418–2180. Questions related to the window application filing process should be addressed to the Audio Services Division, (202) 418–2700.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 97–46, adopted January 21, 1998, and released January 30, 1998. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, DC 20036, (202) 857–3800.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 reads as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by adding Boonville, Channel 241A.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 98–2991 Filed 2–5–98; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 97–170; RM–8980]

Television Broadcasting Services; San Bernardino and Long Beach, CA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document reallots Channel 18– from San Bernardino to Long Beach, California, and modifies the license of KSLS, Inc. for Station KSCI(TV) to specify operation on Channel 18– at Long Beach, as requested, pursuant to the provisions of Section 1.420(i) of the Commission's Rules. *See* 62 FR 42225, August 6, 1997. The reallotment of Channel 18– to Long Beach will provide the larger community with its first local television transmission service while retaining local television service at San Bernardino. Coordinates used for Channel 18– at Long Beach are 34–11–15 and 117–41–54. Although Long Beach is located within 320 kilometers (199 miles) of the United States-Mexico border, concurrence of the Mexican government to the reallotment of Channel 18– from San Bernardino was not required based upon the retention of the existing channel and transmitter site of Station KSCI(TV). However, as a result of the granted reallotment request, the Mexican government will be advised of the change to the TV Table of Allotments. With this action, this proceeding is terminated.

EFFECTIVE DATE: March 16, 1998.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 97–170, adopted January 14, 1998, and released January 30, 1998. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, DC 20036, (202) 857–3800.

List of Subjects in 47 CFR Part 73

Television broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 reads as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.606 [Amended]

2. Section 73.606(b), the Table of TV Allotments under California, is amended by removing Channel 18– at San Bernardino, and adding Long Beach, Channel 18–.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 98–2990 Filed 2–5–98; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 101

[ET Docket No. 95–183; PP Docket No. 93–253; FCC 97–391]

Service and Auction Rules for the 38.6–40.0 GHz Frequency Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In the Report and Order portion of the Second Notice of Proposed Rule Making and Report and Order, the Commission amends rules to facilitate more effective use of the 39 GHz band, by implementing a number of improvements such as licensing by Basic Trading Areas (BTAs) and employing competitive bidding procedures as a means for choosing among mutually exclusive license applicants. In addition, the Commission concludes that the regulatory framework for the 39 GHz band should be expanded to include service rules for mobile operations. Such flexibility will promote competition by increasing both the diversity of potential service offerings and the number of providers that can offer any service. Finally, the Commission addresses those 39 GHz applications held in abeyance pursuant to a processing freeze.

EFFECTIVE DATE: April 7, 1998.

ADDRESSES: 1919 M Street, N.W., Room 222, Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: (For service and licensing rules), Susan Magnotti, Public Safety and Private Wireless Division, (202) 418–0871; (for auction rules and procedures) Christina Eads Clearwater, Auctions and Industry Analysis Division, (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Report and Order portion of the Commission's Second Notice of Proposed Rule Making and Report and Order in ET Docket No. 95–183 and PP Docket No. 93–253, adopted October 24, 1997 and released November 3, 1997. The complete text of the Second Notice of Proposed Rule Making and Report and Order is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington D.C., and also may be purchased from the Commission's copy contractor, International Transcription Services, at (202) 857–3800, 1231 20th Street, N.W., Washington, D.C. 20036.

Synopsis of Report and Order in the Second Notice of Proposed Rulemaking and Report and Order

1. In the Report and Order portion of the Second Notice of Proposed Rulemaking and Report and Order, the Commission amends parts 1 and 101 of title 47, Code of Federal Regulations, to facilitate more effective use of the 39 GHz band. The Commission implements a number of improvements such as licensing by Basic Trading Areas (BTAs) and employing competitive bidding procedures as a means for choosing among mutually exclusive license applicants. (Rand McNally is the copyright owner of the Basic Trading Area and Major Trading Area Listing, which lists the counties contained in each BTA, as embodied in Rand McNally's Trading Areas System diskette and geographically represented in the map contained in Rand McNally's Commercial Atlas & Marketing Guide.) In addition, it concludes that its regulatory framework should be expanded to include service rules for mobile operations in the 39 GHz band. Thus, 39 GHz service providers will be better positioned to respond to the dictates of the marketplace. Moreover, such flexibility will promote competition by increasing both the diversity of potential service offerings and the number of providers that can offer any service. Finally, the Commission addresses those 39 GHz applications held in abeyance pursuant to the processing freeze imposed in the Notice of Proposed Rulemaking and Order, (NPRM and Order), 61 FR 02452 (January 26, 1996) as modified in its subsequent Memorandum Opinion and Order, 62 FR 14015 (March 25, 1997).

2. In the NPRM and Order, the Commission considered permitting an array of fixed services in the 37 GHz band. Subsequently, Motorola and other satellite entities expressed their interest in this band as well, and similar interests were expressed for other high gigahertz bands. Accordingly, the Commission decided to address the 36.0–51.0 GHz bands in a unified manner, and In the Matter of Allocation and Designation of Spectrum For Fixed-Satellite Services in the 37.5–38.5 GHz, 40.5–41.5 GHz, and 48.2–50.2 GHz Frequency Bands; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5–42.5 GHz Frequency Band, Allocation of Spectrum in the 46.9–47.0 GHz Frequency Band for Wireless Services; and Allocation of Spectrum in the 37.0–38.0 GHz and 40.0–40.5 GHz for Government Operations, IB Docket No. 97–95, Notice of Proposed Rulemaking, FCC 97–85 (rel. March 24, 1997) (''36–51 GHz NPRM''), Notice of Proposed Rulemaking, 62 FR 16129 (April 4, 1997), the Commission sought comment on its proposals for these frequency bands. However, because the 39 GHz band is significantly licensed and subject to additional applications for license, the Commission has concluded that it is in the public interest to refine its rules at this time to allow existing and new licensees to maximize the array of services they can provide to the public. In addition to providing support for existing services (*e.g.*, broadband PCS, cellular, and other commercial and private mobile radio operations), 39 GHz band providers plan to use this spectrum to satisfy needs for a host of other fixed services, such as: (1) Wireless local loops, (2) call termination or origination services to long distance companies, (3) connection of the customers of a competitive access provider (''CAP'') or a local exchange carrier (''LEC'') to its fiber rings, (4) connection and interconnection services to private networks operated by business and government as well as other institutions, (5) Internet access, and (6) cable headend applications. In some cases, 39 GHz band licensees are already using the spectrum for such purposes.

I. Decision—Service Rules

A. Service Areas

3. The Commission adopts its proposal in the NPRM and Order to license new 39 GHz licenses based on pre-defined geographic areas rather than the applicant-defined rectangular areas currently authorized in the 39 GHz band. Commission-defined service areas will foster efficient utilization of 39 GHz spectrum in an expeditious manner and will provide a more orderly structure for the licensing process. The Commission therefore rejects the suggestion by some commenters that it continue licensing the 39 GHz band by permitting applicants to define their own service areas. For those interested in tailoring a service area to other smaller or larger markets, the Commission notes that, concurrently with the instant proceeding, it is also proposing service rules to allow partitioning and disaggregation by 39 GHz licensees.

4. In choosing the most appropriate definition for 39 GHz service areas, the Commission observes that its conclusion that this band is auctionable (explained below in Discussion Section A) requires it to apply the criteria of section 309(j)(4)(C) of the Communications Act of 1934, as amended, (''Act'' or ''Communications Act''). This section mandates that the Commission consider certain factors when establishing service areas for auctionable services. The first of these criteria is that the service area promote an equitable distribution of licenses and services among geographic areas. The Commission believes that use of BTAs fulfills this objective because they are intended to represent the natural flow of commerce, comprising areas within which consumers have a community of interest. As a result, the Commission believes that BTAs are representative of the geographic areas in which the types of services envisioned for the 39 GHz band are likely to be provided. The second criterion the Commission is required to consider is whether the service area is appropriate to provide economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. The Commission believes that BTAs are sufficiently large to accommodate the array of services proposed for the 39 GHz band in a manner which provides opportunities for a variety of licensees. The BTA-sized service areas for support spectrum will be compatible with the primary service areas defined for broadband PCS providers. The Commission also believes that other services, such as telephony, would find sufficient population within BTAs to support the pursuit of various business opportunities. In addition, the Commission believes that other services anticipated for 39 GHz spectrum, such as wireless local loop, competitive access, local exchange, and Internet access, are of a local nature for which use of BTAs also would be appropriate. Moreover, the Commission believes that use of BTAs as the service area definition for the 39 GHz band will also satisfy the third criterion of section 309(j)(4)(C), which requires that the Commission establish service areas in a manner which will promote investment in and rapid deployment of new technologies and services. Accordingly, the Commission agrees with the commenters who advocate the use of BTAs for licensing the 39 GHz band.

5. The Commission disagrees with those commenters who contend that the service areas for the 39 GHz band should be based on larger geographic areas. The Commission believe that BTAs offer a sufficiently large service area to allow applicants flexibility in designing a system to maximize population coverage and to take advantage of economies of scale necessary to support a successful

operation. Moreover, to the extent that 39 GHz licensees desire to provide service over a larger geographic region, the rules the Commission adopt today will allow them to aggregate BTAs. The Commission does not believe, however, nor does the record indicate, that the majority of licensees will seek to provide service over vast geographic regions. Thus, the Commission believes that larger service areas would be inappropriate for the 39 GHz band.

6. Finally, although GTE expressed some concern that any Rand McNally licensing agreement should be reasonable, the Commission does not believe that the existence of Rand McNally's copyright interest in the BTA listings will present an impediment to use of these areas by 39 GHz band licensees. The Commission expects that potential licensees and Rand McNally will execute a licensing agreement similar to those already undertaken in other contexts. In particular, Rand McNally has already licensed the use of its copyrighted MTA/BTA listing and maps for a number of services, such as PCS, 800 MHz Special Mobile Radio (SMR) service, and Local Multipoint Distribution Service (''LMDS''), and the company has also reached an agreement with the American Mobile Telecommunications Association (''AMTA'') for a blanket copyright license for the conditional use of copyrighted material in the 900 MHz SMR service. These agreements authorize the conditional use of Rand McNally's copyrighted material in connection with these particular services, require interested persons using the material to include a legend on reproductions (as specified in the license agreement) indicating Rand McNally's ownership, and provide for a payment of a license fee to Rand McNally.

7. The Commission encourages interested parties and Rand McNally to explore the possibility of entering into blanket license agreements to cover the 39 GHz band. The Commission notes that a 39 GHz BTA authorization grantee who does not obtain a copyright license through a blanket license agreement (or some other arrangement) with Rand McNally for use of the copyrighted material may not rely on the grant of a BTA-based authorization from the Commission as a defense to any claim of copyright infringement brought by Rand McNally against such grantee. The MTA/BTA Listings, the MTA/BTA Map and the license agreements noted above are available for public inspection at the Wireless Telecommunications Bureau, Reference Room, Room 5322, 2025 M Street, N.W., Washington, D.C., 20554.

B. Permissible Operations in the 39 GHz Band

8. In the NPRM and Order, the Commission raised questions about expanding the array of services provided in the 39 GHz band to include point-to-multipoint and mobile operations. Although these services are permitted under the Table of Allocations for this spectrum band, the only type of service authorized under the Commission's current service rules is point-to-point operations. The 39 GHz band is currently being licensed and used for non-Government, terrestrial-based, fixed, point-to-point microwave service. In addition, there are no satellite operations in the 39 GHz band. Accordingly, the Commission's efforts to improve the licensing and service rules for non-Government service in this band are not affected by any existing assignments under different allocations. The Commission takes note of the fact that the 39 GHz band contains the following allocations:

- Domestically, the 38.6–39.5 GHz portion of the band is allocated for non-Government use to provide fixed and mobile services and FSS (space-to-Earth) on a primary basis. In addition to these primary allocations, the 39.5–40.0 GHz portion of the band is allocated on a shared basis between Government and non-Government users on a primary basis for FSS (space-to-Earth) and Mobile-Satellite Service (''MSS'') (space-to-Earth). Government use of 39.5–40.0 GHz is limited to military systems.
- Internationally, the 39 GHz band is allocated on a co-primary basis for fixed and mobile services and FSS (space-to-Earth), and on a secondary basis for use by the Earth-Exploration Satellite service (space-to-Earth). The 39.5–40.0 GHz portion of the band is also allocated on a primary basis for MSS (space-to-Earth).

9. In the NPRM and Order, the Commission requested public comment on whether it should also establish service rules which would permit point-to-multipoint and mobile services. Many parties commenting in this proceeding have encouraged us to allow them flexibility to determine the best uses of the 39 GHz band; in particular, they have requested authority to provide point-to-multipoint and mobile service, as the technology to provide these services becomes available. The Commission has considered these comments in connection with the recent amendment to section 303 of the Communications Act concerning criteria it must consider when permitting flexible use of the electromagnetic spectrum, which was enacted after the NPRM and Order and after the comment period had been completed in this proceeding.

i. Point-to-Multipoint Operations

10. Given the fact that the 39 GHz service is still in its early stages of development, the Commission believes that it is imperative that it not take any regulatory actions that would hamper the service's continued development and growth potential. The Commission notes, as a general matter, that the type of services proposed for the 39 GHz band by the commenters can be offered on both a point-to-point and point-to-multipoint basis. Although a few commenters contend that the Commission should defer allowing point-to-multipoint operations in this band until specific technical rules are adopted to protect against interference to point-to-point users (such as equipment specifications), there is no evidence in the record that point-to-point and point-to-multipoint operations are inherently incompatible in the same band or licensing area. Therefore, the Commission will adopt 39 GHz rules for point-to-multipoint operations.

ii. Mobile Operations

11. The Commission has considered the comments of several parties requesting that it establish rules to permit mobile operations in this band. Parties opposing authorization of mobile services in the 39 GHz band argue that there are no technical parameters to protect both fixed and mobile operations from mutual interference.

12. After careful review of the record evidence, the Commission has decided to permit implementation of mobile operations in the 39 GHz band. Permitting such flexibility will enable providers to modify their offerings quickly and efficiently to provide the services that consumers demand and that technology makes possible. Thus, providers will be better positioned to respond to the dictates of the marketplace. Moreover, such flexibility will promote competition by increasing both the diversity of potential service offerings and the number of providers that can offer any service. Thus, the requirements of section 303(y) are fulfilled because both technological development and investment therein will be stimulated. Moreover, this broad view of the character of 39 GHz service comports with the development of the industry thus far because parties are developing a wide variety of fixed services and some parties may be developing, or planning to develop,

mobile services technology capable of operating without interference to fixed facilities in this band. Accordingly, the Commission is convinced that establishing rules for mobile operations will best serve the public interest. In addition, the Commission observes that in a number of other contexts it has authorized licensees to provide both mobile and fixed operations within the same service—*e.g.*, General Wireless Commercial Services (''GWCS''), the Commercial Mobile Radio Services (''CMRS''), and the Interactive Video and Data Service (''IVDS'').

13. For the most part, the objections that have been raised to mobile operations in this proceeding are misplaced. Since the service is licensed on an exclusive, area-wide basis (whether by incumbents' rectangular service areas or by new licensees' BTAs), the issue of technical compatibility of fixed and mobile operations within a service area is one that can and should be resolved by the licensee. To the extent that a licensee has the technological wherewithal to provide one or the other, or both, types of services, the licensee will do so in a manner that the market directs. Governmental direction in this service is unnecessary except to the extent that the operations of one licensee may interfere with that of another. Even if mobile operations are not now compatible with fixed operations within a licensee's service area, if adequate protections against inter-licensee interference are in place, a failure to authorize mobile use in this spectrum might delay implementation of a dual (mobile and fixed) operation when it does become feasible. Accordingly, the Commission agrees that 39 GHz licensees should have the flexibility to provide mobile services.

14. The Commission recognizes that inter-licensee interference issues are magnified under this approach. For example, a mobile unit operating in a fixed microwave environment on the same frequency calls for a different interference analysis and a more difficult resolution than the operation of two or more fixed microwave systems on the identical frequency in the same vicinity. In addition, the Department of Defense has stated that it has plans to implement satellite downlinks at 39.5–40.5 GHz in the future. NASA has also identified 39.5–40.0 GHz as a possible space research band to accommodate future earth-to-space wideband data requirements. Such plans, however, should not affect the continued development of the 39 GHz band for non-Government use. The Commission believes that it is likely that military satellite systems will be able to share with non-Government terrestrial and/or fixed satellite systems, provided that the Government receiving Earth stations are limited in number. The Commission intends to address these interference issues in a future, separate proceeding that will focus on developing inter-licensee and inter-service standards and criteria. Until these standards and criteria are adopted the Commission will not permit mobile operations in the 39 GHz band.

iii. The Balanced Budget Act Requirements for Flexible Use

15. The Balanced Budget Act authorizes the Commission to allocate spectrum so as to provide flexible use, if such use is consistent with international agreements to which the United States is a party and the Commission finds that: (1) Such an allocation would be in the public interest; (2) such use would not deter investment in communications services and systems, or technical development; and (3) such use would not result in harmful interference among users. In the NPRM and Order, the Commission sought comment on whether it should allow point-to-multipoint and mobile operations in addition to the traditional point-to-point services authorized in the 39 GHz band. As discussed *supra*, the Commission finds that the flexible use approach adopted herein is consistent with the new statute. Accordingly, the Commission will permit point-to-point, point-to-multipoint and mobile operations on the 39 GHz band. However, as explained *supra*, the Commission will defer mobile use until a future rulemaking proceeding can establish interference criteria. Accordingly, the Commission finds, as required by Section 303(y) of the Communications Act, as amended by the Balanced Budget Act, that no harmful interference will be caused by allowing both point-to-point and point-to-multipoint operations in the 39 GHz band. The Commission concludes further, based on the above-mentioned comments in the record, that point-to-multipoint use will not deter investment in communications services and systems, or in technology development. To the contrary, permitting point-to-multipoint use will stimulate creative technology development and facilitate investment therein. It is in the public interest to afford 39 GHz licensees flexibility in the design of their systems to respond readily to consumer demand for their services, thus allowing the marketplace to dictate the best uses for this band. Accordingly, the Commission finds that the requirements of Section 303(y) of the Communications Act, as amended, are fulfilled to justify point-to-multipoint use of the 39 GHz band as part of a flexible use approach. While at this time, the Commission is not determining the specific provisions for interference protection with regard to mobile use, it will adopt such requirements before permitting mobile operations in this band.

C. Channeling Plan

16. The existing 39 GHz channeling plan consists of fourteen paired 50 MHz channel blocks, with a spacing of 700 MHz between the transmit and receive frequencies. Within this framework, 39 GHz licensees have the flexibility to subdivide their channels in the manner they deem most appropriate to meet service demands. The Commission will retain its current channel plan. The Commission concludes that adopting a standard subchannelization plan at this early stage in the development of the 39 GHz service would potentially hamper licensees' efforts to meet their customer demands and could unnecessarily impose technical and economic costs on equipment users and limit the range of services potentially available. Moreover, given the short propagation transmission characteristics at these frequencies, lack of a subchannelization plan is not likely to cause any significant coordination problems in the 39 GHz band. Furthermore, because the Commission anticipates that one of the uses for the 39 GHz band is provision of CMRS infrastructure, it is concerned that adoption of a subchannelization plan may frustrate such use if it is inconsistent with the channeling plan for particular CMRS providers. Thus, the Commission believes that the existing approach that allows 39 GHz licensees to freely subdivide their channel blocks will not only avoid this unintended result but also facilitate the most flexible and efficient use of 39 GHz spectrum. As the Commission observed in the NPRM and Order, however, the Commission's decision not to adopt a standard subchannelization plan does not preclude the industry from developing its own voluntary standards in this area.

D. Licensing Rules

i. Eligibility

17. In addressing the eligibility issue, the Commission inquires whether open eligibility poses a significant likelihood of substantial competitive harm in specific markets, and, if so, whether eligibility restrictions are an effective way to address that harm. This approach results in reliance on

competitive market forces to guide license assignment absent a compelling showing that regulatory intervention to exclude potential participants is necessary. Such an approach is appropriate here because it best comports with the Commission's statutory guidance. When granting the Commission authority in Section 309(j)(3) to auction spectrum for the licensing of wireless services, Congress acknowledged the Commission's authority ''to [specify] eligibility and other characteristics of such licenses.'' However, Congress specifically directed that the Commission exercise that authority so as to ''promot[e] * * * economic opportunity and competition.'' Congress also emphasized this pro-competitive policy in Section 257, where it articulated a ''national policy'' in favor of ''vigorous economic competition'' and the elimination of barriers to market entry by a new generation of telecommunications providers. This approach is also consistent with the Commission's analysis in Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules To Redesignate the 27.5–29.5 GHz Frequency Band, To Reallocate the 29.5–30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, CC Docket No. 92–297, Suite 12 Group Petition for Pioneer Preference, PP–22, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 62 FR 16514 (April 7, 1997), adopting subpart L of part 101 of the Commission's Rules, 47 CFR 101.1001–1112; appeal pending sub nom. *Melcher* v. *FCC,* Case Nos. 93–110, et al. (D.C. Cir., filed Feb. 8, 1993); Order on Reconsideration, 62 FR 28373 (May 23, 1997). Finally, implementation of this approach is consistent with the court's treatment of eligibility issues in *Cincinnati Bell Tel. Co.* v. *FCC,* 69 F.3d 752 (6th Cir. 1995), at 760. In that decision, the Court looked to statistical data and general economic theory as support for predictive judgments by the Commission such as a finding that eligibility restrictions are required.

18. In the case of the 39 GHz band, the Commission determines that it is unlikely that substantial anticompetitive effects would result from LEC eligibility for two primary reasons. First, increased LEC provision of services other than those provided in local exchange markets, such as point-to-point backhaul and backbone transmission, will not diminish the generally competitive environment in which those services are now available. Second, even presuming that 39 GHz licenses will enable effective provision of services that can compete with local exchange service, such as wireless local loop, incumbent LECs should have little or no incentive to acquire those licenses with the anticompetitive intent of foreclosing entry by other firms and preserving market power. An incumbent strategy of preserving expected future profits by buying 39 GHz licenses cannot succeed because there are numerous other sources of actual and potential competition. As discussed *supra,* there are many non-LEC license holders in the 39 GHz band currently, and these licensees will be able to provide services that compete with wireline local exchange. In addition, the Commission's overall 36–51 GHz band plan contemplates making available considerable additional spectrum, including substantial unencumbered spectrum, for flexible terrestrial use at frequencies close to those covered by this Order. These future licenses should enable provision of whatever competitive services can be provided with the 39 GHz licenses. Further, entry by other wireless licensees is possible as well, such as CMRS firms now authorized to provide fixed services. Moreover, the Telecommunications Act of 1996, Public Law 104–104, 110 Stat. 56 (1996), has set the stage for new facilities-based, wireline entrants such as interexchange carriers and competitive LECs, and non-facilities-based wireline entrants utilizing the new local competition provisions. Finally, the Commission has now provided for one additional potential competitive option in every region of the country in the form of the 1150 MHz LMDS licensee. The Commission has imposed an eligibility restriction preventing in-region LECs (and cable television companies) from acquiring these large LMDS licenses for three years, guaranteeing that each license will be acquired by a firm new to provision of local exchange in the service area. Therefore, these licensees also constitute potential competition for incumbent LECs providing local exchange services. Given all these competitive possibilities, it is implausible that incumbent LECs would pursue a strategy of buying 39 GHz licenses in the hope of foreclosing or delaying competition, and implausible that they would succeed if that strategy were attempted. Therefore, the Commission finds that LEC eligibility for these licenses poses no likelihood of substantial competitive harm.

19. Note that several factors, taken together, explain the distinction between the Commission's resolution of the eligibility issue here and in the case of the 1150 MHz LMDS licenses. The 1150 MHz LMDS license blocks are unusually large, making possible the provision of voice, video, data, or some combination of these services. With the possibility of providing voice cheaply as part of a set of services, the 1150 MHz LMDS license is a particularly attractive competitive option, and incumbents are particularly likely to attempt acquisition in order to prevent entry by new competitors using the LMDS license. In addition, with only one large LMDS license available per geographic area, anticompetitive preemption is quite feasible and thus the risk of such acquisition is increased. Moreover, the 39 GHz licenses being made available within the near future (*i.e.,* within a similar time frame as the LMDS spectrum) are encumbered, while LMDS licenses are largely unencumbered. Thus, 39 GHz licenses are less likely to be acquired by incumbent LECs for anticompetitive motives. Most importantly, as noted above, given the fact that the Commission has now provided for an additional competitive option by imposing the 1150 MHz LMDS eligibility restriction, the competitive circumstances it faces in this proceeding differ from those it faced in the LMDS proceeding. The Commission's eligibility analysis and conclusion here, in fact, are consistent with the Commission's treatment of eligibility for the small, 150 MHz, LMDS licenses.

20. Because the Commission sees no likely and substantial competitive harm flowing from LEC eligibility, it rejects the argument that LECs should be required to certify compliance with the ''Competitive Checklist'' as a precondition to participation in the 39 GHz auction. The Commission also notes as a general matter that LEC eligibility can be expected to yield efficiency benefits if there are complementarities between the ultimate use(s) of 39 GHz spectrum and the existing LEC services when offered in the same service area. For example, LECs might be able to achieve savings not available to new entrants by taking advantage of their current infrastructure, and imposition of restrictions would prevent realization of such savings. Restrictions might also prevent incumbent LECs from experimenting with certain technology and market combinations, and preclude or delay

desirable entry by incumbents into new markets.

ii. License Term

21. Under the Commission's previous rules, all common carrier 39 GHz licensees who were licensed before August 1, 1996 (*i.e.*, those licensed previously under part 21 of the Commission's Rules) were subject to a fixed license term ending February 1, 2001, regardless of the grant date of their individual licenses. Private carrier 39 GHz licensees authorized before August 1, 1996 (*i.e.*, those licensed previously under part 94 of the Commission's Rules) received a five-year license which would run from the date of license grant. However, both private and common carrier licenses granted on or after August 1, 1996, the effective date of the Part 101 Report and Order, have a license term not to exceed ten years. In addition, neither the former fixed microwave rules in Parts 21 and 94, nor the current ones in the new part 101, expressly provide for a renewal expectancy for common carrier or private carrier 39 GHz licensees.

22. The Commission declines to increase the term to ten years for incumbents who have received a shorter period under the rules that predated those adopted in the Part 101 Report and Order. When it adopted the part 101 rules, the Commission decided to conform the license terms of common carrier and private carrier 39 GHz licensees on a going forward basis. The Commission did not, therefore, alter the conditions under which incumbent licensees had taken their licenses, and it left in place a bifurcated approach toward renewal that would exist until the incumbents' current licensing cycle runs its course. The Commission is unpersuaded that this approach, adopted only a year ago, should be altered.

iii. Performance Requirements: Renewal and Build-out

23. The Commission noted in the NPRM and Order that both cellular and PCS licensees receive a renewal expectancy, and it proposed adopting a similar standard in this proceeding. Commenters support adopting a renewal expectancy for the 39 GHz service for similar reasons, as they recognize the benefits that such a presumption offers.

24. Incumbent 39 GHz licensees are currently subject to the build-out requirements of part 101 of the Commission's Rules, which require that at least one link be constructed in a licensee's geographic service area within eighteen months of the date of license grant. In the NPRM and Order, the Commission proposed new build-out requirements for incumbent 39 GHz licensees in order to ensure that the spectrum was being used to provide service to the public. Because of the Commission's concern that such licenses be used to provide service to the public, the Commission solicited comment on its proposal to allow incumbent 39 GHz licensees to retain their licenses only by meeting specific construction and loading requirements. The Commission suggested three basic construction build-out options, each of which depended upon a specific number of fixed stations to be built within the licensees' geographic service area. The build-out options were each intended to ensure a minimum level of service. While the proposals represented a significant departure from the current build-out rules applicable to these licensees, in the NPRM and Order the Commission stated that the purpose of these proposed measures was to minimize speculation without harming existing 39 GHz licensees who are responsibly developing the spectrum they have been assigned.

25. The Commission also requested comment on build-out requirements for new licensees authorized pursuant to the competitive bidding rules promulgated herein. In the NPRM and Order, the Commission observed that the Communications Act requires that any regulations implementing a competitive bidding system include performance requirements—such as appropriate deadlines and penalties for performance failures—to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees, and to promote investment in and rapid deployment of new technologies and services. The build-out requirements that apply to other fixed, microwave services licensed on a link-by-link basis, as well as those requirements that apply to mobile services, did not appear appropriate for a fixed, geographically licensed service like 39 GHz. Accordingly, the Commission asked for comment on what other methods it might employ to ensure that licensees are using their spectrum, servicing rural areas, and enabling the provision of new services to the public. The Commission suggested that these goals might be accomplished if it required licensees to demonstrate substantial service in their service areas. As the Commission noted in the NPRM and Order, the use of a substantial service standard has precedent in the Commission's Rules.

26. The performance rules the Commission is adopting for the 39 GHz band require each licensee to prove substantial service in order to achieve license renewal. The Commission arrives at this approach based on two factors. First, the approach satisfies the dictates of Section 309(j)(4)(B) of the Communications Act, which requires the Commission to adopt effective safeguards and performance requirements for licensees in connection with any competitive bidding system. The Commission believes that the requirements it establishes herein will fulfill this obligation, because a license will be assigned in the first instance through competitive bidding, with the result that it will be assigned efficiently to an entity that has shown, by its willingness to pay market value, its willingness to put the license to its best use.

27. Second, the approach the Commission is taking with regard to performance rules is also based on the record in this proceeding, which strongly supports giving 39 GHz licensees a significant degree of flexibility in meeting their performance requirement. As described above, the types of service available from 39 GHz providers is tremendously varied, and the service promises to develop in ways the Commission cannot predict at this time. Thus, an inflexible performance requirement might impair innovation and unnecessarily limit the types of service offerings 39 GHz licensees can provide. Permitting licensees to demonstrate that they are meeting the goals of a performance requirement with a showing tailored to their particular type of operation avoids this pitfall. Moreover, the Commission's examples of presumed substantial service, based on a specific number of links per population standard, provides licensees with a degree of certainty regarding their license requirements. Accordingly, the Commission believes that the performance requirements it establish herein will permit flexibility in system design and market development, yet provide a clear and expeditious accounting of spectrum use by licensees to ensure that service is indeed being provided to the public.

28. The Commission declines to adopt any of the build-out proposals it made for incumbent 39 GHz licensees in the NPRM and Order. The first option would have required licensees to meet a specific build-out benchmark. The Commission has considered a number of possibilities for such a benchmark, and it has rejected those that appear infeasible. The Commission's principal proposal fell into this category. The Commission had proposed to require any licensee to construct and put in operation at least four links per 100

square kilometers of their service area within 18 months of adoption of a Report and Order in this proceeding. The Commission is persuaded by several commenters' arguments that such a build-out requirement would be unduly restrictive and burdensome, thus unnecessarily limiting licensees' service options. For the same reasons, the Commission rejects a variant of its principal proposal, which would have combined the alternatives discussed below with an 18-month requirement to construct a certain number of links per 100 kilometers.

29. The other two alternatives the Commission had proposed for providing licensees with specific build-out benchmarks are also problematic. One alternative provided for a specific number of links, increasing over time, per geographic area served by each licensee. This alternative does not adequately take into account the differences among licensees. Under this requirement, a licensee in a sparsely populated BTA would have to build an operation that could provide the same level of service as a licensee of a metropolitan BTA. Such an approach would result in either an overly burdensome requirement for the licensee of the smaller market or a very lenient and almost meaningless requirement for the licensee of the metropolitan BTA. Moreover, since market size is a reasonable proxy for gauging the appropriate comparative levels of spectrum use, the Commission agrees with the consensus of the commenters that any build-out standard should therefore be based on market population or population density. This approach is, in fact, an underpinning of standards that have been adopted for CMRS services such as PCS and SMR.

30. The second alternative would have required licensees to construct a specific number of link installations based on the market's population. In the case of 39 GHz, however, the services to be offered generally will be customized for each subscriber, and, for the most part, each subscriber will have equipment dedicated to its location. Moreover, 39 GHz licensees are not likely to install equipment until they receive an order. The Commission further notes that some commenters argue that adoption of a concrete standard would discourage growth, stymie new development, and deter investment in the 39 GHz arena. Accordingly, the Commission is concerned that a requirement for a fixed number of links may interfere with the market decisions of a particular licensee and its customers.

31. The Commission concludes that a showing of substantial service, the approach it proposed for new 39 GHz licensees, should be applied to both incumbent and new licensees in the band. This approach will permit flexibility in system design and market development, while ensuring that service is being provided to the public. Although a finding of substantial service will depend upon the particular type of service offered by the licensee, one example of a substantial service showing for a traditional point-to-point licensee might consist of four links per million population within a service area. This revised performance standard should ensure that meaningful service will be provided without unduly restricting service offerings.

32. One of the principal problems that commenters identified with the Commission's build-out proposals was that they required too much too soon. The Commission recognizes that licensees must be given a reasonable amount of time to meet a performance requirement. Parties, particularly incumbent licensees, also argued that different build-out standards were unfair and would place an unreasonable burden on their ability to respond to market demands. Accordingly, the Commission has decided that in order to impose the least regulatory burden on licensees as possible, but to remain consistent with the Commission's statutory responsibilities, it will combine the showing traditionally required for build-out and the showing required to acquire a renewal expectancy into one showing at the time of renewal. The Commission believes this will give licensees a sufficient opportunity to construct their systems. The Commission believes that applying a similar performance requirement to all licensees at the license renewal point will help establish a level playing field without compromising the goals of ensuring efficient spectrum use and expeditious provision of service to the public.

33. The Commission recognizes that existing licensees who obtained their licenses before August 1, 1996, will receive a somewhat shorter period from the date of this decision to meet the construction threshold (*i.e.*, about four years). Extending the build-out deadline past renewal, however, would not be prudent nor would it appear to be consistent with the objectives of section 309(j) of the Communications Act. Moreover, these incumbents already have had at least a year, and in some cases more than two years, in which to set in motion their business plans. Thus, the Commission does not believe this approach will adversely affect incumbent 39 GHz licensees.

34. The Commission concurs with those commenters who advocate adopting a renewal expectancy for all licensees in the 39 GHz band. As with cellular and broadband PCS licensees, affording 39 GHz providers the opportunity to earn a renewal expectancy will facilitate investment for their industry, provide stability over the long run, and better serve the public by reducing the possibility that proven operators will be replaced with less effective licensees. The Commission is not limiting this opportunity to newly licensed 39 GHz providers. The build-out/renewal requirements established herein will, if met, serve to give the incumbent licensee a renewal expectancy as well.

iv. Spectrum Aggregation Limit

35. In the NPRM and Order, the Commission sought general comment on whether there should be a limit on the aggregation of 39 GHz channels within a single BTA. The Commission also requested comment on whether the 39 GHz service represents a discrete market. In the event that the Commission concluded that this service did constitute a discrete market, it indicated that a spectrum aggregation limit might be advisable to ensure that there would be an adequate number of licenses available to meet the needs of broadband PCS licensees and other competitors in the wireless marketplace.

36. The Commission agrees with those commenters who oppose a 39 GHz spectrum aggregation limit. The record strongly supports the conclusion that 39 GHz licensees will participate in a number of broad markets, consisting of a host of short-range fixed communications provided by many operators who employ a range of different, but substitutable, technologies (both radio and wire). Therefore, the Commission is not concerned with guaranteeing a particular number of 39 GHz competitors or with creating competition within the 39 GHz band. Moreover, as the Commission noted above, there is no evidence that the 1400 megahertz of spectrum in the 39 GHz band is particularly important for, or unusually suited for, the creation of competition in two markets where market power still exists—local telecommunications services and multi-channel video program delivery. Therefore, an aggregation limit is not needed in order to foster competition in these two markets. Indeed, a 39 GHz spectrum aggregation limit that was applicable to 39 GHz licensees might

limit the ability of a licensee to bring efficient competition to these markets.

37. Although the Commission believes that some of the 39 GHz spectrum will be used to satisfy CMRS and private mobile radio infrastructure needs, it is persuaded by the commenters that a great portion of this spectrum likely will be used to provide other wireless services, *e.g.*, local area network (''LAN'')-to-LAN, local access for long distance providers, wireless augmentations to CAPs' networks, and other high capacity data transmission networks. This is evidenced by current 39 GHz operations, which are not supporting CMRS communications infrastructure but generally tend to be local private line and local bypass services. Since this arena is already being served by multiple providers using a variety of technologies, it is clear that disaggregated ownership of 39 GHz spectrum is not necessary for the competitive provision of those services.

38. The Commission also notes that even the current users of the 39 GHz band are still in the early stages of developing their services, and that the particular uses of this spectrum are still being defined by the marketplace. As indicated above, 39 GHz spectrum can be used for almost any fixed, short-range communication—the internal parts of almost any communications system (mobile or fixed)—or the ''last mile'' of any fixed system, whether for voice, data, video, or more than one of the foregoing. At this time, the Commission believes that it would be inappropriate for us to view the output of 39 GHz spectrum as falling into any one of these categories or to find that some limit on spectrum aggregation in order to foster competition in that category is necessary. Accordingly, the Commission does not believe that it is appropriate to restrict the amount of 39 GHz spectrum that may be licensed to any one service or entity.

39. Moreover, the Commission concludes that there may be benefits to the public in terms of efficiencies and types of services provided if it permits aggregation of 39 GHz spectrum. For example, spectrum aggregation would allow a licensee to expand its operation and thereby lower the per unit cost of equipment and its per capita cost of providing service to subscribers. Furthermore, a 39 GHz licensee with substantial spectrum can better compete with established service providers who have large transmission capacity. In addition, the Commission concludes that it is not likely that aggregation of 39 GHz spectrum by a single entity would lead to undue market power. The Commission notes that other service providers, such as LECs and CAPs, have some significant competitive advantages over a competitor using only 39 GHz spectrum, such as an established customer base and transmission facilities that carry much more traffic than would be possible by a 39 GHz-based facility using only, for example, 700 MHz of spectrum. In addition, other service providers are not precluded from adding fiber or radio transmission facilities to their existing networks. Moreover, the Commission has proposed to make available additional spectrum enabling more parties to compete in many of the types of services proposed by potential 39 GHz service providers, and it plans to consider these proceedings in connection with the Commission's 36–51 GHz band plan proceeding. Therefore, the Commission believes that even if a single licensee controls a significant part of the 39 GHz band in a single BTA, it could not control service prices or limit competition, given the number of providers of similar or substitutable services and the variety of transmission media at their disposal.

40. The Commission also does not believe that a spectrum aggregation limit is warranted to ensure that there is adequate support spectrum available for broadband PCS, cellular radio, and other commercial and private mobile radio operations. While the use of the 39 GHz band may help meet these needs, such backhaul and backbone support can also be provided by using wire-based technologies and over-the-air spectrum outside the 39 GHz band (*e.g.*, at 6, 11, 18 and 23 GHz). Given this availability of substitutable spectrum for backhaul and backbone support, coupled with the aforementioned competition that exists to 39 GHz providers of alternative types of services, the Commission finds that imposing a spectrum aggregation limit for the 39 GHz band would be contrary to the public interest.

v. Technical Rules

a. *Frequency Tolerance and Efficiency Standard.*

41. The Commission has determined that a frequency tolerance standard is unnecessary. The Commission's basis for this view stems from its desire to provide 39 GHz licensees flexibility in the operation of their facilities and to avoid imposing unnecessary regulations. In addition, the Commission believes such a standard could inhibit technological advances, for equipment performance is likely to be influenced by customer demand. For those that might be concerned that elimination of this standard may lead to inter-system interference, the Commission points to its existing out of band emission requirements (emission mask) contained in § 101.111 of the rules. That rule requires frequencies removed in various percentages from the center frequency to be attenuated below the mean power of the transmitter. This means that the frequencies at the outer edges of an assigned 50 MHz channel or at the edge of an aggregated group of 50 MHz channels power levels will be significantly reduced such that interference to an adjacent channel licensee is unlikely. Thus, the Commission believes that strict adherence to § 101.111 will be as effective in controlling inter-system interference as the imposition of a frequency tolerance standard. In addition, concerns for inter-system interference should be further eased, as the Commission is requiring neighboring and adjacent channel licensees to engage in frequency coordination before implementation of their planned operations.

b. Antenna Requirements.

42. There is evidence in the record that the Commission's proposal to require 39 GHz licensees to employ only Category A antennas is too restrictive because parties are contemplating a variety of system configurations that would require different types of antennas, *e.g.*, sectorized or wide beam units, characteristics of which would be incompatible with the standards of a Category A antenna. These models represent a more cost-effective and technically suitable alternative to traditional narrowbeam Category A antennas when deployed in a point-to-multipoint configuration. As the deployment of 39 GHz facilities increases, the Commission expects other system configurations to be developed in which narrowbeam antennas may not be the optimal solution. The Commission concludes that the need to provide 39 GHz licensees the technical flexibility to meet service demands outweighs any benefits that would ensue by adopting the requirement. Therefore, the Commission declines to require licensees in the 39 GHz band to use Category A antennas initially. The Commission concludes that 39 GHz licensees should be given the flexibility to employ antennas other than Category A types, provided they do not cause interference problems. Should the use of an antenna other than a Category A antenna become the source of an interference problem, however, the Commission will require that the licensee immediately resolve such interference by replacing the antenna

with a Category A model or one with better performance characteristics.

c. Frequency Coordination and Power Flux Density (''PFD'') Limit.

43. The Commission is persuaded by the record that adoption of a PFD limit or field strength limit now would not further the Commission's goal of facilitating the growth and development of the 39 GHz spectrum. In this connection, the Commission notes that there is a lack of consensus regarding the parameters necessary to establish a reasonable and practical PFD or field strength limit. As a result, the Commission is concerned that establishing a service area boundary PFD or field strength limit without such information may stifle the development of advanced 39 GHz technology. Thus, the Commission declines to adopt such a standard at this time, and consequently, it need not reevaluate the current EIRP at this time. The Commission concludes that it is in the public interest to continue to use the frequency coordination procedures outlined in § 101.103(d) of the Commission's Rules. The Commission describes these procedures, *infra,* as modified to implement certain improvements supported by the record of this proceeding. Despite the fact that licensees will not be able to rely on PFD or field strength limits to avoid the formal coordination process, the Commission believes that its modified coordination procedures will provide licensees substantial flexibility in system design while ensuring that inter-system interference will be kept to a minimum. The Commission's experience with other services employing frequency coordination procedures shows that those services have been successfully implemented with little delay and rarely result in unresolved frequency interference cases.

44. Under the Commission's frequency coordination procedures, 39 GHz licensees will be subject to the requirements of § 101.103(d) of the Commission's Rules, with certain modifications. As a result, they must provide values for the appropriate parameters listed in that subsection to each neighboring BTA licensee authorized to use adjacent and co-channel frequencies. Likewise, they must provide the same information to each potentially-affected, adjacent-channel licensee in the same BTA. Coordinating parties also must supply technical information related to their subchannelization plan and system geometry. Based on the propagation characteristics of this spectrum, coordination between neighboring systems need only encompass operations located within 16 kilometers of BTA boundaries. Currently, § 101.103(d) of the Commission's Rules gives each party that receives a coordination notification 30 days in which to respond. The record in this proceeding indicates that 30 days is an inappropriate time frame for operations in the 39 GHz band because licensees often offer service that requires much shorter installation deadlines. In order to facilitate such rapid service installation schedules, the Commission will require that recipients of coordination notifications respond within 10 days. Each licensee must complete this coordination process prior to initiating service within its service area. Finally, participating parties should resolve any problems that develop during this process. Only unresolved frequency conflicts should be reported to the Commission. In such cases the Commission will resolve the conflicts. The Commission believes that the coordination approach it is adopting does not preclude licensees from entering into private agreements that mitigate interference problems. These agreements may include an arrangement to conduct a one-time blanket coordination as opposed to coordinating each individual link as they are planned for activation, or arrangements for one party to compensate another financially for modifying its operation to accommodate new installations.

vi. Partitioning and Disaggregation

45. Partitioning is the assignment of all the spectrum within specific geographic portions of a licensee's service area. Disaggregation is the assignment of discrete portions or ''blocks'' of licensed spectrum to another entity. The Commission concludes that partitioning and disaggregation should be permitted in the 39 GHz band. The Commission further concludes that the option of partitioning should not be limited to rural telephone companies but should be made available to all entities eligible to be licensees in the 39 GHz band, including incumbent 39 GHz licensees. The Commission thus concurs with commenters who support partitioning, and notes that no parties opposed this proposal. The Commission believes that the availability of these options will enhance 39 GHz licensees' flexibility with respect to system design and service offerings. The Commission also believes that partitioning and disaggregation opportunities further the objectives of section 309(j) of the Communications Act by facilitating the development of niche markets and the arrival of new entrants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women. In addition, these tools will promote efficient use of 39 GHz spectrum.

46. As a result, 39 GHz licensees acquiring their licenses under the new rules established herein will be permitted to acquire partitioned and/or disaggregated licenses in either of two ways: (1) They may form bidding consortia to participate in auctions, and then partition or disaggregate the licenses won among consortia participants after grant; or (2) they may acquire partitioned or disaggregated 39 GHz licenses from other licensees through private negotiation and agreement either before or after the auction. A licensee planning to partition or disaggregate its license must first be granted the license, and the licensee and partitionee and/or disaggregatee will be required to file an assignment application. The Commission will require that a licensee disaggregate by frequency pairs. This requirement is necessary for administrative purposes: the database necessary to track authorizations could otherwise become too cumbersome and complex and processing could become delayed or prone to error.

47. Overall, the Commission believes that partitioning and disaggregation will promote competition in the 39 GHz service and expedite the delivery of service to the public, particularly in rural areas. Moreover, partitioning and disaggregation will help to eliminate market entry barriers pursuant to section 257 of the Communications Act by creating smaller, less capital intensive service areas that may be more accessible to small entities. The Commission considers partitioning and disaggregation effectively to be types of assignments, which will, therefore, require prior approval by the Commission. In authorizing partitioning and disaggregation, the Commission will follow existing assignment procedures.

48. The Commission will require the entity acquiring a license by partitioning or disaggregation to satisfy the same construction requirements as the initial licensee, regardless of when its license was acquired. Should a licensee fail to meet the construction requirements, the license will cancel automatically. The cancelled license will, if it was partitioned from a rectangular service area, revert to the BTA licensee for that channel (unless the forfeiting entity is the BTA licensee for that channel). If the forfeited license was partitioned from a BTA, the license will be auctioned. In addition, parties must comply with the Commission's current technical rules

with respect to service area boundary limits and protections. Coordination and negotiation among licensees must be maintained and applied in licensing involving partitioned areas and disaggregated spectrum. Finally, under partitioning or spectrum disaggregation, an entity will be authorized to hold its license for the disaggregated spectrum or partitioned area for the remainder of the original license term. The Commission concludes that this approach is appropriate because the Commission should not bestow greater rights to a licensee receiving its authorization pursuant to partitioning or spectrum disaggregation than the Commission awarded under the terms of the original license grant.

vii. Regulatory Status

49. The Commission concludes that 39 GHz band licensees should be permitted to serve as a common carrier or as a private licensee. Further, those licensees who select common carrier regulatory status will be able to provide private service, and those licensees who select private service provider regulatory status may share the use of their facilities on a non-profit basis or may offer service on a for-profit, private carrier basis subject to § 101.135 of the Commission's Rules. Under this scenario, licensees will elect the status of the services they wish to offer and be governed by the rules applicable to their status. Although no commenters addressed this issue, the Commission believes this approach will promote economic efficiencies by reducing construction and operating costs associated with having to provide separate facilities. This result also is consistent with § 101.133(a) of the Commission's Rules.

E. Treatment of Incumbent 39 GHz Licensees

50. Incumbent 39 GHz licensees are those who have been licensed under the current fixed microwave rules in 47 CFR Part 101, or its predecessors, parts 21 (for common carriers) or 94 (for private carriers). Their service areas are self-defined and generally are restricted to point-to-point operations. Many of these licensees have participated as commenters in this proceeding, and include WinStar, ART, BizTel, Columbia, and a number of PCS licensees.

i. Reconciling Service Areas of 39 GHz Incumbents With BTA Service Areas of New Licensees

51. While the Commission has decided that BTAs are appropriate for the new licensing system in the 39 GHz band, it recognizes that many of the newly-licensed BTA service areas will be encumbered by incumbent 39 GHz band licensees. These incumbents are authorized in various locations throughout the country, and their rectangular service areas will occupy portions of BTAs or cross BTA boundaries. After careful consideration of the concerns expressed by various commenters, the Commission concludes that the following approaches are appropriate.

52. Where an incumbent licensee's rectangular service area occupies only a portion of a BTA, the licensee's channels will be available for application under the new competitive bidding rules, but the incumbent will retain the exclusive right to use those channels within its rectangular service area. The holder of the BTA authorization thus will be required to design its system to protect against harmful interference to the incumbent by complying with the Commission's interference protection standards. The Commission notes that should such an incumbent lose its authority to operate, the BTA license holder will be entitled to operate within the portion of the forfeited rectangular service areas located within its BTA, without being subject to competitive bidding. This approach best serves the public because it gives the service providers an incentive to make efficient use of available spectrum, and it ensures that any disruption of service will be remedied as quickly as possible.

53. Where an authorized incumbent licensee has a rectangular service area covering an entire BTA, the Commission will not make those channels available for ''overlay'' licensing in that BTA. Unlike the scenario described above, in this situation a BTA will not have areas that are currently unassigned. Since incumbents will be required to construct and operate pursuant to Commission Rules, the public should be assured of receiving service throughout the BTA without the need to license an alternative provider.

ii. Repacking

54. *Background.* In the NPRM and Order, the Commission asked for comment on whether incumbent facilities should be relicensed on their current frequency or whether incumbent links should be ''repacked'' into a different portion of the band than initially occupied. There was very little discussion by commenters on the issue of repacking. The Commission's general approach up to this point has been to refrain from repacking, if possible. The Commission finds that repacking the 39 GHz band would cause a significant disruption of incumbent 39 operations. As noted throughout this proceeding, the Commission does not intend to alter or restrict significantly the operations of incumbents. Moreover, the Commission believes that it can coordinate with the extant licenses of 39 GHz incumbents so that they will not impair the Commission's new licensing system using BTAs and 50-MHz channel blocks. Accordingly, the Commission does not believe that repacking is necessary under these circumstances.

iii. Disposition of Pending 39 GHz Band Applications

a. Background.

55. On November 13, 1995, the Wireless Telecommunications Bureau (''Bureau''), pursuant to delegated authority, adopted and released an Order (''Freeze Order''), 61 FR 8062 (March 1, 1996), announcing that the Commission would no longer accept for filing any new applications for 39 GHz licenses in the Common Carrier or Operational Fixed Point-to-Point Microwave Radio Services, pending Commission action on the TIA Petition. The Freeze Order was made effective upon its release.

56. The NPRM and Order, *supra*, extended the freeze, providing that pending applications would be processed only if (1) they were not mutually exclusive with other applications at the time of the Bureau's Freeze Order, and (2) the 60-day period for filing mutually exclusive applications had expired prior to November 13, 1995 (*i.e.*, the applications were ''ripe''). The NPRM and Order further provided that those applications that were mutually exclusive with others as of November 13, 1995, or within the 60-day period for filing competing applications on or after November 13, 1995, would be held in abeyance for processing and disposition. In addition, amendments to these frozen applications received on or after November 13, 1995, were also held in abeyance. Moreover, applications for modification of existing 39 GHz licenses (*e.g.*, applications to modify existing licenses for the purpose of changing the height of an antenna) filed on or after November 13, 1995, were held in abeyance, as well as amendments thereto that were filed on or after November 13, 1995. Finally, no new applications to modify existing licenses, or amendments to pending modification applications, were to be accepted for filing on or after December 15, 1995, unless they (1) did not involve any enlargement of any portion of the proposed area of operation, and (2) did

not change frequency blocks, other than to delete one or more.

57. On January 16, 1996, Commco filed a Petition for Reconsideration and an Emergency Request for Stay, asking the Commission to vacate that portion of the NPRM and Order imposing an interim freeze on the processing of mutually exclusive applications to establish new facilities in the 39 GHz band, including amendments thereto, pending as of November 13, 1995. BizTel, GHZ Equipment Company, Inc. (''GEC''), and TIA filed comments in support of the Stay Request. Additionally, on January 16, 1996, DCT Communications, Inc., filed a Petition for Partial Reconsideration, requesting that the Commission process (a) minor amendments, at least those that eliminate mutual exclusivity, and (b) as-yet uncontested applications for which the 60-day period for filing mutually exclusive applications had not expired prior to the November 13, 1995, Freeze Order.

58. In its Memorandum Opinion and Order, *supra,* the Commission reconsidered certain aspects of the Commission's processing freeze and decided to lift the processing freeze on amendments of right filed before December 15, 1995. Thus, all applications that were amended to resolve mutual exclusivity before that date were to be processed, provided they had completed their 60-day public notice period as of November 13, 1995. In addition, the Commission clarified that applications to modify existing 39 GHz licenses and amendments thereto were to be processed regardless of when filed, provided they neither enlarge the service area nor change the assigned frequency blocks (except to delete them). In all other respects, the Commission's decisions regarding the filing and processing of 39 GHz applications and amendments were unaffected by the reconsideration decision. A summary of other main points of the decision follows:

- The Commission decided to process those amendments of right filed on or after November 13, 1995, but before December 15, 1995.
- The Commission noted that all other amendments filed on or after November 13, 1995, would continue to be held in abeyance.
- The Commission affirmed its decision to continue to hold in abeyance all pending mutually exclusive applications, unless the mutual exclusivity was resolved by an amendment of right filed before December 15, 1995. Where the mutual exclusivity was resolved, the Commission expressly stated that it would process the application provided that the application was ''ripe'' as of November 13, 1995—*i.e.*, that it had been placed on public notice and completed the 60-day cut-off period for filing of competing applications as of November 13, 1995.
- The Commission affirmed its decision to hold in abeyance all applications that had not been placed on public notice or completed the 60-day cut-off period as of November 13, 1995.

b. Processing of Pending Applications.

59. In view of the goals of this proceeding, *e.g.*, to foster competition among different service providers, to promote maximum efficient use of the spectrum, and to provide efficient service to customers by improving the licensing procedure, the Commission concludes that what follows is the best approach for processing currently pending 39 GHz license applications that were affected by the November 13, 1995, Freeze Order and the December 15, 1995, freeze. The Commission has processed: (1) Those 39 GHz applications that were not mutually exclusive as of December 15, 1995, and that, as of November 13, 1995, had passed the 60-day cut-off period for filing competing applications, and (2) applications to modify existing licenses (''modification applications''), or amendments to modification applications, which do not enlarge the service area or change frequency blocks, except to delete them. For the reasons that follow, the Commission has decided to dismiss, without prejudice, all other applications that have remained subject to the freeze, *i.e.*, (1) applications that are mutually exclusive, (2) applications that were not yet on public notice, or for which the 60-day cut-off period had not been completed prior to November 13, 1995, and (3) modification applications or amendments thereto that do not meet the criteria set out *infra,* in paragraph 95. These applicants may reapply under the new geographic area licensing rules established in this proceeding.

i. Pending Mutually Exclusive 39 GHz Applications.

60. PCS and other CMRS licensees, equipment manufacturers, and the Telecommunications Industry Association (TIA) ask that the Commission process 39 GHz applications that are pending and mutually exclusive. GTE Service Corporation (GTE), however, urges us either to (1) dismiss the pending 39 GHz applications that the Commission is holding in abeyance and open a new application filing window for such frequencies and licensing areas under the new rules that the Commission adopts in this proceeding; or (2) retain those applications on file and permit other interested parties to file competing applications that will be processed pursuant to adopted competitive bidding procedures and corresponding rules for 39 GHz authorizations. Some commenters recommend a specific time frame for allowing 39 GHz license applicants to resolve mutual exclusivity, *i.e.*, between 60 days and six months after a Report and Order is issued in this proceeding. In its Comments filed on March 4, 1996, Bachow and Associates, Inc. (Bachow) asks that the Commission dismiss, without prejudice, any mutually exclusive applications that remain after the time for resolving mutual exclusivity passes.

61. Some commenters further ask that the Commission dismiss as defective any applications which did not limit themselves to only one specified 39 GHz channel as of November 13, 1995, or which otherwise failed to satisfy the Public Notice, Mimeo No. 44787 (released Sept. 16, 1994), that described the processing procedures and rules applicable to the 39 GHz band. Under this approach, any remaining applicants that are still subject to mutual exclusivity would be allowed to file amendments to reduce their proposed service area contours or otherwise enter into settlement agreements to resolve their conflicts.

62. The Commission has determined that the best approach for processing pending mutually exclusive applications is to dismiss them without prejudice, and to allow these applicants to submit new applications under the competitive bidding rules established in this proceeding. The Commission takes this action because it finds that this procedure will optimize the public interest by promoting fair and efficient licensing practices. As the Commission discusses below, (''Auctionability of the 39 GHz Band''), the use of a competitive bidding system for licensing the 39 GHz band constitutes the best method for choosing among mutually exclusive applicants. Competitive bidding allows spectrum to be acquired by the parties who value it most highly and increases the likelihood that innovative, competitive services will be offered to consumers. These benefits will be lost, in part, if the Commission were to process pending mutually exclusive applications under its old rules. Moreover, under such an approach, those pending mutually exclusive applications that cannot be accommodated by the availability of alternative frequencies would be subject to comparative hearing (either formal or informal). While these rules may be

useful in other bands to address the rare situation in which two point-to-point links cannot be coordinated to avoid interference, in the 39 GHz band, applicants seek to serve geographic areas rather than to provide service on a single point-to-point link basis. This, coupled with the exponential growth in demand for 39 GHz spectrum, results in a significant number of mutually exclusive applications, including ''daisy-chain'' situations, among entities seeking to acquire spectrum. Resolving these mutually exclusive applications through comparative hearings would be much slower and possibly more costly, both to the government and applicants, than competitive bidding.

63. The Commission also finds that those who believe that they should be afforded the opportunity to amend their pending applications to avoid mutual exclusivity had ample opportunity to file such amendments prior to the commencement of this rule making. The Commission is not convinced that parties who have not already entered such agreements will successfully accomplish such agreements now. Moreover, even if such agreements are possible, the parties will have the opportunity to accomplish similar results through the partitioning and disaggregation rules the Commission is adopting today. Similarly, parties may resolve existing conflicts by forming joint ventures or similar arrangements to apply for BTA licenses. If, however, the Commission permitted pending mutually exclusive applicants to resolve their conflicts outside the structure of the competitive bidding process, other entities would be foreclosed from an opportunity to apply for 39 GHz spectrum under the flexible rules the Commission adopts herein. This would have the result of limiting the pool of potential applicants to those who have already filed under the current, more restrictive rules, and may inhibit the development of new and innovative services in this spectrum. Accordingly, the Commission finds that existing applicants have a reasonable avenue of relief for their concerns in the procedures it adopts herein, and accordingly denies their requests.

ii. Applications Within the 60-day Public Notice Period on November 13, 1995.

64. Some petitioners and commenters argue that the Commission should process the ''unripe'' applications—those that had not passed the 60-day public notice period as of the date of the November 13, 1995, Freeze Order. According to DCT, for example, all applications that have been or should have been placed on public notice announcing their susceptibility to petitions to deny as required by section 309 of the Communications Act meet the processing requirements of the Communications Act. DCT contends that the disparate treatment of these applications and those the Commission have decided to process would only make sense if there were no vacant channel pairs available for a second applicant in the same service area. DCT and WinStar argue that under the rules, if there were a vacant channel pair, a second applicant would have to yield ultimately to the first-in-time applicant with respect to the frequencies specified by the first-in-time applicant.

65. In the Memorandum Opinion and Order, *supra,* the Commission held that unripe applications would continue to be held in abeyance because, until the Commission had completed its consideration of the record, the Commission was not in a position to state whether further applications may be filed, or how the applications presently held in abeyance would have been treated. Having concluded here that the 39 GHz band should be subject to significantly different rules than the ones used previously, the Commission believes that the most fair and reasonable approach with regard to pending unripe applications is to dismiss them and allow these applicants to reapply under the new rules set forth in this proceeding. Taking into account its conclusion that these new rules further the public interest, the Commission believes that applying the new 39 GHz rules to those applications that were still subject to the possibility of competing applications under the former rules adequately balances the expectations of applicants with the public need for a better system for licensing use of the 39 GHz band. The Commission further believes that it has crafted a fair approach because such applicants will be permitted to apply for spectrum under the new rules.

iii. Modification Applications.

66. In the NPRM and Order, the Commission stated that it would hold in abeyance modification applications, and any amendments thereto, that were filed on or after November 13, 1995, the date of the Freeze Order. The Commission stated that no new applications to modify existing licenses would be accepted after December 15, 1995, unless they did not involve any enlargement in any portion of the service area and did not change frequency blocks (unless to delete one).

67. In the Memorandum Opinion and Order, *supra,* the Commission clarified that any pending modification application or amendment thereto filed prior to November 13, 1995, was to be processed. Modification applications or amendments to such applications, filed between November 13 and December 15, 1995, which meet the criteria of § 101.59 of the Commission's Rules and which do not enlarge the applicant licensee's service area, were to be accepted for filing and processed. Any modification application, or amendment thereto, which meets the criteria of § 101.61 of the Commission's Rules were likewise to be accepted for filing and processed. All other modification applications and amendments thereto were to be held in abeyance.

68. For the same reasons that the Commission dismisses without prejudice the pending mutually exclusive and unripe applications as discussed *supra,* the Commission also dismisses without prejudice any modification application held in abeyance pursuant to the freeze. Such applications, if granted under the previous rules, would frustrate the goals underlying this proceeding by continuing the licensing scheme which the Commission is abandoning with this Report and Order. As discussed *supra,* the Commission must choose a point from which its new rules will apply, taking into account its conclusion that these new rules are in the best interest of the public for the development of new services in the 39 GHz band. The Commission believes that it is fair to dismiss major modification applications because such applicants will be permitted to apply for additional spectrum, without disadvantaging potential new entrants, under the new rules.

iv. Applications That Are Partially Mutually Exclusive.

69. There are seven applications that are partially mutually exclusive. That is, these applications request more than one frequency pair, some of which are mutually exclusive with frequencies requested in other applications and some of which are not mutually exclusive. Although the non-mutually exclusive portion of these applications was subject to processing under the Commission's December 15, 1995, NPRM and Order, the mutually exclusive portion of each of the applications was required to be held in abeyance. The divided status of these applications has presented a unique processing issue. The Commission's electronic process for addressing these applications does not permit partial grants because there is no capability for allowing an application to remain in pending status if final action has been taken on a portion of it. As a result, the Commission has not been able to process the non-mutually exclusive portion of these applications until it had

reached a decision regarding the disposition of pending mutually-exclusive applications in general. As the Commission has now made this determination, it will process these applications as follows. Specifically, it will process to completion that portion of each of these applications that is non-mutually exclusive with other applications. However, the Commission will dismiss the remainder of the application which cannot be granted due to mutual exclusivity, consistent with the Commission's order herein.

II. Decision—Competitive Bidding Issues

A. Auctionability of the 39 GHz Band

70. *Background.* In the NPRM and Order, 61 FR 2465 (January 26, 1996), the Commission proposed to use competitive bidding to select among mutually exclusive applications for initial licenses in the 39 GHz band. The Commission reconsidered its previous decision not to license intermediate links by competitive bidding and the various factors that influenced its decision. First, the Commission noted that point-to-point microwave channels used as part of end-to-end subscriber-based service offerings meet the ''principal use'' requirement of the Communications Act. Second, because BTAs are large areas, the Commission stated that defining service areas by BTAs likely will result in the filing of mutually exclusive applications. Third, the Commission noted that based upon experience with auctions in other services, an auction for intermediate links within a well-defined service area will neither significantly delay the provision of other services, such as PCS, to the public nor impose significant administrative costs on the applicants or the Commission. Fourth, the Commission noted that by placing licenses in the hands of those who value this spectrum most highly, competitive bidding will likely promote the development and rapid deployment of new technologies and ensure that new and innovative technologies are readily accessible to the American people. Finally, the Commission noted that some of the licensees in the 39 GHz band have offered to sell or lease their licenses and may never have intended to directly serve the public, but rather to hold their own auctions and thereby deprive the public of the aforementioned benefits.

71. *Discussion.* Upon consideration of the record in this proceeding, the Commission concludes that auctioning the 39 GHz band meets the new criteria set forth in § 309(j) of the Communications Act, as amended by the Balanced Budget Act of 1997 (''Budget Act''). During the pendency of this proceeding and after comments were received in this proceeding, Congress enacted the Budget Act which extended and expanded the Commission's auction authority. Many commenters support the award of unallocated spectrum through auctions for the 39 GHz band. Using the pre-Budget Act criteria for auctionability of spectrum, some commenters argued that the 39 GHz band did not meet such criteria because: (1) The band is being used for providing intermediate links and, therefore, is not principally being used to garner compensation from subscribers as required under the former ''principal use'' criterion of the Act; (2) an auction of the 39 GHz band does not promote the objectives contained in the Act; and (3) an auction of intermediate links could significantly delay the development and deployment of new products and services and impose significant costs on licensees and the Commission. As discussed below, as a result of the Budget Act provisions, the ''principal use'' criterion of 309(j)(2)(A) and ''promote the objectives'' criterion of 309(j)(2)(B) and 309(j)(3) of the Act no longer govern the auctionability of electromagnetic spectrum. Thus, the Commission does not find these arguments to be compelling reasons not to employ competitive bidding procedures for 39 GHz spectrum.

72. Under the Budget Act, the Commission's auction authority covers all mutually exclusive applications for initial licenses or construction permits, with three limited exceptions which are not applicable in this proceeding. The Budget Act replaced language in section 309(j)(2), formerly called ''Uses to Which Bidding May Apply,'' which stated the requirements for spectrum to be auctionable (i.e., a determination that the principle use of the spectrum will be on a subscription basis and that competitive bidding will promote the objectives stated in section 309(j)(3)) with a new paragraph that expands the Commission's auction authority. Under amended section 309(j) the Commission has the authority to auction the 39 GHz band.

73. DCT contends that using competitive bidding procedures for this band violates §§ 309(j)(1) and 309(j)(6)(E), because the Commission is required to use various means to avoid mutual exclusivity, including the use of engineering solutions, negotiate threshold qualifications and service regulations, and licensing proceedings, before turning to auctions. DCT argues that because the NPRM and Order finds that current point-to-point rules are structured to avoid mutual exclusivity through frequency coordination, changing the rules to license by BTAs is tantamount to adopting a licensing system designed to encourage mutual exclusivity. The Commission rejects DCT's contentions. The 39 GHz band has been the subject of significantly increased requests for large rectangular service areas and multiple channels. Frequency coordination techniques, suitable for the level of point-to-point spectrum demand existing prior to the existence of emerging technologies, are no longer adequate. The use of pre-defined geographic areas rather than the applicant-defined rectangular areas currently used as service areas furthers the Commission's public interest goals, as concluded above. As the Commission noted, *supra,* predetermined service areas will provide a more orderly structure for the licensing process and will foster efficient utilization of the 39 GHz spectrum in an expeditious manner. Indeed, the use of applicant-defined service areas can actually slow the delivery of services because the processing of each application requires extensive analysis and review by Commission staff.

74. Similarly, the Commission also rejects DCT's related contention that the proposed auction framework for the 39 GHz band—simultaneous multiple round bidding, the Milgrom-Wilson activity rule and the simultaneous stopping rule—encourages mutual exclusivity of applications. DCT further rejects the proposed rule that would have limited licensees to an interest in four channel blocks contending that the ''expansion of the number of channels which an applicant may receive from a *de facto* one channel to four channels also encourages mutual exclusivity.'' The competitive bidding rules proposed have been used successfully in previous auctions and are intended to provide flexibility to bidders to pursue different strategies for interrelated licenses. Finally, as noted *surpa,* the Commission has decided not to place any limit on the number of channels a licensee may hold. The Commission rejects the contention that this will encourage mutual exclusivity, but rather believes that this will best foster the creation and deployment of new services. As discussed below, various other auction provisions adopted here will address the speculative bidding concerns raised by DCT.

75. While the Commission believes that competitive bidding will place licenses in the hands of those who value them the most, various commenters propose other methods for licensing this

band. DCR, for example, proposes that the Commission use the alternative licensing proposal set forth in the NPRM and Order. TGI proposes tight usage requirements, *e.g.,* existing permittees would have six months from completion of rule making to construct and commence operation of their systems. Bachow proposes that the Commission adopt a going-forward licensing approach that provides for, among other things, applicant-defined service areas in contrast to geographic licensing; public notice and thirty-day cut-off windows; exhaustion of coordination efforts prior to any auction; and reasonable build-out requirements. Finally, Ameritech and others state that after the Commission has finished processing 39 GHz amendments, there likely will be little or no desirable spectrum for any subsequent overlay auction of the 39 GHz channels. These commenters recommend that, in lieu of auctions, the Commission make the 39 GHz band available for the licensing of point-to-point paths. While the Commission notes these various proposals, the Commission concludes that the Budget Act's amendments to section 309(j) of the Act directs it to auction the 39 GHz band.

76. The Commission also notes that under the Budget Act amendments, it is required to provide adequate time before the issuance of bidding rules to permit notice and comment, and after the issuance of bidding rules to ensure adequate time for interested parties to assess the market and develop their strategies or approaches as required under section 309(j)(3)(E). The Commission believes it has satisfied the first requirement by seeking comment in the NPRM and Order. As to the second requirement, the Bureau recently released a Public Notice announcing general time frames for upcoming auctions. The Commission anticipates that the Bureau will routinely release similar public notices in the future. The Commission believes that the release of such public notices combined with the release of a Public Notice announcing the 39 GHz auction should ensure that interested parties have adequate time to assess the market and develop their strategies.

B. Competitive Bidding Design and Procedures

i. Competitive Bidding Design

77. *Background.* In the NPRM and Order, the Commission tentatively concluded that simultaneous multiple round auctions are appropriate for this band. The Commission noted that compared with other bidding mechanisms, simultaneous multiple round bidding will generate the most information about license values during the course of the auction and provide bidders with the most flexibility to pursue back-up strategies.

78. *Discussion.* Based on the record in this proceeding and the Commission's successful experience conducting simultaneous multiple round auctions for other services, the Commission believes a simultaneous multiple round auction design is the preferable competitive bidding design for the 39 GHz band. The commenters generally support the proposal to use simultaneous multiple round auctions for selecting among mutually exclusive applicants. In addition, the Commission believes that the value of these licenses will be significantly interdependent because of the desirability of aggregation across geographic regions. Under these circumstances, simultaneous multiple round bidding will generate more information about license values during the course of the auction and provide bidders with more flexibility to pursue back-up strategies, than if the licenses were auctioned separately.

79. DCT, on the other hand, argues that simultaneous multiple round auctions give applicants only one opportunity to file for any or all channels and that this approach creates an urgency to file for channels that the applicant would not otherwise seek, thereby fostering unnecessary creation of mutual exclusivity. DCT's argument misses several points. As an initial matter, the Commission is not proposing to auction all of the channels at one time but rather in a series of simultaneous multiple round auctions in which three channels would be placed up for bid in each auction. See *infra.* Thus, applicants will have more than one opportunity to file for channels. Moreover, the nature of this auction design provides bidders with flexibility to pursue different strategies for interrelated licenses. Specifically, it allows a bidder to pursue substitute licenses in the event it fails to obtain its first choices. In addition, the Commission believes that the upfront payment requirement and its withdrawal rules provide a sufficient deterrent against applicants seeking licenses that they do not want or intend to use. Notwithstanding its conclusion regarding the use of simultaneous multiple round bidding, the Commission retains the discretion to use a different methodology if that proves to be more administratively efficient.

ii. Applicability of Part 1, Standardized Auction Rules

80. In the Competitive Bidding Second Report and Order, 59 FR 22980 (May 4, 1994) as modified by the Competitive Bidding Second Memorandum Opinion and Order, 59 FR 44272 (August 26, 1994), the Commission established general competitive bidding rules for all auctionable services, but also stated that such rules may be modified on a service-specific basis. These general competitive bidding rules are contained in part 1 of the Commission's Rules. In the recent Order, Memorandum Opinion and Order and Notice of Proposed Rule Making in WT Docket No. 97–82, 62 FR 13540 (March 21, 1997), the Commission amended some of the part 1 provisions, and proposed further amendments to the part 1 rules to streamline its auction procedures. Accordingly, for the 39 GHz band, the Commission will follow the competitive bidding rules contained in, or ultimately established for, Subpart Q of part 1 of the Commission's Rules, as amended by the part 1 proceedings and related decisions, unless specifically indicated otherwise below.

C. Bidding Issues

i. Grouping of Licenses

81. *Background.* The Commission determined in the Competitive Bidding Second Report and Order that highly interdependent licenses should be grouped together and put up for bid at the same time in a multiple round auction because such grouping provides bidders with the most information about the complementary and substitutable licenses during the course of the auction. In the NPRM and Order, the Commission requested comment on whether it should endeavor to have a single auction. The Commission also solicited comments on alternative license groupings and requested bidders to explain how such groupings would benefit bidders.

82. *Discussion.* The Commission believes that all 39 GHz licenses are significantly interdependent. As a result, the optimal grouping of the licenses would be to put all of the licenses up for bid at the same time in order for bidders to have information about the prices of complementary and substitutable licenses during the auction. However, due to the large number of licenses anticipated to be auctioned (approximately 6,900), this approach may be burdensome for bidders. Specifically, placing all of the 39 GHz licenses up for bid in a single auction may overwhelm bidders with

the processing necessary to analyze effectively and efficiently the amount of information associated with such a large number of licenses. The Commission concludes that a series of simultaneous multiple round auctions would be more advantageous to bidders and the most administratively feasible means of distributing these licenses. At this time, the Commission believes that three channel pairs should be placed up for bid in each auction based on its review of the applicants' requests for channels in the 39 GHz band. The Commission nonetheless reserves the discretion to change the number of channels offered during an auction if it is efficient and administratively feasible to do so and delegate such authority to the Bureau.

ii. Reserve Price or Minimum Opening Bids

83. When licenses are subject to auction, the recently enacted Budget Act requires the Commission to prescribe methods by which a reasonable reserve price or a minimum opening bid is established, unless a determination is made that such an assessment is not in the public interest. Recently, in conjunction with the 800 MHz Specialized Mobile Radio (''SMR'') Service auction, the Bureau, pursuant to the Budget Act's provisions calling for the establishment of reserve prices or minimum opening bids in FCC auctions, proposed, *inter alia,* a formula for determining a reserve price or minimum opening bid for licenses, and sought comment on its formula and other proposals for the auction scheduled to begin on October 28, 1997. For the 39 GHz auction, the Commission directs the Bureau to issue a similar public notice proposing a method for determining a reserve price or minimum opening bid for 39 GHz licenses subject to auction and seeking comment on its proposed method and other proposals.

iii. Bid Increments

84. *Background.* Consistent with the approach for previous simultaneous multiple round auctions for other services, in the NPRM and Order the Commission proposed to establish minimum bid increments for bidding in each round of the auction based on the same considerations given in the Commission's prior orders. The Commission proposed that the bid increment be the greater of either: (1) A percentage of the high bid from the previous round or (2) a fixed dollar amount per megahertz per service area population (''MHz-pops''). The Commission also proposed to retain the discretion to vary the minimum bid increments for individual licenses or groups of licenses at any time before or during the course of the auction, based on the number of bidders, bidding activity, and the aggregate high bid amounts.

85. *Discussion.* The Commission adopts its bid increment proposals, particularly given that no commenters opposed them. In fact, Milliwave supports the Commission's proposal to retain the discretion with respect to bidding increments. The Commission will follow the practice that it has used for other auctions and delegates authority to the Bureau to announce, by Public Notice prior to the auction, the general guidelines for bid increments.

iv. Stopping Rules

86. *Background.* When simultaneous multiple round auctions are used, a stopping rule must be established for determining when the auction is over. In simultaneous multiple round auctions, bidding may close separately on individual licenses, simultaneously on all licenses, or a hybrid approach may be used. Generally, the Commission proposed to adopt a simultaneous stopping rule in the 39 GHz auction in which bidding generally remains open on all licenses until there is no new acceptable bid for any license. In order to move the auction toward closure more quickly, the Commission further proposed to retain the discretion to declare when the auction will end, to vary the duration of bidding rounds or the interval at which bids are accepted.

87. *Discussion.* The Commission will adopt a simultaneous stopping rule whereby bidding will remain open on all licenses in an auction until bidding stops on every license. The Commission believes that allowing simultaneous closing for all licenses will afford bidders flexibility to pursue back-up strategies without running the risk that bidders will hold back their bidding until final rounds. As a general matter, the auction will close after one round passes in which no new valid bids or proactive activity rule waivers are submitted. In any event, the Commission adopts its proposal to retain the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round. Milliwave supports the Commission's proposal to retain such discretion. In the event that the Commission exercises this discretion, the effect will be the same as if a bidder has submitted a proactive waiver. The Commission also retains the discretion to announce license-by-license closings.

88. The Commission further retains the discretion to declare after 40 rounds that the auction will end after some specified number of additional rounds. Under such an approach, bids will be accepted only on licenses where the high bid has increased in the last three rounds. This will deter bidders from continuing to bid on a few low value licenses solely to delay the closing of the auction. It also will enable the Commission to end the auction when it determines that the benefits of terminating the auction and issuing licenses exceed the likely benefits of continuing to allow bidding.

v. Activity Rules

89. *Background.* In the Competitive Bidding Second Report and Order, the Commission adopted the Milgrom-Wilson activity rule as the preferred activity rule when a simultaneous stopping rule is used. The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. In the NPRM and Order, the Commission tentatively concluded that the Milgrom-Wilson activity rule should be used in conjunction with the proposed simultaneous stopping rule for this auction. The Commission indicated its belief that the Milgrom-Wilson approach would best achieve the Commission's goals of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time.

90. *Discussion.* In accordance with § 1.2104 of the Commission's Rules and the guidelines adopted in the Competitive Bidding Second Report and Order, the Commission will employ the Milgrom-Wilson activity rule for the 39 GHz auction. Milliwave supports adoption of this rule. DCT appears to argue that the activity rule adds an incentive for bidders to apply for areas they do not intend to serve. No other comments on this issue were received. DCT's argument with respect to this activity rule is misplaced. The activity rules do not encourage applicants to apply for more licenses than they intend to use, and actually has the opposite effect. Indeed, the total number of licenses applied for determines the activity requirement. Therefore, the greater the number of licenses an applicant applies for the greater its activity level must be in order to maintain eligibility in the auction.

91. For the 39 GHz auction, the Commission will generally use the Milgrom-Wilson activity rule with some variations. Specifically, under the Milgrom-Wilson activity rule, the auction is divided into three stages and the minimum required activity level,

measured as a fraction of the bidder's eligibility in the current round, will increase during the course of the auction. As in previous auctions, the Commission will set, by announcement before the auction, the minimum required activity levels for each stage of the auction. The Commission retains the discretion to vary, by announcement before or during the auction, the required minimum activity levels (and associated eligibility calculations) for each auction stage. Retaining this flexibility will improve the Commission's ability to control the pace of the auction and help ensure that the auction is completed within a reasonable period of time. The Commission delegates to the Bureau the authority to set or vary the minimum activity levels if circumstances warrant a modification. The Bureau will announce any such modification by Public Notice. The auction will start in Stage One and move to Stage Two and then to Stage Three. The movement from one auction stage to the next will be dependent upon the auction activity level. The Bureau will retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next. However, under no circumstances can the auction revert to an earlier stage.

92. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission in a particular round, the Commission will (as it has in past auctions) provide bidders with five activity rule waivers that may be used in any round during the course of the auction. A waiver will preserve current eligibility in the next round, but cannot be used to correct an error in the amount bid. Bidders also will be afforded an opportunity to override the automatic waiver mechanism when they place a bid, if they wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level. If a bidder overrides the automatic waiver mechanism, its eligibility permanently will be reduced (according to the formulas specified above), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no valid bids will not keep the auction open. Bidders will have the option to proactively enter an activity rule waiver during the bid submission period. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open. The Bureau will retain the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control, and also retain the flexibility to adjust, by Public Notice prior to an auction, the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction.

vi. Duration of Bidding Rounds

93. *Background.* The Commission proposed in the NPRM and Order to retain the discretion to vary the duration of bidding rounds or the interval at which bids are accepted (*e.g.,* run more than one round per day) in order to move the auction toward closure more quickly.

94. *Discussion.* The Commission will retain discretion to vary the duration of bidding rounds and the interval at which bids are accepted. In simultaneous multiple round auctions, bidders may need a significant amount of time to evaluate back-up strategies and develop their bidding plans. Milliwave, the sole commenter addressing this issue, supports the Commission's decision. The Bureau will announce any changes to the duration of and intervals between bidding rounds, either by Public Notice prior to the auction or by announcement during the auction.

D. Procedural and Payment Issues

i. Short-Form Applications

95. *Background.* In the Competitive Bidding Second Report and Order, the Commission determined that it should only require a short-form application (FCC Form 175) prior to the auction, and that only winning bidders should be required to submit a long-form license application after the auction.

96. *Discussion.* The Commission adopts the bidding application and certification procedures contained in § 1.1205 of the Commission's Rules, as amended by the Part 1 proceeding. Prior to the start of the 39 GHz auction, the Bureau will release an initial Public Notice announcing the auction. The initial Public Notice will specify the licenses to be auctioned and the procedures for the auction in the event that mutually exclusive applications are filed. The Public Notice will specify the method of competitive bidding to be used, applicable bid submission procedures, stopping rules, activity rules, and the deadline by which short-form applications must be filed and the amounts and deadlines for submitting the upfront payment. The Commission will not accept applications filed before or after the dates specified in the Public Notice. Applications submitted before the release of the Public Notice will be returned as premature. Likewise, applications submitted after the deadline specified by Public Notice will be dismissed with prejudice as untimely.

97. Soon after the release of the initial Public Notice, a Bidder Information Package will be made available to prospective bidders. The Bidder Information Package will contain information about incumbent licensees based on the Commission's licensing records. Bidders also should conduct their own due diligence regarding incumbent licensees within the 39 GHz band.

98. All bidders will be required to submit short-form applications on FCC Form 175 (and FCC Form 175–S, if applicable), by the date specified in the initial Public Notice. Applicants are encouraged to file Form 175 electronically. Detailed instructions regarding electronic filing will be contained in the Bidder Information Package. The short-form applications will require applicants to provide the information required by § 1.2105(a)(2) of the Commission's Rules, as amended by the Part 1 proceeding.

ii. Amendments and Modifications

99. *Background.* To encourage maximum bidder participation, the Commission proposed to provide applicants with an opportunity to correct minor defects in their short-form applications prior to the auction. Applicants whose short-form applications are substantially complete, but contain minor errors or defects, would be provided the opportunity to correct their applications prior to the auction.

100. *Discussion.* The Commission received no comments on its proposal. Thus, the Commission will apply the provisions set forth in Part 1 of the Commission's rules, including amendments adopted in the Part 1 proceeding, governing amendments to and modifications of short-form applications to the 39 GHz service. Upon reviewing the short-form applications, the Commission will issue a Public Notice listing all defective applications. Applicants with minor defects in their applications will be given an opportunity to cure them and resubmit a corrected version.

iii. Upfront Payments

101. *Background.* As in the case of other auctionable services, the NPRM and Order proposed to require all

auction participants to tender in advance to the Commission a substantial upfront payment. The Commission proposed to use the standard upfront payment formula of $2,500 or $0.02 per MHz-pop for the largest combination of MHz-pops, whichever is greater.

102. Discussion. The Commission previously has determined that a substantial upfront payment requirement is necessary to ensure that only serious, qualified bidders participate in auctions and to ensure that sufficient funds are available to satisfy any bid withdrawal or default payments that may be incurred. The Commission stated in the Competitive Bidding Second Report and Order that as a general matter it will base upfront payments on a formula of $0.02 per MHz-pop for the largest combination of MHz-pops a bidder anticipates being active on in any single round of bidding. The Commission also established a minimum upfront payment of $2,500, but indicated that the minimum amount could be modified on a service-specific basis. The Commission has varied the minimum upfront payment where it determined that it would result in too high an upfront payment for the service. Various commenters contend that the formula used in the PCS context is not appropriate for the 39 GHz band because it results in an upfront payment that is too high.

103. The Commission recognizes, as indicated by commenters, that for purposes of 39 GHz services the Commission's standard upfront payment formula may yield excessively high payment amounts relative to license values. Upfront payments at such levels could discourage participation in the auction and would be well above the amounts needed to discourage frivolous bidding and above what is necessary to ensure that sufficient funds are available to satisfy any bid withdrawal or default payments that may be incurred. Since the frequency range and anticipated uses of 39 GHz services are more like LMDS than broadband PCS, the Commission believes that it would be appropriate to set upfront payments closer to the levels used for LMDS than the $.02 per MHz-pop used in broadband PCS. LMDS upfront payments for 1150 MHz licenses range from $.00078 per MHz-pop for BTAs with population over one million to $.00026 per MHz-pop for BTAs with population under one hundred thousand. Since many of the 39 GHz licenses are heavily encumbered, it may also be appropriate to make license-by-license downward adjustments to the upfront payments to account for the reduced amount of spectrum available. Furthermore, by waiting until after the LMDS auction is conducted, the Commission will have better estimates regarding the value of 39 GHz spectrum and be able to more accurately set the upfront payment amounts. Therefore, to allow the Commission sufficient time to conduct such analysis, and to benefit from further auction experience, the Commission proposes not to set the amounts of the upfront payments for 39 GHz services at this time. Instead, the Commission delegates authority to the Bureau to set the amounts of upfront payments and to announce the levels by Public Notice.

iv. Down Payment and Full Payment

104. *Background*. In the NPRM and Order, the Commission tentatively concluded that winning bidders should be required to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).

105. *Discussion*. We adopt the requirement that winning bidders must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). No commenters addressed this specific proposal. If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default payments due, the additional monies will be refunded.

106. The Commission also will require winning bidders to submit the required down payment by wire transfer to the Commission's lock-box bank, by a date and time to be specified by Public Notice, generally within ten (10) business days following release of the Public Notice announcing the close of bidding. All auction winners generally will be required to make full payment of the balance of their winning bids within ten (10) business days following Public Notice that the Commission is prepared to award the license.

107. The Commission notes that it has proposed to adopt a late fee in § 1.2109(a) in the Part 1 proceeding, to permit auction winners to make their final payments 10 business days after the payment deadline, provided that they also pay a late fee equal to five percent of the amount due. While the Commission does not adopt the proposed late fee provision in this proceeding, the Commission notes that should it ultimately adopt such a provision in the part 1 proceeding it shall apply to the 39 GHz band.

v. Bid Withdrawal, Default, and Disqualification

108. *Background*. In the Competitive Bidding Second Report and Order, the Commission noted the importance to the success of the competitive bidding process that potential bidders be required to make a monetary payment if they withdraw a high bid, are found not to be qualified to hold licenses, or default on payment of a balance due.

109. *Discussion*. To prevent insincere bidding, the Commission will apply the bid withdrawal, default and disqualification rules found in §§ 1.2104(g), and 1.2109 of the Commission's Rules, as amended by the part 1 proceeding, to the 39 GHz auctions. No commenters addressed this issue. Any bidder that withdraws a high bid before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid. The Commission will calculate the bid withdrawal payment as either (1) the difference between the withdrawn bid net of bidding credit and the subsequent winning bid net of bidding credit, or (2) the difference between the gross withdrawn bid and the subsequent gross winning bid for that license, whichever is less. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. If a winning bidder defaults after the close of an auction, the defaulting bidder will be required to pay the foregoing payment plus an additional payment of 3 percent of the subsequent winning bid or its own withdrawn bid, whichever is lower.

110. The Commission notes that it has proposed to adopt guidelines for erroneous bids in the part 1 proceeding, based upon the rationale discussed in the Atlanta Trunking Order. While it does not adopt the proposed guidelines in this proceeding, the Commission notes that should the Commission ultimately adopt such guidelines for erroneous bids in the part 1 proceeding it shall apply to the 39 GHz band.

vi. Long-Form Applications and Petitions to Deny

111. *Background*. In the NPRM and Order, the Commission stated that if the winning bidder makes a down payment in a timely manner, it would be required to file a long-form application.

112. *Discussion.* The Commission will apply the part 1 long-form procedures to the 39 GHz auction, as amended by the part 1 proceeding. No commenters addressed this issue. While long-form applications may be filed either electronically or manually, beginning January 1, 1998, all applications must be filed electronically. Upon acceptance for filing of the long-form application, the Commission will issue a Public Notice announcing this fact and triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, a Public Notice announcing the grants will be issued.

E. Regulatory Safeguards

i. Transfer Disclosure Requirements

113. *Background.* In section 309(j) of the Communications Act, Congress directed the Commission to ''require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.''

114. *Discussion.* The Commission will adopt the transfer disclosure requirements contained in § 1.2111(a) of the Commission's rules, as amended by the Part 1 proceeding, for all 39 GHz licenses obtained through competitive bidding. Generally, applicants transferring their licenses within three years after the initial license grant will be required to file, together with their transfer applications, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license(s).

ii. Anti-Collusion Rules

115. *Background.* In the Competitive Bidding Second Report and Order, the Commission adopted special rules prohibiting collusive conduct in the context of competitive bidding. The Commission indicated that such rules would serve the objectives of the Omnibus Budget Reconciliation Act of 1993 (Budget Act) by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and that disadvantage other bidders.

116. *Discussion.* The Commission adopts the rules prohibiting collusive conduct in §§ 1.2105 and 1.2107 of the Commission's rules, as amended by the Part 1 proceeding, for use in the 39 GHz auctions. The Commission notes that it has proposed to adopt two exceptions to the anti-collusion rules in the Commission's Part 1 proceeding. While it does not adopt the proposed exceptions in this proceeding, the Commission notes that whatever exceptions to the anti-collusion rules are ultimately adopted in the Part 1 proceeding shall apply to the 39 GHz band. Sections 1.2105 and 1.2107 of the Commission's rules operate, along with existing antitrust laws, as a safeguard to prevent collusion in the competitive bidding process. In addition, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the auction process may be subject to a variety of sanctions, including forfeiture of their down payment or their full bid amount, revocation of their license(s), and possible prohibition from participating in future auctions.

F. Treatment of Designated Entities

i. Overview and Objectives

117. In authorizing the Commission to use competitive bidding, Congress mandated that the Commission ''ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.'' The statute required the Commission to ''consider the use of tax certificates, bidding preferences, and other procedures'' in order to achieve this Congressional goal. In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote ''economic opportunity and competition * * * by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.'' Finally, Section 309(j)(4)(A) provides that to promote these objectives, the Commission shall consider alternative payment schedules including installment payments.

118. The Commission has employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to designated entities in other spectrum-based services. The measures considered thus far for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of designated entity opportunities. For example, in the C block broadband PCS auction, small businesses received a 25 percent bidding credit and all entrepreneurs' block licensees were entitled to pay for these licenses under an installment plan. More recently, for the WCS auction, the Commission adopted tiered bidding credits of 25 percent for small businesses and 35 percent for very small businesses, declined to adopt installment payments for designated entities because of the expedited procedures imposed by the Appropriations Act which required entities to make full payment on the bid amount quickly, and adopted a tiered definition of small and very small businesses. For the 800 MHz SMR auction, the Commission also adopted tiered bidding credits of 25 percent for small businesses and 35 percent for very small businesses; eliminated installment payments for the upper 200 channels and deferred the decision on adopting installment payments in the lower 80 and General category channels to the outcome in the pending Part 1 proceeding; and adopted a tiered definition of small and very small businesses.

119. In the NPRM and Order, the Commission sought comment on whether the designated entity provisions adopted for broadband PCS should be applied here because this spectrum may be used in support of PCS. The Commission also sought comments broadly on how it can best promote opportunities for businesses owned by minorities and women in light of *Adarand.*

Commenters were encouraged to provide the Commission with as much evidence as possible with regard to past discrimination, continuing discrimination, discrimination in access to capital, underrepresentation and other significant barriers facing businesses owned by minorities and women in obtaining licenses in communications services.

ii. Eligibility for Bidding Credits

120. At this time the Commission has not developed a record sufficient to sustain race-based measures in the 39 GHz band based on the standard established by *Adarand Constructors* v. *Peña.* The Commission also believes that at this time the record is insufficient to support any gender-based provisions under the intermediate scrutiny standard. In addition, the

record in this proceeding does not demonstrate a need for special provisions for rural telephone companies beyond those that the Commission adopts for small businesses. The Commission thus will limit eligibility for special provisions for designated entities in the 39 GHz band to small businesses. While DCR supports adoption of special provisions designed to promote opportunities for businesses owned by minorities and women, it contends that fashioning provisions that can withstand the *Adarand* test should not be permitted to delay the licensing process. It notes that such a delay would be harmful to minority- and women-owned businesses attempting to attract financing and operate PCS systems. Neither DCR nor other commenters provide evidence with regard to past discrimination, continuing discrimination, or other significant barriers to minorities and women. Based on the record in this proceeding, the Commission intends to adopt bidding credits for applicants qualifying as small businesses, as discussed *infra.* As there will be small businesses with variable abilities to access capital, the Commission will tier the bidding credits to account for these differences. The Commission believes these provisions will provide small businesses with a meaningful opportunity to obtain licenses in the 39 GHz auction. Moreover, many minority- and women-owned entities are small businesses and will therefore qualify for the same special provisions that would have applied to them under the previous PCS rules. As such, these provisions will meet Congress' goal of promoting wide dissemination of 39 GHz licenses.

a. Small Business Definition. 121. *Background.* In the Competitive Bidding Second Memorandum Opinion and Order, the Commission stated it would define small business eligibility on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold. In the NPRM and Order, the Commission proposed to define small businesses as those entities with not more than $40 million in average annual gross revenues for the preceding three years. In addition, the Commission proposed to apply the same affiliation and attribution rules for calculating revenues previously adopted for broadband PCS. The Commission noted, however, that the attribution rules for calculating gross revenues for broadband PCS are complex and sought comment on substituting the ''control group'' concept for a simpler attribution model. The Commission asked how the revenues of a small business entity should be calculated. The Commission also asked how investors should be treated in determining the eligibility of a small business, *e.g.*, whether only investors that hold ownership interests at a certain threshold should have their gross revenues included (*e.g.*, ownership interests of five percent would trigger attribution).

122. *Discussion.* As a general matter, the Commission adopts its proposed small business definition of an entity with not more than $40 million in average annual gross revenues for the preceding three years. The Commission concludes that this definition will accommodate the broadest cross-section of small businesses because it will include, at a minimum, all entities recognized as small businesses in the CMRS contexts for which the Commission has either adopted or proposed small business definitions. The Commission, however, rejects DCR's suggestion to adopt a definition which completely mirrors the small business definition in the broadband PCS C block rules. Significantly, if certain winning C block winners do not qualify as small businesses here, they will be able to participate in the 39 GHz auctions even though they will not be eligible for special provisions. Moreover, DCR has failed to demonstrate that control group equity structures and affiliation rule exceptions are warranted in the 39 GHz context. In fact, given the broad array of services that may be offered in the 39 GHz band, ranging from CMRS support services to niche service offerings, the Commission is reluctant to adopt such complex ownership structures absent evidence of the same factors present in the broadband PCS context. As discussed in further detail, *infra*, the Commission is providing bidding credits to an additional category of small businesses—very small businesses. A very small business is an entity that, together with its affiliates and persons or entities that hold attributable interests in such entity and their affiliates, has average gross revenues that are not more than $15 million for the preceding three years.

123. In determining whether an applicant qualifies for bidding credits as a small business or a very small business in the 39 GHz auction, the Commission will consider the gross revenues of the small business applicant, its affiliates, and certain investors in the applicant. Specifically, for purposes of determining small business status, the Commission will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant. The Commission also chooses not to impose specific equity requirements on the controlling principals that meet the small business definition. The Commission will still require, however, that in order for an applicant to qualify as a small business, qualifying small business principals must maintain ''control'' of the applicant. The term ''control'' would include both *de facto* and *de jure* control of the applicant. For this purpose, the Commission will borrow from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small business. Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) The entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensees; and (3) the entity plays an integral role in all major management decisions. While the Commission is not imposing specific equity requirements on the small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business. Finally, the Commission rejects Winstar's proposal to adopt a high attribution standard to determine small business status because the absence of special provisions for minorities and women reduces the risk that applications falsely claiming such status will be filed. The existence of special small business provisions requires adoption of the provisions set forth herein in order to prevent their improper use.

b. *Bidding Credits.* 124. *Background.* In the NPRM and Order, the Commission proposed a 10 percent bidding credit for qualified small businesses. The Commission stated that the magnitude of the credit was reasonable and equitable in view of other proposals which will benefit designated entities, including the relatively small geographic licensing areas and the availability of installment payments. The Commission also proposed to allow eligible entities to apply the credit to all licenses. However, the Commission sought

comment on whether small businesses should receive a larger bidding credit, such 25 percent credit.

125. *Discussion.* Based upon the record, the Commission adopts tiered bidding credits for the 39 GHz service. Several commenters support the Commission's proposal to give bidding credits to small businesses. Some of these commenters also express concern that a 10 percent credit is too low. The Commission agrees with PCS Fund's contention that tiered bidding credits will promote vigorous competition not only between small businesses and large businesses but also between small businesses of different economic sizes.

126. The Commission believes that a tiered approach will encourage smaller businesses, that may be very well-suited to provide niche services, to participate in the provision of services in the 39 GHz band. For example, Winstar states that it believes that a major use of the spectrum will be for wireless local loop services. Microwave Partners indicates that it is looking at the spectrum for medical, public health and safety related applications, such as high speed transmission of medical data between physicians' offices and clinics and hospitals, laboratories and X-ray facilities; interactive videoconferencing for the continuing education of all health care personnel; and surveillance and security monitoring of high risk areas. The Commission recognizes that smaller businesses have more difficulty accessing capital and thus need a higher bidding credit. These tiered bidding credits are narrowly tailored to the varying abilities of businesses to access capital. Tiering also takes into account that different small businesses will pursue different strategies. Accordingly, small businesses with average gross revenues of not more than $40 million for the preceding three years will receive a 25 percent bidding credit. Very small businesses, that is, those small businesses with average gross revenues of not more than $15 million for the preceding three years, will receive a 35 percent bidding credit. Bidding credits for small businesses are not cumulative.

c. Installment Payments.

127. *Background.* In the *NPRM and Order,* the Commission proposed to allow small businesses to pay off their successful license bids in installments. In the *Competitive Bidding Second Report and Order,* the Commission concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum. Under the Commission's proposal, small business licensees may elect to pay their winning bid amount (less upfront payments) in installments over the ten-year term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. The Commission sought comment on these proposals.

128. The Commission also sought comments on proposals for additional special payment provisions to further address the access to capital challenges faced by small businesses. The Commission proposed that small business licensees be permitted to make interest-only installment payments during the first two years of the license term. The Commission also proposed to reduce down payments for small businesses to 5 percent of the winning bid due five days after the auction closes and the remaining 5 percent down payment due five days after release of the Public Notice announcing that the Commission is prepared to award the license. Finally, the Commission sought comment on whether to offer ''tiered'' installment payments scaled to the financial size of a small business applicant.

129. *Discussion.* The Commission has carefully considered the use of installment payment plans for 39 GHz licenses and has decided not to adopt its proposal to allow small businesses to pay for their licenses in installment payments. First, Congress did not require the use of installment payments in all auctions, but rather recognized them as one means of promoting the various objectives of section 309(j)(3) of the Communications Act. The Commission continues to experiment with different means for achieving its obligations under the statute, and has offered installment payments to licensees in several auctioned wireless services. By no means, however, has Congress dictated that installment payments are the only tool in assisting small business. Indeed, the Commission has conducted several auctions without installment payments. The Commission concludes that it can meet its statutory obligations in the 39 GHz auction absent these provisions.

130. The Commission must balance competing objectives in section 309(j) that require, *inter alia,* that it promote the development and rapid deployment of new spectrum-based services (i.e., competition) and ensure that designated entities are given the opportunity to participate in the provision of such services. In assessing the public interest, the Commission must try to ensure that all the objectives of section 309(j) are considered. The Commission's experience with the installment payment program leads it to conclude that installment payments may not always serve the public interest. The Commission is presently examining issues relating to the administration of installment payments in several other proceedings. Because of the importance of these issues, the Commission plans to incorporate its decisions regarding installment payments and other financial issues into the Part 1 rulemaking.

131. Finally, as discussed *infra,* the Commission has adopted enhanced bidding credits for the 39 GHz auction. The bidding credits adopted for small businesses will help to promote access to the 39 GHz band and various new services by ensuring that small businesses will have genuine opportunities to participate in the 39 GHz auctions and in provision of services. The Commission also notes that, given the relatively large numbers of licenses available in the 39 GHz band, there should be opportunities for small business participation. The Commission has determined that, in view of the favorable tiered bidding credits adopted herein, it does not see the need to adopt reduced down payments for small businesses in order to ensure either their access to capital or their participation in the auction. Instead, the Commission will require a 20 percent down payment, the same down payment that is required of all other 39 GHz auction winners. Under this approach, all winning bidders will be required to supplement their upfront payments to bring their total payment to 20 percent of their winning bid within 10 business days of the close of the auction. Prior to licensing, they will be required to pay the balance of their winning bid. The Commission believes that a 20 percent down payment is appropriate here to ensure that all auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system and protect against possible default, while at the same time not being so onerous as to hinder growth and diminish access.

iii. Transfer Restrictions and Unjust Enrichment Provisions

132. *Background.* The Commission's unjust enrichment provisions are integral to the success of the special provisions for designated entities in the various auctionable services. In the Competitive Bidding Second Report and Order, the Commission outlined unjust enrichment provisions applicable specifically to designated entities. The Commission established these

provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or intend to use the Commission's provisions to obtain a license at a lower cost than they otherwise would have to pay, and later to sell it for a profit. In the NPRM and Order, the Commission sought comment regarding the appropriate approach to prevent unjust enrichment.

133. *Discussion.* To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, the Commission will adopt unjust enrichment provisions similar to those adopted for other services, including, for example, narrowband PCS and 900 MHz SMR services. These rules provide that, during the initial license term, licensees utilizing bidding credits and seeking to assign or transfer control of a license to an entity that does not meet the eligibility criteria for bidding credits will be required to reimburse the government for the total value of the benefit conferred by the government, that is, the amount of the bidding credit, plus interest, before the transfer will be permitted. The rules which the Commission now adopts additionally provide that, if a licensee applies to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest, must be paid to the United States Treasury as a condition of approval of the assignment or transfer.

134. If a licensee that utilizes bidding credits seeks to make any change in ownership structure that would render the licensee ineligible for bidding credits, or eligible only for a lower bidding credit, the licensee must first seek Commission approval and reimburse the government for the amount of the bidding credit, or the difference between its original bidding credit and the bidding credit for which it is eligible after the ownership change, plus interest. Additionally, if an investor subsequently purchases an interest in the business and, as a result, the gross revenues of the business exceed the applicable financial caps, this unjust provision will apply. The amount of this payment will be reduced over time as follows: (1) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit received by the latter is eligible); (2) in year three of the license term the payment will be 75 percent; (3) in year four the payment will be 50 percent; and (4) in year five the payment will be 25 percent, after which there will be no payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment or transfer. Thus, a small business that received bidding credits seeking transfer or assignment of a license to an entity that does not qualify as a small business will be required to reimburse the government for the amount of the bidding credit, plus interest, before the transfer will be permitted.

iv. Entrepreneurs' Block

135. *Background.* In the Competitive Bidding Fifth Report and Order, 59 FR 37566 (July 22, 1994), the Commission established entrepreneurs' blocks in broadband PCS on which only qualified entrepreneurs, including small businesses, could bid. The Commission requested comment on whether the capital requirements of this service were anticipated to be so substantial that the Commission should insulate certain blocks from very large bidders in order to provide meaningful opportunities for designated entities. The Commission also requested comment on the need to adopt an entrepreneurs' block to ensure that there will be adequate spectrum available for communications links for broadband PCS entrepreneurs' block licensees.

136. *Discussion.* No commenter advocated the adoption of an entrepreneurs' block and the Commission decides not to adopt one in the 39 GHz service. First, the relatively large numbers of licenses available in the 39 GHz band should allow for extensive small business participation. Second, small businesses will have a significant opportunity to compete for licenses given the enhanced bidding credits adopted for small businesses. The bidding credits adopted for small businesses will help to promote access to the 39 GHz band and various new services by ensuring that small businesses will have genuine opportunities to participate in the 39 GHz auctions and in provision of services.

VI. Procedural Matters

A. Regulatory Flexibility Act

137. The analysis for this Report and Order pursuant to the Regulatory Flexibility Act, 5 U.S.C. 604, is contained herein as follows. As required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making in this proceeding in ET Docket No. 95–183. The Commission sought written public comments on the proposals in the NPRM, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Report and Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 (CWAAA), Public Law 104–121, 110 Stat. 847 (1996).

i. Need for and Purpose of This Action

138. In this Report and Order, the Commission adopts rules and procedures intended to facilitate the efficient use of the 38.6–40.0 GHz frequency band (the ''39 GHz'' band) and to permit different types of services to be offered therein. The purposes of this action are to provide support spectrum for emerging technologies, as well as to permit the development of innovative point-to-point or point-to-multipoint services. The Commission amends the rules for fixed, point-to-point microwave service in the 39 GHz band , so as to conform the regulatory approach toward operations in that band with its proposals for licensing the adjacent 37.0–38.6 GHz (37 GHz) band. Action on the 37.0–38.6 GHz band (the ''37 GHz'' band) has been postponed. In this item the Commission retains the existing channeling plan and amends some of the existing licensing and technical rules for the 39 GHz band in order to improve the regulatory environment for the development and implementation of a broad range of point-to-point microwave operations. The Commission also is adopting rules for competitive bidding for the 39 GHz band. By these actions, the Commission is creating a flexible regulatory vehicle for facilitating the development of a variety of fixed microwave operations that will provide, *inter alia*, communications infrastructure for commercial and private mobile radio operations and competitive wireless local telephone service. The Commission concludes that the public interest is served by the geographic licensing and competitive bidding rules adopted herein.

ii. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

139. No comments were filed in direct response to the IRFA. In general comments on the NPRM, however, some commenters raised issues that might

affect small entities. In particular, one commenter contended that in the auctions for the 39 GHz band, small entities may be at serious competitive disadvantage vis-a-vis large, well-financed companies, especially if the small businesses already expended substantial sums on obtaining PCS licenses. This commenter stated that if auctions are to be utilized, small business preferences must be designed to provide meaningful assistance to small business. Other commenters also supported small business preferences in the auctions. Various commenters contend that the upfront payment formula of $2,500 or $0.02 pop per MHz as proposed is excessive and will put a burden on small businesses. Further, some commenters claim that the proposed bidding credit offered to small business entities is too low. Many commenters support the concept of permitting all 39 GHz licensees to partition their licenses to any potential licensee meeting the relevant requirements. These commenters state that partitioning will assist small businesses that might be able to afford a portion of a license.

iii. Changes Made to the Proposed Rules

Service Rules.

140. In the NPRM, the Commission proposed a partitioning scheme with respect to rural telephone companies. The Commission has determined in the Report and Order that the option of partitioning should be made available to all entities eligible to be licensees in the 39 GHz band. The Commission also concluded that 39 GHz licensees should be permitted to disaggregate their spectrum blocks. In the NPRM the Commission also proposed to establish a maximum field strength limit that would apply at the boundaries of each service area which would provide that licensees' operations not exceeding this limit would avoid the need to complete the formal coordination process. However, in this Report and Order the Commission elects not to adopt a field strength limit but will continue to use the frequency coordination procedures outlined in § 101.103(d) of the Commission's Rules. In addition, the Commission proposed new build-out requirements for 39 GHz licensees to ensure that the spectrum was being used efficiently. The Commission suggested four construction build-out options, each of which depended upon a specific number of fixed stations to be built within the licensees' geographic area. In this Report and Order, the Commission concludes that a substantial service standard is the most appropriate benchmark for a build-out requirement for the 39 GHz band, because it will permit flexibility in system design and market development, and provide a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public.

Auction Rules.

141. The Commission has delegated authority to the Wireless Telecommunications Bureau to modify the upfront payment calculation for the 39 GHz auction if circumstances warrant and such modification is in the public interest.

142. The Commission in general adopted the proposed small business definition of an entity with not more than $40 million in average annual gross revenues for the preceding three years. As discussed below, with respect to bidding credits, the Commission created an additional category of small businesses—very small businesses. These are entities with not more than $15 million in average annual gross revenues for the preceding three years. In determining whether an applicant qualifies as a small business, the Commission will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant. No specific equity requirements will be imposed on the controlling principals that meet the small business definition. However, in order for an applicant to qualify as a small business, qualifying small business principals must maintain ''control'' of the applicant. The term control will include both *de facto* and *de jure* control of the applicant.

143. In the NPRM, the Commission proposed a 10 percent bidding credit for qualified small businesses. In this item, the Commission adopts tiered bidding credits. Tiered bidding credits will promote vigorous competition not only between small businesses and large businesses but also between small businesses of different economic sizes. In addition, a tiered approach will encourage smaller businesses, that may be very well-suited to provide niche services to participate in this auction. Accordingly, small businesses with average gross revenues of not more than $40 million for the preceding three years will receive a 25 percent bidding credit. Smaller businesses with average gross revenues of not more than $15 million for the preceding three years will receive a 35 percent bidding credit. Bidding credits for small businesses will not be cumulative.

iv. Description and Estimate of the Small Entities Subject to the Rules

144. The rules adopted in this Report and Order will allow cellular, PCS, and other small communication entities that require support spectrum to obtain licenses through competitive bidding. Pursuant to 47 CFR 101.1209, the Commission has defined ''small business entity'' in the 39 GHz auction as a firm that had gross revenues of less than $40 million in the three previous calendar years. Approval for this regulation defining ''small business entity'' in the context of 39 GHz was requested from the Small Business Administration on May 8, 1997.

a. Estimates for Cellular Licensees.

145. The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing fewer than 1,500 persons. Since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small cellular businesses and is unable at this time to determine the precise number of cellular firms which are small businesses.

146. The size data provided by the SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees. The Commission therefore used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. Therefore, even if all 12 of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. The Commission assumes, for purposes of the evaluations and conclusions in this FRFA, that all of the current cellular licensees are small entities, as that term is defined by the SBA. Although there are 1,758 cellular licenses, the Commission does not know the number of cellular licensees, since a cellular licensee may own several licenses.

b. Estimates for Broadband PCS Licensees.

147. The broadband PCS spectrum is divided into six frequency blocks designated A through F. Pursuant to 47 CFR 24.720(b), the Commission has defined ''small entity'' in the auctions for Blocks C and F as a firm

that had average gross revenues of less than $40 million in the three previous calendar years. This regulation defining ''small entity'' in the context of broadband PCS auctions has been approved by the SBA.

148. The Commission has auctioned broadband PCS licenses in Blocks A through F. The Commission does not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. For the C Block auction, a total of 255 qualified bidders participated in the auction. Of the qualified bidders, all were entrepreneurs—defined for this auction as entities together with affiliates, having gross revenues of less than $125 million and total assets of less than $500 million at the time the FCC Form 175 application was filed. Of the 255 qualified bidders, 253 were ''small businesses''—defined for this auction as entities together with affiliates, having gross revenues of less than $40 million at the time the FCC Form 175 application was filed. After a total of 184 rounds, the number of winning bidders totalled 89, all of whom were small business entrepreneurs, who won a total of 493 licenses. To date, two of the winning bidders defaulted on 18 of the licenses. Those licenses were reauctioned in Auction #10. For the D, E, and F Block auction, the D and E blocks were open to all licensees; the F block was open to bidders who qualified as an entrepreneur—defined for this auction as entities, together with affiliates, having gross revenues of less than $125 million and total assets of less than $500 million at the time the FCC Form 175 application was filed. Of the 153 initial bidders for the three blocks, 105 qualified as entrepreneurs. The D, E, and F Block auction ended with 125 bidders winning 1472 licenses and the FCC holding 7 licenses as a result of bid withdrawals. For the D, E, and F Block auction, 93 of the winning bidders qualified as small entities as defined for that auction. Accordingly, the Commission estimates that 48% of the winning bidders for the auction of broadband PCS licenses in Blocks A through F are small businesses.

c. Estimates for Point-to-Point or Point-to-Multipoint Entities.

149. The rules adopted in this Report and Order will apply to any current licensee or any company which chooses to apply for a license in the 39 GHz band. The Commission has not developed a definition of small entities applicable to such licensees. The SBA definitions of small entity for 39 GHz band licensees are the definitions applicable to radiotelephone companies. The definition of radiotelephone companies provides that a small entity is a radiotelephone company employing fewer than 1,500 persons. Since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the potential number of small businesses interested in the 39 GHz frequency band and is unable at this time to determine the precise number of potential applicants which are small businesses.

150. The size data provided by the SBA does not enable us to make a meaningful estimate of the number of telecommunications providers which are small entities because it combines all radiotelephone companies with 500 or more employees. The Commission therefore used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. Therefore, a majority of 39 GHz entities providing radiotelephone services could be small businesses under the SBA's definition.

151. However, in the NPRM, the Commission proposed to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of less than $40 million. The Commission has not yet received approval by the SBA for this definition. The Commission assumes, for purposes of its evaluations and conclusions in this FRFA, that nearly all of the 39 GHz licensees will be small entities, as that term is defined by the SBA.

v. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements

Service Rules.

152. There are some reporting requirements imposed by the Report and Order. In most instances, it is likely that the entities filing will require the services of persons with technical or engineering expertise to prepare reports. In order to facilitate operation in the 39 GHz band, the Commission is not imposing separate regulatory burdens that may affect small businesses. Generally, all applicants will be required to file applications for authorization to construct and operate and to adhere to the technical criteria set forth in the final rules.

Auction Rules.

153. All license applicants will be subject to reporting and record keeping requirements to comply with the competitive bidding rules. Specifically, applicants will apply for 39 GHz license auctions by filing a short-form application and will file a long-form application at the conclusion of the auction. Additionally, entities seeking treatment as ''small businesses'' will need to submit information pertaining to the gross revenues of the small business applicant, its affiliates, and certain investors in the applicant.

vi. Steps Taken to Minimize the Economic Impact on Small Entities

Service Rules.

154. The Commission adopts service and technical rules that facilitate the accommodation of all proposed and existing systems in the 39 GHz band. The Commission believes these rules are a reasonable accommodation of all competing interests in this band, including small entities. The plans for the 39 GHz band provide both small entities and larger businesses the same opportunity to develop and operate viable systems within the band, and initiate competitive services.

Auction Rules.

155. Section 309 (j)(3)B) of the Communications Act of 1934, as amended, provides that in establishing eligibility criteria and bidding methodologies the Commission shall, *inter alia*, ''promote[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Section 309(j)(4)(A) provides that in order to promote such objectives, the Commission shall ''consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods * * * and combinations of such schedules and methods.'' Section 309(j)(4)(D) also requires the Commission to ''ensure that small business, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.'' Therefore, it is appropriate to establish special provisions in the 39 GHz band for competitive bidding by small businesses.

156. The Commission notes that Congress made specific findings with regard to access to capital in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that small business concerns, which represent higher degrees of risk in

financial markets than do large businesses, are experiencing increased difficulties in obtaining credit. The Commission believes that small businesses applying for 39 GHz band licenses should be entitled to some type of bidding credits. In awarding licenses, the Commission is committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. The Commission concludes that special provisions for small businesses are appropriate for awarding licenses because construction of systems may require a significant amount of capital, and minority- and women-owned businesses will be able to take advantage of specific provisions that the Commission adopts for small businesses.

157. The Commission has adopted various special provisions to encourage and facilitate participation by small entities in the auctions. In particular, small businesses with revenues of not more than $40 million are eligible for a 25 percent bidding credit, and small businesses with average annual gross revenues of not more than $15 million are eligible for a 35 percent bidding credit on all 39 GHz licenses. These bidding credits are not cumulative.

158. In addition, the Commission has extended partitioning to all entities eligible to be licensees in the 39 GHz band. The Commission also concluded here to allow all 39 GHz licensees to disaggregate their spectrum blocks. These provisions should help facilitate market entry by small entities who may lack the financial resources to participate in the auction alone. These entities will be able to participate in the provision of services by purchasing a portion of a license.

vii. Significant Alternatives Considered and Rejected

Service Rules.

159. The Commission considered and rejected several alternatives to the licensing plan and competitive bidding rules adopted. In response to a Petition for Rule Making filed by the Telecommunications Industry Association (TIA), the Commission initiated this proceeding. This Report and Order does not provide direct relief requested by TIA in particular areas. For example, the Commission rejected the individual link licensing alternative which was suggested by TIA. The Commission also considered and rejected proposals to license spectrum on an MTA or Rectangular Service Area basis because it determined that BTA licensing would further spectrum management and better serve the 39 GHz band because the wide variety of services proposed by commenters relate to PCS systems or are local in nature. In addition, BTAs which are smaller than MTAs, will facilitate the ability of smaller systems to participate in geographic area licensing. Therefore, based on the record in this proceeding, the Commission believes that BTAs would be more appropriate for licensing the 39 GHz band.

160. The Commission also considered various proposals by entities relating to the disposition of pending 39 GHz applications. The processing procedures adopted are based on some proposed alternatives. Other proposals were rejected, such as the suggestion that the Commission process pending mutually exclusive applications. The Commission determined that pending mutually exclusive applications will be dismissed without prejudice, and all applicants, including small business entities, would be permitted to submit new applications under the competitive bidding rules established in this proceeding. Because applicants had ample opportunity to file amendments prior to the onset of this rule making, in order to avoid mutual exclusivity, the Commission believes the above procedure is the best approach. The Commission also considered various divergent proposals made in response to the build-out plan for incumbents and for new 39 GHz licensees. With the goal of accommodating various entities, the Commission developed specific construction requirements and implemented a ''substantial service'' showing for these entities. By rejecting such build-out alternatives which required the construction of significant amounts of links within a short time frame, the Commission adopts an alternative which takes into consideration concerns raised by commenters, including small business entities, regarding establishing services which are specialized and do not lend to traditional construction requirements.

Auction Rules.

161. The Commission considered and rejected several significant alternatives with respect to the auction rules. The Commission rejected the use of any type of licensing method in favor of competitive bidding as the method of awarding 39 GHz licenses. The Commission concluded that awarding 39 GHz licenses by auction meets the congressional criteria in § 309(j) of the Communications Act, and will likely promote the Act's objectives. The Commission also rejected a sequential or other auction design in favor of a simultaneous multiple round auction design because the licenses are interdependent. As to designated entities that may be entitled to special provisions, the Commission determined that based upon the record it only would extend such special provisions to small businesses. The Commission rejected offering reduced upfront or down payments and payment by installment payments and, instead, adopted tiered bidding credits for small businesses. The Commission adopted a small business definition of an entity with not more than $40 million in average gross revenues for the preceding three years. The Commission held that this definition of small business will accommodate the broadest cross-section of small businesses because it will include, at a minimum, all those entities recognized as small businesses in the CMRS contests for which the Commission has adopted or proposed small businesses definitions. Since the Commission rejected a straight across-the-board 10 percent bidding credit for qualified small businesses and, based upon the record, adopted tiered bidding credits for the 39 GHz service, small businesses with average gross revenues of not more than $40 million for the preceding three years will receive a 25 percent bidding credit and smaller businesses with average gross revenues of not more than $15 million for the preceding three years will receive a 35 percent bidding credit.

viii. Report to Congress

162. The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this Report and Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801(a)(1)(A). A copy of this Final Regulatory Flexibility Analysis will also be published in the **Federal Register**.

B. Ex Parte Rules—Non-Restricted Proceeding

163. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. See generally 47 CFR 1.1201, 1.1203, and 1.1206(a).

C. Paperwork Reduction Act

164. Written comments by the public on the modified information collections are due March 9, 1998. Written

comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before April 7, 1998. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington D.C. 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725—17th Street, N.W., Washington D.C. 20503 or via the Internet to fain__t@al.eop.gov.

D. Ordering Clauses

165. Authority for issuance of this Report and Order and Second Notice of Proposed Rule Making is contained in sections 4(i), 257, 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 257, 303(r), and 309(j).

166. *It is ordered*, that parts 1 and 101 of the Commission's Rules are amended as specified effective April 7, 1998. This action is taken pursuant to sections 4(i), 303(c), 303(f), 303(g), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r) and 309(j).

List of Subjects in 47 CFR Parts 1 and 101

Communications equipment, Radio.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

Parts 1 and 101 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1— PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154, 207, 303 and 309(j), unless otherwise noted.

2. Amend § 1.2102 by adding new paragraph (a)(10) and revising paragraph (b)(4) introductory text to read as follows:

§ 1.2102 Eligibility of applications for competitive bidding.

(a) * * *

(10) Basic trading area licenses in the 38.6–40.0 GHz band.

(b) * * *

(4) Applications for channels in all frequency bands, except those listed in paragraph (a)(10), which are used as an intermediate link or links in the provision of continuous, end-to-end service where no service is provided directly to subscribers over the frequencies. Examples of such intermediate links are:

* * * * *

PART 101— FIXED MICROWAVE SERVICES

3. The authority citation for Part 101 continues to read as follows:

Authority: 47 U.S.C. §§ 524, 303.

4. Amend § 101.13 by revising paragraph (d) to read as follows:

§ 101.13 Application forms and requirements for private operational fixed stations.

* * * * *

(d) Application for renewal of station licenses must be submitted on such form as the Commission may designate by public notice. Applications for renewal must be made during the license term and, except for renewal applications in the 38.6–40.0 GHz band, should be filed within 90 days, but not later than 30 days, prior to the end of the license term. Renewal applications in the 38.6–40.0 GHz band must be filed eighteen months prior to the end of the license term. See § 101.17 for renewal requirements for the 38.6–40.0 GHz frequency band. When a licensee submits a timely application for renewal of a station license, the existing license for that station will continue as a valid authorization until the Commission has made a final decision on the application. Whenever a group of station licenses in the same radio service are to be renewed simultaneously, a single ''blanket'' application may be filed to cover the entire group if the application identifies each station by call sign and station location. Applicants should note also any special renewal requirements under the rules for such radio station(s).

* * * * *

5. Amend § 101.15 by revising paragraph (c) to read as follows:

§ 101.15 Application forms for common carrier fixed stations.

* * * * *

(c) *Renewal of station license.* Except for renewal of special temporary authorizations and authorizations in the 38.6–40.0 GHz band, FCC Form 415 (''Application for Authorization in the Microwave Services'') must be filed by the licensee between thirty (30) and sixty (60) days prior to the expiration date of the license sought to be renewed. For authorizations in the 38.6–40.0 GHz band, the licensee must file FCC Form 415 eighteen months prior to the expiration date of the license sought to be renewed. See § 101.17 for renewal requirements for the 38.6–40.0 GHz frequency band. Whenever a group of station licenses in the same radio service are to be renewed simultaneously, a single ''blanket'' application may be filed to cover the entire group if the application identifies each station by call sign and station location. Applicants should note also any special renewal requirements under the rules for each radio service. When a licensee submits a timely application for renewal of a station license, the existing license continues in effect until the Commission has rendered a decision on the renewal application.

* * * * *

6. Add new § 101.17 to read as follows:

§ 101.17 Performance requirements for the 38.6–40.0 GHz frequency band.

(a) All 38.6–40.0 GHz band licensees must demonstrate substantial service at the time of license renewal. A licensee's substantial service showing should include, but not be limited to, the following information for each channel for which they hold a license, in each BTA or portion of a BTA covered by their license, in order to qualify for renewal of that license. The information provided will be judged by the Commission to determine whether the licensee is providing service which rises to the level of ''substantial.''

(1) A description of the 38.6–40.0 GHz band licensee's current service in terms of geographic coverage;

(2) A description of the 38.6–40.0 GHz band licensee's current service in terms of population served, as well as any additional service provided during the license term;

(3) A description of the 38.6–40.0 GHz band licensee's investments in its system(s) (type of facilities constructed and their operational status is required);

(b) Any 38.6–40.0 GHz band licensees adjudged not to be providing substantial service will not have their licenses renewed.

7. Amend § 101.45 by revising paragraph (d) to read as follows:

§ 101.45 Mutually exclusive applications.

* * * * *

(d) Except for applications in the 38.6–40.0 GHz band, private operational fixed point-to-point microwave applications for authorization under this Part will be entitled to be included in a random selection process or to comparative consideration with one or

more conflicting applications in accordance with the provisions of § 1.227.(b)(4) of this chapter. Applications in the 38.6–40.0 GHz band are subject to competitive bidding procedures in §§ 101.1201–1209.

* * * * *

8. Amend § 101.51 by revising paragraph (a) introductory text to read as follows:

§ 101.51 Comparative evaluation of mutually exclusive applications.

(a) In order to expedite action on mutually exclusive applications in services under this rules part where neither competitive bidding nor the random selection processes apply, the applicants may request the Commission to consider their applications without a formal hearing in accordance with the summary procedure outlined in paragraph (b) in this section if:

* * * * *

9. Amend § 101.53 by adding new paragraph (g) to read as follows:

§ 101.53 Assignment or transfer of station authorization.

* * * * *

(g) Assignees receiving Commission authority to acquire a 38.6–40.0 GHz license pursuant to this paragraph must meet the assignors' construction requirement dates. *See* §§ 101.63 and 101.64 of this part.

10. Amend § 101.55 by revising the introductory text of paragraph (a) and paragraph (b)(2) to read as follows:

§ 101.55 Considerations involving assignment or transfer applications.

(a) Licenses not authorized pursuant to competitive bidding procedures may not be assigned or transferred prior to completion of construction of the facility. However, consent to the assignment or transfer of control of such a license may be given prior to the completion of construction where:

* * * * * *

(b) * * *

(2) That have not been constructed, unless the authorizations were granted pursuant to a competitive bidding procedure; or

* * * * *

11. Add § 101.56 to read as follows:

§ 101.56 Partitioned service areas (PSAs) and disaggregated spectrum.

(a)(1) The holder of a Basic Trading Area (BTA) authorization to provide service in the 38.6–40 GHz band pursuant to the competitive bidding process may enter into agreements with eligible parties to partition any portion of its service area according to county boundaries, or according to other geopolitical subdivision boundaries. Alternatively, licensees may enter into agreements or contracts to disaggregate portions of spectrum, provided acquired spectrum is disaggregated according to frequency pairs.

(2)(i) Contracts must be filed with the Commission within 30 days of the date that such agreements are reached.

(ii) The contracts must include descriptions of the areas being partitioned or spectrum disaggregated. The partitioned service area shall be defined by coordinate points at every 3 seconds along the partitioned service area unless an FCC recognized service area is utilized (i.e., Metropolitan Service Area or Rural Service Area) or county lines are followed. If geographic coordinate points are used, they must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1927 North American Datum (NAD27). Applicants may supply geographical coordinates based on 1983 North American Datum (NAD83) in addition to those required (NAD27). In the case where an FCC recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(3) Parties to partitioning and spectrum disaggregation contracts must file concurrently with such contracts the following:

(i) An application FCC Form 415 for authority to operate a 38.6–40 GHz service facility.

(ii) Application for assignment to operate in the market area being partitioned or to operate in the market area covered by the disaggregated spectrum.

(iii) A completed FCC Form 430, where applicable, if not already on file at the Commission.

(b) The eligibility requirements applicable to BTA authorization holders also apply to those individuals and entities seeking partitioned or disaggregated spectrum authorizations.

(c) Subsequent to issuance of the authorization for a partitioned service area, the partitioned area will be treated as a separate protected service area.

(d) When any area within a BTA becomes a partitioned service area, the remaining counties and geopolitical subdivision within that BTA will be subsequently treated and classified as a partitioned service area.

(e) At the time a BTA is partitioned, the Commission shall cancel the BTA authorization initially issued and issue a partitioned service area authorization to the former BTA authorization holder.

(f) The duties and responsibilities imposed upon BTA authorization holders in this part, apply to those licensees obtaining authorizations by partitioning or spectrum disaggregation.

(g) The build-out requirements for the partitioned service area or disaggregated spectrum shall be the same as applied to the BTA authorization holder.

(h) The license term for the partitioned service area or disaggregated spectrum shall be the remainder of the period that would apply to the BTA authorization holder.

(i) Licensees, except those using bidding credits in a competitive bidding procedure, shall have the authority to partition service areas or disaggregate spectrum.

12. Amend § 101.63 by revising paragraphs (a) and (d) to read as follows:

§ 101.63 Period of construction; certification of completion of construction.

(a) Except for stations licensed in the 38.6–40.0 GHz band, each station licensed under this part must be in operation within 18 months from the initial date of grant. Modification of an operational station other than one licensed in the 38.6–40.0 GHz band must be completed within 18 months of the date of grant of the applicable modification request.

* * * * *

(d) Except for stations licensed in the 38.6–40.0 GHz band, requests for extension of time to be in operation may be granted upon a showing of good cause, setting forth in detail the applicant's reasons for failure to have the facility operating in the prescribed period. Such requests must be submitted no later than 30 days prior to the end of the prescribed period to the Federal Communications Commission, Gettysburg, PA 17325–7245.

* * * * *

13. Add § 101. 64 to read as follows:

§ 101.64 Service areas.

Service areas for 38.6–40.0 GHz service are BTAs as defined below. BTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 40–44. Rand McNally organizes the 50 States and the District of Columbia into 487 BTAs. The BTA Map is available for public inspection at the Wireless Telecommunications Bureau, Room 5322, 2025 M Street, NW., Washington, DC. The BTA service areas are based on the Rand McNally 1995 Commercial Atlas & marketing Guide, 123rd Edition, at pages 40–44, with the following additions licensed separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; Mayaguez/

Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The Mayaguez/Aguadilla-Ponce BTA-like service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, Maricao, Maunabo, Mayaguez, Moca, Patillas, Penuelas, Ponce, Quebradillas, Rincon, Sabana Grande, Salinas, San German, Santa Isabel, Villalba, and Yauco. The San Juan BTA-like service area consists of all other municipios in Puerto Rico.

14. Amend § 101.103 by adding paragraphs (i)(1) and (i)(2) to read as follows:

§ 101.103 Frequency coordination procedures.

* * * * *

(i)(1) When the licensed facilities are to be operated in the band 38,600 MHz to 40,000 MHz and the facilities are located within 16 kilometers of the boundaries of a Basic Trading Area, each licensee must complete the frequency coordination process of § 101.103(d) with respect to neighboring BTA licensees and existing licensees within its BTA service area that may be affected by its operation prior to initiating service. In addition to the technical parameters listed in § 101.103(d), the coordinating licensee must also provide potentially affected parties technical information related to its subchannelization plan and system geometry.

(2) Response to notification should be made as quickly as possible, even if no technical problems are anticipated. Any response to notification indicating potential interference must specify the technical details and must be provided to the licensee, either electronically or in writing, within 10 days of notification. Every reasonable effort should be made by all licensees to eliminate all problems and conflicts. If no response to notification is received within 10 days, the licensee will be deemed to have made reasonable efforts to coordinate and may commence operation without a response. The beginning of the 10-day period is determined pursuant to § 101.103(d)(v).

15. Amend § 101.107 by revising the last entry in the table and adding new footnote 9 to read as follows:

§ 101.107 Frequency tolerance.

* * * * *

FREQUENCY TOLERANCE

[Percent]

Frequency (MHz)	All fixed and based stations	Mobile stations over 3 watts	Mobile stations 3 watts or less
* *	*	*	*
31,300 to 40,000[6]	0.03[9]	0.03	0.03
* *	*	*	*

[9] Equipment authorized to be operated in the 38,600–40,000 MHz band is exempt from the frequency tolerance requirement noted in the above table.

16. Amend § 101.109 by adding a new footnote 7 to the entry in the second column for 38,600 to 40,000, and by adding a new entry at the end of the table to read as follows:

§ 101.109 Bandwidth.

* * * * *

Frequency band (MHz)	Maximum authorized bandwidth
* * * *	*
38,600 to 40,000	50 MHz[7]
Above 40,000	([3])
* * * *	*

[7] For channel block assignments in the 38,600–40,000 MHz band, the authorized bandwidth is equivalent to an unpaired channel block assignment or to either half of a symmetrical paired channel block assignment. When adjacent channels are aggregated, equipment is permitted to operate over the full channel block aggregation without restriction.

Note to Footnote 7: Unwanted emissions shall be suppressed at the aggregate channel block edges based on the same roll-off rate as is specified for a single channel block in paragraphs 101.111(a)(ii) and (iii) of this chapter.

17. Amend § 101.115 by removing the entry for ''Above 31,300'' in the table in paragraph (c)(2), and adding the following entry and new footnote 14 to read as follows:

§ 101.115 Directional antennas.

* * * * *

(c) * * *

(2) * * *

ANTENNA STANDARDS

Frequency (MHz)	Category	Maximum beamwidth to 3 dB points(1) (included angles in degrees)	Minimum antenna gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
*	*	*	*	*		*		*		*
38,600 to 40,000[14]	A	n/a	38	25	29	33	26	42	55	55
	B	n/a	38	20	24	28	32	35	36	36

[14] Stations authorized to operate in the 38,600–40,000 MHz band may use antennas other than those meeting the Category A standard. However, the Commission may require the use of higher performance antennas where interference problems can be resolved by the use of such antennas.

18. Amend § 101.147 by redesignating paragraph (v) as (v)(1), revising newly redesignated (v)(1) and adding new paragraph (v)(2) to read as follows:

§ 101.147 Frequency assignments.

* * * * *

(v)(1) Assignments in the band 38,600–40,000 MHz must be according to the following frequency plan:

Channel group A		Channel group B	
Channel No.	Frequency band limits (MHz)	Channel No.	Frequency band limits (MHz)
1–A	38,600–38,650	1–B	39,300–39,350
2–A	38,650–38,000	2–B	39,350–39,400
3–A	38,700–38,750	3–B	39,400–39,450
4–A	38,750–38,800	4–B	39,450–39,500
5–A	38,800–38,850	5–B	39,500–39,550
6–A	38,350–38,900	6–B	39,550–39,600
7–A	38,900–38,950	7–B	39,600–39,650
8–A	38,950–39,000	8–B	39,650–39,700
9–A	39,000–39,050	9–B	39,700–39,750
10–A	39,050–39,100	10–B	39,750–39,800
11–A	39,100–39,150	11–B	39,800–39,850
12–A	39,150–39,200	12–B	39,850–39,900
13–A	39,200–39,250	13–B	39,900–39,950
14–A	39,250–39,300	14–B	39,950–40,000

(2) Channel Blocks 1 through 14 are assigned for use within Basic Trading Areas (BTAs). Applicants are to apprise themselves of any grandfathered links within the BTA for which they seek a license. All of the channel blocks may be subdivided as desired by the licensee and used within its service area as desired without further authorization subject to the terms and conditions set forth in § 101.149.

19. Add Subpart N to Section 101 to read as follows:

Subpart N—Competitive Bidding Procedures for the 38.6–40.0 GHz Band

Subpart N—Competitive Bidding Procedures for the 38.6–40.0 GHz Band

§ 101.1201 38.6–40.0 GHz subject to competitive bidding.

Mutually exclusive 38.6–40.0 GHz initial applications are subject to competitive bidding. The general competitive bidding procedures found in 47 CFR Part 1, Subpart Q will apply unless otherwise provided in this part.

§ 101.1202 Competitive bidding design for 38.6–40.0 GHz licensing.

The following competitive bidding procedures generally will be used in 38.6–40.0 GHz auctions. Additional, specific procedures may be set forth by public notice. The Commission also may design and test alternative procedures. See 47 CFR §§ 1.2103 and 1.2104. The Commission will employ simultaneous multiple round bidding when choosing from among mutually exclusive initial applications to provide 38.6–40.0 GHz service, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

§ 101.1203 Competitive bidding mechanisms.

(a) *Sequencing.* The Commission will establish and may vary the sequence in which 38.6–40.0 GHz licenses will be auctioned.

(b) *Grouping.* The Commission will conduct a series of sequential auctions of three channels at a time within each BTA unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative auction scheme.

(c) *Minimum bid increments.* The Commission will, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(d) *Stopping rules.* The Commission will establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(e) *Activity rules.* The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted a certain number of waivers of such rule during the auction.

§ 101.1204 Bidding application procedures.

All applicants to participate in competitive bidding for 38.6–40.0 GHz licenses must submit applications on FCC Forms 175 pursuant to the provisions of § 1.2105 of this Chapter. The Wireless Telecommunications Bureau will issue a public notice announcing the availability of 38.6–40.0 GHz licenses and, in the event that mutually exclusive applications are filed, the date of the auction for those licenses. This public notice also will specify the date on or before which applicants intending to participate in a 38.6–40.0 auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the forms, any filing fee that must accompany the application or any upfront payment that need to be submitted, and the location where the application must be filed. In addition, each applicant must identify its status as a small business or rural telephone company.

§ 101.1205 Submission of upfront payments and down payments.

(a) Each bidder in the 38.6–40.0 GHz auction will be required to submit an upfront payment. This upfront payment will be based upon a formula established by the Wireless Telecommunications Bureau and announced by public notice prior to the auction.

(b) Each winning bidder in the 38.6–40.0 GHz auction shall make a down payment to the Commission in an amount sufficient to bring its total deposits up to 20 percent of its winning bid by a date and time to be specified by public notice, generally within ten business days following the close of bidding. Full payment of the balance of the winning bids shall be paid within ten days after public notice announcing that the Commission is prepared to award the license. The grant of the application is conditional upon receipt of full payment. The Commission generally will grant the license within a

reasonable period of time after receiving full payment.

§ 101.1206 Long-form applications.

Each winning bidder will be required to submit a long-form application. Winning bidders must submit long-form applications within ten (10) business days after being notified by Public Notice that it is the winning bidder. Long-form applications shall be processed under the rules contained in parts 1 and 101 of the Commission's rules.

§ 101.1207 Procedures for filing petitions to deny against long-form applications.

The applicable procedures for the filing of petitions to deny the long-form applications of winning bidders contained in § 1.2108 of the Commission's rules shall be followed by the applicant (see 47 CFR 1.2108).

§ 101.1208 Bidding credits for small businesses.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses, (as defined in § 101.1209(b)(1)(i) may use a bidding credit of 25 percent to lower the cost of its winning bid on any of the licenses in this part. A winning bidder that qualifies as a very small business or a consortium of very small businesses, (as defined in § 101.1209(b)(1)(ii) may use a bidding credit of 35 percent to lower the cost of its winning bid on any of the licenses in this part.

(b) *Unjust enrichment.* (1) A small business seeking transfer or assignment of a license to an entity that is not a small business under the definitions in § 101.1209(b)(1)(i) and (ii), will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this penalty will be reduced over time as follows: a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit: in year three of the license term the penalty will be 75 percent; in year four the penalty will be 50 percent and in year five the penalty will be 25 percent, after which there will be no penalty. These penalties must be paid back to the U.S. Treasury as a condition of approval of the assignment or transfer.

(2) If a small business that utilizes a bidding credit under this section seeks to assign or transfer control of its license to a small business meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

§ 101.1209 Definitions.

(a) *Scope.* The definitions in this section apply to §§ 101.1201 through 101.1209, unless otherwise specified in those sections.

(b) *Small business and very small business.* (1)(i) A small business is an entity that together with its affiliates and persons or entities that hold attributable interests in such entity and their affiliates, has average gross revenues that are not more than $40 million for the preceding three years.

(ii) A very small business is an entity that together with its affiliates and persons or entities that hold attributable interests in such entity and their affiliates, has average gross revenues that are not more than $15 million for the preceding three years.

(2) For purposes of determining whether an entity meets either the small business or very small business definitions set forth in paragraph (b)(1) of this section, the gross revenues of the entity, its affiliates, persons or entities holding interests in the entity and their affiliates shall be considered on a cumulative basis and aggregated.

(3) A small business consortium is a conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies either definition of a small business in paragraphs (b)(1) and (b)(2) of this section.

(c) *Rural telephone company.* A rural telephone company means a local exchange carrier operating entity to the extent that such entity—

(A) Provides common carrier service to any local exchange carrier study area that does not include either—

(i) Any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) Any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census, as of August 10, 1993;

(B) Provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) Provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) Has less than 15 per cent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

(d) *Gross Revenues. Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited quarterly financial statements for the relevant number of calendar years preceding January 1, 1996, or, if audited financial statements were not prepared on a calendar-year basis, of the most recently completed fiscal years preceding the filing of the applicant's short-form application (Form 175). For applications filed after December 31, 1995, gross revenues shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

(e) *Affiliate.* (1) *Basis for affiliation.* An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant (both referred to herein as ''the applicant'') if such individual or entity:

(i) Directly or indirectly controls or has the power to control the applicant, or

(ii) Is directly or indirectly controlled by the applicant, or

(iii) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(iv) Has an ''identity of interest'' with the applicant.

(2) *Nature of control in determining affiliation.*

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example for paragraph (e)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a

corporation may permit a stockholder with less than 50 percent of the voting to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example for paragraph (e)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

Example 1. Two shareholders in Corporation Y each have attributable interests in the same application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity of interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

Example 2. One shareholder in Corporation Y, shareholder A, has an attributable interest in a SMR application. Another shareholder in Corporation Y, shareholder B, has a nonattributable interest in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. Through the common investment of shareholders A and B in the SMR application, Corporation Y would still be deemed an affiliate of the applicant.

(i) *Spousal affiliation*. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship affiliation*. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context ''immediate family member'' means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father, or -mother, step-brother, or -sister, step-son, or -daughter, half brother or sister. This presumption may be rebutted by showing that

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

Example for paragraph (e)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in an SMR application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership*. (i) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (e)(5). If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in an SMR application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2 for paragraph (e)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in an SMR application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (e)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.* (i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) *Affiliation under joint venture arrangements.* (i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business option is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

(11) *Exclusion from affiliation coverage.* For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliated entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

[FR Doc. 98–1731 Filed 2–5–98; 8:45 am]

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DEPARTMENT OF DEFENSE

48 CFR Part 246

[DFARS Case 97–D326]

Defense Federal Acquisition Regulation Supplement; Warranties in Weapon System Acquisitions

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The Director of Defense Procurement has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 847 of the National Defense Authorization Act for Fiscal Year 1998. Section 847 repealed the requirement for contractor guarantees on major weapon systems.

EFFECTIVE DATE: February 6, 1998.

FOR FURTHER INFORMATION CONTACT: Rick Layser, PDUSD(A&T)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0131. Telefax (703) 602–0350. Please cite DFARS Case 97–D326.

SUPPLEMENTARY INFORMATION:

A. Background

Section 847 of the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. 105–85) repealed 10 U.S.C. 2403, which required contractor guarantees on major weapon systems. This final rule removes the DFARS language that implemented 10 U.S.C. 2403.

B. Regulatory Flexibility Act

The final rule does not constitute a significant revision within the meaning of FAR 1.501 and Public Law 98–577 and publication for public comment is not required. However, comments from small entities concerning the affected DFARS subpart will be considered in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 97–D326 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the final rule imposes no information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 246

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR Part 246 is amended as follows:

1. The authority citation for 48 CFR Part 246 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 246—QUALITY ASSURANCE

2. Section 246.703 is revised to read as follows:

246.703 Criteria for use of warranties.

(b) *Cost.* Contracting officers may include the cost of a warranty as part of an item's price or as a separate contract line item.

246.704 [Amended]

3. Section 246.704 is amended by removing paragraph (1) and redesignating paragraphs (2) through (5) as paragraphs (1) through (4), respectively.

246.770 through 246.770–8 [Removed].

4. Sections 246.770 through 246.770–8 are removed.

[FR Doc. 98–2924 Filed 2–5–98; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 961204340–7087–02; I.D. 020298B]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Closure

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure.

SUMMARY: NMFS closes the commercial run-around gillnet fishery for king mackerel in the exclusive economic