



# PUBLIC NOTICE

**Federal Communications Commission**  
**445 12<sup>th</sup> St., S.W.**  
**Washington, D.C. 20554**

**News Media Information: 202-418-0500**  
**Internet: [www.fcc.gov](http://www.fcc.gov)**  
**TTY: 888-835-5322**

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**AUCTION OF CROSS-SERVICE FM TRANSLATOR CONSTRUCTION PERMITS  
SCHEDULED FOR MAY 15, 2018**

**COMMENT SOUGHT ON COMPETITIVE BIDDING PROCEDURES FOR AUCTION 99**

AU Docket No. 17- 143

**Comments Date: February 13, 2018**  
**Reply Comments Date: February 21, 2018**

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## I. INTRODUCTION

1. By this Public Notice, the Wireless Telecommunications and Media Bureaus (Bureaus) announce an auction of certain cross-service FM translator construction permits and seek comment on the procedures to be used for this auction, designated as Auction 99. Bidding in this auction is scheduled to commence on May 15, 2018. Auction 99 will be a “closed” auction: only those entities listed in Attachment A to this Public Notice will be eligible to participate further in this auction.

2. Auction 99 will resolve 12 groups of pending mutually exclusive (MX) applications for cross-service FM translator construction permits.<sup>1</sup> The MX groups and engineering proposals listed on Attachment A are those that remain after the opportunity to resolve mutual exclusivity through settlement or technical resolution.<sup>2</sup> The Bureaus will now proceed to resolve those mutually exclusive applications by competitive bidding.

## II. CONSTRUCTION PERMITS IN AUCTION 99

3. As discussed in greater detail below, Auction 99 will resolve mutually exclusive applications for construction permits for up to 12 new cross-service FM translator stations. A list of the locations and channels of these proposed stations is included as Attachment A. Attachment A also sets forth a proposed minimum opening bid and a proposed upfront payment amount for each construction permit.

4. An applicant listed in Attachment A may become qualified to bid only if it complies with the additional filing, qualification, payment, and other applicable rules, policies and procedures. Each qualified bidder will be eligible to bid on only those construction permits specified for that qualified bidder in Attachment A to this Public Notice. Each of the engineering proposals within each MX group are directly mutually exclusive with one another; therefore, no more than one construction permit will be awarded for each MX group identified in Attachment A. Under the Commission’s established precedent, because mutual exclusivity exists for auction purposes once “mutually exclusive applications are accepted,”<sup>3</sup> even if only one applicant for a particular construction permit becomes qualified to bid, that applicant must submit a bid in order to be eligible to obtain the construction permit.<sup>4</sup>

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<sup>1</sup> On June 1, 2017, the Bureaus announced an auction filing window for AM Broadcasters seeking new cross-service FM translator station construction permits. See *Filing Instructions for Cross-Service FM Translator Auction Filing Window for AM Broadcasters to be Open July 26-August 2, 2017; Freeze on FM Translator and Low-Power FM Station Minor Change Applications and FM Booster Applications July 19-August 2, 2017*, Public Notice, 32 FCC Rcd 4663(MB/WTB 2017) (*Auction 99 Filing Instructions Public Notice*). See also *Online Tutorial Available to Assist AM Broadcasters in Filing Auction 99 Applications for New Cross-Service FM Translators; AM Station Licensees or Proposed AM Station Assignees May Seek FM Translators in This Filing Window*, Public Notice, 32 FCC Rcd 5567 (MB/WTB 2017). Each applicant was required to file FCC Form 175, Application to Participate in an FCC Auction, and certain sections of FCC Form 349, Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station, which permitted staff to determine mutual exclusivities between applicant engineering proposals. Each Auction 99 applicant with an MX engineering proposal was provided with a limited opportunity to eliminate mutual exclusivity through settlement or technical modification of its engineering proposal. See *Settlement Period Announced for Cross-Service FM Translator Mutually Exclusive Applications for Auction 99*, Public Notice, 32 FCC Rcd 9716 (MB/WTB 2017) (*Auction 99 Settlement Public Notice*).

<sup>2</sup> See *Auction 99 Settlement Public Notice*, 32 FCC Rcd at 9716.

<sup>3</sup> 47 U.S.C. § 309(j)(1).

### III. PROCESSING OF SHORT-FORM APPLICATIONS (FCC FORM 175) AND MINOR CORRECTIONS

#### A. Initial Review of FCC Form 175

5. The Bureaus will process all timely submitted applications to determine which are complete, and subsequently will issue a public notice identifying those that are complete and those that are incomplete or deficient because of minor defects that may be corrected. That public notice will provide instructions for applicants to make only minor corrections to their applications. The public notice will include the deadline for resubmitting corrected applications.

#### B. Updates to Auction Application Outside of Filing Windows

6. Section 1.65 of the Commission's rules requires an applicant to maintain the accuracy and completeness of information furnished in its pending application and to notify the Commission of any substantial change that may be of decisional significance to that application.<sup>5</sup> Thus, section 1.65 requires an auction applicant to notify the Commission of any substantial change to the information or certifications included in its pending short-form application.<sup>6</sup>

7. If information needs to be submitted pursuant to sections 1.65 or 1.2105 outside of the upcoming resubmission window,<sup>7</sup> the applicant must submit a letter briefly summarizing the changes by email to [auction99@fcc.gov](mailto:auction99@fcc.gov).<sup>8</sup> Such email must include a subject or caption referring to Auction 99 and the name of the applicant.<sup>9</sup>

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<sup>4</sup> See, e.g., *Auction of FM Broadcast Construction Permits Scheduled for July 23, 2015; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 98*, Public Notice, 30 FCC Rcd 3544, 3547, para. 5 (WTB/MB 2015) (*Auction 98 Procedures Public Notice*); *Auction of FM Broadcast Construction Permits Scheduled for July 23, 2015; Comment Sought on Competitive Bidding Procedures for Auction 98*, Public Notice, 30 FCC Rcd 1755, 1756, para. 2 & n.5 (WTB/MB 2015) (*Auction 98 Comment Public Notice*). See also Letter to J. Dominic Monahan, Esq., counsel to Rob Allen Hauser, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, re: Request for Refund of Upfront Payment for MX Group FM 130 in Closed Broadcast Auction No. 25, 16 FCC Rcd 2181 (WTB 2001); Letter to Carl Northrop, counsel to Vodafone Airtouch Licenses, LLC, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, re: Request for Refund for Licenses Purchased in Auction 26, 16 FCC Rcd 22358 (WTB 2001); *Closed Broadcast Auction; Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999; Minimum Opening Bids and Other Procedural Issues*, Public Notice, 14 FCC Rcd 10632, 10647 (WTB/MMB 1999).

<sup>5</sup> 47 CFR § 1.65; see also *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, Seventh Report and Order, 16 FCC Rcd 17546, 17550-51, para. 9 (2001) (*Part 1 Seventh Report and Order*).

<sup>6</sup> See also 47 CFR § 1.2105(b)(4), (c).

<sup>7</sup> During the upcoming resubmission window, if any information needs to be submitted pursuant to sections 1.65 or 1.2105, that information must be submitted within an Auction 99 applicant's Form 175.

<sup>8</sup> A party reporting any communication pursuant to sections 1.65, 1.2105(a)(2), or 1.2105(c)(6) must take care to ensure that any report of a prohibited communication does not itself give rise to a violation of section 1.2105(c). For example, a party's report of a prohibited communication could violate the rule by communicating prohibited information to other applicants through the use of Commission filing procedures that would allow such materials to be made available for public inspection. A party seeking to report such a prohibited communication is encouraged to coordinate with the Auctions and Spectrum Access Division staff about the procedures for submitting such reports.

<sup>9</sup> The Bureaus request that parties format any attachments to any such email as an Adobe® Acrobat® (pdf) or Microsoft® Word document.

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

8. The Bureaus seek comment on whether our application of certain aspects of the current rules governing auctions should be modified to implement our prior decision to allow eligible AM licensees having any of the same controlling interests in common to file separate auction applications (Forms 175), rather than a single auction application, as is currently required.<sup>10</sup> In recognition of the specific eligibility provisions and filing procedures for this auction window, the Bureaus waived, for Auction 99, section 1.2105(a)(3)'s prohibition on the filing of more than one Form 175 in an auction by entities with any of the same controlling interests.<sup>11</sup> Thus, the Bureaus permitted entities controlled by the same individual or set of individuals to file separate short-form applications for Auction 99.<sup>12</sup>

9. The prohibition on the filing of more than one Form 175 in an auction by entities with any of the same controlling interests was adopted in 2015 in conjunction with other rule changes.<sup>13</sup> Under section 1.2105(a), as revised in 2015, each auction applicant must certify that it has disclosed any arrangements or understandings of any kind relating to the licenses being auctioned to which it (or any party that controls or is controlled by it) is a party, and must certify that it (or any party that controls or is controlled by it) has not entered and will not enter any arrangement or understanding of any kind relating directly or indirectly to bidding at auction with, among others, any other applicant for the auction.<sup>14</sup> Also

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<sup>10</sup> *Auction 99 Filing Instructions Public Notice*, 32 FCC Rcd at 4666-67, para. 13.

<sup>11</sup> *Id.* Section 1.2105(a)(3) also prohibits the same individual or entity from filing more than one short-form application in any auction. 47 CFR § 1.2105(a)(3). Section 1.2105(a)(3) provides that if applications were filed by entities with overlapping controlling interests, at most only one of the applicants could become qualified to bid. *Id.*

<sup>12</sup> *Auction 99 Filing Instructions Public Notice*, 32 FCC Rcd at 4666-67, para. 13. See 47 CFR §§ 1.3 and 1.925(a). In addition to prohibiting the same individual or entity from filing more than one short-form application in any auction, section 1.2105(a)(3) bars multiple short-form applications by applicants controlled by the same individual or set of individuals. 47 CFR § 1.2105(a)(3). For this purpose, the rule defines control as *de jure* or *de facto* control. See 47 CFR § 1.2105(a)(4)(i) (definition and examples of "controlling interest"). This prohibition applies without regard to the construction permits or licenses selected by an applicant. See *Updating Part 1 Competitive Bidding Rules; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, Third Report and Order, 30 FCC Rcd 7493, 7580, para. 206 (2015) (*Updating Part 1 Order*) (modified by Erratum, DA 15-959 (rel. Aug. 25, 2015)).

<sup>13</sup> 47 CFR § 1.2105(a)(c)(1); see also *Updating Part 1 Order*, 30 FCC Rcd at 7577, para. 199.

<sup>14</sup> "The short-form application must contain...

(viii) Certification that the applicant has provided in its application a brief description of, and identified each party to, any partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any agreements that address or communicate directly or indirectly bids (including specific prices), bidding strategies (including the specific licenses on which to bid or not to bid), or the post-auction market structure, to which the applicant, or any party that controls as defined in section 1.2105(a)(4) or is controlled by the applicant, is a party.

(ix) Certification that the applicant (or any party that controls as defined in section 1.2105(a)(4) or is controlled by the applicant) has not entered and will not enter into any partnerships, joint ventures, consortia or other agreements, arrangements, or understandings of any kind relating to the licenses being auctioned that address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid) or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure with: any other applicant (or any party that controls or is controlled by another applicant); with a nationwide provider that is not an applicant (or any party that controls or is controlled (continued...))

in 2015, section 1.2105(c) was extended to prohibit communication of bids or bidding strategies between *any* applicants for an auction, and thus is no longer limited to communications between applicants that had applied for construction permits to serve the same area.<sup>15</sup> In addition, the revisions to that rule removed a prior exception to section 1.2105(c) under which applicants that had entered into bidding-related agreements could engage in certain communications so long as each entity had disclosed the other as a party to such an agreement on its auction application, pursuant to section 1.2105(a)(2)(viii).<sup>16</sup> In applying the prohibited communications rule, the Bureaus have found that, where an individual served as an officer and director for two or more applicants subject to the rule, the bids and bidding strategies of one applicant are presumptively conveyed to the other applicant.<sup>17</sup> Consequently, the Bureaus determined that, absent a disclosed bidding agreement between such applicants creating an applicable exception under the prior rule, an apparent violation of section 1.2105(c) would occur.<sup>18</sup> Finally, in a change related to the prohibition on joint bidding agreements and the changes to the prohibited communications rule, revised section 1.2105(a)(2)(iii) now prohibits any individual from serving as an authorized bidder of more than one applicant.<sup>19</sup>

10. In the event that Auction 99 applicants under common control may have filed separate short-form applications pursuant to the Bureaus' waiver of section 1.2105(a)(3),<sup>20</sup> such applicants could be at risk of violating section 1.2105(c) because the Commission presumes that bidding strategies are

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by such a nationwide provider); or, if the applicant is a nationwide provider, with any non-nationwide provider that is not an applicant (or with any party that controls or is controlled by such a non-nationwide provider), other than:

- (a) Agreements, arrangements, or understandings of any kind that are solely operational as defined under section 1.2105(a)(4);
- (b) Agreements, arrangements, or understandings of any kind to form consortia or joint ventures as defined under section 1.2105(a)(4);
- (c) Agreements, arrangements or understandings of any kind with respect to the transfer or assignment of licenses, provided that such agreements, arrangements or understandings do not both relate to the licenses at auction and address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid), or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure.”

47 CFR § 1.2105(a)(2)(viii-ix); *see also Updating Part 1 Order*, 30 FCC Rcd at 7570-78, paras. 180-201.

<sup>15</sup> Compare 47 CFR § 1.2105(c)(1) (2015) with 47 CFR § 1.2105(c)(1) (2014).

<sup>16</sup> See 47 CFR §§ 1.2105(a)(2)(viii) and 1.2105(c)(1). Then, as now, section 1.2105(a)(2)(viii) required disclosure of any agreement related to the bidding or licenses being offered and identification of all parties to the agreement.

<sup>17</sup> See, e.g., Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, and Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau to Colby M. May, TCCSA, Inc., d/b/a Trinity Broadcasting Network, 20 FCC Rcd 14648, 14648-49 (WTB/MB 2005) (finding apparent violation of communication prohibitions of section 1.2105(c) where applicants with mutually exclusive applications reported sharing same individual as an officer and director and reported having no bidding agreement) (*Kreisman Letter*); *c.f. Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd 10794, 10800, para. 15 (WTB 2015) (“[A]n individual possessing information regarding the bids and bidding strategies of more than one covered party could provide advice to another covered party that is influenced by the information he or she possesses, perhaps unintentionally, thereby resulting in a violation of the rule.”).

<sup>18</sup> *Kreisman Letter*, 20 FCC Rcd at 14648-49.

<sup>19</sup> 47 CFR § 1.2105(a)(2)(iii).

<sup>20</sup> See 47 CFR § 1.2105(a)(3); *Auction 99 Filing Instructions Public Notice*, 32 FCC Rcd at 4666-67, para. 17.

communicated between entities that share a common officer or director.<sup>21</sup> Moreover, as mentioned above, current rules bar most kinds of joint bidding agreements that may have, under the prior rule, permitted certain communications between commonly controlled entities or other auction applicants under the former rules.<sup>22</sup>

11. Accordingly, we seek comment on whether it would be appropriate to waive or modify the application of section 1.2105 provisions discussed above so that Auction 99 applicants relying on the waiver of section 1.2105(a)(3) will not thereby violate such other provisions. For Auction 83, the Bureaus have sought comment on relief that may be needed to reconcile long-pending applications with subsequently adopted provisions of section 1.2105.<sup>23</sup> This auction, however, appears more analogous to the circumstances of Auction 1001, the reverse auction portion of the broadcast spectrum incentive auction. In that case, as here, applicants to participate in the auction were limited to current licensees of the Commission.<sup>24</sup> Consequently, it was clear that multiple applicants would be commonly controlled.<sup>25</sup>

12. When adopting the customized rules for the broadcast incentive auction, the Commission concluded that this eligibility restriction made it appropriate to adopt an exception to the prohibition on certain communications with respect to communications between commonly owned applicants.<sup>26</sup> In that context, the Commission concluded that “[a]n overly broad prohibition restricting communications between a broadcast television licensee and its controlling interests during the reverse auction could unduly restrict bidders’ flexibility. This exception to the prohibition recognizes various interrelationships that may exist between covered television licensees and permits communications between such licensees that will facilitate strategic decisions regarding multiple licensees in real time as various contingencies unfold during the auction. Thus, the exception will allow such licensees to participate more fully, particularly in a multiple-round auction, such as a descending clock auction.”<sup>27</sup>

13. With respect to implementing the commonly controlled applicant exception in the broadcast incentive auction, the Commission provided that the prohibition did not apply to

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<sup>21</sup> For purposes of section 1.2105(c)’s prohibition, section 1.2105(c)(5)(i) defines “applicant” as including all officers and directors of the entity submitting a short-form application to participate in the auction, all controlling interests of that entity, as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application. 47 CFR § 1.2105(c)(5)(i). This definition remains unchanged from the former rule. *See* 47 CFR § 1.2105(c)(7)(i) (2003).

<sup>22</sup> *See id.* § 1.2105(a)(2)(viii)-(x). Certain types of agreements are permitted under limited exceptions to the current 1.2105(c); the limited exceptions allow communications under agreements that are solely operational in nature; agreements to form consortia for purposes of applying for an auction; and agreements for assignment or transfer of licenses, provided that any such agreement does not both relate to the licenses at auction and address or communicate, directly or indirectly, bidding at auction or bidding strategies or post-auction market structure. *See id.* § 1.2105(a)(2)(ix)(A)-(C).

<sup>23</sup> *See Auction of FM Translator Construction Permits Scheduled for June 21, 2018; Comment Sought on Competitive Bidding Procedures for Auction 83*, Public Notice, DA 18-11, paras. 6-11 (MB/WTB Jan. 16, 2018).

<sup>24</sup> *See* 47 CFR § 1.2204(b).

<sup>25</sup> *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6746, paras. 425-27 (2014) (*Incentive Auction R&O*) (rule promotes accountability and transparency; a corporate parent will not be able to file a single application for multiple licensee subsidiaries).

<sup>26</sup> *See id.*, 29 FCC Rcd at 6740, para. 405.

<sup>27</sup> *Incentive Auction R&O*, 29 FCC Rcd at 6740, para. 405 (citations omitted) (citing comments “arguing that the prohibition should account for the myriad broadcast ownership and management structures that may require communications regarding auction strategy, such as communications between licensees and their investors or other commercial partners”).

communications between different applicants “if they share a common controlling interest, director, officer, or governing board member as of the deadline for submitting applications to participate in the reverse auction.”<sup>28</sup> The Commission expressly noted that an applicant’s communications will not qualify for this exception based on a new director, officer or governing board member added after the application deadline.<sup>29</sup> “Consequently, if a covered . . . licensee appoints a new officer after the application deadline, that new officer would be subject to the rule and *not* included within the exception.”<sup>30</sup>

14. In this auction, when applying the Commission’s general competitive bidding rules, do the limitations on eligibility to bid on specific permits in this closed auction similarly provide good cause to waive section 1.2105(c) for communications between commonly controlled applicants consistent with the exception provided for in the broadcast incentive auction? Do other factors demonstrate good cause for such relief, or some other form of relief? Commenters are encouraged to identify circumstances of this auction that should guide us in developing application procedures under the current competitive bidding rules, including specific aspects of the auction application process and processing procedures, the nature of the permits to be awarded, or other relevant considerations.

## V. BUREAUS SEEK COMMENT ON BIDDING PROCEDURES

15. 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 bidding in each auction.<sup>31</sup> The Bureaus therefore seek comment on multiple issues relating to the conduct of Auction 99.

### A. Auction Structure

#### 1. Simultaneous Multiple-Round Auction Design

16. The Bureaus propose to use the Commission’s standard simultaneous multiple-round auction format for Auction 99.<sup>32</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

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<sup>28</sup> 47 CFR § 1.2205(b)(2)(i).

<sup>29</sup> *Incentive Auction R&O*, 29 FCC Rcd at 6740, para. 405 n.1203.

<sup>30</sup> *Id.* (emphasis in original).

<sup>31</sup> 47 U.S.C. § 309(j)(3)(E)(i). *See Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374, 447-49, paras. 123-25 (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 Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service License*, First Report and Order, 13 FCC Rcd 15920, 15967-68, paras. 127-28 (1998) (*Broadcast First Report and Order*) (the Commission also delegated authority to the Media Bureau to seek comment and establish an appropriate auction design methodology, consistent with the Part 1 rules, prior to the start of each broadcast auction). *See generally* 47 CFR § 0.131(c); *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Proceeding*, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making, 12 FCC Rcd 5686, 5697-98, para. 16 (1997) (*Part 1 Order*).

<sup>32</sup> *See Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2360-75, paras. 68-159 (1994) (*Competitive Bidding Second Report and Order*) for a general discussion of competitive bidding design.

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

17. Under this proposal, Auction 99 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 bidding. Details on viewing round results, including the location and format of downloadable round results files, will be included in the same public notice.

18. 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.

19. The Commission will conduct Auction 99 over the Internet using the FCC auction bidding 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 bidding in the auction.

## 3. Stopping Rule

20. 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>33</sup> For Auction 99, 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 would close on all construction permits after the first round in which no bidder submits any new bids, applies a proactive waiver, or withdraws any provisionally winning bids (if bid withdrawals are permitted in this auction).<sup>34</sup> Thus, under the proposed simultaneous stopping rule bidding would remain open on all construction permits until bidding stops on every construction permit. Consequently, under this approach, it is not possible to determine in advance how long the bidding in this auction would last.

21. Further, The Bureaus propose to retain the discretion to exercise any of the following options during Auction 99:

Option 1. The auction would close for all construction permits after the first round in which no bidder applies a waiver, no bidder withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or no bidder 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.

Option 2. The auction would close for all construction permits after the first round in which no bidder applies a waiver, no bidder withdraws a provisionally winning bid (if withdrawals are

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<sup>33</sup> 47 CFR § 1.2104(e).

<sup>34</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 VI.B.6, "Provisionally Winning Bids." Proactive waivers are described in Section VI.B.3, "Activity Rule Waivers and Reducing Eligibility," and bid withdrawals are described in Section VI.B.7, "Bid Removal and Bid Withdrawal," below.



permitted in this auction), or no bidder places any new bid on a construction permit that already has a provisionally winning bid. Thus, absent any other bidding activity, a bidder placing a new bid on an FCC-held construction permit (a construction permit that does not already have a provisionally winning bid) would not keep the auction open under this modified stopping rule.

Option 3. The auction would close using a modified version of the simultaneous stopping rule that combines Option 1 and Option 2 above.

Option 4. The auction would close after a specified number of additional rounds (special stopping rule) to be announced by the Bureaus. If the Bureaus invoke this special stopping rule, they will accept bids in the specified final round(s), after which the auction will close.

Option 5. The auction would remain 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 lose bidding eligibility or use a waiver.

22. 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**

23. For Auction 99, the Bureaus propose that the Bureaus may delay, suspend, or cancel bidding in 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>35</sup> We will notify participants of any such delay, suspension, or cancellation by public notice and/or through the FCC auction bidding 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 we will exercise this authority solely at our discretion, and not as a substitute for situations in which bidders may wish to apply their activity rule waivers. The Bureaus seek comment on this proposal.

### **B. Auction Procedures**

#### **1. Upfront Payments and Bidding Eligibility**

24. 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>36</sup> As described below, the upfront payment is a refundable deposit made by an applicant to establish eligibility to bid on construction permits. Upfront payments that are related to the specific construction permits being

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<sup>35</sup> 47 CFR § 1.2104(i).

<sup>36</sup> See *Part 1 Order*, 12 FCC Rcd at 5697-98, para. 16. See also *Part 1 Third Report and Order*, 13 FCC Rcd at 425, para. 86; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-79, paras. 169-75.

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 bidding.<sup>37</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.

25. 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. If an applicant is found to be qualified to bid on more than one permit being offered in Auction 99, such bidder may place bids on multiple construction permits, provided that the total number of bidding units associated with those construction permits does not exceed its 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>
FMT060	Knoxville, Tennessee	2,500	\$2,500
FMT053	Florida / Georgia	5,000	\$5,000

If a bidder wishes to bid on both construction permits in a round, each construction permit must be designated for that bidder in Attachment A of this Public Notice, and that bidder must have purchased at least 7,500 bidding units (2,500 + 5,000) of bidding eligibility. If it only wishes to bid on one, but not both, purchasing 5,000 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 2,500 bidding units, the bidder would have enough eligibility to bid for the Knoxville, Tennessee construction permit but not for the Florida / Georgia construction permit.

## 2. Activity Rule

26. 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. The Bureaus propose a single stage auction with the following activity requirement: In each round of the auction, a bidder desiring to maintain its current bidding eligibility is required to be active on 100 percent of its bidding eligibility. 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 with any construction permits for which it holds provisionally winning bids. Failure to maintain the requisite activity level will result in the use of an activity rule waiver, if any, or a reduction in the bidder's eligibility, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction.<sup>38</sup> The Bureaus seek comment on this proposal.

<sup>37</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-79, paras. 169-76.

<sup>38</sup> See Section VI.B.3, "Activity Rule Waivers and Reducing Eligibility," below.

### 3. Activity Rule Waivers and Reducing Eligibility

27. For our proposed simultaneous multiple round auction format, we propose that when a bidder's eligibility in the current round is below the required minimum level, it may preserve its current level of eligibility through an activity rule waiver, if available. 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.

28. The FCC auction bidding system will assume 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 level is below the minimum required unless (1) the bidder has no activity rule waivers 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 waivers remaining and does not satisfy the required activity level, the bidder's current eligibility will be permanently reduced, possibly curtailing or eliminating the ability to place additional bids in the auction.

29. 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 bidding system. In this case, the bidder's eligibility would be 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 cannot regain its lost bidding eligibility.

30. Under the proposed simultaneous stopping rule, a bidder would be permitted to 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 *proactive waiver* function in the FCC auction bidding 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 bidding system in a round in which there is no new bid, no bid withdrawal (if bid withdrawals are permitted in this auction), or no proactive waiver will not keep the auction open.

31. Consistent with recent FCC spectrum auctions, the Bureaus propose that each bidder in Auction 99 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. The Bureaus seek comment on this proposal.

### 4. Reserve Price or Minimum Opening Bids

32. Consistent with the statutory mandate of section 309(j),<sup>39</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 the start of each auction.<sup>40</sup>

33. Normally, a reserve price is an absolute minimum price below which a construction permit or license 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.

34. The Bureaus propose to establish minimum opening bid amounts for Auction 99. The

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<sup>39</sup> 47 U.S.C. § 309(j)(4)(F). See also 47 CFR § 1.2104(c), (d).

<sup>40</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15971, para. 134; *Part 1 Third Report and Order*, 13 FCC Rcd at 454-56, paras. 139-41. See also 47 CFR § 1.2104(c), (d).

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>41</sup> The Bureaus do not propose to establish separate reserve prices for the construction permits to be offered in Auction 99.

35. For Auction 99, 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 99. The Bureaus seek comment on the minimum opening bid amounts specified in Attachment A.

36. 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 bidders' valuation of the broadcast spectrum, including the type of service offered, market size, population covered by the proposed broadcast facility, and any other relevant factors.

## 5. Bid Amounts

37. 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>42</sup> Under this proposal, the FCC auction bidding system interface will list the acceptable bid amounts for each construction permit.<sup>43</sup>

38. The first of the acceptable bid amount 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. The percentage used for this calculation, the *minimum acceptable bid increment percentage*, is multiplied by the provisionally winning bid amount, and the resulting amount is added to the provisionally winning bid amount. If, for example, the minimum acceptable bid increment percentage is 10 percent, then the provisionally winning bid amount is multiplied by 10 percent. The result of that calculation is added to the provisionally winning bid amount, and that sum is rounded using the Commission's standard rounding procedure for auctions.<sup>44</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, the minimum acceptable bid amount will equal the second highest bid received for the construction permit.<sup>45</sup>

39. Under this proposal, the FCC will calculate the eight additional bid amounts using the minimum acceptable bid amount and an *additional bid increment percentage*. The minimum acceptable bid amount is multiplied by the additional bid increment percentage, and that result (rounded<sup>46</sup>) is the

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<sup>41</sup> See, e.g., *Auction 98 Procedures Public Notice*, 30 FCC Rcd at 3579, para. 139.

<sup>42</sup> Bidders must have sufficient eligibility to place a bid on the particular construction permit. See Section VI.B.1, "Upfront Payments and Bidding Eligibility," above.

<sup>43</sup> In the event of duplicate bid amounts due to rounding, the FCC auction bidding system will omit the duplicates and will list fewer than nine acceptable bid amounts for the construction permit.

<sup>44</sup> 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.

<sup>45</sup> See Section VI.B.7, "Bid Removal and Bid Withdrawal," below.

<sup>46</sup> See note 44 (concerning rounding), above.

additional increment amount. The first additional acceptable bid amount equals the minimum acceptable bid amount plus the additional increment amount. The second additional acceptable bid amount equals the minimum acceptable bid amount plus two times the additional increment amount; the third additional acceptable bid amount is the minimum acceptable bid amount plus three times the additional increment amount; etc. If, for example, the additional bid increment percentage is 5 percent, then the calculation of the additional increment amount is (minimum acceptable bid amount) \* (0.05), rounded. The first additional acceptable bid amount equals (minimum acceptable bid amount) + (additional increment amount); the second additional acceptable bid amount equals (minimum acceptable bid amount) + (2\*(additional increment amount)); the third additional acceptable bid amount equals (minimum acceptable bid amount) + (3\*(additional increment amount)); etc.

40. For Auction 99, the Bureaus propose to use a minimum acceptable bid increment 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 an additional bid increment percentage of 5 percent. The Bureaus seek comment on these proposals.

41. The Bureaus propose to retain the discretion to change the minimum acceptable bid amounts, the minimum acceptable bid increment percentage, the additional bid increment percentage, and the number of acceptable bid amounts if the Bureaus determine that circumstances so dictate, consistent with past practice.<sup>47</sup> Further, the Bureaus propose to retain the discretion to do so on a construction permit-by-construction permit basis. The Bureaus also propose to 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 \$1,000 limit on increases in minimum acceptable bid amounts over provisionally winning bids. Thus, if calculating a minimum acceptable bid using the minimum acceptable bid increment percentage results in a minimum acceptable bid amount that is \$1,200 higher than the provisionally winning bid on a construction permit, the minimum acceptable bid amount would instead be capped at \$1,000 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 bidding system during the auction. The Bureaus seek comment on these proposals.

## 6. Provisionally Winning Bids

42. The bidding system will determine provisionally winning bids consistent with practice in past auctions.<sup>48</sup> At the end of each bidding round, the bidding system will determine a *provisionally winning bid* for each construction permit based on the highest bid amount received for that permit. A provisionally winning bid will remain the provisionally winning bid until there is a higher bid on the same construction permit at the close of a subsequent round. Provisionally winning bids at the end of the auction become the winning bids.

43. If identical high bid amounts are submitted on a construction permit in any given round (i.e., tied bids), the FCC auction bidding system will use a pseudo-random number generator to select a single provisionally winning bid from among the tied bids. This means that the auction bidding system

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<sup>47</sup> See e.g., *Auction 98 Procedures Public Notice*, 30 FCC Rcd at 3588 paras. 147-8; see also 47 CFR § 1.2104(d) (“The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.”)

<sup>48</sup> See e.g., *Auction 98 Comment Public Notice*, 30 FCC Rcd at 1764-65 para. 37.

assigns a pseudo-random number to each bid when the bid is entered. The tied bid with the highest pseudo-random number wins the tiebreaker and becomes the provisionally winning bid. The remaining bidders, as well as the provisionally winning bidder, can submit higher bids in subsequent rounds. However, if the auction were to close 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.

44. 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). As a reminder, provisionally winning bids count toward activity for purposes of the activity rule.<sup>49</sup>

## 7. Bid Removal and Bid Withdrawal

45. The FCC auction bidding system allows each bidder to remove any of the bids it placed in a round before the close of that round. By removing a bid placed within a round, a bidder effectively “unsubmits” the bid. 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.

46. The Bureaus seek comment on whether bid withdrawals should be permitted in Auction 99. 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 would be able to withdraw its provisionally winning bids using the *withdraw* function in the FCC auction bidding 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>50</sup>

47. The Commission has recognized that bid withdrawals may be a helpful tool for bidders seeking to efficiently aggregate licenses or implement backup strategies in certain auctions.<sup>51</sup> The Commission has also acknowledged that allowing bid withdrawals may encourage insincere bidding or increase opportunities for anti-competitive bidding in certain circumstances.<sup>52</sup> The stand-alone nature of FM translator facilities, however, suggests that it is not necessary for bidders to aggregate facilities being offered in the same auction in order to realize full value from those facilities, or to put the spectrum to effective and efficient use.

48. Based on the nature of the permits being offered in Auction 99, and on our experience with past auctions of broadcast construction permits, the Bureaus propose to prohibit bidders from withdrawing any bid after the close of the round in which that bid was placed. The Bureaus make this proposal in light of the site- and applicant-specific nature and wide geographic dispersion of the permits available in this closed auction, which suggests that potential applicants for this auction will have limited opportunity to aggregate construction permits through the auction process (as compared with bidders in many auctions of wireless licenses) because of the closed MX groups previously established. 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 cross-service FM translator stations and attendant delays in the offering

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<sup>49</sup> See Section VI.B.2., “Activity Rule,” above.

<sup>50</sup> 47 C.F.R. §§ 1.2104(g), 1.2109.

<sup>51</sup> See *Part 1 Third Report and Order*, 13 FCC Rcd at 458-60 paras. 148-50.

<sup>52</sup> See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Report and Order, 21 FCC Rcd 891, 902-03, para. 29, 904 n.57 (2006) (*CSEA/Part 1 Report and Order*).

of new broadcast service to the public. The Bureaus seek comment on our proposal to prohibit bid withdrawals in Auction 99.

### **C. Post-Auction Payments**

#### **1. Interim Withdrawal Payment Percentage**

49. In the event the Bureaus allow bid withdrawals in Auction 99, the Bureaus propose the interim bid withdrawal payment be 20 percent of the withdrawn bid. 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>53</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>54</sup>

50. The amount of the interim bid withdrawal payment is established in advance of bidding in the auction and may range from three percent to twenty percent of the withdrawn bid amount.<sup>55</sup> The Commission has determined that the level of interim withdrawal payment in a particular auction will be based on the nature of the service and the inventory of the licenses being offered.<sup>56</sup> The Commission has noted that it may impose a higher interim withdrawal payment percentage if warranted to deter the anti-competitive use of withdrawals when, for example, bidders will not need to aggregate the licenses being offered in the auction or when there are few synergies to be captured by combining licenses. In light of these considerations, with respect to the construction permits being offered in Auction 99, the Bureaus propose to use the maximum interim bid withdrawal payment percentage permitted by section 1.2104(g)(1) in the event bid withdrawals are allowed. The Bureaus request comment on using 20 percent for calculating an interim bid withdrawal payment amount in Auction 99. Commenters advocating the use of bid withdrawals should also address the percentage of the interim bid withdrawal payment.

#### **2. Additional Default Payment Percentage**

51. Any winning bidder that defaults or is disqualified after the close of an auction (i.e., fails to remit the required down payment by the specified deadline, fails to submit a timely long-form application, fails to make a full and timely final payment, or is otherwise disqualified) is liable for a default payment under section 1.2104(g)(2) of the rules.<sup>57</sup> This payment consists of a deficiency payment, equal to the difference between the amount of the Auction 99 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, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less.

52. The Commission's rules provide that, in advance of each auction, it will establish a percentage between three percent and 20 percent of the applicable winning bid to be assessed as an

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<sup>53</sup> 47 C.F.R. § 1.2104(g)(1).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See *CSEA/Part 1 Report and Order*, 21 FCC Rcd at 903-04, paras. 30-31.

<sup>57</sup> See 47 CFR § 1.2104(g)(2).

additional default payment.<sup>58</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>59</sup>

53. For Auction 99, the Bureaus propose to establish an additional default payment of 20 percent. As noted in the *CSEA/Part I Report and Order*, defaults weaken the integrity of the auction process and may impede the deployment of service to the public, and an additional 20 percent default payment will be more effective in deterring defaults than the three percent used in some earlier auctions.<sup>60</sup> Moreover, a 20 percent additional default payment amount is consistent with the percentage used in recent auctions of broadcast construction permits.<sup>61</sup> In light of these considerations, the Bureaus propose for Auction 99 an additional default payment of 20 percent of the relevant bid. The Bureaus seek comment on this proposal.

## VI. TUTORIAL AND ADDITIONAL INFORMATION FOR AUCTION 99 APPLICANTS

54. The Bureaus intend to provide educational opportunities for applicants to familiarize themselves with the FCC auction bidding system. Auction 99 will be the first auction to use the FCC's new auction bidding system, an extensive redesign of the previous auction bidding system. The redesign includes enhancements to the auction bidding system, such as easier navigation, customizable results, and improved functionality. The Bureaus intend to provide additional information on these enhancements and to offer demonstrations and other educational opportunities for applicants to familiarize themselves with the auction bidding system.

55. On July 13, 2017, the Bureaus released an online tutorial to assist applicants in understanding the procedures to be followed in the filing of their auction short-form application (FCC Form 175). The Auction Application Filing Tutorial is available at the Auction 99 website: [www.fcc.gov/auction/99](http://www.fcc.gov/auction/99).

## VII. PROCEDURAL MATTERS

### A. Supplemental Initial Regulatory Flexibility Analysis

56. As required by the Regulatory Flexibility Act of 1980 as amended (RFA),<sup>62</sup> the Bureaus have prepared this Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in the Public Notice to supplement the Commission's Initial and Final Regulatory Flexibility Analyses completed in the *Broadcast First Report and Order* and other Commission orders pursuant to which Auction 99 will be conducted.<sup>63</sup> Written public comments are requested on this Supplemental IRFA. Comments must be

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<sup>58</sup> See *id.*

<sup>59</sup> See *CSEA/Part I Report and Order*, 21 FCC Rcd at 903-04, paras. 30-31.

<sup>60</sup> *Id.*, 21 FCC Rcd at 902-03 para. 29.

<sup>61</sup> See, e.g., *Auction 98 Procedures Public Notice*, 30 FCC Rcd at 3584, para. 168 (setting additional default payment for Auction 98 permits at twenty percent of the applicable bid).

<sup>62</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>63</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*, Notice of Proposed Rulemaking, 12 FCC Rcd 22363, 22416-22, Appendix B (1997) (*Broadcast Competitive Bidding Notice*); *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Declaratory Ruling and Notice of Proposed Rule Making, 20 FCC Rcd 11268, 11301-07, Appendix B (2005) (*CSEA Declaratory Ruling*); *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Notice of Proposed Rule Making, 8 FCC Rcd 7635, 7666, Appendix (1993) (*Competitive Bidding Notice*); *CSEA/Part I Report and Order*, 21 FCC Rcd at 927-34, Appendix (continued....)



identified as responses to the IRFA and must be filed by the same filing deadline for comments specified on the first page of the Public Notice. The Commission will send a copy of the Public Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>64</sup> In addition, the Public Notice and IRFA (or summaries thereof) will be published in the *Federal Register*.<sup>65</sup>

### 1. Need for, an Objectives of, the Proposed Rules

57. This Public Notice seeks comment on proposed procedural rules to govern Auction 99, an auction of up to 12 cross-service FM translator construction permits. This process is intended to provide notice of and adequate time for potential applicants to comment on proposed auction procedures.<sup>66</sup> To promote the efficient and fair administration of the competitive bidding process for all Auction 99 participants, the Bureaus seek comment on the following proposed procedures:

- application of the current rules prohibiting certain communications between auction applicants and the related prohibition on joint bidding arrangements to implement the Bureaus' prior decision to allow eligible AM licensees having any of the same controlling interest in common to file separate auction applications (Forms 175), rather than a single auction application;
- use of a simultaneous multiple-round auction format, consisting of sequential bidding rounds with a simultaneous stopping rule (with discretion by the Bureaus to exercise alternative stopping rules under certain circumstances);
- a specific minimum opening bid amount for each construction permit available in Auction 99;
- 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;
- a single stage auction in which a bidder is required to be active on 100 percent of its bidding eligibility in each round of 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 additional 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;

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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; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2400, para. 299-302.

<sup>64</sup> See 5 U.S.C. § 603(a).

<sup>65</sup> See *id.*

<sup>66</sup> 47 U.S.C. § 309(j)(3)(E)(i) (requirement to seek comment on auction procedures); see also *supra* note 31.

- establishment of an interim bid withdrawal percentage of 20 percent of the withdrawn bid in the event the Bureaus allow bid withdrawals in Auction 99; and
- establishment of an additional default payment of 20 percent under section 1.2104(g)(2) of the rules in the event that a winning bidder defaults or is disqualified after the auction.

## 2. Legal Basis

58. The Commission's statutory obligations to small businesses under the Communications Act of 1934, as amended, are found in sections 309(j)(3)(B) and 309(j)(4)(D). The statutory basis for the Commission's competitive bidding rules is found in various provisions of the Communications Act of 1934, as amended, including 47 U.S.C. §§ 154(i), 301, 302, 303(e), 303(f), 303(r), 304, 307, and 309(i). 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 99.<sup>67</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 bidding in each auction.<sup>68</sup>

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

59. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>69</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."<sup>70</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>71</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 Small Business Administration (SBA).<sup>72</sup>

60. *Radio Stations.* This Economic Census category "comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own

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<sup>67</sup> See generally 47 CFR Part 1, Subpart Q. See also 47 CFR §§ 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., *Competitive Bidding Notice*, 8 FCC Rcd at 7666, Appendix; *Part 1 Order*, 12 FCC Rcd at 5749-53, Appendix C; *Broadcast Competitive Bidding Notice* 12 FCC Rcd at 22416-22, Appendix B; *CSEA Declaratory Ruling* 20 FCC Rcd at 11301-07 Appendix B. 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; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2400, paras. 299-302.

<sup>68</sup> 47 U.S.C. § 309(j)(3)(E)(i), 309(j)(4)(F); 47 CFR § 1.2104(c), (d); *Part 1 Third Report and Order*, 13 FCC Rcd at 447-49 paras. 123-25; see *Broadcast First Report and Order*, 13 FCC Rcd at 15967-15968 paras. 127-28. See generally 47 CFR § 0.131; *Part 1 Order*, 12 FCC Rcd at 5697-98 para. 16.

<sup>69</sup> 5 U.S.C. § 603(b)(3).

<sup>70</sup> 5 U.S.C. § 601(6).

<sup>71</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 Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>72</sup> 15 U.S.C. § 632.

studio, from an affiliated network, or from external sources.”<sup>73</sup> The SBA has established a small business size standard for this category as firms having \$38.5 million or less in annual receipts.<sup>74</sup> Economic Census data for 2012 shows that 2,849 radio station firms operated during that year.<sup>75</sup> Of that number, 2,806 firms operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.<sup>76</sup> Therefore, based on the SBA’s size standard the majority of such entities are small entities.

61. According to Commission staff review of the BIA/Kelsey, LLC’s Media Access Pro Radio Database as of January 30, 2018, about 11,261 (or about 99.92 percent) of 11,270 commercial radio stations had revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition.<sup>77</sup> We note however, that the SBA size standard data does not enable the Bureaus to make a meaningful estimate of the number of small entities who may participate in Auction 99. There are a maximum of 26 entities that may become qualified bidders in Auction 99, in which applicant eligibility is closed. The specific procedures and minimum opening bid amounts on which comment is sought in this Public Notice will affect directly all applicants participating in Auction 99.

62. We also note that we are unable to accurately develop an estimate of how many of these 26 entities are small businesses 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 eligible bidders in Auction 99 may include existing holders of broadcast station construction permits or licenses. In 2013, the Commission 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>78</sup> The SBA has since increased that revenue threshold to \$38.5 million, which suggests that an even greater percentage of radio broadcasters would fall within the SBA’s definition.<sup>79</sup> Based on Commission data 4,635 (99.94%) of 4,638 AM radio stations have revenue of \$38.5 million or less.<sup>80</sup> Accordingly, based on this data, we conclude that the majority of Auction 99 eligible bidders will likely meet the SBA’s definition of a small business concern.<sup>81</sup>

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<sup>73</sup> U.S. Census Bureau, 2017 NAICS Definitions, “515112 Radio Stations,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.

<sup>74</sup> 13 CFR § 121.201; NAICS code 515112.

<sup>75</sup> U.S. Census Bureau, Table No. EC0751SSSZ4, *Information: Subject Series – Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* NAICS Code 515112, [https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012\\_US/51SSSZ4//naics~515112](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112).

<sup>76</sup> *Id.*

<sup>77</sup> BIA/Kelsey, MEDIA Access Pro Database (viewed Jan. 30, 2018).

<sup>78</sup> *Revitalization of the AM Service*, Notice of Proposed Rule Making, 28 FCC Rcd 15221, 15247 para. 6 (2013).

<sup>79</sup> 13 CFR § 121.201; NAICS code 515112.

<sup>80</sup> BIA/Kelsey, MEDIA Access Pro Database (viewed Jan. 30, 2018).

<sup>81</sup> In assessing whether a business entity qualifies as “small” under the above definition, business control affiliations must be included. The Commission’s estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. Moreover, the definition of “small business” also requires that an entity not be dominant in its field of operation and that the entity be independently owned and operated. The estimate of small businesses to which rules may apply does not exclude any radio station from the definition of a small business on these bases and is therefore over-inclusive to that extent. Furthermore, we are unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. In addition, the Commission notes that it is difficult at times to assess these criteria in the context of media entities and therefore our (continued....)

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

63. 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>82</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.

#### 5. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

64. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."<sup>83</sup>

65. The Commission has taken steps to minimize any economic impact of its auction procedures on small businesses through among other things, the many resources it provides potential auction participants. Small entities and other auction participants 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. Small entities may also utilize the web-based, interactive online tutorial produced by Commission staff for each auction to familiarize themselves with auction procedures, filing requirements, bidding procedures and other matters related to an auction.

66. 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 99, 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 99 applicants, including small businesses, thereby lowering their administrative costs to comply with the Commission's competitive bidding rules.

67. Prior to the start of bidding in each auction, eligible bidders 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 99 electronically over the Internet using its web-based auction system that eliminates the need for bidders to be physically present in a specific location.

(Continued from previous page) \_\_\_\_\_  
estimates of small businesses to which they apply may be over-inclusive to this extent.

<sup>82</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2376-77 paras. 163-66.

<sup>83</sup> 5 U.S.C. § 603(c)(1)-(4).

Qualified bidders also have the option to place bids by telephone. These mechanisms are made available to facilitate participation in Auction 99 by all eligible bidders, and may result in significant cost savings for small business entities who utilize these alternatives. 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.

68. These proposed procedures for the conduct of Auction 99 constitute the more specific implementation of the competitive bidding rules contemplated by Parts 1 and 73 of the Commission's rules and the underlying rulemaking orders, including the *Broadcast First Report and Order* and relevant competitive bidding orders, and are fully consistent therewith.<sup>84</sup>

## **6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

69. None.

### **B. Deadlines and Filing Procedures**

70. Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>85</sup> interested parties may file comments or reply comments on or before the dates indicated on the first page of this document in AU Docket No. 17-143. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.<sup>86</sup>

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

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

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> Street, SW, Room TW-A325, Washington, DC 20554. The filing hours 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 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

72. *Auction 99 E-mail Box:* The Bureaus also request that a copy of all comments and reply comments be submitted electronically to the following address: [auction99@fcc.gov](mailto:auction99@fcc.gov).

73. *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call

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<sup>84</sup> See note 63 above.

<sup>85</sup> 47 CFR §§ 1.415, 1.419.

<sup>86</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

the Consumer and Government Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

74. This proceeding has been designated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>87</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to the Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

### C. Contact Information

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

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

FM Translator service questions: James Bradshaw, Lisa Scanlan or Tom Nessinger at (202) 418-2700

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

Auction legal questions: Lynne Milne at (202) 418-0660  
General auction questions: Auctions Hotline at (717) 338-2868

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

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

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<sup>87</sup> 47 CFR §§ 1.1200(a), 1.1206.

**ATTACHMENT A:  
CONSTRUCTION PERMITS IN AUCTION 99**

This page was intentionally inserted as a placeholder for Attachment A, which is available as a separate file.