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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DISPATCHED BY

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act -)
Competitive Bidding)

SECOND MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1994

Released: August 15, 1994

By the Commission:

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I. INTRODUCTION

1. By this action, we respond to petitions for reconsideration or clarification of the rules and policies adopted in the Second Report and Order in this proceeding, which sets forth general rules for the use of competitive bidding to award licenses.¹ Twenty-one such petitions were received, as well as eight oppositions and five replies. A list of the petitions, oppositions and replies is contained in Appendix A.

2. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the Budget Act) added Section 309(j) to the Communications Act of 1934, as amended, 47 USC §309(j).² Section 309(j) gives the Commission express authority to employ competitive bidding procedures to choose among mutually exclusive applications for initial licenses. The Commission adopted a Notice of Proposed Rulemaking in this proceeding on September 23, 1993.³ The Second Report and Order prescribing the required regulations was adopted on March 8, 1994. The Commission has subsequently adopted specific rules for auction of narrowband Personal Communications Service (PCS) licenses,⁴ Interactive Video and Data Service (IVDS) licenses,⁵ and broadband PCS licenses.⁶

3. The Second Report and Order established rules for determining what types of services and licenses may be subject to auctions. The Second Report and Order also set forth a range of auction designs and procedures, from which the Commission stated it would choose in establishing procedures for awarding licenses in specific services. The Second Report and Order addressed a variety of procedural issues regarding announcement of auctions, filing of applications, bidder and licensee qualifications, payment requirements, and penalties for

¹ Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, 59 FR 22980 (May 4, 1994) (Second Report and Order).

² See Omnibus Budget Reconciliation Act of 1993, 47 U.S.C. 309(j)(3)(B).

³ Notice of Proposed Rule Making in PP Docket No. 93-253, 8 FCC Rcd 7635, 58 FR 53489 (Oct 15, 1993), (NPRM). In the First Report and Order in PP Docket No. 93-253, FCC 94-32, released February 4, 1994, 59 FR 09100 (Feb 25, 1994), (First Report and Order), the Commission prescribed transfer disclosure requirements with respect to licenses awarded by random selection.

⁴ Third Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2941, 59 FR 26741 (May 24, 1994)(Third Report and Order).

⁵ Fourth Report and Order in PP Docket No. 93-253, 59 FR 24947 (May 13, 1994) (Fourth Report and Order).

⁶ Fifth Report and Order in PP Docket No. 93-253, FCC 94-178, 59 FR 37566 (Jul 29, 1994) adopted June 29, 1994, released July 15, 1994 (Fifth Report and Order).

default or disqualification, as well as safeguards to deter possible abuses of the bidding and licensing process. In response to statutory directive, the Second Report and Order also identified provisions designed to ensure that small businesses, rural telephone companies, and businesses owned by women or members of minority groups (designated entities) are given the opportunity to participate in the provision of spectrum-based services.

4. In many cases, the appropriate auction procedures and rules vary from service to service. In the Second Report and Order we retained the flexibility to choose, from within a defined range, the appropriate procedures for particular services, depending on characteristics of the service such as the likely value and interdependence of the licenses being auctioned and the capital required to construct a system. We also retained the flexibility to alter our procedures in response to our experience with different auction techniques.

5. We dispose of all but two of the petitions for reconsideration of the Second Report and Order in this Order. We defer consideration of Brown and Schwaninger's petition concerning Finders's Preferences. We plan to issue a Further Notice addressing the applicability of Finder's Preferences to auctionable services in the near future, and we will consider Brown and Schwaninger's petition in the context of that Notice. We also defer to a future Order consideration of MCI's petition concerning auctioning of BETRS licenses.

6. The issues raised in the petitions for reconsideration fall into three categories: those dealing with the applicability of competitive bidding to specific services and particular circumstances, those dealing with auction design and procedures, and those dealing with the definition of the groups eligible for special provisions (the "designated entities") and the nature of these provisions. We consider issues raised by these petitions below.

II. APPLICABILITY OF COMPETITIVE BIDDING

A. Cellular Unserved Areas

7. Two cellular systems operate on separate frequency blocks in each cellular market.⁷ The geographic areas not covered after five years by the initial licensees are considered cellular "unserved areas" that are licensed separately. In 1991, we adopted random selection procedures to govern licensing of the cellular unserved areas,⁸ and stated that we would revisit this decision to use lotteries if Congress authorized Commission use of competitive bidding procedures.⁹ As noted above, competitive bidding authority was in fact enacted in 1993.¹⁰

⁷ The Domestic Public Cellular Service is governed by Part 22 of the Commission's Rules, 47 CFR Part 22.

⁸ See First Report and Order and Memorandum Opinion and Order on Reconsideration, CC Docket No. 90-6, 6 FCC Rcd 6185, 56 FR 58503 (Nov 20, 1991).

⁹ Id. at 6217.

8. After receiving comment and considering the extensive record, the Commission indicated in the Second Report and Order that, unless specifically excluded, mutually exclusive applications for licenses in the Public Mobile Services, including the Cellular Service, will be subject to competitive bidding if they were filed after July 26, 1993.¹¹ We noted, however, that applications filed before July 26, 1993 present special issues due to the "special rule" of Section 6002(e) of the Budget Act.¹² That rule does not require the Commission to award licenses or permits by competitive bidding if the license applications were filed before July 26, 1993, even if the applications otherwise meet the criteria that would subject them to selection by bidding.¹³ We therefore stated in the Second Report and Order that we would determine in a separate order how to authorize Public Mobile systems if applications were filed before July 26, 1993.¹⁴ Subsequently, after thorough consideration of the record, we adopted a Memorandum Opinion and Order stating that in such situations we will award licenses for the unserved areas by random selection.¹⁵

9. Petitions. We received three petitions for reconsideration of the provisions of the Second Report and Order related to authorization of the cellular unserved areas.¹⁶ John G. Andrikopoulos, et al. (Andrikopoulos) states that where applications for cellular unserved area licenses were accepted for filing before July 26, 1993, the applications should not be subject to competitive bidding. Andrikopoulos asserts that auctioning these licenses would be unreasonable, retroactive application of the Budget Act.¹⁷ The Houston, Dallas, Oxnard and Huntington Cellular Settlement Groups (Cellular Settlement Groups; Groups) assert that the Commission should accept full-market settlements between mutually exclusive applicants for

¹⁰ See Budget Act , 107 Stat. 387-392.

¹¹ See Second Report and Order at ¶ 61 & n.58.

¹² See id. at n.55, citing Budget Act, § 6002(e).

¹³ See Budget Act, § 6002(e).

¹⁴ See Second Report and Order at n.55.

¹⁵ See Memorandum Opinion and Order, PP Docket No. 93-253, FCC No. 94-123, 59 FR 37163 (Jul 21, 1994), adopted May 27, 1994, released July 14, 1994 (Memorandum Opinion and Order).

¹⁶ See petitions of Thumb Cellular Limited Partnership (Thumb Cellular), John Andrikopoulos, et al. (Andrikopoulos), and cellular settlement groups in Houston, Dallas, Oxnard and Huntington (Cellular Settlement Groups).

¹⁷ See Andrikopoulos Petition at 4-5.

cellular unserved area licenses.¹⁸ These Groups state that Congress intended the Commission to continue use of its existing policy favoring full-market settlements, and express concern that the Second Report and Order appears to prohibit full-market settlements where licenses will be awarded through competitive bidding procedures.¹⁹ Finally, Thumb Cellular, a party to a full-market settlement agreement filed for a Detroit unserved area, asks the Commission to process its settlement agreement immediately.²⁰

10. Discussion. The issues raised by these petitioners are fully addressed in the Memorandum Opinion and Order, which was released shortly after these petitions were filed. We stated in that item that we will grant licenses for cellular unserved areas by random selection from the pool of applicants that filed lottery applications prior to July 26, 1993, and we will permit full-market settlements among lottery applicants to avoid mutual exclusivity.²¹ Applications for cellular unserved areas accepted for filing prior to July 26, 1993 will not be subject to competitive bidding. Accordingly, the issues raised by these three petitioners are moot.

B. Principal Use of PCS

11. Section 309(j)(1) of the Communications Act, as amended, permits auctions only where mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission and where the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals.²² In the Second Report and Order we concluded that PCS service would meet the criteria for auctionability.²³ Millin requests that we reverse that decision and conduct further inquiry concerning the possibility of non-subscription PCS.²⁴ We considered and rejected Millin's arguments in the Fifth Report and Order in this docket, stating that the overwhelming weight of the comments in that proceeding, as well as our experience with the PCS experiments that we have licensed, reflect that licensed PCS spectrum is likely to be used principally for the

¹⁸ See Cellular Settlement Groups Petition at 3-7.

¹⁹ Id.

²⁰ Thumb Cellular Petition at 3-4.

²¹ See Memorandum Opinion and Order at ¶¶ 10-18.

²² 47 U.S.C. § 309(j)(1).

²³ See Second Report and Order at ¶¶ 55-56.

²⁴ See petition of Millin Publications, Inc. (Millin).

provision of service to subscribers for compensation.²⁵ We continue to believe that the record strongly supports the likelihood that PCS spectrum will be used principally for the provision of service to subscribers for compensation. Accordingly, we deny Millin's request.

III. AUCTION DESIGN AND PROCEDURES

A. Activity and Stopping Rules

12. Activity rules and stopping rules are intended to govern the speed and duration of bidding in an auction. An activity rule encourages each bidder to participate actively through the course of an auction. Activity rules are intended to ensure that simultaneous auctions with simultaneous stopping rules will close within a reasonable period of time and that bid prices will convey meaningful information during the course of the auction. In the Second Report and Order, the Commission adopted a three-stage Milgrom-Wilson activity rule as the preferred activity rule when a simultaneous stopping rule is employed.²⁶ Under this rule the auction moves from stage I to stage II when, in each of three consecutive rounds of bidding, the high bid has increased on less than some specified percent of the spectrum (measured in terms of MHz-pops) being auctioned.²⁷ The auction will move from stage II to stage III when in each of three consecutive rounds the high bid has increased on less than some specified percent of the spectrum (measured in terms of MHz-pops). The Commission, however, retained the flexibility to decide whether to use an activity rule, and if so what type of activity rule to use. We described possible activity rules, and stated the range of alternatives from which we would choose and the circumstances that might cause us to choose particular rules. We stated that we would announce the activity rule to be used by Public Notice before an auction.²⁸ A stopping rule specifies when an auction is over. In the Second Report and Order we stated that, for simultaneous auctions, our preferred stopping rule was that all markets would close simultaneously if a single round passed in which no new acceptable bids are submitted for any license. We retained the discretion, however, to announce at any point

²⁵ Fifth Report and Order at n.8.

²⁶ Second Report and Order at ¶ 144.

²⁷ The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license.

²⁸ Id. at ¶ 133.

during a multiple round auction that the auction would end after a specified number of rounds.²⁹

13. Petitions. Southwestern Bell Corporation (SBC), the GTE Service Corporation (GTE), and the Association of Independent Designated Entities (AIDE) argue that the three-stage Milgrom-Wilson activity rule is unnecessarily complex and should be simplified or eliminated.³⁰ SBC points out that the three-stage Milgrom-Wilson activity rule would require the Commission to track a large number of upfront payments and eligibility levels, and notes that the software the Commission intends to develop to track activity levels may not be developed in time. SBC states that allowing five automatic waivers, as the Commission proposes to do, does not reduce the uncertainty and expense which the activity rule imposes and may make bidding strategy more complex.³¹ GTE states that the upfront payment formula, when combined with the activity rule, unnecessarily restricts bidder flexibility.³² GTE states that the activity rules limit the ability of bidders to revise their plans in the course of the auction, particularly if information revealed during the latter stages of the auction causes a bidder to become interested in additional properties. The activity rules, according to GTE, discourage qualified entities from participating as fully as they might otherwise do, so that some licenses may not be awarded to the entity placing the highest value on them.³³ SBC urges the Commission to alter the stopping rule to allow the agency to issue a notice that bidding will close after a given number of rounds.³⁴ GTE and SBC ask the Commission to adopt a simpler activity rule, such as a requirement that bidders be active on a single license in each round.³⁵ AIDE urges that the activity rules be withdrawn, at least in the case of designated entities.³⁶ PacBell counters that the three-stage Milgrom-Wilson activity rule avoids delay, provides meaningful information, and allows bidders the flexibility to react to that information, and that software is available to help ensure that the Milgrom-Wilson rule will not be hard to implement.³⁷

²⁹ Id. at ¶ 132.

³⁰ SBC Petition at 1-6; GTE Petition at 6-11; AIDE Petition at 12-13.

³¹ SBC Petition at 3-6.

³² GTE Petition at 7.

³³ Id. at 9-10.

³⁴ SBC Petition at 5.

³⁵ GTE Petition at 10-11; SBC Petition at 5.

³⁶ AIDE Petition at 12-13.

³⁷ PacBell Opposition at ii.

14. Discussion. As we noted in the Second Report and Order, the decision to use activity rules and the choice among activity rules involve tradeoffs among the speed of the auction, bidder flexibility, and simplicity.³⁸ The petitioners raise no issues relating to activity rules that we did not consider carefully in the Second Report and Order.³⁹ We see nothing in the petitions for reconsideration to cause us to change our opinion concerning the choices we made among these goals.

15. We do not believe that the Milgrom-Wilson activity rules will excessively restrict bidders' flexibility to bid for desired combinations of licenses or cause licenses to be awarded to bidders who value them less than other bidders. The rules were expressly designed to counteract the incentive to delay serious bidding that occurs in simultaneous auctions, without unduly limiting bidders' flexibility to pursue backup strategies and to use new information.⁴⁰ The restrictions placed on bidders at the beginning of the three-stage auction procedure are modest. In the first stage, to retain full eligibility a bidder need only bid on, or have the highest bid from the previous round on, licenses representing at least one-third of the MHz-pops he or she ultimately hopes to win. In the second stage, the bidder must bid on, or hold the high bid on, two-thirds of the MHz-pops he or she hopes to win. Only in the third stage are bidders required to bid on the full amount of MHz-pops they hope to acquire.⁴¹ Bidders may shift bids among any combination of licenses from round to round.⁴² Paul Milgrom points out that at the shift from stage I to stage II there will be no more than three bidders on an average license, and at the shift to stage III there will be at most 1½ bidders on an average license.⁴³ Because the progression to higher stages imparts such information, it gives the bidders important signals concerning the state of bidding. By stage III, bidding should be rapidly drawing to a close, and any major shifts in strategy should already have been

³⁸ Second Report and Order at ¶ 134.

³⁹ For instance, GTE notes that a bidder may be interested in some properties only if it can also acquire other key properties. GTE states that "under the modified Milgrom-Wilson rule, the bidder could be forced to choose between dropping out of the auction prematurely or staying active in markets that may prove to be less valuable if the bidder loses out in the other key markets." GTE Petition at 9-10. The Second Report and Order considers the same situation of interdependency and concludes that a bidder would have more flexibility with the three-stage Milgrom-Wilson rule than with another possible activity rule, that of starting the bidding with the third stage of the Milgrom-Wilson rule. See Second Report and Order at ¶ 142.

⁴⁰ Id.

⁴¹ Id. at ¶ 137.

⁴² Id. at ¶ 136.

⁴³ Ex parte submission of Paul Milgrom, June 21, 1994 at 2.

implemented. Bidders who believe that they may want to expand their purchases if prices are unexpectedly low can guarantee their ability to do so by making a sufficiently high upfront payment.

16. In the Second Report and Order, we also stated our intention to reduce the complexity faced by bidders by developing bidding software and making it available to all bidders in auctions in which a Milgrom-Wilson activity rule is used.⁴⁴ SBC expresses concern that the software may not be available in time. Software was in fact developed in time for the July nationwide narrowband auction, and performed successfully in that auction. In light of that success, we have no doubt that appropriate software will also be available for the remaining narrowband and broadband auctions.

17. Finally, we remind petitioners that, in the Second Report and Order, we adopted the three-stage Milgrom-Wilson activity rules only as a preferred option.⁴⁵ We deferred to later, service-specific Orders the choice of actual rules to be used in auctions for individual services, depending, as discussed in the Second Report and Order, on the characteristics of the services and our experience with the conduct of auctions. In addition, we retained the flexibility to decide on an auction-by-auction basis, and to announce by Public Notice before the auction, whether to use an activity rule, and if so what type of rule.⁴⁶ Thus, if experience shows that the Milgrom-Wilson rules are unduly difficult to administer, we may shift to other activity rules, including the one recommended by petitioners requiring only that bidders be active on a single license in each round. We also expressly retained the discretion, requested by SBC, to announce at any point during a multiple round auction that the auction will end after some specified number of additional rounds.⁴⁷

18. In the Second Report and Order the Commission also retained the ability to speed up an auction by announcing at any time during an auction that the next stage of the auction will begin in the next bidding round.⁴⁸ In this Order the Commission wishes to make explicit that this discretion could be exercised by employing an alternative rule for moving from one stage of the auction to the next. The Commission will announce by Public Notice prior to an auction its intent to use an alternative rule. One possible alternative rule would be that the auction will move to the next stage if in each of some fixed number of rounds, bidding activity is below some level measured as the ratio of new bids (measured in terms of MHz-pops) to available licenses (measured in terms of MHz-pops). The ratio of new bids to

⁴⁴ Second Report and Order at ¶ 143.

⁴⁵ Second Report and Order at ¶ 144.

⁴⁶ Id. at ¶ 133.

⁴⁷ Id. at ¶ 132.

⁴⁸ Id. at n.110.

licenses may be a better measure of bidding activity than the percentage of total licenses on which the high bid has increased (measured in terms of MHz-pops) because it accounts for the possibility that bidding may be concentrated on a few licenses. In contrast, the latter measure indicates the same level of bidding activity regardless of how many bids are made on a given set of licenses.

B. Suggested Opening Bid

19. In the Second Report and Order, we stated that in multiple round auctions the Commission will generally specify minimum bid increments to speed the progress of the auction.⁴⁹ The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round. We retained the discretion to use a "suggested" minimum bid increment rather than a required bid increment.⁵⁰

20. In the recent nationwide narrowband auctions, it became apparent that the Commission may need further tools to avoid unnecessarily long auctions. In order to expedite the auction process further, we also reserve the discretion to establish a suggested opening bid on each license in addition to the minimum bid increment.⁵¹ Where we adopt a suggested opening bid, initial bids will have to be above the minimum bid increment but may be below the suggested opening bid. Generally, we will establish suggested opening bids in the range of \$.03 - \$.20 per pop per MHz for each license. This suggested opening bid will provide bidders with an incentive to start bidding at a substantial portion of the license value, thus ensuring a rapid conclusion of the auction.

C. Commission Discretion During Auctions

21. In the Second Report and Order, as discussed supra, we chose our primary auction methodology, but noted that no one auction design is optimal for all auctionable services. We stated that we would adopt auction rules for specific services in subsequent Report and Orders, based on criteria established in the Second Report and Order. We further stated that when we announced individual auctions for specific services, we would specify more detailed procedures for those auctions in a Public Notice, but that those procedures also would be governed by criteria set forth in the Second Report and Order.⁵² Our rules also afforded flexibility with respect to some auction procedures, such as those governing the duration of

⁴⁹ Second Report and Order at ¶ 124.

⁵⁰ Under a suggested minimum bid increment rule, the auction would close if no bids or only one bid was submitted that was above the minimum bid increment. Id. at n.102.

⁵¹ See ex parte submission of Paul Milgrom, May 19, 1994.

⁵² Id. at ¶ 68.

bidding rounds, minimum bid amounts, and stopping rules, and we stated that we might make decisions regarding such matters during the course of an auction.⁵³

22. Petition. The National Association of Business and Educational Radio, Inc. ("NABER") asserts that the auction rules do not comply with the public interest and the Administrative Procedure Act⁵⁴ because they allow the Commission to circumvent the normal notice and comment procedure, and that the rules prevent providers of service from devising a business plan and auction strategy in advance.⁵⁵ NABER states that the Commission should eliminate its discretion to change the auction rules or procedures during a particular auction, that bidders need to know the rules which will apply for a particular service auction, and that interested parties should have the opportunity to provide meaningful comment before the final auction rules for particular services and frequencies are set.⁵⁶ NABER asserts that should the Commission change bidding methods in mid-stream without prior public comment, the Commission would violate the notice and comment rulemaking requirements of the Administrative Procedure Act, by its failure to keep a record and analyze and consider all relevant matter regarding those new rules.⁵⁷

23. Discussion. We believe that the process we have used to adopt auction designs and implementation procedures and the rules themselves fully comply with the Administrative Procedure Act. In the NPRM in this docket, we provided notice of the auction designs we were considering and requested comment on issues of auction design and procedure. We received voluminous public comment on these issues. In the Second Report and Order, we carefully considered all comments and suggestions concerning a wide variety of proposed auction designs, including the comments and proposals of numerous experts in auction theory. We have established a broad framework for the conduct of license auctions, specifying a menu of auction designs and procedures from which we will choose for individual auctions. We have identified our preferred options, and have discussed the circumstances in which we believe the various options will be most appropriate in order to serve our statutory goals, and which are therefore most likely to be chosen. After the Second Report and Order was issued, we made, in addition, more specific choices of auction designs for particular services in Orders dealing with those services.⁵⁸ We have also established application, payment, and

⁵³ Id. at ¶¶ 123, 126, 132.

⁵⁴ See Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

⁵⁵ NABER Petition at 2.

⁵⁶ Id. at 8.

⁵⁷ Id. at 9; see 5 U.S.C. § 553.

⁵⁸ See Third Report and Order at ¶¶ 16-40, Fourth Report and Order at ¶ 11-18, and Fifth Report and Order at ¶¶ 27-57.

penalty procedures for individual services.⁵⁹ The procedures, we believe, afforded members of the public all of the procedural rights to which they are entitled under the Administrative Procedure Act.

24. Our rules, however, must also be flexible enough so that we can adjust our procedures to fit the circumstances of individual auctions. We will not know until we have gained some experience with simultaneous multiple round auctions exactly what values of such parameters as bidding increments and triggers for movement to the next auction phase work best under what circumstances. Consequently, we believe that it is important for those running the auctions to be able to use information generated in the early auctions and in the early rounds of individual auctions. Further, it may be important to be able to respond to the behavior of bidders in the course of particular auctions. We may find it desirable to allow more time for consultation between bidding rounds in complex auctions, for instance, or, in light of the statutory requirement to issue licenses expeditiously, to increase the bidding increment to hasten the conclusion of an auction if the auction is proceeding slowly. Clearly, notice and comment procedures would be unworkable in such cases. The flexibility that our rules permit us is analogous to the ad hoc decisional authority that may be exercised within other types of licensing proceedings, and our discretion here is similarly constrained by the general framework and standards embodied in our rules. The latitude remaining to the Commission to alter auction procedures is, however, necessary to ensure that we can make improvements as we become aware of the need for them, and that we can manage auctions efficiently. The Commission will exercise its discretion in a manner consistent with our clearly articulated goals and the general procedures we have established.

25. We have also taken care to safeguard bidders' interests. During the course of an auction only minor adjustments in procedures are permitted that will necessitate no major changes of strategy on their part. Further, we have stated clearly which procedures are, and which are not, subject to change during the course of an auction, so that bidders will know what kinds of changes to expect and to prepare for. We have stated that when we announce auctions for a particular services by public notice, we will also announce the procedures to be used in those auctions.⁶⁰ We believe that this approach will provide prospective bidders with ample information to plan rational bidding strategies.

26. Finally, although the Commission has never before used auctions as a licensing method, we note that our auction procedures afford as much, or more, detailed guidance to bidders than is usually provided in advance of an auction. For example, in conventional oral auctions the auctioneer customarily has the discretion to alter bid increments and other procedures at will in any manner and at any time during an auction. As in other types of

⁵⁹ See Third Report and Order at ¶¶ 41-60, Fourth Report and Order at ¶¶ 19-29, and Fifth Report and Order at ¶¶ 58-92.

⁶⁰ Second Report and Order at ¶ 68.

auctions, we believe that it will be critically important to the success of our auctions to leave the Commission some discretion to fine-tune auction procedures between auctions and, in some cases, on an ad hoc basis, during the course of an auction. Accordingly, we affirm our original decisions to adopt rules that afford the Commission some flexibility to modify its procedures during the course of an auction, within the scope of the options we have delineated and under the circumstances described above.

D. Treatment of Upfront Payments

27. In the Second Report and Order we required bidders to tender a substantial payment in advance of the auction in order to deter frivolous or insincere bidding.⁶¹ Upfront payments were also intended to provide a source of funds for collection of penalties for bid withdrawal.⁶² The amount of the upfront payment was related to the level of eligibility the bidder wished to establish, measured in terms of the population and amount of spectrum encompassed by the licenses on which the bidder was permitted to bid. In some cases the upfront payment could amount to millions of dollars.⁶³ We required that upfront payments be submitted prior to bidding, and we did not permit use of letters of credit or Treasury bills for upfront deposits due to administrative difficulties in accepting payment in such forms, at least until the Commission has more experience in conducting auctions.⁶⁴ We stated that upfront payments made by a winning bidder would be applied to satisfy its down payment obligations, and that losing bidders' upfront payments would be returned if they wished to withdraw from further bidding.⁶⁵

28. Petitions. GTE asserts that the Commission should adopt an interest-bearing evergreen deposit procedure for upfront deposits.⁶⁶ GTE states that, since the Commission is not currently authorized to establish interest-bearing accounts, substantial sums of money could be tied up in upfront deposits without any accrual of interest for substantial periods of time. GTE asserts that maximum bidder flexibility can be achieved by allowing bidders to add or withdraw deposit funds during the course of the auction. GTE states that the Commission needs to ensure that it has the requisite authority to permit the accumulation and payment of interest.

⁶¹ Second Report and Order at ¶ 171.

⁶² Id. at ¶ 176.

⁶³ Id. at ¶¶ 172, 173.

⁶⁴ Id. at ¶¶ 182, 184, 185.

⁶⁵ Id. at ¶ 187, n.140.

⁶⁶ GTE Petition at 11-13.

29. AIDE states that when a winning bidder's upfront payments, less bid withdrawal penalties, exceed the required deposit, the excess upfront payment should remain available for crediting to another auction or for refund to the winning bidder.⁶⁷ AIDE points out that, in the case of designated entities, the required deposit is only 10 percent. AIDE notes that the Commission has stated that it will apply this policy for losing bidders, and as a matter of equal protection the Commission should apply the same policy to winning bidders with excess upfront payments.⁶⁸

30. AIDE requests clarification of footnote 133 in the Second Report and Order.⁶⁹ Footnote 133 reads:

For example, an entity that is interested in bidding on several 30 MHz PCS licenses with a goal of providing service to a population of at most 50 million should make an upfront payment of \$30 million ($\$.02 \times 30 \text{ MHz} \times 50,000,000$). That bidder will not be permitted to bid (at any time) in the auction, or be permitted to win, 30 MHz licenses covering more than 50 million pops.

31. Discussion. Allowing bidders to add funds to upfront deposits in order to increase their eligibility level, or to withdraw funds from upfront deposits, as GTE recommends, would add greatly to the complexity of the Commission's administrative task. The Commission would have to keep track of changes in eligibility due to changes in upfront payments, as well as to changes in bidders' activity levels, and would have to ascertain that fund transfers had taken place before permitting bidders to bid at the levels to which the additional payments entitled them. Because of the short intervals between bidding rounds, delays in the transfer of funds would likely create problems for both bidders and the Commission. For these reasons, we believe it is prudent to require bidders to submit upfront payments that represent the maximum level of bidding that they anticipate before the beginning of the auction. Bidders can always ensure that they will be able to expand their bidding above their originally anticipated level by submitting a sufficiently large upfront payment and maintaining a high activity level.

32. We agree with AIDE that winners' upfront deposits, in excess of their required down payment deposits and any penalties they may owe, should be refunded expeditiously. We intend to refund excess upfront deposits of all bidders as soon as possible. We will not apply excess upfront deposit balances to subsequent auctions, however, due to the additional administrative difficulty of tracking the funds.

⁶⁷ AIDE Petition at 15.

⁶⁸ Id. at 16.

⁶⁹ Id. at 13.

33. With respect to AIDE's request for clarification, we clarify that footnote 133 means that in any round of the auction, a bidder who has made an upfront payment of \$30 million may bid on, or hold the high bid from the previous round on, 30 MHz licenses in markets with a combined population totaling not more than 50 million. The specific licenses on which the bidder submits bids may vary from round to round, but the total MHz-pop ceiling cannot be exceeded in any single round.

E. Default Penalty

34. In the Second Report and Order the Commission imposed a default penalty for withdrawing a bid after a simultaneous multiple round auction has closed.⁷⁰ This default penalty was set at 3 percent of the amount of the winning bid the next time the license is offered by the Commission, or 3 percent of the amount of the defaulting bidder's bid, whichever is less. The default penalty would be imposed in addition to the bid withdrawal penalty, which was set at the difference between the amount bid and the amount of the subsequent winning bid. We stated that the default penalty was intended to provide an incentive for bidders who wished to withdraw their bids to do so before the close of the auction. We stated that such a penalty was appropriate because a withdrawal that occurs after an auction closes is likely to be more harmful than one that occurs before closing. We stated that if a withdrawal occurs after the auction closes, other bidders will have little opportunity to revise their strategies, and the likelihood will be lower that the licenses will be awarded to those who value them most. We also stated that default imposes on the government the extra costs of re-auctioning the license.

35. Petition. AIDE asserts that the default penalty will produce a windfall to the Treasury if the winning bid exceeds the defaulting bid by more than 3 percent.⁷¹ AIDE states that the defaulting bidder should pay no penalty if the second bid exceeds the defaulting bid by 3 percent or more, and that if the second bid exceeds the defaulting bid by less than 3 percent, the defaulting bidder's penalty should be the difference between the second winning bid and 103 percent of the defaulting bid.

36. Discussion. We believe that it is appropriate to charge the full 3 percent default penalty in addition to the bid withdrawal penalty whether or not the winning bid in the second auction exceeds the defaulting bid. As we stated in the Second Report and Order, the function of the default penalty is to encourage bidders who plan to withdraw their bids to do so before the close of the auction.⁷² The additional costs to the Commission and to other bidders of auctioning the license a second time, and the increased likelihood that the license will not be won by the bidder who values it most, are incurred as a consequence of default

⁷⁰ Second Report and Order at ¶ 154.

⁷¹ AIDE Petition at 14.

⁷² Second Report and Order at ¶ 154.

regardless of the level of the bids. Even if the winning bid is higher than the defaulting bid, we have no reason to believe that it is higher than the winning bid would have been had the defaulting bidder withdrawn before the close of the auction, nor have we reason to believe that a high winning bid compensates for the undesirable effects of default. Consequently, we retain the default penalty as set forth in the Second Report and Order.

F. Disclosure of Bidding Information

37. In the Second Report and Order the Commission recognized the informational benefits to be gained from releasing bidder identities during an auction, but concluded that such information should not be released because "the risk of collusion and strategic manipulation outweighs the benefits of the additional information." Instead the Commission adopted an intermediate approach pursuant to which the bidder identification numbers and bid amounts for each bidder will be released at the end of each round of bidding. This approach provides bidders with useful information without incurring excessive risks of collusion and strategic manipulation.⁷³

38. Petitions. GTE and Southwestern Bell request that the identities of bidders be released during the course of the auction. GTE requests that the identity of the bidder associated with each bidder identification number be disclosed during the bidding process.⁷⁴ SBC states that the Commission should announce both the identity of the highest bidder and the bid amount for each round of the auction.⁷⁵ GTE argues that a bidder must construct a strategy based on its own valuation of the spectrum as well as estimates of its competitors' valuations and past bids, and that a fundamental component of this exercise is knowledge of who the competitors are. GTE notes that the Commission's sole justification for not furnishing information about the identity of bidders is a concern for collusion, and states that the Second Report and Order includes other mechanisms for minimizing collusion. GTE states that increases in available information raise the level of competition and the efficiency of license assignments, and that access to bidder identification information may increase revenue from the auction process while ensuring award to the bidder who most highly values the license.⁷⁶ SBC argues that the decision to keep winning bidder identities secret creates an opportunity for collusive behavior because cartels could coordinate activities and punish violators without detection. SBC notes that if the identity of all bidders is known, the Commission and bidders need not be concerned with protecting bidders' identity. SBC states that knowing who the successful bidders are affects other bidders' ability to assess the accuracy of their valuation of the spectrum and allows them to ascertain that an aggregation

⁷³ Id. at ¶ 158.

⁷⁴ GTE Petition at 4-6.

⁷⁵ SBC Petition at 8-10.

⁷⁶ GTE Petition at 5-6.

of licenses is underway which might pose a competitive threat. MCI states that because of the potential for bidder collusion and strategic manipulation, bidder identities should not be revealed.⁷⁷

39. Discussion. Arguments in favor of disclosing bidder identities primarily turn on the value of the information in improving the quality of bids. Some auction experts argue that bidders' estimates of license values can be improved by comparing them to the valuations of their competitors.⁷⁸ Bidders' valuations of licenses may also be highly dependent on knowing the identity of neighboring carriers, especially regional leaders and competitors, and on knowing the manner in which complementary licenses are likely to be used and the compatibility of standards both inside and outside their desired service areas. Maximizing information available to bidders may increase bids by decreasing bidders' incentives to reduce their bids to avoid the "winner's curse," the tendency for the bidder who most overestimates the value of the item for sale to win an auction. Revealing bidder identities may facilitate awarding licenses to those who value them most highly by providing more information to bidders. More accurate valuation of licenses by bidders can thus improve the efficiency of license assignments. In addition, publicly disclosing the identity of other bidders may encourage vigorous bidding for licenses. Releasing bidder identities may increase interest in and media coverage of the auctions.

40. Our experience with the first narrowband PCS auction showed that preventing bidder identities from being revealed can be extremely difficult. In addition, if some but not all bidders know other bidders' identities, those bidders have an advantage in the quality of information available to them and in the potential ability to thwart others' bidding strategies. Concealing bidder identities may give an advantage to larger bidders that have the resources to devote to discovering other bidders' identities.

41. As we noted in the Second Report and Order, however, releasing the identities of high bidders may foster strategic manipulation, such as bidding up the prices of licenses needed by rivals, and may facilitate collusion.⁷⁹ Some auction experts argue that anonymity makes it harder to target a firm for strategic hold-up because the bidding and aggregation strategies of specific competitors cannot be easily detected.⁸⁰ Concealing bidder identities makes initiating collusive arrangements during the course of an auction more difficult because

⁷⁷ MCI Comments at 3.

⁷⁸ See e.g. comments of PacBell on NPRM, Attachment by Paul R. Milgrom and Robert B. Wilson at 21.

⁷⁹ Second Report and Order at ¶ 158.

⁸⁰ Comments of NYNEX on NPRM, attachment by Robert G. Harris and Michael L. Katz, "A Public Interest Assessment of Spectrum Auctions for Wireless Telecommunications Services" at 9.

bidders will not easily be able to identify the parties against whom they are bidding, unless those parties voluntarily reveal their identities. On the other hand, concealing bidders' identities may not be critical to preventing collusion during an auction; existing antitrust laws and the FCC's collusion rules should be adequate to prevent collusive conduct. In any event, under an anonymous bidding scenario, if bidders want to collude they can simply disclose their bidder identification numbers to one another before the auction.

42. Because of the advantages of providing more information to bidders and the difficulties involved in ensuring that bidder identities remain confidential, we will generally release the identities of bidders before each auction. However, we recognize that experts disagree on the potential for knowledge of bidders' identities to facilitate collusion and other strategic behavior. Consequently we wish to have the flexibility to conceal bidder identities if further experience shows that it would be feasible and desirable to do so. We may also wish to test the effects of releasing identities of bidders. Consequently we are reserving the option to withhold bidder identities on an auction-by-auction basis. If we decide to withhold bidder identities for a particular auction, we will announce that decision by a service-specific auction Order. We will announce by Public Notice prior to each auction whether the identities of bidders will be made public in that auction.

G. Standby Queue

43. Petition. GTE states that for 10 MHz blocks in broadband PCS the Commission should adopt the "standby queue" bidding mechanism considered in experiments sponsored by the National Telecommunications and Information Administration and conducted at the California Institute of Technology.⁸¹ The standby queue allows parties seeking individual licenses to coordinate their bids in order to beat a bid for a combination of licenses. GTE asserts that the standby queue would allow bidders seeking to combine smaller blocks into a larger set of frequencies, or to combine blocks on a geographic basis, to obtain information about the status of bidding that would permit them to bid rationally and efficiently.

44. Discussion. The standby queue is a mechanism to be used in conjunction with combinatorial auctions. In the Fifth Report and Order we concluded that the disadvantages of combinatorial bidding were likely to outweigh the advantages for auctions of broadband PCS licenses, and we adopted simultaneous multiple round bidding as our auction methodology for broadband PCS licenses. Nevertheless, we left open the option to use combinatorial auctions if simultaneous multiple round auctions do not result in efficient aggregation of licenses, and if there are significant advances in the development of combinatorial auctions.⁸² Although we have no current plans to use combinatorial auctions, if in future we do adopt such an auction methodology we will consider the use of a standby queue mechanism.

⁸¹ GTE Petition at 13-14.

⁸² Fifth Report and Order at ¶ 35.

H. Filing Fees

45. **Petition.** William E. Zimsky (Zimsky) states that the rule imposing filing fees for the filing of short form applications for auctions should be deleted.⁸³ Zimsky asserts that because there is no provision in 47 U.S. C. § 158(g) for imposing the filing fee for the new short form application, the Commission lacks the statutory authority to impose such a fee. Zimsky also asserts that, even if the Commission has such statutory power, to impose a filing fee on all bidders is unreasonable because the filing fee was designed to recoup the costs of fully processing the application. Since only auction winners will submit long form applications and have their applications scrutinized, the losing bidders do not receive this service. Consequently, the Commission's proposed scheme is unconstitutional, he argues, because a user fee which is not reasonably related to, or a fair approximation of, the cost incurred by the government in providing the service for which the fee is assessed, effects a taking of applicants' property without just compensation, in violation of their fifth amendment rights. Zimsky cites Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980); United States v. Sperry Corp., 493 U.S. 52, 60 (1989) in support of his argument.

46. **Discussion.** The Commission has requested express statutory authority to impose section 8 application fees for short form applications. In the absence of such express authority, we do not currently impose fees for short-form applications. However, long-form applications in most services are subject to fees under section 8. Consequently we find Zimsky's petition to be moot, and we dismiss it.

I. Waiver Requests in Short-Form Applications

47. Cable & Wireless, Inc. (CWI) asks that the Commission reconsider its rules that appear to mandate dismissal of the short-form application, (Form 175) that do not certify compliance with the foreign ownership provision of Section 310 of the Communications Act, notwithstanding the filing of a request for waiver or other relief.⁸⁴ CWI asserts that the Commission should permit participation at auction where the applicant certifies to the pendency of such a waiver request. In considering the acceptance for filing of short form applications, the Commission will accept certifications that state that a request for waiver or declaratory ruling concerning the requirements of section 310 is pending.⁸⁵

⁸³ See William E. Zimsky Petition.

⁸⁴ See petition of CWI.

⁸⁵ On January 5, 1994, CWI also filed a petition seeking a declaratory ruling that the public interest warrants grant of common carrier radio license applications to U.K. citizens and/or corporations that possess ownership interests in excess of the foreign ownership benchmarks in Section 310(b)(4) of the Communications Act. We expect to address the merits of this petition in a separate Declaratory Ruling.

J. Rules Prohibiting Collusion

48. In order to prevent collusion in bidding, the Commission in the Second Report and Order stated,

. . . 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 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 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.⁸⁶

49. Petition. BET Holdings, Inc. (BET) states that the above requirements prevent bidders from entering into any new agreements, joint ventures or similar arrangements with other entities after filing a short-form application.⁸⁷ BET claims that as a consequence bidders may be locked into bidding arrangements significantly before the commencement of the auctions, and will be unable to modify their bidding strategies, consult with experts or others, or enter into additional alliances with new parties any time after the filing of the short-form application. BET states that the collusion rule is an unrealistic constraint on lawful business behavior. For example, according to BET, if a company does not identify affiliates or others with whom it must consult, the company would be forbidden from soliciting research, sharing resources, or discussing its bids until after the winning bidder tenders its down payment.⁸⁸ BET requests that the Commission rely on antitrust law as a safeguard against collusion.

50. Discussion. While we intend to rely primarily on the antitrust laws to prevent bidding collusion, we believe that the anticollusion rules in the Second Report and Order will provide an important additional tool that will enable the Commission to detect, prevent, and punish collusion. To prevent and detect collusion, we believe that it is important to have clearly stated rules concerning the entities with whom communication about bidding strategies is permissible. The requirement that an entity identify at the time of the short-form application those affiliates, subsidiaries, or others with whom it has agreements concerning

⁸⁶ Second Report and Order at ¶ 225.

⁸⁷ BET Petition at 10.

⁸⁸ Id. at 11.

bidding, and the prohibition of communication concerning bidding with entities identified by other bidders, serve this purpose and are not particularly burdensome. Similarly, prohibiting additional agreements and alliances concerning bidding between applicants bidding for the same licenses, after applications have been filed and the identities of all applicants are known, seems a prudent deterrent to collusion that should have only a minimal and temporary effect on bidders' flexibility. We wish to make explicit our intention that the prohibition extend to post-application settlement agreements and discussions concerning settlement agreements.

51. We do believe, however, that our prohibition on communication among bidders and formation of agreements among bidders after applications have been filed may have been excessively broad in that it includes communications and agreements with bidders who are not bidding against each other, and so may prevent useful agreements that have no effect on the competitiveness of bidding. Consequently, we are modifying our collusion rules, which currently prohibit bidders from communicating with one another after short-form applications have been filed regarding the substance of their bids or bidding strategies and which also prohibit bidders from entering into consortium arrangements or joint bidding agreements of any kind after the deadline for short-form applications has passed. In order to permit certain bidders to respond to higher than expected license prices by combining their resources during an auction, we will now permit bidders who have not filed Form 175 applications for any of the same licenses to engage in discussions and enter into bidding consortia or joint bidding arrangements during the course of an auction. We conclude that where bidders have not applied for any of the same licenses there is little risk of anticompetitive conduct and therefore we believe that it is appropriate to relax our collusion rules to permit bidders in this context to have greater flexibility to increase their competitiveness in the auction by combining their resources, provided that no change of control of any applicant takes place.

52. In addition, we now believe that entering into consortium arrangements or adding equity partners during an auction may have a useful effect in enabling bidders to acquire the capital necessary to bid successfully for licenses. We have concluded that formation of consortia or changes in ownership after the filing of short-form applications will not necessarily have anticompetitive effects, provided they do not involve parties that might have bid against each other and do not result in a change in control of the applicant. Consequently, we wish to modify our rules regarding amendments to short-form applications. As a result of our experience in the nationwide narrowband PCS auction, we believe that it is necessary to allow applicants to amend their FCC Form 175 applications to make ownership changes after the filing deadline has passed, provided such changes do not result in a change in control of the applicant. Permitting such amendments will provide bidders with flexibility to seek additional capital after applications have been filed, while ensuring that the real party in interest does not change. Accordingly, we will modify Section 1.2105(c) to permit applicants to amend their FCC Form 175 applications to reflect ownership changes that do not result in a change in control of the applicant, provided the parties have not filed Form 175 applications for any of the same licenses. Such changes shall not be regarded as major amendments to an application, provided they do not result in a transfer of control of the license or the applicant and do not change control of the company.

53. Situations may arise in which an applicant has some common ownership interest with another bidder. We wish to clarify that, unless that other entity is expressly identified as an entity with whom the applicant has an agreement concerning bidding, we will prohibit communication concerning bidding with that bidder, as described in the Second Report and Order, even if the other bidder is identified on the applicant's short form application as having some common ownership interest with the applicant. We will retain the anticollusion rules as set forth in the Second Report and Order, with these clarifications.

K. Information Disclosure by Applicants and Licensees

54. Petitions. Two petitions deal with the amount of information auction participants are required to disclose. GTE requests that the Commission require applicants to provide full ownership disclosure in their short form applications.⁸⁹ GTE asserts that by enabling the Commission and competing applicants to assess the legitimacy of auction applicants, full disclosure facilitates the award of licenses to qualified and eligible service providers. According to GTE, full disclosure also promotes open and informed bidding decisions.

55. SBC asks that the Commission minimize requirements for disclosure of information upon transfer of licenses.⁹⁰ SBC states that the point of transfer disclosures is to "prevent unjust enrichment as a result of the methods employed to issue licenses and permits."⁹¹ SBC asserts that rules designed to prevent unjust enrichment should be solely applicable, if at all, to designated entities that receive special accommodations, since the risk of unjust enrichment is high only in auctions where such special accommodations are provided. SBC asserts that the formation of reasonable and efficient alliances would be discouraged by the mandate to expose the details of the alliance to competitors. SBC particularly objects to the requirement that any management agreements or consulting contracts be filed. SBC seeks clarification that the disclosure requirements will apply only to the licensees which either have not begun to offer service or have only offered service for some minimal period of time.

56. Discussion. With respect to ownership disclosure in short-form applications, in the Second Report and Order we decided to require applicants to furnish only minimal information in short-form applications and bidder certifications prior to auctions in order to reduce administrative burdens and minimize the potential for delay.⁹² Further ownership disclosure requirements, however, were adopted on a service specific basis in later Reports

⁸⁹ GTE Petition at 2-4.

⁹⁰ SBC Petition at 6-8.

⁹¹ Id. at 6 (citing 47 U.S.C. §309(j)(4)(E)) .

⁹² Second Report and Order at ¶ 165.

and Orders.⁹³ We believe that GTE's concerns are fully met by these requirements.

57. As for transfer disclosure requirements, Congress in the Budget Act required us to develop and test alternative auction designs.⁹⁴ We noted in the Second Report and Order that in addition to allowing detection of unjust enrichment, transfer disclosure requirements would provide data necessary for evaluation of our auction designs.⁹⁵ We noted that the reporting requirements would allow us to monitor our compliance with the Congressional 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 disseminating licenses among a wide variety of applicants. . . ." ⁹⁶ The information will be useful in meeting our statutory obligation to report to Congress on the outcome of the auctions.⁹⁷ The information we acquire from transfer disclosures, including purchase price and other aspects of the sale contracts and management agreements, will enable us to determine the ultimate distribution of licenses and the value of the spectrum for particular uses, and will permit comparisons between licenses awarded with and without designated entity provisions. Such analyses require collection of data from all licensees, not just from designated entities or those who have not begun to offer service or have only offered service for a short period of time. As we stated in the Second Report and Order, we do not expect the transfer disclosure requirements to be burdensome to licensees because the documents to be submitted will have been prepared for other purposes in any event. Moreover, parties may request confidential treatment of competitively sensitive information pursuant to Sections 0.457 and 0.459 of our Rules.⁹⁸ Consequently we will retain transfer disclosure requirements for all transfers of licenses obtained by competitive bidding.

L. Application-Processing Rules

58. In the NPRM in this proceeding the Commission stated:

In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45 and 22.917(f), and 22.918-22.945, 47 C.F.R §§ 22.3-22.45, 22.917(f), and 22.918-22.945. For those PCS applicants who file on Form 574, we believe that Sections 90.113-90.159 of our rules,

⁹³ See Third Report and Order, Appendix at 13; Fifth Report and Order at ¶ 62 .

⁹⁴ 47 U.S.C. 309(j)(3).

⁹⁵ Second Report and Order at ¶ 214.

⁹⁶ Id. at ¶ 215.

⁹⁷ See Budget Act, 47 U.S.C. § 309(j)(2).

⁹⁸ Second Report and Order at ¶ 215, citing 47 CFR §§ 0.457, 0.459.

47 CFR §§ 90.113-90.159, could be used to process those applications with appropriate modifications.⁹⁹

59. **Petition.** AIDE asserts that the Commission acted improperly in proposing substantive PCS application-processing rules in the NPRM because, it argues, such rules are outside the scope of this rulemaking, which is limited to implementation of the competitive bidding requirements of §309(j) of the Communications Act.¹⁰⁰ AIDE argues that the Commission's proposal of application-processing rules is legally insufficient to constitute a valid notice of proposed rules, and that some of the rules cited have no immediate applicability to PCS service. AIDE asserts that in the Second Report and Order the Commission failed to respond to the merits of the arguments concerning filing and processing rules in AIDE's comments on the NPRM. AIDE concludes that the Commission needs to issue a supplemental Notice of Proposed Rulemaking to adopt license-processing rules for PCS.

60. **Discussion.** The competitive bidding process is a means of assigning licenses, and rules and procedures for processing of license applications are an integral and necessary part of that process. The Commission adopted few filing or processing rules in the Second Report and Order. Those rules that the Commission did adopt pertaining to the filing and processing of applications and certifications were clearly proposed in the NPRM.¹⁰¹ The rules to which AIDE refers were adopted not in the Second Report and Order but in subsequent Orders establishing auction rules for specific services.¹⁰² We address AIDE's petition relating to those rules either in the Orders in which they were adopted or in reconsiderations of those Orders.¹⁰³

M. Financial Qualifications

61. In the Second Report and Order, the Commission stated that applicants filing short form applications would be required to certify that they are financially qualified pursuant to Section 308(b) of the Communications Act. The applicants would also be required to certify that they satisfy any financial qualification requirements for the service in question.¹⁰⁴

⁹⁹ NPRM at ¶ 128.

¹⁰⁰ AIDE Petition at 20-21.

¹⁰¹ See Second Report and Order at ¶¶ 164-168, NPRM at ¶¶ 96-101.

¹⁰² See Third Report and Order at ¶ 41, n. 18; Fifth Report and Order at ¶ 83.

¹⁰³ See Fifth Report and Order at ¶ 83.

¹⁰⁴ Second Report and Order at ¶ 166.