



# PUBLIC NOTICE

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## **AUCTION OF FM BROADCAST CONSTRUCTION PERMITS SCHEDULED FOR JULY 23, 2015**

### **COMMENT SOUGHT ON COMPETITIVE BIDDING PROCEDURES FOR AUCTION 98**

AU Docket No. 15-3

Comments Due: April 1, 2015

Reply Comments Due: April 8, 2015

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## I. INTRODUCTION

1. By this Public Notice, the Wireless Telecommunications and Media Bureaus (the Bureaus) announce an auction of certain FM broadcast construction permits and seek comment on the procedures to be used for this auction. This auction is scheduled to commence on July 23, 2015, and is designated as Auction 98.

## II. CONSTRUCTION PERMITS IN AUCTION 98

2. As discussed in greater detail below, Auction 98 will offer 131 construction permits in the FM broadcast service.<sup>1</sup> The construction permits to be auctioned are for 113 new FM allotments, including 18 construction permits that were offered but not sold or were defaulted upon in prior auctions.<sup>2</sup> Attachment A lists the specific vacant FM allotments for which the Federal Communications Commission (FCC or Commission) will offer construction permits, along with the reference coordinates for each vacant FM allotment.<sup>3</sup> These comprise FM channels added to the Table of FM Allotments, 47 C.F.R. § 73.202(b), pursuant to the Commission's established rulemaking procedures, and designated for use in the indicated communities. Under the policies established in the *Broadcast First Report and Order*, an applicant may apply for any vacant FM allotment listed in Attachment A.<sup>4</sup> If two or more short-form applications (FCC Form 175) specify the same FM allotment, they will be considered mutually exclusive, and the construction permit for that FM allotment will be awarded by competitive bidding procedures.<sup>5</sup>

## III. DUE DILIGENCE

3. Each potential bidder is solely responsible for investigating and evaluating all technical and marketplace factors that may have a bearing on the value of the construction permits for broadcast facilities that it is seeking in this auction. Each bidder is responsible for assuring that, if it wins a construction permit, it will be able to build and operate facilities in accordance with the Commission's rules. **The FCC makes no representations or warranties about the use of this spectrum for particular services. Each applicant should be aware that an FCC auction represents an opportunity to become an FCC permittee in the broadcast service, subject to certain conditions and**

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<sup>1</sup> See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, *First Report and Order*, FCC 98-194, 13 FCC Rcd 15920, 15923-24 ¶¶ 7-9, 15961 ¶ 112 (1998) (“*Broadcast First Report and Order*”), on recon., *Memorandum Opinion and Order*, FCC 99-74, 14 FCC Rcd 8724 (1999), on further recon., *Memorandum Opinion and Order*, FCC 99-201, 14 FCC Rcd 12541 (1999), *aff'd*, *Orion Communications Ltd. v. FCC*, 221 F.3d 196, No. 98-1424 (D.C. Cir. June 13, 2000) (unpublished opinion available at 2000 WL 816046), *aff'd*, *Orion Communications Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000).

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

<sup>3</sup> In the *Broadcast First Report and Order*, the Commission gave each applicant in the FM service the opportunity to submit a set of preferred site coordinates as an alternative to the reference coordinates for the vacant FM allotment upon which the applicant intends to bid. A future Public Notice announcing the procedures for Auction 98 will provide guidelines for completing FCC Form 175 and exhibits, including detailed instructions for specifying preferred site coordinates. See *Broadcast First Report and Order*, 13 FCC Rcd at 15974-75 ¶ 142 & nn.152-53.

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

<sup>5</sup> When two or more short-form applications (FCC Forms 175) are submitted for a construction permit for the same allotment in Auction 98, mutual exclusivity exists for auction purposes. See *Broadcast First Report and Order*, 13 FCC Rcd at 15974 ¶ 142, 15978-80 ¶¶ 149-53. Once mutual exclusivity exists for auction purposes, even if only one applicant is qualified to bid for a particular construction permit in Auction 98, that applicant is required to submit a bid in order to obtain the construction permit. Any applicant that submits a short-form application, but fails to timely submit an upfront payment, will retain its status as an applicant in Auction 98 and will remain subject to the rules prohibiting certain communications but, having purchased no bidding eligibility, will not be eligible to bid. An applicant that fails to become a qualified bidder for any other reason also will retain its status as an Auction 98 applicant and will remain subject to the rules prohibiting certain communications.

regulations. These conditions include, but are not limited to, the condition that FCC licenses and other authorizations (whether awarded through competitive bidding or otherwise) are subject to the authority of the FCC, under the Communications Act of 1934, as amended, to modification through rulemaking and adjudicative proceedings. An FCC auction does not constitute an endorsement by the FCC of any particular service, technology, or product, nor does an FCC construction permit or license constitute a guarantee of business success.

4. An applicant should perform its due diligence research and analysis before proceeding, as it would with any new business venture. In particular, the Bureaus strongly encourage each potential bidder to review all underlying Commission orders, such as the specific *Report and Order* amending the FM Table of Allotments and allotting the FM channel(s) on which it plans to bid.<sup>6</sup> A *Report and Order* adopted in an FM allotment rulemaking proceeding may include anomalies such as site restrictions or expense reimbursement requirements.<sup>7</sup> Additionally, each potential bidder should perform technical analyses and/or refresh any previous analyses to assure itself that, should it become a winning bidder for any Auction 98 construction permit, it will be able to build and operate facilities that will fully comply with all applicable technical and legal requirements. The Bureaus strongly encourage each applicant to inspect any prospective transmitter sites located in, or near, the service area for which it plans to bid; confirm the availability of such sites; and familiarize itself with the Commission's rules regarding the National Environmental Policy Act.<sup>8</sup>

5. The Bureaus strongly encourage each applicant to conduct its own research prior to Auction 98 in order to determine the existence of pending administrative or judicial proceedings, including pending allocation rulemaking proceedings, that might affect its decisions regarding participation in the auction.

6. The Bureaus strongly encourage participants in Auction 98 to continue such research throughout the auction. The due diligence considerations mentioned in this Public Notice do not comprise an exhaustive list of steps that should be undertaken prior to participating in this auction. As always, the burden is on the potential bidder to determine how much research to undertake, depending upon the specific facts and circumstances related to its interests.

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

7. Consistent with the provisions of section 309(j)(3)(E)(i) of the Communications Act of 1934, as amended, and to ensure that potential bidders have adequate time to familiarize themselves with the specific rules that will govern the day-to-day conduct of an auction, the Commission directed the Bureaus, under delegated authority, to seek comment on a variety of auction-specific procedures prior to the start of each auction.<sup>9</sup> We therefore seek comment on the following issues relating to the conduct of Auction 98.

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<sup>6</sup> See 47 C.F.R. § 73.202.

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

<sup>8</sup> 47 C.F.R. §§ 1.1301-1.1319.

<sup>9</sup> 47 U.S.C. § 309(j)(3)(E)(i). See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, FCC 97-413, 13 FCC Rcd 374, 447-49 ¶¶ 124-25 (1997) (“*Part 1 Third Report and Order*”) (directing WTB to seek comment on specific mechanisms related to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension or cancellation); see also *Broadcast First Report and Order*, 13 FCC Rcd at 15967-15968 ¶¶ 127-28 (consistent with the Part 1 rules, the Commission also delegated authority to the Media Bureau to seek comment and establish an appropriate auction design methodology prior to the

## A. Auction Structure

### 1. Simultaneous Multiple-Round Auction Design

8. The Bureaus propose to auction all construction permits included in Auction 98 using the Commission's standard simultaneous multiple-round auction format.<sup>10</sup> As described further below, this type of auction offers every construction permit for bid at the same time and consists of successive bidding rounds in which eligible bidders may place bids on individual construction permits. Typically, bidding remains open on all construction permits until bidding stops on every construction permit. The Bureaus seek comment on this proposal.

### 2. Bidding Rounds

9. Auction 98 will consist of sequential bidding rounds, each followed by the release of round results. The initial bidding schedule will be announced in a public notice to be released at least one week before the start of the auction. Details on viewing round results, including the location and format of downloadable round results files, will be included in the same public notice.

10. The Commission will conduct Auction 98 over the Internet using the Commission's Integrated Spectrum Auction System (FCC Auction System). Bidders will also have the option of placing bids by telephone through a dedicated Auction Bidder Line. The toll-free telephone number for the Auction Bidder Line will be provided to qualified bidders prior to the start of the auction.

11. The Bureaus propose to retain the discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. Under this proposal, the Bureaus may change the amount of time for the bidding rounds, the amount of time between rounds, or the number of rounds per day, depending upon bidding activity and other factors. The Bureaus seek comment on this proposal. Commenters on this issue should address the role of the bidding schedule in managing the pace of the auction, specifically discussing the tradeoffs in managing auction pace by bidding schedule changes, by changing the activity requirements or bid amount parameters, or by using other means.

### 3. Stopping Rule

12. The Bureaus have discretion to establish stopping rules before or during multiple round auctions in order to complete the auction within a reasonable time.<sup>11</sup> For Auction 98, the Bureaus propose to employ a simultaneous stopping rule approach, which means all construction permits remain available for bidding until bidding stops on every construction permit. Specifically, bidding will close on all construction permits after the first round in which no bidder submits any new bid, applies a proactive waiver, or withdraws any provisionally winning bid (if bid withdrawals are permitted in this auction).<sup>12</sup> Thus, unless the Bureaus announce alternative procedures, the simultaneous stopping rule will be used in this auction, and bidding will remain open on all construction permits until bidding stops on every construction permit. Consequently, it is not possible to determine in advance how long the bidding in this auction will last.

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start of each broadcast auction). *See generally* 47 C.F.R. § 0.131; Amendment of Part 1 of the Commission's Rules – Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, FCC 97-60, 12 FCC Rcd 5686, 5697-98 ¶ 16 (1997) (“*Part 1 Order*”).

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

<sup>11</sup> 47 C.F.R. § 1.2104(e).

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

13. Further, the Bureaus propose to retain the discretion to exercise any of the following options during Auction 98:

- a) Use a modified version of the simultaneous stopping rule that would close the auction for all construction permits after the first round in which no bidder applies a waiver, withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or places any new bid on a construction permit for which it is not the provisionally winning bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a construction permit for which it is the provisionally winning bidder would not keep the auction open under this modified stopping rule.
- b) Use a modified version of the simultaneous stopping rule that would close the auction for all construction permits after the first round in which no bidder applies a waiver, withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or places any new bid on a construction permit that is not FCC held. Thus, absent any other bidding activity, a bidder placing a new bid on a construction permit that does not already have a provisionally winning bid (an “FCC-held” construction permit) would not keep the auction open under this modified stopping rule.
- c) Use a modified version of the simultaneous stopping rule that combines (a) and (b) above.
- d) Declare the auction will end after a specified number of additional rounds (“special stopping rule”). If the Bureaus invoke this special stopping rule, they will accept bids in the specified final round(s), after which the auction will close.
- e) Keep the auction open even if no bidder places any new bid, applies a waiver, or withdraws any provisionally winning bid (if withdrawals are permitted in this auction). In this event, the effect will be the same as if a bidder had applied a waiver. The activity rule will apply as usual, and a bidder with insufficient activity will either lose bidding eligibility or use a waiver.

14. The Bureaus propose to exercise these options only in certain circumstances, for example, where the auction is proceeding unusually slowly or quickly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time or will close prematurely. Before exercising these options, the Bureaus are likely to attempt to change the pace of the auction. For example, the Bureaus may adjust the pace of bidding by changing the number of bidding rounds per day and/or the minimum acceptable bids. The Bureaus propose to retain the discretion to exercise any of these options with or without prior announcement during the auction. The Bureaus seek comment on these proposals.

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

15. For Auction 98, the Bureaus propose that the Bureaus may delay, suspend, or cancel the auction in the event of a natural disaster, technical obstacle, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding.<sup>13</sup> We will notify participants of any such delay, suspension or cancellation by public notice and/or through the FCC Auction System’s announcement function. If the auction is delayed or suspended, we may, in our sole discretion, elect to resume the auction starting from the beginning of the current round or from some previous round, or cancel the auction in its entirety. Network interruption may cause the Bureaus to delay or suspend the auction. The Bureaus emphasize that they will exercise this authority solely at their discretion, and not as a substitute for situations in which bidders may wish to apply activity rule waivers. The Bureaus seek comment on this proposal.

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<sup>13</sup> 47 C.F.R. § 1.2104(i).

## B. Auction Procedures

### 1. Upfront Payments and Bidding Eligibility

16. The Bureaus have delegated authority and discretion to determine an appropriate upfront payment for each construction permit being auctioned, taking into account such factors as the efficiency of the auction process and the potential value of similar construction permits.<sup>14</sup> As described further below, the upfront payment is a refundable deposit made by each bidder to establish eligibility to bid on construction permits. Upfront payments that are related to the specific construction permits being auctioned protect against frivolous or insincere bidding and provide the Commission with a source of funds from which to collect payments owed at the close of the auction.<sup>15</sup> With these considerations in mind, the Bureaus propose the upfront payments set forth in Attachment A to this Public Notice. The Bureaus seek comment on the upfront payments specified in Attachment A.

17. The Bureaus further propose that the amount of the upfront payment submitted by a bidder will determine its initial bidding eligibility in bidding units. The Bureaus propose to assign each construction permit a specific number of bidding units, equal to one bidding unit per dollar of the upfront payment listed in Attachment A. The number of bidding units for a given construction permit is fixed and does not change during the auction as prices change. A bidder may place bids on multiple construction permits, provided that the total number of bidding units associated with those construction permits does not exceed the bidder's current eligibility. A bidder cannot increase its eligibility during the auction; it can only maintain its eligibility or decrease its eligibility. Thus, in calculating its upfront payment amount and hence its initial bidding eligibility, an applicant must determine the maximum number of bidding units on which it may wish to bid (or hold provisionally winning bids) in any single round, and submit an upfront payment amount covering that total number of bidding units. The Bureaus request comment on these proposals.

<b>Example: Upfront Payments, Bidding Eligibility, and Bidding Flexibility</b>			
<b>Construction Permit</b>	<b>Market Name</b>	<b>Bidding Units</b>	<b>Upfront Payment</b>
MM-FM979-A	Hermitage, AR	1,500	\$1,500
MM-FM1002-A	Hornbeck, LA	2,500	\$2,500

If a bidder wishes to bid on both construction permits in a round, it must have selected both on its FCC Form 175 and purchased at least 4,000 bidding units (1,500 + 2,500) of bidding eligibility. If it only wishes to bid on one, but not both, purchasing 2,500 bidding units would meet the eligibility requirement for either construction permit. The bidder would be able to bid on either construction permit, but not both at the same time. If the bidder purchased only 1,500 bidding units, the bidder would have enough eligibility for the Hermitage, AR construction permit but not for the Hornbeck, LA construction permit.

### 2. Activity Rule

18. In order to ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. A bidder's activity in a round will be the sum of the bidding units associated with any construction permits upon which it places bids during the current round and the bidding units associated

<sup>14</sup> See *Part 1 Order*, 12 FCC Rcd at 5697-98 ¶ 16; see also *Part 1 Third Report and Order*, 13 FCC Rcd at 425 ¶ 86; *Second Report and Order*, 9 FCC Rcd at 2377-79 ¶¶ 169-75.

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

with any construction permits for which it holds provisionally winning bids. Bidders are required to be active on a specific percentage of their current bidding eligibility during each round of the auction. Failure to maintain the requisite activity level will result in the use of an activity rule waiver, if any remain, or a reduction in the bidder's eligibility for the next round of bidding, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction.<sup>16</sup>

19. The Bureaus propose to divide the auction into at least two stages, each characterized by a different activity requirement.<sup>17</sup> The auction will start in Stage One. The Bureaus propose to advance the auction to the next stage by announcement during the auction. In exercising this discretion, the Bureaus will consider a variety of measures of auction activity, including but not limited to, the percentage of bidding units associated with construction permits on which there are new bids,<sup>18</sup> the number of new bids, and the increase in revenue. The Bureaus seek comment on these proposals.

20. The Bureaus propose the following activity requirements, while noting again that the Bureaus retain the discretion to change stages unilaterally by announcement during the auction:

**Stage One:** In each round of the first stage of the auction, a bidder desiring to maintain its current bidding eligibility is required to be active on bidding units associated with construction permits representing at least 80 percent of its current bidding eligibility. Failure to maintain the required activity level will result in the use of an activity rule waiver or a reduction in the bidder's bidding eligibility for the next round of bidding. During Stage One, a bidder's reduced eligibility for the next round will be calculated by multiplying the bidder's current round activity by five-fourths (5/4).

**Stage Two:** In each round of the second stage, a bidder desiring to maintain its current bidding eligibility is required to be active on 95 percent of its current bidding eligibility. Failure to maintain the required activity level will result in the use of an activity rule waiver or a reduction in the bidder's bidding eligibility for the next round of bidding. During Stage Two, a bidder's reduced eligibility for the next round will be calculated by multiplying the bidder's current round activity by twenty-nineteenths (20/19).

21. The Bureaus seek comment on these activity requirements. Under this proposal, the Bureaus will retain the discretion to change the activity requirements during the auction. For example, the Bureaus could decide to add an additional stage with a higher activity requirement, not to transition to Stage Two if the Bureaus believe the auction is progressing satisfactorily under the Stage One activity requirement, or to transition to Stage Two with an activity requirement that is higher or lower than the 95 percent proposed herein.<sup>19</sup> If the Bureaus exercise this discretion, they will alert bidders by announcement in the FCC Auction System.

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

<sup>17</sup> See 47 C.F.R. § 1.2104(f).

<sup>18</sup> For example, when monitoring activity for determining when to change stages, the Bureaus may consider the percentage of bidding units of the construction permits receiving new provisionally winning bids, excluding any FCC-held permits. In past auctions, the Bureaus have generally—but not always—changed stages when this measure was approximately twenty percent or below for three consecutive rounds of bidding.

<sup>19</sup> If the Bureaus implement stages with activity requirements other than the ones listed above, a bidder's reduced eligibility for the next round will be calculated by multiplying the bidder's current round activity by the reciprocal of the activity requirement. For example, with a 98 percent activity requirement, the bidder's current round activity would be multiplied by 50/49; with a 100 percent activity requirement, the bidder's current round activity would become its bidding eligibility (current round activity would be multiplied by 1/1).

### 3. Activity Rule Waivers and Reducing Eligibility

22. When a bidder's activity in the current round is below the required minimum level, it may preserve its current eligibility through an activity rule waiver. An activity rule waiver applies to an entire round of bidding, not to a particular construction permit. Activity rule waivers can be either proactive or automatic. Activity rule waivers are principally a mechanism for a bidder to avoid the loss of bidding eligibility in the event that exigent circumstances prevent it from bidding in a particular round.

23. The FCC Auction System assumes that a bidder that does not meet the activity requirement would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver at the end of any bidding round in which a bidder's activity is below the minimum required unless (1) the bidder has no activity rule waiver remaining; or (2) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the activity requirement. If a bidder has no waiver remaining and does not satisfy the activity requirement, the bidder's current eligibility will be permanently reduced, possibly curtailing or eliminating the ability to place additional bids in the auction.

24. A bidder with insufficient activity may wish to reduce its bidding eligibility rather than use an activity rule waiver. If so, the bidder must affirmatively override the automatic waiver mechanism during the bidding round by using the "reduce eligibility" function in the FCC Auction System. In this case, the bidder's eligibility is permanently reduced to bring it into compliance with the activity rule described above. Reducing eligibility is an irreversible action; once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility, even if the round has not yet closed.

25. Under the proposed simultaneous stopping rule, a bidder may apply an activity rule waiver proactively as a means to keep the auction open without placing a bid. If a bidder proactively applies an activity rule waiver (using the "apply waiver" function in the FCC Auction System) during a bidding round in which no bids are placed or withdrawn (if bid withdrawals are permitted in this auction), the auction will remain open and the bidder's eligibility will be preserved. An automatic waiver applied by the FCC Auction System in a round in which there are no new bids, withdrawals (if bid withdrawals are permitted in this auction), or proactive waivers will not keep the auction open. A bidder cannot apply a proactive waiver after bidding in a round, and applying a proactive waiver will preclude it from placing any bids in that round.<sup>20</sup> Applying a waiver is irreversible; once a proactive waiver is submitted, it cannot be unsubmitted, even if the round has not yet closed.

26. Consistent with recent FCC auctions, the Bureaus propose that each bidder in Auction 98 be provided with three activity rule waivers that may be used as set forth above at the bidder's discretion during the course of the auction.<sup>21</sup> The Bureaus seek comment on this proposal.

### 4. Reserve Price or Minimum Opening Bids

27. Consistent with the statutory mandate of section 309(j),<sup>22</sup> the Commission has directed the Bureaus to seek comment on the use of a minimum opening bid amount and/or reserve price prior to

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<sup>20</sup> In general, once a bidder places a proactive waiver during a round, the FCC Auction System does not allow the bidder to take any other bidding-related action in that round, including placing bids or withdrawing bids (if bid withdrawals are permitted in this auction).

<sup>21</sup> See, e.g., Auction of FM Broadcast Construction Permits Rescheduled for April 23, 2013; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 94, AU Docket No. 12-239, *Public Notice*, DA 12-1865, 27 FCC Rcd 14299, 14333 ¶¶ 128-29 (WTB/MB 2012) ("*Auction 94 Procedures Public Notice*"); Auction of FM Broadcast Construction Permits Scheduled for March 27, 2012; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 93, AU Docket No. 11-146, *Public Notice*, DA 11-1845, 26 FCC Rcd 15484, 15515 ¶¶ 119-20 (WTB/MB 2011) ("*Auction 93 Procedures Public Notice*").

<sup>22</sup> 47 U.S.C. § 309(j)(4)(F); see also 47 C.F.R. § 1.2104(c), (d).

the start of each auction.<sup>23</sup>

28. Normally, a reserve price is an absolute minimum price below which an item will not be sold in a given auction. A minimum opening bid, on the other hand, is the minimum bid price set at the beginning of the auction below which no bids are accepted. It is generally used to accelerate the competitive bidding process. It is possible for the minimum opening bid and the reserve price to be the same amount.

29. The Bureaus propose to establish minimum opening bid amounts for Auction 98. The Bureaus believe that a minimum opening bid amount, which has been used in other broadcast auctions, is an effective bidding tool for accelerating the competitive bidding process.<sup>24</sup> The Bureaus do not propose to establish separate reserve prices for the construction permits to be offered in Auction 98.

30. For Auction 98, the Bureaus propose minimum opening bid amounts determined by taking into account the type of service and class of facility offered, market size, population covered by the proposed broadcast facility, and recent broadcast transaction data. Attachment A to this Public Notice lists a proposed minimum opening bid amount for each construction permit available in Auction 98. The Bureaus seek comment on the minimum opening bid amounts specified in Attachment A.

31. If commenters believe that these minimum opening bid amounts will result in unsold construction permits, are not reasonable amounts, or should instead operate as reserve prices, they should explain why this is so and comment on the desirability of an alternative approach. The Bureaus ask commenters to support their claims with valuation analyses and suggested amounts or formulas for reserve prices or minimum opening bids. In establishing the minimum opening bid amounts, the Bureaus particularly seek comment on factors that could reasonably have an impact on valuation of the broadcast spectrum, including the type of service and class of facility offered, market size, population covered by the proposed FM broadcast facility and any other relevant factors.

## 5. Bid Amounts

32. The Bureaus propose that, in each round, an eligible bidder will be able to place a bid on a given construction permit in any of up to nine different amounts.<sup>25</sup> Under this proposal, the FCC Auction System interface will list the acceptable bid amounts for each construction permit.<sup>26</sup>

33. The first of the acceptable bid amounts is called the minimum acceptable bid amount. The minimum acceptable bid amount for a construction permit will be equal to its minimum opening bid amount until there is a provisionally winning bid for the construction permit. After there is a provisionally winning bid for a construction permit, the minimum acceptable bid amount will be a certain percentage higher. That is, the FCC will calculate the minimum acceptable bid amount by multiplying the provisionally winning bid amount times one plus the minimum acceptable bid percentage. If, for example, the minimum acceptable bid percentage is 10 percent, the minimum acceptable bid amount will equal (provisionally winning bid amount) \* (1.10), rounded.<sup>27</sup> If bid withdrawals are permitted in this auction, in the case of a construction permit for which the provisionally winning bid has been withdrawn,

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<sup>23</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15971 ¶ 134; *Part 1 Third Report and Order*, 13 FCC Rcd at 454-56 ¶ 139-41; see 47 C.F.R. § 1.2104(c), (d).

<sup>24</sup> See, e.g., *Auction 94 Procedures Public Notice*, 27 FCC Rcd at 14335-37 ¶¶ 140-44; *Auction 93 Procedures Public Notice*, 26 FCC Rcd at 15517-19 ¶¶ 131-33.

<sup>25</sup> Bidders must have sufficient eligibility to place a bid on the particular construction permit. See Section IV.B.1. “Upfront Payments and Bidding Eligibility,” above.

<sup>26</sup> In the event of duplicate bid amounts due to rounding, the FCC Auction System will omit the duplicates and will list fewer than nine acceptable bid amounts for the construction permit.

<sup>27</sup> Results are rounded using the Commission's standard rounding procedure for auctions: results above \$10,000 are rounded to the nearest \$1,000; results below \$10,000 but above \$1,000 are rounded to the nearest \$100; and results below \$1,000 are rounded to the nearest \$10.

the minimum acceptable bid amount will equal the second highest bid received for the construction permit.<sup>28</sup>

34. The FCC will calculate the eight additional bid amounts using the minimum acceptable bid amount and a bid increment percentage, which need not be the same as the percentage used to calculate the minimum acceptable bid amount. The first additional acceptable bid amount equals the minimum acceptable bid amount times one plus the bid increment percentage, rounded. If, for example, the bid increment percentage is 5 percent, the calculation is (minimum acceptable bid amount) \* (1 + 0.05), rounded, or (minimum acceptable bid amount) \* 1.05, rounded; the second additional acceptable bid amount equals the minimum acceptable bid amount times one plus two times the bid increment percentage, rounded, or (minimum acceptable bid amount) \* 1.10, rounded; etc. The Bureaus will round the results using the Commission's standard rounding procedures for auctions.<sup>29</sup>

35. For Auction 98, the Bureaus propose to use a minimum acceptable bid percentage of 10 percent. This means that the minimum acceptable bid amount for a construction permit will be approximately 10 percent greater than the provisionally winning bid amount for the construction permit. To calculate the additional acceptable bid amounts, the Bureaus propose to use a bid increment percentage of 5 percent. The Bureaus seek comment on these proposals.

36. The Bureaus retain the discretion to change the minimum acceptable bid amounts, the minimum acceptable bid percentage, the bid increment percentage, and the number of acceptable bid amounts if the Bureaus determine that circumstances so dictate. Further, the Bureaus retain the discretion to do so on a construction permit-by-construction permit basis. The Bureaus also retain the discretion to limit (a) the amount by which a minimum acceptable bid for a construction permit may increase compared with the corresponding provisionally winning bid, and (b) the amount by which an additional bid amount may increase compared with the immediately preceding acceptable bid amount. For example, the Bureaus could set a \$10,000 limit on increases in minimum acceptable bid amounts over provisionally winning bids. Thus, if calculating a minimum acceptable bid using the minimum acceptable bid percentage results in a minimum acceptable bid amount that is \$12,000 higher than the provisionally winning bid on a construction permit, the minimum acceptable bid amount would instead be capped at \$10,000 above the provisionally winning bid. The Bureaus seek comment on the circumstances under which the Bureaus should employ such a limit, factors the Bureaus should consider when determining the dollar amount of the limit, and the tradeoffs in setting such a limit or changing other parameters, such as changing the minimum acceptable bid percentage, the bid increment percentage, or the number of acceptable bid amounts. If we exercise this discretion, we will alert bidders by announcement in the FCC Auction System during the auction.

## 6. Provisionally Winning Bids

37. Provisionally winning bids are bids that would become final winning bids if the auction were to close in that given round. At the end of a bidding round, the FCC Auction System determines a provisionally winning bid for each construction permit based on the highest bid amount received. If identical high bid amounts are submitted on a construction permit in any given round (i.e., tied bids), the FCC Auction System will use a random number generator to select a single provisionally winning bid from among the tied bids. (The Auction System assigns a random number to each bid when the bid is entered. The tied bid with the highest random number wins the tiebreaker.) The remaining bidders, as well as the provisionally winning bidder, can submit higher bids in subsequent rounds. However, if the auction were to end with no other bids being placed, the winning bidder would be the one that placed the provisionally winning bid. If the construction permit receives any bids in a subsequent round, the provisionally winning bid again will be determined by the highest bid amount received for the construction permit.

<sup>28</sup> See Section IV.B.7. "Bid Removal and Bid Withdrawal," below.

<sup>29</sup> See note 27 (concerning rounding), above.

38. A provisionally winning bid will be retained until there is a higher bid on the construction permit at the close of a subsequent round, unless the provisionally winning bid is withdrawn (if bid withdrawals are permitted in this auction). The Bureaus remind bidders that provisionally winning bids count toward a bidder's activity for purposes of the activity rule.<sup>30</sup>

## 7. Bid Removal and Bid Withdrawal

39. For Auction 98, the Bureaus propose the following bid removal procedures. Before the close of a bidding round, a bidder has the option of removing any bid that bidder placed in that round. By removing a selected bid in the FCC Auction System, a bidder may effectively "unsubmit" any bid placed within that round. In contrast to the bid withdrawal provisions described below, a bidder removing a bid placed in the same round is not subject to a withdrawal payment. Once a round closes, a bidder may no longer remove a bid. The Bureaus seek comment on this bid removal proposal.

40. The Bureaus also seek comment on whether bid withdrawals should be permitted in Auction 98. When permitted in an auction, bid withdrawals provide a bidder with the option of withdrawing bids placed in prior rounds that have become provisionally winning bids. A bidder may withdraw its provisionally winning bids using the "withdraw bids" function in the FCC Auction System. A bidder that withdraws its provisionally winning bid(s), if permitted, is subject to the bid withdrawal payment provisions of the Commission's rules.<sup>31</sup>

41. In the *Part 1 Third Report and Order*, the Commission explained that it had found in prior auctions that allowing bid withdrawals risks encouraging insincere bidding and the use of withdrawals for anti-competitive strategic purposes, such as signaling other bidders.<sup>32</sup> In a more recent rulemaking proceeding, the Commission emphasized the anti-competitive effects of bid withdrawals, especially late in an auction.<sup>33</sup> The Commission stated that the Bureaus should exercise their discretion assertively, consider limiting the number of rounds in which bidders may withdraw bids, and prevent bidders from bidding on a particular market if they find a bidder is abusing the Commission's bid withdrawal procedures.<sup>34</sup> In managing the auction we, therefore, have discretion to limit the number of withdrawals to prevent bidding abuses.

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

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<sup>30</sup> See Section IV.B.2. "Activity Rule," above.

<sup>31</sup> 47 C.F.R. § 1.2104(g)(1); see also 47 C.F.R. § 1.2109.

<sup>32</sup> See *Part 1 Third Report and Order*, 13 FCC Rcd at 458-60 ¶¶ 148-50. After stating a few paragraphs later that allowing bid withdrawals facilitates efficient aggregation of licenses or construction permits and the pursuit of backup strategies as information becomes available during the course of an auction, the Commission immediately again noted that in some instances bidders may seek to withdraw bids for improper reasons. *Id.*

<sup>33</sup> See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Report and Order*, FCC 06-4, 21 FCC Rcd 891, 902-03 ¶ 29, 904 n.57 (2006) ("*CSEA/Part 1 Report and Order*") ("[T]here have been a disproportionate number of withdrawals late in our auctions, indicating that some bidders have been placing and then withdrawing bids primarily to discourage potential or existing market competitors from seeking to acquire licenses.").

<sup>34</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 458-60 ¶¶ 148-50.

## C. Post-Auction Payments

### 1. Interim Withdrawal Payment Percentage

43. In the event the Bureaus allow bid withdrawals in Auction 98, the Bureaus propose the interim bid withdrawal payment be 20 percent of the withdrawn bid.<sup>35</sup> A bidder that withdraws a bid during an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or a subsequent auction.<sup>36</sup> However, if a construction permit for which a bid has been withdrawn does not receive a subsequent higher bid or winning bid in the same auction, the FCC cannot calculate the final withdrawal payment until that construction permit receives a higher bid or winning bid in a subsequent auction. In such cases, when that final withdrawal payment cannot yet be calculated, the FCC imposes on the bidder responsible for the withdrawn bid an interim bid withdrawal payment, which will be applied toward any final bid withdrawal payment that is ultimately assessed.<sup>37</sup>

44. The amount of the interim bid withdrawal payment may range from three percent to twenty percent of the withdrawn bid amount, with the percentage generally being higher where there is greater risk of bid withdrawals being used for anti-competitive purposes, such as when there is little need for bidders to aggregate permits. As discussed above, this is the case in Auction 98. In light of these considerations, the Bureaus propose to use the maximum interim bid withdrawal payment percentage allowed by 47 C.F.R. § 1.2104(g)(1) in the event bid withdrawals are allowed. The Bureaus request comment on using twenty percent for calculating an interim bid withdrawal payment amount in Auction 98. Commenters advocating the use of bid withdrawals should also address the percentage of the interim bid withdrawal payment.

### 2. Additional Default Payment Percentage

45. Any winning bidder that defaults or is disqualified after the close of an auction (i.e., fails to remit the required down payment within the prescribed period of time, fails to submit a timely long-form application, fails to make full and timely final payment, or is otherwise disqualified) is liable for a default payment under 47 C.F.R. § 1.2104(g)(2). This default payment consists of a deficiency payment equal to the difference between the amount of the Auction 98 bidder's winning bid and the amount of the winning bid the next time a construction permit covering the same spectrum is won in an auction,<sup>38</sup> plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid,<sup>39</sup> whichever is less.<sup>40</sup>

46. The Commission's rules provide that, in advance of each auction, it will establish a percentage between three percent and twenty percent of the applicable bid to be assessed as an additional default payment.<sup>41</sup> As the Commission has indicated, the level of this additional payment in each auction will be based on the nature of the service and the construction permits being offered.<sup>42</sup>

47. For Auction 98, the Bureaus propose to establish an additional default payment of twenty percent. As noted in the *CSEA/Part 1 Report and Order*, defaults weaken the integrity of the auction process and may impede the deployment of service to the public, and an additional twenty percent default

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<sup>35</sup> See *CSEA/Part 1 Report and Order*, 21 FCC Rcd at 903-04 ¶¶ 30-31.

<sup>36</sup> 47 C.F.R. § 1.2104(g)(1).

<sup>37</sup> *Id.*

<sup>38</sup> See *id.* § 1.2104(g)(2)(i).

<sup>39</sup> See *id.* § 1.2104(g)(2)(ii), (iii).

<sup>40</sup> See also 47 C.F.R. § 1.2109.

<sup>41</sup> See 47 C.F.R. § 1.2104(g)(2).

<sup>42</sup> See *CSEA/Part 1 Report and Order*, 21 FCC Rcd at 903-04 ¶¶ 30-31.

payment will be more effective in deterring defaults than the three percent used in some earlier auctions.<sup>43</sup> Moreover, a twenty percent additional default payment amount is consistent with the percentage used in recent auctions of FM permits.<sup>44</sup> In light of these considerations, the Bureaus propose for Auction 98 an additional default payment of twenty percent of the relevant bid. The Bureaus seek comment on this proposal.

## V. SUPPLEMENTAL REGULATORY FLEXIBILITY ANALYSIS

48. Consistent with the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>45</sup> as well as our obligations to small businesses under sections 309(j)(3)(B) and 309(j)(4)(D) of the Communications Act of 1934, as amended, the Bureaus have prepared this additional analysis to supplement the Commission’s Initial and Final Regulatory Flexibility Analyses completed in the underlying notices of proposed rulemaking and orders, including the *Broadcast First Report and Order* and associated orders described above, which are hereby incorporated by reference.<sup>46</sup> This analysis addresses any possible incremental significant economic impact on small entities by the competitive bidding procedures proposed in this Public Notice implementing such orders.<sup>47</sup> The Bureaus request written public comments on this supplemental analysis. Comments must be filed by the same filing deadline for comments specified on the first page of this Public Notice, and must be identified as responses to this supplemental analysis. The Bureaus will send a copy of this Public Notice, including this supplemental analysis, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>48</sup> In addition, a summary of this Public Notice, including a summary of this analysis, will be published in the Federal Register.<sup>49</sup>

49. **Need for, and Objectives of, the Proposed Competitive Bidding Procedures.** This Public Notice seeks comment on proposed procedures to govern Auction 98, an auction of 131 FM radio station construction permits. This process is intended to implement the Commission’s duty under section 309(j)(3)(e)(i) of the Communications Act of 1934, as amended, to provide notice of and adequate time

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<sup>43</sup> *Id.* at 902-03 ¶ 29.

<sup>44</sup> *See, e.g., Auction 94 Procedures Public Notice*, 27 FCC Rcd at 14341 ¶ 171 (setting additional default payment for Auction 94 permits at twenty percent of the applicable bid); *Auction 93 Procedures Public Notice*, 26 FCC Rcd at 15523 ¶ 160 (same twenty percent); Auction of FM Broadcast Construction Permits Rescheduled for April 27, 2011; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 91, AU Docket No. 10-183, *Public Notice*, DA 10-2253, 25 FCC Rcd 16787, 16828 ¶ 172 (WTB/MB 2010)(same twenty percent).

<sup>45</sup> 5 U.S.C. § 603. The Regulatory Flexibility Act, *see* 5 U.S.C. §§ 601-12, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>46</sup> *See Broadcast First Report and Order*, 13 FCC Rcd at 16015-27 Appendix B; Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, *Notice of Proposed Rulemaking*, FCC 97-397, 12 FCC Rcd 22363, 22416-22 Appendix B (1997). *See also* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Declaratory Ruling and Notice of Proposed Rule Making*, FCC 05-123, 20 FCC Rcd 11268, 11301-07 Appendix B (2005); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Notice of Proposed Rule Making*, FCC 93-455, 8 FCC Rcd 7635, 7666 Appendix (1993). *See generally CSEA/Part 1 Report and Order*, 21 FCC Rcd at 927-34 Appendix C; *Part 1 Third Report and Order*, 13 FCC Rcd at 492-503 Appendix B; *Part 1 Order*, 12 FCC Rcd at 5749-53 Appendix C; *Second Report and Order*, 9 FCC Rcd at 2400 ¶¶ 299-302.

<sup>47</sup> *See id.*

<sup>48</sup> *See* 5 U.S.C. § 603(a).

<sup>49</sup> *Id.*

for potential applicants to comment on proposed auction procedures.<sup>50</sup> The objective of this notice and comment proceeding is to promote the efficient and fair administration of the competitive bidding process for all Auction 98 participants, including small businesses.<sup>51</sup>

50. This Public Notice seeks comment on the proposed procedures for conducting Auction 98, including:

- use of a simultaneous multiple-round auction format, consisting of sequential bidding rounds with a simultaneous stopping rule (with discretion to exercise alternative stopping rules under certain circumstances);
- a specific minimum opening bid amount for each construction permit proposed to be offered in Auction 98;
- a specific upfront payment amount for each construction permit;
- establishment of a bidder's initial bidding eligibility in bidding units based on that bidder's upfront payment through assignment of a specific number of bidding units for each construction permit;
- use of an activity rule that would require bidders to bid actively during the auction rather than waiting until late in the auction before participating;
- use of different activity requirements in two stages of the auction, with the Bureaus retaining discretion to change the activity requirement during the auction;
- provision of three activity rule waivers for each bidder to allow it to preserve eligibility during the course of the auction;
- use of minimum acceptable bid amounts and bid increments, along with a proposed methodology for calculating such amounts, with the Bureaus retaining discretion to change their methodology if circumstances dictate;
- a procedure for breaking ties if identical high bid amounts are submitted on a permit in a given round;
- bid removal procedures;
- whether to permit bid withdrawals;
- establishment of an interim bid withdrawal percentage of 20 percent of the withdrawn bid in the event the Bureaus allow bid withdrawals in Auction 98; and
- establishment of an additional default payment of 20 percent under section 47 C.F.R. § 1.2104(g)(2) in the event that a winning bidder defaults or is disqualified after the auction.

51. **Description and Estimate of the Number of Small Entities to which Specified Auction 98 Procedures Will Apply.** The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by rules proposed in that rulemaking proceeding, if adopted.<sup>52</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental

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<sup>50</sup> 47 U.S.C. § 309(j)(3)(E)(i) (requirement to seek comment on auction procedures); *see also Part 1 Third Report and Order*, 13 FCC Rcd at 447-49 ¶¶ 123-25 (directing Wireless Telecommunications Bureau to seek comment on specific mechanisms related to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension or cancellation); *Broadcast First Report and Order*, 13 FCC Rcd at 15967-15968 ¶¶ 127-28 (consistent with the Part 1 rules, the Commission delegated authority to the Bureaus to seek comment and establish an appropriate auction design methodology prior to the start of each broadcast auction).

<sup>51</sup> *See Part 1 Third Report and Order*, 13 FCC Rcd at 447-49 ¶¶ 123-25; *Broadcast First Report and Order*, 13 FCC Rcd at 15967-15968 ¶¶ 127-28; *see also Part 1 Order*, 12 FCC Rcd at 5697-98 ¶ 16.

<sup>52</sup> 5 U.S.C. § 603(b)(3).

jurisdiction.”<sup>53</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>54</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>55</sup> Moreover, the SBA has created a small business size standard of \$38.5 million or less in annual receipts<sup>56</sup> for “establishments primarily engaged in broadcasting aural programs.”<sup>57</sup> The size data provided by the SBA, however, does not enable the Bureau to make a meaningful estimate of the number of small entities who may participate in Auction 98.

52. The specific procedures on which comment is sought in this Public Notice will affect directly all applicants participating in Auction 98. The number of entities that may apply to participate in Auction 98 is unknown. Based on the numbers of applicants in prior FM auctions, we estimate that the number of applicants for Auction 98 may range from approximately 175 to 260. This estimate is based on the number of applicants who filed short-form applications to participate in previous auctions of FM radio station construction permits (exclusive of closed auctions).<sup>58</sup> In the eight open FM broadcast auctions held to date, an average of 1.98 short-form applications were filed per construction permit offered, with a median of 1.365 applications per permit.<sup>59</sup> If those figures apply to Auction 98, the number of applicants may range between 179 and 259. (We recognize that the actual number of applicants for Auction 98 could vary significantly as any individual’s or entity’s decision to participate may be affected by a number of factors beyond the Commission’s control.)

53. We are unable to accurately develop an estimate based on the number of small entities that applied to participate in prior broadcast auctions because that information is not collected from applicants for broadcast auctions in which bidding credits are not based on an applicant’s size (as is the case in auctions of licenses for wireless services). Potential applicants in Auction 98 may include existing holders of broadcast station construction permits or licenses as well as non-licensees. We note, however, that the Commission has recently estimated that 97 percent of radio broadcasters met the SBA’s prior definition of “small business concern,” based on annual revenues of \$7 million.<sup>60</sup> Moreover, the SBA has since increased that revenue threshold to \$38.5 million.<sup>61</sup> Based on this assessment, we conclude that nearly all of Auction 98 applicants will likely meet the SBA’s definition of a small business concern.

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<sup>53</sup> 5 U.S.C. § 601(6).

<sup>54</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies unless an agency, after consultation with the Office of Advocacy of the SBA, and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.

<sup>55</sup> 15 U.S.C. § 632(a)(1996).

<sup>56</sup> 13 C.F.R. § 121.201; North American Industrial Classification System (NAICS) code 515112.

<sup>57</sup> U.S. Census Bureau, 2012 NAICS Definitions, “515112 Radio Stations,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>58</sup> FM Auction 98 is not a closed auction; any person or entity meeting the eligibility requirements may seek to participate in Auction 98.

<sup>59</sup> The number of applicants and permits in open FM auctions held to date are as follows: Auction 37 – 697 applicants for 288 permits; Auction 62 – 339 applicants for 171 permits; Auction 68 – 51 applicants for 9 permits; Auction 70 – 181 applicants for 120 permits; Auction 79 – 121 applicants for 122 permits; Auction 91 – 161 applicants for 144 permits; Auction 93 – 145 applicants for 119 permits; Auction 94 – 109 applicants for 112 permits.

<sup>60</sup> Revitalization of the AM Service, *Notice of Proposed Rule Making*, FCC 13-139, 28 FCC Rcd 15221, 15247 ¶ 6 (2013).

<sup>61</sup> 13 C.F.R. § 121.201; NAICS code 515112.

54. **Legal Basis.** The Commission has established a framework of competitive bidding rules pursuant to which it has conducted auctions since the inception of the auction program in 1994 and would conduct Auction 98.<sup>62</sup> The statutory basis for those rules is found in various provisions of the Communications Act of 1934, as amended, including sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304, 307 and 309(j).<sup>63</sup> The Commission has directed the Bureaus, under delegated authority, to seek comment on a variety of auction-specific procedures prior to the start of each auction.<sup>64</sup>

55. **Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.** The Bureaus do not propose to implement any new reporting requirements, recordkeeping requirements or any other compliance requirements in this proceeding. Any individual or entity seeking to participate in an auction must submit a short-form application (FCC Form 175). The information collected on FCC Form 175 is used by the Bureaus to determine if an applicant is legally, technically, and financially qualified to participate in a Commission auction. Additionally, if an applicant applies for status as a new entrant auction participant pursuant to Commission rules, the Commission uses information collected on Form 175 to determine whether the applicant is eligible for the status requested. If an applicant is a winning bidder, it is required to submit a more detailed long-form application (such as an FCC Form 301 for an FM station), including any showings to demonstrate its eligibility for new entrant status it may have claimed. As further described below, this two-phased process helps minimize reporting and compliance requirements for auction applicants.<sup>65</sup>

56. **Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.** The RFA requires an agency to describe any significant alternatives beneficial to small entities considered in reaching a proposed approach, which may include the following four alternatives (among others): (1) establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification for small entities of compliance and reporting requirements; (3) use of performance, rather than design, standards; and (4) an exemption for small entities.<sup>66</sup>

57. In this Public Notice, the Bureaus propose a number of specific procedures to govern an auction of 131 FM radio station construction permits, which are summarized in paragraph 50 of this supplemental analysis. Based on experience in conducting numerous auctions since the program's inception in 1994, the Commission has taken steps to minimize the impact of its auction procedures on

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<sup>62</sup> See generally 47 C.F.R. Part 1, Subpart Q. See also 47 C.F.R. §§ 73.5000, 73.5002-73.5003, 73.5005-73.5009. In promulgating those rules, the Commission conducted numerous Regulatory Flexibility Act analyses to consider the possible impact of those rules on small businesses that might seek to participate in Commission auctions. See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Notice of Proposed Rule Making*, FCC 93-455, 8 FCC Rcd 7635, 7666 Appendix (1993); *Part 1 Order*, 12 FCC Rcd at 5749-53 Appendix C; Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, *Notice of Proposed Rulemaking*, FCC 97-397, 12 FCC Rcd 22363, 22416-22 Appendix B (1997); Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Declaratory Ruling and Notice of Proposed Rule Making*, FCC 05-123, 20 FCC Rcd 11268, 11301-07 Appendix B (2005). In addition, multiple Final Regulatory Flexibility Analyses ("FRFAs") were included in the rulemaking orders which adopted or amended rule provisions relevant to this Public Notice. See *CSEA/Part 1 Report and Order*, 21 FCC Rcd at 927-34 Appendix C; *Broadcast First Report and Order*, 13 FCC Rcd at 16015-27 Appendix B; *Part 1 Third Report and Order*, 13 FCC Rcd at 492-503 Appendix B; *Second Report and Order*, 9 FCC Rcd at 2400 ¶¶ 299-302.

<sup>63</sup> 47 U.S.C. §§ 154(i), 301, 302, 303(e), 303(f), 303(r), 304, 307 and 309(j).

<sup>64</sup> 47 U.S.C. § 309(j)(3)(E)(i), 309(j)(4)(F); 47 C.F.R. § 1.2104(c), (d); *Part 1 Third Report and Order*, 13 FCC Rcd at 447-49 ¶¶ 123-25; see *Broadcast First Report and Order*, 13 FCC Rcd at 15967-15968 ¶¶ 127-28. See generally 47 C.F.R. § 0.131; *Part 1 Order*, 12 FCC Rcd at 5697-98 ¶ 16.

<sup>65</sup> Paragraph 50 above lists the issues for which comment is solicited in this Public Notice.

<sup>66</sup> 5 U.S.C. § 603(c)(1) through (c)(4).

small businesses. For example, following consideration of any comments submitted in response to this Public Notice, the Bureaus will release a public notice to provide detailed guidance for potential applicants on how to complete a short-form application, participate in the auction and comply with the various competitive bidding requirements applicable to all Auction 98 applicants.

58. The Commission designed the auction application process itself to minimize reporting and compliance requirements for applicants, including small business applicants. In the first part of the Commission's two-phased auction application process, parties desiring to participate in an auction file streamlined, short-form applications in which they certify under penalty of perjury as to their qualifications.<sup>67</sup> Eligibility to participate in bidding is based on an applicant's short-form application and certifications, as well as its upfront payment. In the second phase of the process, winning bidders file a more comprehensive long-form application. Thus, a small business which fails to become a winning bidder does not need to file a long-form application and provide the additional showings and more detailed demonstrations required of a winning bidder.

59. The Commission provides a number of resources through which potential auction participants, including small entities, may seek clarification of or guidance on complying with competitive bidding rules and procedures, reporting requirements, and the FCC's auction system. An FCC Auctions Hotline provides access to Commission staff for information about the auction process and procedures. The FCC Auctions Technical Support Hotline is another resource which provides technical assistance to applicants, including small business entities, on issues such as access to or navigation within the electronic FCC Form 175 and use of the FCC's auction system. These hotlines are generally accessible during regular business hours. Commission staff also produces a web-based, interactive online tutorial for each auction which potential applicants, including small businesses, may access to familiarize themselves with auction procedures, filing requirements and other matters related to an auction. Once posted, the online tutorial remains available for reference and is accessible anytime.

60. The Bureaus also make various databases and other sources of information, including the Media Bureau's Consolidated Database System, the Auctions program websites, and copies of Commission decisions, available to the public without charge, providing a low-cost mechanism for small businesses to conduct research prior to and throughout the auction. Prior to and at the close of Auction 98, the Bureaus will post public notices on the Auctions website, which articulate the procedures and deadlines. The Bureaus make this information easily accessible and without charge to benefit all Auction 98 applicants, including small businesses, by lowering their administrative costs to comply with the Commission's competitive bidding rules.

61. Prior to the start of bidding in each auction, all auction applicants are given an opportunity to become familiar with auction procedures and the bidding system by participating in a mock auction. Further, the Commission intends to conduct Auction 98 electronically over the Internet using its web-based auction system that eliminates the need for bidders to be physically present in a specific location. Qualified bidders also have an option to place bids by telephone. These mechanisms are made available to facilitate participation in Auction 98 by all applicants, including small business entities. Moreover, the adoption of bidding procedures in advance of the auction, consistent with statutory directive, is designed to ensure that the auction will be administered predictably and fairly for all participants, including small businesses.

62. **Federal Rules that May Duplicate, Overlap, or Conflict with the Procedures for which Comment is Solicited in this Public Notice.** None. These proposed procedures for the conduct of Auction 98 constitute the more specific implementation of the competitive bidding rules contemplated by Parts 1 and 73 of the Commission's rules and the foregoing orders, including the *Broadcast First Report and Order* and associated orders, and are fully consistent therewith.<sup>68</sup>

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<sup>67</sup> See *Second Report and Order*, 9 FCC Rcd at 2376-77 ¶¶ 163-66.

<sup>68</sup> See footnote 46 above.

## VI. DEADLINES AND FILING PROCEDURES

63. Comments are due on or before April 1, 2015, and reply comments are due on or before April 8, 2015. All filings related to procedures for Auction 98 must refer to AU Docket No. 15-3. Comments may be submitted using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies.<sup>69</sup> We strongly encourage interested parties to file comments electronically.

64. *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS at <http://www.fcc.gov/cgb/ecfs>. Filers should follow the instructions provided on the website for submitting comments. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number, AU Docket No. 15-3. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message: "get form." A sample form and directions will be sent in response.

65. *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary Attn: WTB/ASAD, Office of the Secretary, Federal Communications Commission.

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

66. *Auction 98 E-mail Box:* We also request that a copy of all comments and reply comments be submitted electronically to the following address: [auction98@fcc.gov](mailto:auction98@fcc.gov).

67. Copies of comments and reply comments will be available for public inspection between 8:00 a.m. and 4:30 p.m. ET Monday through Thursday, or 8:00 a.m. to 11:30 a.m. ET on Fridays, in the FCC Reference Information Center, Room CY-A257, 445 12th Street SW, Washington, DC 20554, and will also be accessible through the search function on the ECFS web page at <http://www.fcc.gov/cgb/ecfs>.

68. This proceeding has been designated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.<sup>70</sup> Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required. Other provisions pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules.<sup>71</sup>

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<sup>69</sup> See Electronic Filing of Documents in Rulemaking Proceedings, GC Docket No. 97-113, *Report and Order*, FCC 98-56, 13 FCC Rcd 11322 (1998), *on recon.*, *Memorandum Opinion and Order on Reconsideration*, FCC 98-254, 13 FCC Rcd 21517 (1998).

<sup>70</sup> 47 C.F.R. §§ 1.1200(a), 1.1206.

<sup>71</sup> The Commission substantially revised its *ex parte* rules in 2011. These revised rules require, for example, that an *ex parte* notice must be filed for each oral *ex parte* presentation, not just for those presentations that involve new information or arguments not already in the record. Further, a filer typically must submit an *ex parte* notice electronically in machine-readable format. A filer may not submit a PDF image created by scanning a paper document, except in a situation in which a word processing version of the document is not available. See

69. To request materials in accessible formats (Braille, large print, electronic files, audio format) for people with disabilities, send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Government Affairs Bureau at (202) 418-0530 or (202) 418-0432 (TTY).

## VII. CONTACTS

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

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

For FM service rule questions: Lisa Scanlan or Tom Nessinger at (202) 418-2700

### **Auctions and Spectrum Access Division, Wireless Telecommunications Bureau**

For general auction questions: Jeff Crooks at (202) 418-0660 or Sue Sterner at (717) 338-2868

For auctions legal questions: Lynne Milne or Howard Davenport at (202) 418-0660

### **Office of Communications Business Opportunities**

For questions concerning small business inquiries: (202) 418-0990

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