed below, this approach to allowing installment payments best comports with the intent of Congress in enacting section 309(j)(4)(A), to avoid a competitive bidding program that has the effect of favoring incumbents, with established revenue streams, over new companies or start-ups.¹⁷⁹

235. In describing the provisions concerning designated entities contained in the House bill, the House Report states generally that the Commission's regulations "must promote economic opportunity and competition," and "[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women." H.R. Rep. 103-111 at 254. The Report states that the House Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." *Id.* More specifically, the House Committee was concerned that adoption of competitive bidding should not have the effect of "excluding" small businesses from the Commission's licensing procedures, and anticipated that

¹⁷⁷ See Radio KDAN, Inc., 11 FCC 2d 934 (1968), recon. denied, 13 RR 2d 100 (1968), aff'd on other grounds sub nom Hansen v. FCC, 413 F.2d 374 (D.C. Cir. 1969); Kirk v. Merkley, 94 FCC 2d 829 (1983); but see also Notice of Proposed Rulemaking and Notice of Inquiry, MM Docket No. 92-51, 7 FCC Rcd 2654 (1992). In this regard, we do not at this time adopt the suggestions of the Small Business PCS Association and Telepoint that financing organizations be allowed a security interest in a PCS license. See comments of Small Business PCS Assoc. at 6-7, Telepoint at 3. The general issue of whether such security interests are permitted under the Communications Act is at issue in MM Docket No. 92-51 and will be addressed in that proceeding.

¹⁷⁸ See 47 U.S.C. § 309(j)(3)(A).

¹⁷⁹ See H.R. Rep. No. 103-111 at 255.

the Commission would adopt regulations that would ensure that small businesses would "continue to have opportunities to become licensees." *Id.* at 255.

236. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments for minorities and women also were intended to assist only minorities and women who are small businesses. The House Report states that these related provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations, including those owned by members of minority groups and women." *Id.* (emphasis added). It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups." *Id.* Because the Congressional objective here was to assist "new companies or start-ups," we therefore believe the Commission should consider installment payments only for entities with lesser economic status. As indicated by the legislative history, large entities with established revenue streams were not intended to be beneficiaries of this particular means of financial assistance. In short, the statutory language, when read in conjunction with the legislative history, does not indicate that Congress's purpose was to accord special financial assistance measures under section 309(j)(4)(A) to entities other than those with small economic status. We thus reject the proposals by some commenters to allow installment payments for designated entities irrespective of their size, or to permit proportionate installment payments based simply on the degree of non-controlling investment by designated entities in a bidder.

237. In addition, and consistent with our decision to limit installment payments to small businesses, we believe that installment payments should not be available for all spectrum auctions. Rather, in order to match the preference with eligible recipients of the preference, installment payments will only be available for certain licenses that do not involve the largest spectrum blocks and service areas. (For example, in the context of narrowband PCS, we could adopt installment payments for small businesses in the auctions for smaller spectrum blocks.) We will limit the auctions in which this preference can be used in order to avoid the abuses that will likely result if installment payments are available for every auctioned license. Where the license being auctioned is for a large, valuable block of spectrum, for example, we do not want to create incentives for entities to create small business "fronts" enabling large businesses to become eligible for low-cost government financing. Nor do we desire to delay service to the public by encouraging under-capitalized firms to receive licenses for facilities which they clearly lack the resources adequately to finance. *See* 47 U.S.C. § 309(j)(3)(A). Accordingly, as a general matter, we will only allow installment payments for licenses in those smaller spectrum blocks that are most likely to match the business objectives of bona fide small businesses. We stress that this limitation in no way prohibits eligible small businesses from bidding on and acquiring other licenses; it simply limits the licenses that the government will help finance. We shall make determinations regarding the use of installment payments when we adopt competitive bidding rules for specific services.

238. We agree with commenters that a reduced, post-auction down payment for designated entities eligible for installment payments is in order. As suggested by some commenters, the down payment for such entities, which is due five business days after the close of the auction, will be 10 percent of the winning bid, instead of 20 percent. This will provide eligible designated entities with necessary funds for additional application, legal and engineering costs that will be incurred immediately following the auction. Once the license is granted we will require that the remaining 10 percent of the down payment be made within five days of grant, thereby commencing the eligible entity's installment payment plan, which will extend over the period of the license.

239. Finally, we also agree with those commenters that suggest that interest on installments should be charged at a rate no higher than the government's cost of money. We recognize that, in addition to providing a source of financing that might not otherwise be available to small entities, we should impose interest in a manner that is designed to provide significant financial assistance to small businesses. Accordingly, in order to ensure that this government financing results in significant capital cost savings to small businesses, we will impose interest on installment payments equal to the rate for U.S. Treasury obligations of maturity equal to the license term.¹⁸⁰ This rate is generally lower than the prime lending rate established by private banks. The applicable interest rate will be determined and fixed at the time of licensing. We agree with the commenters that suggest that, to promote the rapid deployment of service by designated entities eligible for installment payments, payment of principal should not begin until after the start-up phase of the business. Therefore, the schedule of installment payments will begin with interest-only payments for the first two years. After that, principal and interest will be amortized over the remaining term of the license, during which the licensees can be expected to be generating income from operations. Further details of the Commission's installment payment program for designated entities will be established in further Orders involving those auctionable services for which installment payments will be available.

240. An eligible designated entity that elects installment payments will have its license conditioned upon the full and timely performance of its payment obligations under the installment plan granted to the licensee. If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default. Any default in this regard could result in the cancellation of the license for failing to meet this condition. However, as recommended by commenters, upon request by a designated entity that has defaulted or that anticipates default under an installment payment program, we will consider providing for a three to six month grace period before a delinquent payor's license cancels. During this grace period, a defaulting licensee could maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a

¹⁸⁰ We note, for example, that PCS licenses are issued for a ten-year term. See 47 C.F.R. § 99.15. In other services with shorter license terms, we may base the interest rate applicable to installment payments on government instruments of similar duration.

restructured payment plan. We will evaluate requests for a grace period on a case-by-case basis. In deciding whether to grant such requests or to pursue other measures we may consider, for example, the licensee's payment history, including whether it has defaulted before and how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under a distress sale policy.¹⁸¹ Following a grace period without successful resumption of payment or upon denial of a grace period request, we will declare the license cancelled and take appropriate measures under the Commission's debt collection rules and procedures. See 47 C.F.R. Part 1, Subpart O.

2. Bidding Credits

241. Among the variety of measures discussed in the Notice, we also asked for comment on the use of bidding credits or bidding preferences for designated entities.¹⁸² Bidding preferences would allow eligible applicants to receive a payment discount (or credit) for their winning bid. Under this approach, if the eligible entity submits the winning bid, it would be required to pay only a certain percentage of its actual bid. Since the bidding credit is actually a payment discount determined at the end of the auction, it will not be difficult to compare bids among eligible and non-eligible bidders during the auction. Many commenters support bidding preferences instead of, or in addition to, set-asides. They claim that bidding credits address the inability of designated entities to obtain capital and would encourage non-designated entities to enter into joint ventures with designated entities.¹⁸³ Some commenters advocate linking the amount of the bidding preference with the degree of designated entity participation.¹⁸⁴

242. We believe that it may be necessary to provide bidding credits to designated entities to achieve the objectives of Section 309(j)(4)(D). Bidding credits may be necessary to ensure that eligible designated entities have the opportunity to participate successfully in auctions for certain services. Therefore, competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures. For example, in service-specific rules, we may determine that a bidding credit of up to 25 percent

¹⁸¹ See ¶ 257, infra.

¹⁸² See NPRM at ¶ 80.

¹⁸³ See, e.g., comments of Palmer at 4-5, NABOB at 10-11.

¹⁸⁴ See, e.g., comments of Cook Inlet at 32, NAMTEC at 15, Sprint at 10, AWCC at 20, George E. Murray at 12-13.

would provide the opportunity to bid successfully for a license.¹⁸⁵ This determination may rest in whole or in part on our assessment of the available opportunities in, and characteristics of, a specific spectrum-based service. As described above, such bidding credits would operate as payment discounts for entities that receive the credits. We also reserve the option to determine, on a service-specific basis, whether certain auctionable services should allow other bidding credits to a consortium of companies organized to bid for auctionable services. To qualify for a bidding credit in this circumstance, the consortium would be required to demonstrate that it has significant equity participation by one or more designated entities and that designated entities will have significant operational roles in the provision of service to the public.

243. We will institute a system of bidding credits for rural telephone companies that is designed to further promote the investment in and rapid deployment of new technologies and services in rural areas. See 47 U.S.C. § 309(j)(3)(A). At the outset, we generally conclude that any preferential measures for rural telephone companies, such as bidding credits, should be limited to bidding for licenses in their rural service areas.¹⁸⁶ As several commenters point out, such an approach satisfies Congress's objectives without unduly favoring rural telephone companies in markets where there is no compelling reason to do so. Specifically, these commenters note that Congress was concerned with assuring rural consumers the benefits of new technologies and providing opportunities for participation by rural telephone companies in the provision of wireless services that supplement or replace their landline facilities.¹⁸⁷ We agree. Rural telephone companies, as defined below, will be eligible for bidding credits for specified licenses only in their service areas. This approach is consistent with Congress' intent to ensure that rural consumers receive the benefits of new technologies and to provide opportunities for participation by rural telephone companies in the provision of wireless services. Rural telephone companies would still be allowed, where eligible, to bid on other licenses outside their service areas.

¹⁸⁵ See, e.g., comments of SBA Associate Administrator for Procurement Assistance at 1, citing the Department of Defense program granting a 10 percent credit to contract bidders under Section 1207 of Pub. L. No. 99-166.

¹⁸⁶ Some commenters have suggested the partitioning of PCS licenses so as to permit rural telephone companies to hold licenses to provide service only in their service areas. See, e.g., comments of GVNW at 2-4, and NTCA at 13. Partitioning may indeed be a means to achieve Congress's goal of ensuring that advanced services are provided in rural areas, but this issue is a subject of our reconsideration of the broadband PCS allocation rules. See generally Second Report and Order in GN Docket No. 90-314, 8 FCC Rcd 7700 (1993) (petitions for reconsideration and clarification pending). This issue will be addressed in the context of the PCS allocation rules.

¹⁸⁷ See, e.g., comments of SBA at 15, BellSouth at 28-29, AT&T at 26 n. 31, Citizens at 5-6, Telocator at 11.

244. The amount of the bidding credit for rural telephone companies will be tied to their commitments to achieve certain telecommunications infrastructure build-out milestones in their rural service areas. These milestones will be greater than those set forth in the particular service rules. The amount of the bidding credit will be proportionately linked to the amount by which the rural telephone company agrees to expand its build-out commitment. Failure to meet a build-out commitment will result in liability for a penalty in the amount of the bidding credit, plus interest at the rate applicable to installment payments. Grant of licenses to rural telephone companies utilizing bidding credits will be conditioned upon payment of this penalty, if and when it becomes applicable. We believe that this added requirement best fulfills the congressional objective of developing and rapidly deploying new services to those residing in rural areas.

3. Spectrum Set-asides

245. In the Notice we specifically asked for comments on setting aside blocks of spectrum for designated entities. NPRM at ¶ 4. Thus, we indicated that specified spectrum blocks could be open to bidding only by applicants that fall under one of the definitions for the eligible entities. *Id.* at ¶ 73. We also noted that measures such as set-asides may be better suited for some services than for others.¹⁸⁸

246. Many parties commented on spectrum set-asides as they relate to specific services, such as broadband PCS. We shall address in subsequent orders those comments that relate primarily to set-asides in those services. Many parties support set-asides as a general matter and some argue that only by using set-asides can the Commission carry out the injunction in section 309(j)(4)(D) "to ensure" that designated entities are given the "opportunity to participate in the provision of spectrum based services."¹⁸⁹ Others, such as BellSouth and Sprint contend that to set aside spectrum blocks for bidding by women- or minority-owned applicants would be unconstitutional and inconsistent with legislative intent and the public interest.¹⁹⁰

247. After consideration of the comments, we believe that, to "ensure" the opportunity for designated entities' participation in spectrum-based services under section 309(j)(4)(D), some spectrum may need to be set aside specifically for bidding by such entities. In this regard, we disagree with commenters who contend that Congress's rejection of the use of a set-aside for rural telephone companies demonstrates that set-asides were not the intended method for effectuating statutory objectives for any of the designated groups. Rather, we agree with Iowa Network that, although Congress decided not to require the Commission to

¹⁸⁸ *Id.* at ¶ 75.

¹⁸⁹ See, e.g., comments of AWRP at 8, NRTA at 8, Iowa Network at 8-11, Iowa Network (Reply) at 4-5, Minority PCS Coalition at 5.

¹⁹⁰ See comments of BellSouth at 18-23, Sprint at 10-11.

reserve certain spectrum blocks for rural telephone companies, Congress did not prohibit the use of such measures for other classes of designated entities. Indeed, set-asides may be necessary to accomplish the statutory objectives of section 309(j)(4)(D). In subsection F below, we address the constitutionality of set-asides and other preferences for minorities and women.

248. We have also decided that, for any auctions of set-aside spectrum, a reduction in the upfront payment amount may also be appropriate. This lower payment would serve to encourage participation by all eligible designated entities in the auction. We anticipate that we will establish lower upfront payments in any particular auctions for set-aside spectrum and that such payments will be based on the characteristics of the service and the nature of the expected pool of bidders.

4. Tax Certificates

249. In the Notice we tentatively concurred with the SBAC Report that different approaches may be appropriate to address the specific concerns applicable to each enumerated entity. We indicated that we could allow deferred payment terms for small businesses and tax certificates for businesses owned by women and minorities.¹⁹¹ The SBAC Report recommended several ways that the Commission could issue tax certificates. For instance, the Commission could enable owners and investors of minority owned and controlled licenses obtained through competitive bidding to obtain tax certificates upon sale of their stock interests, provided that the entities remain minority owned and controlled. See NPRM at ¶ 80, n. 64. Another example would enable licensees that assign or transfer control of their license to designated entities to obtain tax certificates.

250. Most commenters who discuss this option advocate the use of tax certificates when an auction winner sells a license to a designated entity and when a designated entity sells a minority interest to a non-controlling investor.¹⁹² Some commenters believe that tax certificates should be available to minority and female owned businesses that are not also small businesses. Also, if an entity qualifies for both installments and tax certificates, commenters suggest that the licensee be required to specify which preference it wished to use.¹⁹³ One commenter opposed the use of tax certificates generally because it believes that tax certificates would not sufficiently assist designated entities.¹⁹⁴ Others argue that tax

¹⁹¹ See NPRM at ¶¶ 79-80.

¹⁹² See, e.g., comments of NAMTEC at 16-17, Palmer Communications at 4, NTIA at 27-28, MCI at 14, Calcell at 26-27, ARAT at 5.

¹⁹³ See comments of Unique at 2-4, LuxCel Group, Inc. at 3.

¹⁹⁴ See comments of Brown and Schwaninger at 4.

certificates should be used to assist designated entities in acquiring, not disposing of, licenses.¹⁹⁵

251. We generally agree with those commenters who argue that, for purposes of attracting investment in designated entities, tax certificates may not be sufficient as a principal mechanism to assist designated entities. As described above, we have decided to rely primarily on other measures to eliminate barriers to entry into the telecommunications field by designated entities. Therefore, we will not at this time adopt a general tax certificate program for services subject to competitive bidding. We believe that the other available measures, such as bidding credits, will generally provide sufficient incentive to attract investors in designated entity enterprises. We agree at this time, however, that tax certificates could be useful as a means of creating incentives both for designated entities to attract capital from non-controlling investors and to encourage licensees to assign licenses to designated entities in post-auction transactions. We will examine the feasibility of utilizing tax certificates in subsequent competitive bidding rules for particular services, especially where the record demonstrates a need to further stimulate designated entity participation in spectrum auctions and in the after-market for auctioned services.

5. Royalty payments

252. In the Notice we indicated that another measure that could be made available to designated entities would be a combination of an initial payment and royalties. We noted that this system is used by the Department of the Interior for outer continental shelf oil and gas leases. Firms bid on the amount of the initial payment and pay royalties at a fixed rate set by the government. If the FCC is licensing a highly risky service and the government (taxpayers) is better able to bear risk than the firm (shareholders), there may be an advantage to have some part of the payment in the form of a royalty.¹⁹⁶ The SBA endorses royalty payments for designated entities because payment is tied to receipt of income as opposed to lump sum and installment payments. For these entities, payment prior to receipt of income may divert scarce capital from construction requirements.¹⁹⁷ Other commenters claim that royalties are not necessarily more burdensome to collect if the Commission establishes clear guidelines based on an applicant's own cash flow analysis.¹⁹⁸

¹⁹⁵ See, e.g., comments of Quentin L. Breen at 4.

¹⁹⁶ Under a royalty program, the Commission could, for example, allow the winning bidder to pay for its license from a percentage of the revenues it generates from the operation of its licensed facilities. To minimize the risk to the Commission, it could establish a fixed, minimum royalty payment plus a percentage of gross revenues.

¹⁹⁷ See comments of SBA at 24; see also comments of Calcell at 19-21.

¹⁹⁸ See comments of JMP Telecom Systems at 3.