

Authority: 29 U.S.C. 793; 38 U.S.C. 4211 (2001) (amended 2002); 38 U.S.C. 4212 (2001) (amended 2002); E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

■ 2. Section 60–250.2 is corrected by adding a paragraph (x) to read as follows:

§ 60–250.2 Definitions.

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(x) *Compliance evaluation* means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance with one or more of the requirements of the Vietnam Era Veterans' Readjustment Assistance Act. [FR Doc. 06–1092 Filed 2–6–06; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 73, and 74

[WT Docket No. 05–211; FCC 06–4]

Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document adopts several modifications to the Federal Communications Commission's competitive bidding rules. Some of the changes are necessitated by the Commercial Spectrum Enhancement Act and others are designed to enhance the Commission's competitive bidding program.

DATES: Effective April 10, 2006.

FOR FURTHER INFORMATION CONTACT: *For legal questions:* Audrey Bashkin or Erik Salovaara, Auctions Spectrum and Access Division, Wireless Telecommunications Bureau at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of the *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures Report and Order (Report and Order)*, released on January 24, 2006. The complete text of this Report and Order including attachments and related Commission documents, is available for public inspection and copying from 8 a.m. to 4:30 p.m. Monday through Thursday and from 8 a.m. to 11:30 a.m. on Friday at the FCC Reference Information Center, Portals II,

445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Report and Order* and related Commission documents may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–488–5300, facsimile 202–488–5563, and e-mail fcc@bcpiweb.com. BCPI's Web site is <http://www.bcpiweb.com>. When ordering documents from BCPI, please provide the appropriate FCC document number, for example, FCC 06–xx. The *Report and Order* and related documents are also available on the Internet at the Commission's Web's site is: <http://wireless.fcc.gov/auctions> or on <http://fcc.gov/ecfs>.

I. Introduction and Background

1. The Federal Communications Commission (Commission) adopts several modifications to the Commission's competitive bidding rules. The Commission sought comment on these changes in the recent *Notice of Proposed Rule Making (NPRM)*, 70 FR 43372 (July 27, 2005), which, in combination with a *Declaratory Ruling*, 70 FR 43322 (July 27, 2005), began this proceeding. Some of the changes are required by the Commercial Spectrum Enhancement Act (CSEA); others are intended to enhance the effectiveness of the Commission's auctions program.

II. Implementation of CSEA

A. Background

2. CSEA establishes a mechanism for reimbursing federal agencies out of spectrum auction proceeds for the cost of relocating their operations from certain eligible frequencies that have been reallocated from federal to non-federal use. Under CSEA, the total cash proceeds from any auction of eligible frequencies must equal at least 110 percent of estimated relocation costs of eligible federal entities. CSEA prohibits the Commission from concluding any auction of eligible frequencies that falls short of this revenue requirement. Instead, if the auction does not raise the required revenue, it must be canceled.

3. As explained in the *NPRM*, implementing CSEA necessitates that the Commission modify its tribal land bidding credit rules. In the *Declaratory Ruling*, the Commission determined that total cash proceeds for purposes of meeting CSEA's revenue requirement means winning bids net of any applicable bidding credit discounts. Accordingly, to determine whether CSEA's revenue requirements have been met at the end of a CSEA auction, the

Commission will have to determine whether winning bids net of any applicable bidding credit discounts equal at least 110 percent of estimated relocation costs. However, under the Commission's current rules, the Commission may not know for at least 180 days after the end of the auction the amount of tribal land bidding credits that will be awarded with respect to those winning bids. Consequently, being able to determine promptly after the close of bidding whether or not CSEA's revenue requirement has been met requires revision of the Commission's tribal land bidding credit rules.

B. CSEA's Reserve Price Requirement

4. In the *NPRM*, the Commission sought comment on a proposed revision to its current reserve price rule. CSEA directs the Commission to revise its reserve price regulations to ensure that an auction of eligible frequencies raises at least 110 percent of the estimated relocation costs for federal users as determined pursuant to CSEA. The Commission's competitive bidding rules have, since their inception, allowed for the use of reserve prices, and, since 1997, section 309(j) of the Communications Act has required the Commission to prescribe methods by which a reasonable reserve price will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest. Section 1.2104(c) of the Commission's rules, 47 CFR 1.2104(c), gives the Commission the discretion to employ a reserve price. This rule, however, does not satisfy the CSEA mandate that the reserve price rule ensure that an auction of eligible frequencies raises the revenue required by the statute. Accordingly, the Commission proposed a rule that conforms to the CSEA requirement.

5. No commenter addressed this issue. Given the statutory mandate and the absence of opposition from commenters, the Commission will adopt the rule proposed in the *NPRM*.

C. Tribal Land Bidding Credits in CSEA Auctions

6. In the *NPRM*, the Commission sought comment on three alternative methods of ensuring that, in auctions subject to CSEA, the Commission will be able to calculate total cash proceeds promptly after the completion of bidding, while still preserving its ability to award tribal land bidding credits to qualified license winners at some point after such proceeds have been

determined. The need for revision of the rules arises because the Commission allows applicants seeking tribal land bidding credits 180 days after the long-form filing deadline in which to demonstrate their eligibility for such credits. To qualify for a tribal land bidding credit, a license winner must indicate on its long-form application (FCC Form 601) that it intends to serve a qualifying tribal land within a particular market. The applicant must then amend its long-form application within the 180-day period by attaching a certification from the tribal government authorizing the applicant to provide service on its tribal land, certifying that the area to be served by the winning bidder is indeed qualifying tribal land, and assuring that it has not and will not enter into an exclusive contract with the applicant and will not unreasonably discriminate among wireless carriers seeking to provide service on the qualifying tribal land. The applicant must also attach its own certification that it will comply with construction requirements for tribal land and consult with the tribal government regarding the siting of facilities and service deployment.

7. The Commission clarifies that when a deadline for final payment of a winning bid occurs before an applicant's eligibility for a tribal land bidding credit is determined, the Commission requires the applicant to make full payment of the balance of its winning bid by that deadline. In other words, such an applicant receives no reduction in the balance due by the final payment deadline for any as yet unawarded tribal land bidding credit the applicant is seeking. When an applicant's eligibility for a tribal land bidding credit is established after final payment has been made, the Commission will refund the amount of the credit.

8. As soon as the long-form applications have been submitted, the Commission can calculate the maximum amount of tribal land bidding credits for which auction winners could be eligible assuming full compliance with the certification requirements. However, because the deadline for submitting the required certifications is not until 180 days after the filing deadline for long-form applications, the Commission may not know for 180 days or longer to what extent tribal land bidding credit applicants have actually qualified for such credits. Thus, when an auction that has a reserve price or prices includes licenses covering qualifying tribal lands, the Commission may not know for at least 180 days after the long-form deadline how much of a discount

on the auction's winning bids it will have to allow for tribal land bidding credits. In auctions subject to CSEA, this situation could lead to a potentially substantial post-auction delay in calculating whether total cash proceeds meet the 110 percent revenue requirement. Thus, the Commission's current tribal land bidding credit procedures could prevent the Commission from concluding the auction expeditiously after the cessation of bidding and, should the award of the credits reduce the auction's net winning bids to below the 110 percent revenue requirement, might even lead to cancellation of the auction long after the bidding has ended. Accordingly, the Commission sought comment on which of three possible modifications to the Commission's tribal land bidding credit rules would best enable it to meet the its dual objectives of facilitating CSEA compliance and continuing to encourage service on tribal lands. The Commission also invited commenters to propose other methods of accomplishing these objectives.

9. The only commenter to address this issue supports either of the first two options on which the Commission sought comment. Under the first option, the Commission would award pro rata tribal land bidding credits out of the amount by which net winning bids at the close of bidding exceeded the reserve price(s) applicable to that auction. If this amount were insufficient to pay all of the tribal land bidding credits for which auction winners were eligible, then each eligible tribal land bidding credit applicant would receive a pro rata credit based on the credit the applicant would have received had the auction not been subject to a reserve price.

10. The commenter also likes the second option, pursuant to which the Commission would award tribal land bidding credits on a first-come, first-served basis in auctions subject to CSEA. Winning bidders would, under this alternative, still have to file the certifications for a tribal land bidding credit no later than 180 days after the filing deadline for long-form applications. However, bidding credits up to the full amount determined by the existing formula would be awarded to eligible applicants in the order in which they had filed the certifications for such credits, to the extent that funds remained available. As with the first alternative, the money available for tribal land bidding credits would be limited to the net winning bids exceeding 110 percent of the total estimated relocation costs. The commenter believes that this option, by

allowing early and final determination of outstanding tribal land bidding credit valuations, has an advantage over the pro rata option.

11. Under the third option, the Commission would require applicants to specify on their short-form applications the licenses, if any, for which they intended to seek a tribal land bidding credit, should they win. The Commission would determine whether the CSEA reserve price had been met, insofar as tribal land bidding credits were concerned, by deducting the maximum amount of tribal land bidding credits for which winning bidders that had indicated on their short-form applications an interest in receiving such credits could be eligible. The commenter opines that neither adopting this option nor leaving the rules unchanged would serve the public interest.

12. The Commission will adopt the first option, *i.e.*, the pro rata approach. The time at which winning bidders are able to file their suitably amended long-forms is not completely within their control, given that applicants for tribal land bidding credits must depend on tribal governments to provide them with some of the required certifications. In light of these circumstances, the Commission believes that the pro rata option, rather than the first-come, first-served option, is the preferable method of equitably apportioning tribal land bidding credits among the largest number of qualified applicants, while still allowing a speedy determination of whether the reserve price has been met in auctions of eligible frequencies. The Commission agrees with the commenter that neither the third option, *i.e.*, requiring advance notification on the short-form, nor the status quo would adequately serve the interests of the public.

13. Under the pro rata approach, if the reserve price limits the funds available for tribal land bidding credits to less than the full amount for which auction winners seeking tribal land bidding credits might qualify, each applicant eligible for a tribal land bidding credit will receive a pro rata portion of the available funds. The funds available equal the amount by which winning bids for licenses subject to the reserve price, net of discounts the Commission takes into account when reporting net bids in the public notice closing the auction, exceed the reserve price. For purposes of calculating pro-rata tribal land bidding credits, any repayments of tribal land bidding credit amounts pursuant to 47 CFR 1.2110(f)(3)(C)(viii), as amended, are not funds available for granting other pro-rata tribal land

bidding credits. The ratio of (a) each applicant's pro rata credit to (b) the total funds available for tribal land bidding credits will equal the ratio of (a) the applicant's full credit (the tribal land bidding credit for which that applicant would have qualified absent limitations resulting from the reserve price) to (b) the aggregate maximum amount of tribal land bidding credits for which all applicants might have qualified absent limitations resulting from the reserve price. In order to assure that funds are available for all applicants seeking tribal land bidding credits, the Commission will calculate the aggregate maximum amount of tribal land bidding credits for which all applicants might have qualified by assuming that any applicant seeking a tribal land bidding credit on its long-form application will be eligible for the largest tribal land bidding credit possible for its bid for its license, absent limitations resulting from the reserve price. The Commission will use this ratio to determine the pro rata credit awarded when it grants the license. When making any necessary refunds of already-made license payments, the Commission will continue to follow the usual Commission procedures, as set forth in the procedures public notice for the relevant auction.

14. The Commission may be able to award each applicant proving eligibility for a pro rata tribal land bidding credit a larger amount in the event that any other applicant ultimately proves to be eligible for less than the largest possible tribal land bidding credit. Funds available for an applicant that proves to be eligible for less than the largest possible credit can be used to increase pro rata credits for other applicants. However, the Commission can determine the largest possible pro rata credit for an applicant only after all applications seeking a tribal land bidding credit with respect to licenses covered by a reserve price have been finally resolved. Accordingly, the Commission will recalculate pro rata tribal land bidding credits once all such applications have been finally resolved.

15. Final resolution of all applications occurs only after any review or reconsideration of any such credit has been concluded and no opportunity remains for further review or reconsideration. The Commission notes that it is possible that final resolution of less than all applications seeking tribal land bidding credits may make it apparent that funds available for tribal land bidding credits equal or exceed the full amount for which all other applications seeking tribal land bidding credits might qualify. For example, the

funds available may have been just short of the full amount for which all applicants might qualify. If one applicant withdraws its application for a tribal land bidding credit, the funds available subsequently may exceed the full amount for which all other applicants might qualify, even though it may be some time before all other applications are finally resolved. In light of this possibility, the Commission reserves the power to award full credits when available information makes it clear that funds available exceed the full amount for which all applicants might qualify, even though all applications have not yet been fully resolved. In such circumstances, the Commission will increase the amounts of any previously awarded pro rata credits to make them full credits as well.

16. After all such applications have been finally resolved, the Commission will recalculate the amount of pro rata credits using the aggregate amount of actual full credits—*i.e.*, the tribal land bidding credits for which the applicants would have qualified absent the limitations resulting from the reserve price—rather than the hypothetical maximum aggregate amount for which all applicants might have qualified. In other words, the ratio of (a) each applicant's recalculated pro rata credit to (b) the total funds available for tribal land bidding credits will equal the ratio of (a) the applicant's full credit (the tribal land bidding credit for which that applicant would have qualified absent limitations resulting from the reserve price) to (b) the aggregate amount of the actual full credits. In the event that the recalculated pro rata credit is larger than the initial pro rata credit, the Commission will award the difference. If the second calculation produces a different result from the first, it will reflect the fact that when the amount of any one applicant's portion of the fixed funds available for tribal land bidding credits decreases, the amounts of other applicants' portions should increase. An applicant's portion of the fixed funds might decrease, for example, if it reaches agreements with tribal governments regarding service for less than the full area of tribal land covered by the license. Consequently, that applicant may be eligible for a credit smaller than the largest credit possible.

III. Updating Competitive Bidding Rules and Procedures

A. Tribal Land Bidding Credits in Non-CSEA Auctions

17. The Commission sought comment in the NPRM on whether the Commission should extend the same or

a similar approach to the one the Commission selected for allocating tribal land bidding credits in auctions with a CSEA-mandated reserve price (or prices) to those non-CSEA auctions for which the Commission established a reserve price or prices based on winning bids net of discounts. No commenter addressed this aspect of the issue. The Commission believes that, for the reasons discussed above, the pro rata approach the Commission adopted for auctions with a CSEA-mandated reserve price would, in non-CSEA auctions, best allow both a speedy auction conclusion and an equitable allocation of available tribal land bidding credits among all qualified applicants. Accordingly, the Commission adopts a rule extending the pro rata approach, at the discretion of the Commission, to non-CSEA auctions with reserve prices.

B. Default Rule Clarification

18. In the NPRM, the Commission proposed two clarifications of its default payment rule. The first deals with the proper time to calculate the amount of the default payment when, in a subsequent auction, there is a higher withdrawn bid but no winning bid for a license that corresponds to the defaulted license. The second addresses an unusual situation in which it might not be clear whether net or gross bids should be used in calculating the default payment. Neither proposal prompted any response from commenters.

19. Under 47 CFR 1.2104(g), a winning bidder that defaults or is disqualified after the close of an auction is subject to a deficiency payment (or deficiency portion) plus an additional payment equal to 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulting bidder's bid or the subsequent winning bid, whichever is less. Under existing rules, the deficiency payment for a default or disqualification following a package bidding auction (or in situations where the subsequent winning bid is for a license won as part of a package) is, in most instances, calculated differently from the way in which the deficiency payment is calculated when none of the relevant bids is part of a package bid. However, under rule changes the Commission adopts today, the Commission will use a single method of calculating deficiency payments across all auctions.

20. The deficiency payment is calculated in the same manner as a payment owed following the withdrawal of bid. Section 1.2104(g) of the Commission's rules, 47 CFR

1.2104(g), provides that a bidder that withdraws a bid during the course of an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction. In the event that a bidding credit applies to any of the bids, the bid withdrawal payment equals the difference between either the net withdrawn bid and the subsequent net winning bid or the gross withdrawn bid and the subsequent gross winning bid, whichever difference is less. For purposes of calculating the withdrawal payment amount, net bids do not include any discounts resulting from tribal land bidding credits. No withdrawal payment is assessed for a withdrawn bid if either the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the original withdrawn bid. The additional 3 (or 25) percent payment must be calculated using the same bid amounts and basis (*i.e.*, net or gross bids) as used in calculating the deficiency payment.

21. In the NPRM, the Commission described the anomaly that might result from calculating the additional 3 or 25 percent payment for a bidder that defaults or is disqualified after the close of an auction, when, in a subsequent auction, there is a higher withdrawn bid, but no winning bid, for a license corresponding to the defaulted license. By corresponding license, the Commission generally means a license with the same geographic and spectral components as those of the defaulted license or the license on which a bid was withdrawn. However, when, because of intervening partitioning, disaggregation, or rule change, there is no single license with the same geographic and spectral components as the original license then corresponding license means a license covering any part of the geography or spectrum of the original license. Under these circumstances, an original license may have more than one corresponding license. In some instances, the Commission may designate as a corresponding license a license that shares no spectrum or geography with the original license.

22. A selective reading of 47 CFR 1.2104(g) might indicate that, while the defaulter's deficiency obligation would be calculated as the difference between the defaulter's bid and the higher withdrawn bid in the subsequent auction (thus resulting in no deficiency payment), the defaulter's additional 3 or 25 percent payment obligation, which is based upon the lesser of the defaulter's bid or the subsequent winning bid,

could not be calculated until the corresponding license had been won in a still later auction. However, as the Commission pointed out in the NPRM, such a reading would conflict with the assumption evident in the Commission's default payment rule that the deficiency payment and the additional payment are calculated using the same bids. This assumption is reflected, for example, in the rule's explanation of which basis—net bids or gross bids—should be used in calculating the interim bid withdrawal payment.

23. To prevent the anomaly just described, the Commission proposed to clarify the default payment rule as follows. If, in a subsequent auction, there were a higher withdrawn bid but no winning bid for a license that corresponds to a defaulted license, the additional default payment would be determined as 3 percent (or 25 percent) of the defaulting bidder's bid. In this situation, because the applicable subsequent bid was higher, no deficiency payment would be required. In the event that there were no intervening subsequent withdrawn bids that were higher than the defaulted bid but there were intervening subsequent withdrawn bids that were higher than the subsequent winning bid, under the Commission's proposal the highest such intervening subsequent withdrawn bid would be used to calculate both portions of the final default payment. As noted, this proposal generated no comments. Because the Commission believes that the proposed clarification would simplify and accelerate the calculation of final default payments in applicable situations, the Commission adopts the proposal. As in the calculation of withdrawal payments, net bids for purposes of calculating default deficiency and additional payments do not include discounts resulting from tribal land bidding credits.

24. The Commission also sought comment in the NPRM on a proposal to clarify the additional payment portion of the default payment rule in certain situations in which no deficiency payment is owed. The additional payment is, as noted, normally a percentage of either the defaulting bidder's bid or the subsequent applicable bid, whichever is less, using the same basis—net or gross bids—as used in calculating the deficiency payment. However, when the defaulted bid is subject to a bidding credit and the subsequent applicable bid equals or exceeds the defaulted bid, regardless of which basis—net or gross bids—is used, it is not clear whether the additional payment should be based on the net

defaulted bid or on the gross defaulted bid. Accordingly, the Commission proposed that, in such a situation, the additional payment be 3 (or 25) percent of the net defaulted bid amount, thus basing the default payment on what the defaulter was obligated to pay at the close of bidding. Because the Commission believes that this clarification of the default rule is needed, and as no commenter opposed this aspect of the NPRM, the Commission adopts the proposal. The Commission also extends the clarification adopted here to determinations of the amount of default payments in situations where the initial bid, the subsequent winning bid, or any intervening withdrawn bid is for a license that is part of a package. Under the Commission's proposal, the additional payment would, as always, be calculated using the same basis, *i.e.*, net or gross bids, as used in the calculation of the deficiency payment.

C. Withdrawal and Default Payment Percentages

25. The Commission proposed in the NPRM to replace the current interim withdrawal and additional default payments of 3 percent of the relevant bid with an amount up to 20 percent of the relevant bid, with the precise amount for each auction established in advance of the auction.

i. Background

26. *Withdrawals.* The Commission's rules provide that a bidder that withdraws a bid during an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction(s). If a license for which there has been a withdrawn bid is neither subject to a subsequent higher bid nor won in the same auction, the final withdrawal payment cannot be calculated until a corresponding license is subject to a higher bid or won in a subsequent auction. When that final payment cannot yet be calculated, the bidder responsible for the withdrawn bid is assessed an interim bid withdrawal payment equal to 3 percent of the amount of its withdrawn bid, and this interim payment is applied toward any final bid withdrawal payment that is ultimately assessed.

27. The Commission adopted the withdrawal payment rules in 1994 to discourage insincere bidding, which, whether done for frivolous or strategic purposes, distorts price information generated by the auction process and may reduce the efficiency of the auction. The Commission anticipated

that strategic withdrawals—such as when a bidder attempts to deter a rival from acquiring a license by bidding up the price of the license and then withdrawing—would be particularly damaging to competitive bidding. The Commission added the 3 percent interim bid withdrawal payment to the rules to help ensure that the withdrawal payment could be collected if one ultimately were assessed.

28. *Defaults and Disqualifications.* The Commission's rules provide that if, after the close of an auction, a winning bidder defaults on a down payment or final payment obligation or is disqualified, the bidder is liable for a default payment. This payment consists of a deficiency portion, equal to the difference between the amount of the bidder's bid and the amount of the winning bid the next time a license covering the same spectrum is won in an auction, plus an additional payment equal to 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulter's bid or of the subsequent winning bid, whichever is less. The rule as applied in non-combinatorial auctions has been in effect since 1994. In 1997, the Commission extended to all auctionable services a policy, earlier adopted for broadband personal communications services (PCS), of assessing initial default deposits. In instances when the amount of a default payment cannot yet be determined, the Commission assesses an initial default deposit of between 3 percent and 20 percent of the defaulted bid amount.

29. Requiring an additional payment in the case of post-auction defaults is intended to provide an incentive to bidders wishing to withdraw their bids to do so prior to the close of an auction, because a default or disqualification after an auction is generally more harmful to the auction process than a withdrawal during the auction. The Commission set the additional payment at 3 percent, estimating that amount as the transaction cost of selling a license in the after-market. The Commission posited that if it were to establish a significantly higher additional default payment, bidders in a position to do so would opt to sell unwanted licenses individually in the secondary market rather than default. The Commission determined that such a result would not only be unfair to entities unable to rely on the after-market but also would be a less efficient mechanism for assigning defaulted licenses than would Commission auctions of such licenses.

30. The Commission noted in the NPRM that there have been a

disproportionate number of withdrawals late in the Commission's auctions, indicating that some bidders have been placing and then withdrawing bids primarily to discourage potential or existing market competitors from seeking to acquire licenses. The Commission noted further that bidders continue to default on their payment obligations. Because withdrawals and defaults weaken the integrity of the auctions process and impede the deployment of service to the public and could prove particularly troublesome in auctions with a specific cash proceeds or reserve price requirement, such as auctions subject to CSEA, the Commission proposed to deter such behavior more effectively by increasing to a maximum of 20 percent the current 3 percent limit on interim withdrawal payments and additional default payments.

ii. Discussion

31. The Commission will adopt its proposal in the NPRM to determine the precise amount of interim withdrawal and additional default payments, up to 20 percent of the relevant bid, in advance of the auction. The comments the Commission received support its proposal and provide additional support for the observation in the NPRM that the Commission's rationale for limiting additional default payments to 3 percent no longer holds the same validity that it did eleven years ago when the payment was established. Resale restrictions have since been reduced, and secondary market tools for the redistribution of access to spectrum have been rapidly developing. Consequently, the Commission is less concerned about potential negative effects resulting from a bidder's decision to pay for an unwanted license and resell it rather than default. Moreover, the Commission believes that raising the limit on the size of the payments may persuade bidders to be more realistic in their advance assessment of how much they can afford to pay for licenses. Accordingly, the Commission will modify 47 CFR 1.2104(g) of its rules to raise the current 3 percent limits on the interim withdrawal payment and the additional default payment to 20 percent each. The Commission will, as part of its determination of competitive bidding procedures in advance of each auction, establish the appropriate level, from 3 percent up to a maximum of 20 percent, at which to set each of the two payments. The level will be based on the nature of the service and the inventory of the licenses being offered.

32. Adoption of the 3 to 20 percent range permits the Commission to use

more than one percentage in an auction for either the interim withdrawal payment or the additional default payment, or both. The Commission did not propose to, nor will it, alter the size of the 25 percent additional payment for defaults or disqualifications following combinatorial bidding auctions, as the Commission continues to believe that there is a greater potential for harm resulting from defaults following combinatorial bidding auctions than following other auctions.

D. Apportionment of Bid Amounts

i. Among the Licenses in a Package

33. The Commission proposed in the NPRM to determine a stand-in to use for the bid on an individual license included as part of a package in a combinatorial (or package) bidding auction whenever an individual bid amount was needed for a regulatory calculation. The need for this change arises out of the assumption in the Commission's competitive bidding rules and procedures that the amount of each bid on an individual license will always be known. For example, the Commission's rules for calculating the amount of a small business, new entrant, or tribal land bidding credit, presume that the Commission knows the amount of the winning bid amount on the license or construction permit involved. Similarly, in determining the amount of a default or withdrawal payment, which involves a comparison between the withdrawing or defaulting bidder's bid and a subsequent bid, the Commission needs to know the bid amounts for individual licenses. However, in package bidding, where bidders place single all-or-nothing bids on groups (or packages) of licenses, there will be no identifiable bid amounts on the individual licenses comprising packages of more than one license.

34. Recognizing this problem in the context of default payments, the Commission established a rule, 47 CFR 1.2104(g)(3)(i), for calculating the deficiency portion of default payment obligations in connection with package bidding auctions. This provision accommodates situations in which all relevant licenses won in one or more subsequent auctions correspond to licenses originally made available in the same initial auction. However, it does not allow for situations in which the corresponding licenses are made available in one or more subsequent auctions that include licenses that were not won in the same initial auction.

35. As a more comprehensive solution, the Commission proposed in

the NPRM to specify in advance of each auction that uses a combinatorial bidding design or includes spectrum bidding previously subject to combinatorial bidding a method for apportioning the bid on a package among the individual licenses comprising the package. The Commission proposed further that the apportioned package bid (APB)—the portion of the total bid attributed to an individual license pursuant to the selected method—serve as a substitute for the bid on that license whenever the individual bid amount was needed for one of the Commission's regulatory calculations.

36. There are at least two available methods by which the Commission could apportion package bids to the individual licenses comprising a package. One such method would be to use a MHz-pops ratio, just as is currently done for unjust enrichment calculations involving partitioning or disaggregating licenses. For Auction No. 51, the only auction conducted so far in which package bidding has been available, the Commission decided that MHz-pops would be used to determine a substitute individual bid amount should it be necessary to calculate a tribal land bidding credit for a license won as part of a package. In some cases, however, using a simple MHz-pops ratio to apportion a package bid to its component licenses might not reflect very well the relative values of the licenses in the package. For example, if a heavily encumbered license were packaged with an unencumbered license of the same bandwidth and in the same geographic area, the MHz-pops method would assign the same substitute price (half of the bid on the package) to each license, despite the possible effect on value of the encumbrance differential. An alternative method of calculating substitute prices would take into account information indicating the individual values of the licenses, including the minimum opening bid amounts (which may reflect differences in incumbency, for example) and all of the bids placed in the auction covering those licenses. The Commission has used a mathematical algorithm to calculate price estimates that takes these factors into account. These estimates of the prices of individual licenses covered in a single combinatorial bid are referred to as current price estimates (CPEs). The Commission developed a methodology for determining CPEs as part of the combinatorial bidding procedures established for Auction No. 51, as well as for Auction No. 31, an upcoming auction of licenses in the Upper 700

MHz bands for which the Commission previously announced plans to use package bidding. CPEs were calculated after every round of Auction No. 51 as part of the mathematical optimization process used to determine the winning bids and were also used in determining the minimum acceptable bid amounts for each subsequent round. The same use of CPEs was also announced before the previously scheduled start of Auction No. 31.

37. Although CPEs calculated after the final round of the auction are not needed to determine further minimum acceptable bids, final round CPEs (final price estimates or FPEs) can be interpreted as indicators of the individual value that a license covered by a package bid contributes to the winning bid amount for the package. FPEs reflect all available information about the relative demand for the licenses, since they are calculated using a mathematical algorithm that takes into account all the bids placed in the auction. In addition, the sum of the FPEs for the component licenses of a package is mathematically constrained to equal the winning bid for the package. Consequently, the ratios of these estimates to the package bid amount can be seen as indicators of the relative weights of the different licenses in the market value of the package. FPEs, therefore, may be useful in determining apportioned package bid amounts when an individual price is needed for a regulatory calculation.

38. The sole commenter to address this issue supports both aspects of the Commission's proposal, including affording the Commission the flexibility to use either what the commenter refers to as a proportionate approach (*i.e.*, MHz-pops) or an FPE approach to apportion bids among licenses in a package. The commenter believes, however, that in most cases the market approach would yield a better approximation of "the real cost of subsequent default, a bidding credit or an unjust enrichment obligation."

39. Given this support and the absence of opposition, the Commission adopts the proposal. Under this rule, the Commission will establish a methodology in advance of each auction with combinatorial bidding for determining APBs for licenses that are part of a package and will use the APB in place of the individual bid amount on a license included in a package whenever the amount of an individual bid on that license is needed for any determination required by the Commission's rules or procedures, such as determining the amount of a bidding credit or of a withdrawal or default

payment. Adoption of this rule renders unnecessary 47 CFR 1.2104(g)(3)(i), the existing rule for calculating the deficiency portion of default payment obligations in connection with package bidding auctions. Accordingly, the Commission will eliminate this provision. However, as discussed above, the Commission will retain the substance of current 47 CFR 1.2104(g)(3)(ii), which provides 25 percent as the size of the additional payment for defaults or disqualifications following a combinatorial bidding auction.

ii. Among the Components of a License

40. In the NPRM, the Commission proposed that, prior to auctions involving licenses which, due to a rule change, covered different geographic areas or bandwidths than did corresponding licenses made available at an earlier auction, the Commission specify, as necessary, a method for apportioning the bid on any such reconfigured license among the license's component parts (*i.e.*, portions of the license's service area or bandwidth, or both). Implicit in the Commission's rules for determining the amount of a withdrawal or default payment—determinations that involve a comparison between the withdrawing or defaulting bidder's bid and a subsequent bid—is the assumption that the subsequent bid will be for a license with the same geographic and spectral components as the original license. However, when there have been intervening rule changes involving the relevant spectrum, the second license may not be identical in geography and spectrum to the first. For example, both the geographic and spectral characteristics of what formerly were known as Multipoint Distribution Service (MDS) and the Instructional Television Fixed Service (ITFS) licenses in the 2495–2690 MHz band and now are known as Broadband Radio Service (BRS) and Educational Broadband Service (EBS) licenses were changed last year when, in order to provide greater flexibility and a more functional band plan for licensees, the Commission restructured the rules governing these licenses. The Commission can expect that, as radio technology continues to evolve, there will be other instances where the Commission's band plans are updated. Therefore, for purposes of calculating a withdrawal or default payment—or for any comparison of a bid for one license with a bid for a corresponding license in a subsequent auction—the Commission needs a procedure for apportioning the bid placed on the reconfigured license(s).

41. In discussing its proposal for apportioning individual bids, the Commission noted that using a MHz-pops ratio would be suitable for such an apportionment, as the Commission has successfully employed the ratio to apportion small business bidding credit amounts in order to calculate unjust enrichment payments when the relevant license has been partitioned or disaggregated. However, the Commission proposed to retain the flexibility to select another method of apportionment in the event the Commission identified a method it believed would better suit the particular licenses involved. Further, the Commission proposed to use methods for package bid apportionment and individual license bid apportionment in concert when circumstances warranted. The Commission received no comments on this issue.

42. The Commission adopts its proposal with the following modification. Rather than specify a method for apportioning an individual bid among a license's component parts prior to auctions involving reconfigured licenses, the rule the Commission adopts will allow the Commission to apportion an individual bid amount whenever such an apportionment is necessary under Commission rules or procedures, such as when determining the amount of a withdrawal or a default payment. The Commission recognizes that past bids on original licenses, not just future bids on reconfigured licenses, might need to be apportioned in order to compare bids on the original licenses to bids on one or more other reconfigured licenses, or portions thereof. Accordingly, the Commission will use an apportioned individual bid (AIB) whenever it is necessary to allocate the bid on a license among its subparts, such as when comparing bids on licenses, at least one of which has been reconfigured. Under the Commission's rule, the Commission will retain the discretion to use a MHz-pops ratio or any other suitable method for the apportionment. Should it be necessary to apportion the bid on a license included as part of a package, the Commission will use both package bid apportionment and individual license bid apportionment together.

E. Payment Rules for Broadcast Construction Permits

43. The Commission proposed in the NPRM to adopt for broadcast auctions the final payment procedures in the Commission's Part 1 rules. The Commission's Part 1 rules provide that, unless otherwise specified by public notice, auction winners are required to

pay the balance of their winning bids in a lump sum within ten business days following the release of a public notice establishing the payment deadline. In recent wireless spectrum auctions, the Commission has required each winning bidder to submit the balance of the net amount of its winning bid(s) within ten business days after the deadline for submitting down payments; whereas, the Commission's prior practice was to require final payment ten business days after release of a public notice announcing that license applications were ready to be granted. This procedural change was necessary to limit the potential for post-auction bankruptcies to affect the payment obligations of winning bidders. Nevertheless, specific broadcast auction rules in Parts 73 and 74 provide that winning bidders of broadcast construction permits need not render their final payment until after their long-form applications have been processed, any petitions to deny have been dismissed or denied, and the public notice announcing that broadcast construction permits are ready to be granted has been released. Recognizing the discrepancy between the broadcast auction payment procedure and that for all other auctions, the Commission, in the *Auction No. 37 Procedures Public Notice*, 69 FR 136, July 16, 2004, noted that it would consider future changes to the broadcast rules to conform to the broadcast final payment procedures to the analogous Part 1 requirements.

44. The only commenter on this issue opposes the proposal. It recommends that the Commission instead conform its Part 1 final payment rule to the payment procedures for broadcast auctions or, alternatively, require only a 50 percent down payment, rather than payment in full. The commenter argues that the Part 1 final payment rule is disproportionately burdensome to smaller carriers. The commenter also contends that the proposed rule change is unnecessary, because the Supreme Court's decision in *NextWave*, 537 U.S. 293 (2003), which involved a licensee's failure to pay for a license that had already been awarded, does not apply to a winning bidder's failure to pay prior to license grant.

45. The Commission will adopt the proposal. The Commission expects those entities that plan to participate in an auction to have their financing in place before the start of the auction. Consistent with this expectation, the new rule will apply in all auctions where the start of bidding occurs after the rule's effective date, pursuant to publication in the **Federal Register**. However, the new rule will not apply

with respect to auction where the start of bidding occurs before the rule's effective date. In that case, the former rule regarding final payment will continue to apply. The Commission's goal is to ensure that only serious, financially qualified applicants receive licenses and construction permits so that the provision of service to the public is expedited. As the Commission noted in the NPRM, winning bidders, including small businesses, have been able to comply with the Commission's new final payment procedure without difficulty. The Commission therefore believes that, in broadcast auctions, winning bidders, regardless of size, should be able to comply with this change with similar ease. Further, the Commission believes that both the Commission and the public benefit by having, to the extent possible, a consistent set of auction procedures across services.

46. Moreover, the Commission cannot be certain that the commenter's interpretation of *NextWave* would prevail should the issue be decided in the courts. In *NextWave*, the Supreme Court held that Section 525 of the Bankruptcy Code prevented the Commission from canceling *NextWave*'s licenses solely because of *NextWave*'s failure to make full and timely installment payments of its auction debt pursuant to the Commission's installment payment plan. Although *NextWave* involved a default by a licensee on installment payments, the Supreme Court's construction of Section 525 of the Bankruptcy Code could be argued to apply not just to licensees' installment debt but also to any debt dischargeable in the bankruptcy case, including a license applicant's obligation to pay a winning bid. Under the Commission's auction rules, a winning bidder becomes bound to pay its full winning bid immediately upon the close of the auction, rather than at the time of the license grant. Thus, the Commission is at risk for a bankruptcy filing as soon as the auction closes, and, under a broad reading of Section 525, the Commission could be forced to issue a license to a winning bidder in bankruptcy even though the winning bidder has not (and may not ever) pay its full winning bid. Accordingly, despite the commenter's argument, the Commission believes that it is in the public interest to complete the auction process and award licenses as expeditiously as possible including collecting the proceeds of each auction as soon as possible after the auction closes.

47. The Commission will continue to make final determinations regarding an

applicant's eligibility to hold a permit or license, including eligibility for any bidding credits, such as new entrant bidding credits, when it is ready to grant the permit or license. In the event that an applicant's eligibility changes between the final payment deadline and the date on which the Commission is ready to grant the permit or license, the applicant will be required to make any additional payment prior to the issuance of the permit or license. If an event occurs that results in the loss or diminishment of a bidding credit between the final payment deadline and grant of the permit or license, the applicant must promptly report such event.

F. Consortium Exception for Designated Entities and Entrepreneurs

48. The Commission sought comment in the NPRM on several options for facilitating use of the consortium exception to the designated entity and entrepreneur aggregation rule. Under the consortium exception, when an applicant or licensee is a consortium comprised exclusively of members eligible for small business bidding credits or broadband PCS entrepreneur status, or both, the gross revenues (and, when determining broadband PCS entrepreneur eligibility, the total assets) of the consortium members are not aggregated. In other words, so long as each member of a consortium individually meets the financial caps for small business bidding credits (or broadband PCS entrepreneur status), the consortium will be eligible for such credits (or for closed bidding in auctions of broadband PCS licenses), regardless of whether the gross revenues (or total assets) of all consortium members would, if aggregated, exceed the caps. The consortium exception, originally adopted on a service-by-service basis where capital costs of auction participation were expected to be high, is intended to enable small businesses or entrepreneurs to pool their resources to help them overcome this challenge to capital formation.

49. The consortium exception has been seldom used, perhaps in part because of the lack of clear direction from the Commission as to how members of consortia that win licenses can be formally organized and how they can hold their licenses. When these structural questions are not resolved before licenses are awarded, contractual disputes may arise between members of consortia, particularly if any of the members file for bankruptcy protection. And if consortium members agree after the auction to divide among themselves the licenses they have won without first

having applied for Commission approval, they may be held accountable for unauthorized assignments or transfers of control. Not only would such difficulties impede service to the public and consume Commission resources, they would prove expensive and time consuming for the small businesses involved.

50. The Commission sought comment on three rule changes intended to minimize the likelihood of these problems. First, the Commission asked whether it should adopt a requirement that each member of a consortium file an individual long-form application for its respective, mutually agreed-upon license(s), following an auction in which the consortium has won one or more licenses. Second, the Commission sought comment on whether, in order for two or more consortium members to be licensed together for the same license(s), they should be required to form a legal business entity, such as a corporation, partnership, or limited liability company, after having disclosed this intention on their short-form and long-form applications. Third, the Commission asked for comment on whether such new entities would have to meet the Commission's small business or entrepreneur financial limits and, if not, whether allowing these entities to exceed the limits would be consistent with the Commission's existing designated entity and broadband PCS entrepreneur rules, as well as the Commission's obligations under the Communications Act. The Commission also encouraged commenters to express their views on how these approaches might work in the context of package bidding and to what extent adopting these proposals might encourage wider use of the consortium exception. No commenter opposed these possible changes.

51. The Commission believes that if the consortium exception is to become a useful tool for smaller entities, while remaining faithful to the objectives and requirements of section 309(j) of the Communications Act the Commission should implement all of the changes the Commission discussed in the NPRM. Accordingly, the Commission adopts the following modifications to the consortium exception. First, the Commission will require consortium members to file individual long-form applications for their respective, mutually agreed-upon license(s) following an auction in which the consortium has won one or more licenses. Second, in order for two or more consortium members to be licensed together for the same license(s) (or disaggregated or partitioned portions

thereof) the Commission will require them first to form a legal business entity, such as a corporation, partnership, or limited liability company. Third, the Commission will require any such entity to comply with the applicable small business or entrepreneur financial limits. A newly formed legal entity comprising two or more consortium members that do not qualify for as large a size-based bidding credit as that claimed by the consortium on its short-form application will be awarded a bidding credit, if at all, based on the entity's eligibility for such credit at the long-form filing deadline. A license won by the consortium in broadband PCS closed bidding will be granted only to a legal entity whose gross revenues and total assets do not, at the long-form filing deadline, exceed the financial limits for broadband PCS closed bidding.

52. The dissolution of a consortium that applied to participate in an auction into its constituent members or groups of members for purposes of filing long-form applications will not constitute a change in control of the applicant for purposes of 47 CFR 1.927, 1.929, or 1.2105. Because the Commission's application system requires that all long-form license applications for licenses won in an auction use the same FCC Registration Number (FRN) as the auction applicant/winning bidder, the members filing separate long-form applications will continue to use the consortium's FRN on their long-form applications. However, within ten business days after release of the public notice announcing grant of a long-form application, that licensee must update its filings in the Commission's Universal Licensing System (ULS) to substitute its individual FRN for that of the consortium. In addition, ULS accepts applications only for whole licenses won in an auction. Accordingly, if a consortium plans to partition or disaggregate a license among members after the auction, one member of the consortium will have to file the applicable long-form application and append the relevant partitioning or disaggregation agreement to the application. After the long-form application has been granted, members will have to file, pursuant to the Commission's existing rules, assignment applications to partition or disaggregate the license pursuant to the terms of the agreement attached to the original license application.

53. The Commission believes that these modifications will invest the consortium exception with greater transparency, thereby promoting clearer planning by smaller entities, while

continuing to allow them to enhance their competitiveness with efficiencies of scale and strategy. Moreover, ensuring that licenses are granted only to consortium members that comprise legal business entities facilitates enforcement of the Communications Act and the Commission's policies and rules, particularly in the event of a disagreement among consortium members. For this reason, the Commission takes this opportunity to remove any previous ambiguity in its rules by clarifying that the consortium exception (and, indeed, the consortium structure) is available only to short-form applicants seeking a size-based benefit for auction participation, and not to prospective lessees, assignees, or transferees.

IV. Procedural Matters

54. As required by the Regulatory Flexibility Act, 5 U.S.C. 604, the Commission has prepared a Final Regulatory Flexibility Analysis, set forth in an appendix C to the *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures Report and Order*.

55. *The Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures Report and Order* contains no new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Pub. L. 104-13.

56. The Commission will include a copy of the *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures Report and Order* in a report it will send to Congress and the Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

V. Final Regulatory Flexibility Analysis

57. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Notice of Proposed Rule Making (NPRM)* in WT Docket No. 05-211, which, in combination with a *Declaratory Ruling*, began this proceeding. The Commission sought written public comment in the *NPRM* on possible changes to its competitive bidding rules, as well as on the IRFA. The Commission received three comments, one reply comment, and two *ex parte* comments on the *NPRM*, none of which addressed the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

58. This *Report and Order* adopts modifications to existing Commission rules for the purposes of implementing the recently enacted Commercial Spectrum Enhancement Act (CSEA). CSEA establishes a mechanism to use spectrum auction proceeds to reimburse federal agencies operating on certain frequencies that have been reallocated from federal to non-federal use for the cost of relocating their operations. The *Report and Order* also adopts a number of changes to the Commission's competitive bidding rules that are necessary, apart from CSEA, to enhance the effectiveness of the Commission's auctions program.

59. *Reserve Price Rule*. CSEA requires the total cash proceeds from any auction of eligible frequencies to equal at least 110 percent of the total estimated relocation costs provided to the Commission by National Telecommunications and Information Administration (NTIA). To implement this requirement, CSEA directs the Commission to revise its reserve price regulations adopted pursuant to Section 309(j)(4)(F) of the Communications Act. Accordingly, the Commission has adopted a proposal, which received no comment, to add a requirement to its existing reserve price rule (47 CFR 1.2104(c)) such that, for any auction of eligible frequencies requiring the recovery of estimated relocation costs under CSEA, the Commission will establish a reserve price (or prices) that ensures that the total cash proceeds attributable to such spectrum will equal at least 110 percent of the total estimated relocation costs provided to the Commission by NTIA.

60. *Tribal land bidding credit rule for CSEA auctions*. In an effort to encourage carriers to provide telecommunications services to tribal lands with low historical telephone service penetration rates, the Commission makes tribal land bidding credits available to auction winners that serve qualifying tribal lands. Under the Commission's current rules, in auctions that include spectrum covering qualifying tribal lands, the Commission may not know for at least 180 days after the long-form application deadline how much of a discount on the auction's winning bids it will have to allow for tribal land bidding credits. In auctions subject to CSEA, this timing could lead to substantial post-auction delay in calculating whether total cash proceeds meet the 110 percent revenue requirement. Accordingly, the Commission sought comments on three alternative methods of ensuring that it would be able to promptly calculate total cash proceeds while at the same time preserving the availability of tribal

land bidding credits in auctions subject to CSEA. The only commenter to address these alternatives approved of two of them. The Commission has adopted one of these two alternatives, the pro rata option. Under this rule, the Commission will award tribal land bidding credits out of the amount by which net winning bids at the close of bidding exceed the reserve price(s) applicable to that auction. If this amount is insufficient to pay all of the tribal land bidding credits for which auction winners are eligible, then each eligible tribal land bidding credit applicant will receive a pro rata credit based on the credit the applicant would have received had the auction not been subject to a reserve price.

61. *Tribal land bidding credit rule for non-CSEA auctions*. The Commission sought comment in the *NPRM* on whether to extend the same or a similar approach as the one it selected for allocating tribal land bidding credits to auctions with a CSEA-mandated reserve price (or prices) to those non-CSEA auctions for which it established a reserve price or prices based on winning bids net of discounts. No commenter addressed this aspect of the issue. Believing that the pro rata approach the Commission had chosen for auctions with a CSEA-mandated reserve price would, in non-CSEA auctions, best allow both a speedy auction conclusion and an equitable allocation of available tribal land bidding credits among all qualified applicants, the Commission adopted a rule to extend, at Commission discretion, the pro rata approach to non-CSEA auctions with reserve prices.

62. *Default payment rule clarification*. Under 47 CFR 1.2104(g), a winning bidder that defaults or is disqualified after the close of an auction is subject to a default payment consisting of two parts—a deficiency payment and an additional payment. The deficiency payment is equal to the payment required for a withdrawn bid, i.e., the difference between the amount of the defaulted (or withdrawn) bid and the amount of a lower winning bid in the same or a subsequent auction. In the event that a bidding credit applies to any of the bids, the deficiency payment equals the difference between either the net defaulted bid and the subsequent net winning bid or the gross defaulted bid and the subsequent gross winning bid, whichever difference is less. The additional payment is equal to 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulting bidder's bid or the subsequent winning bid, whichever is less.

63. No deficiency payment is assessed when either the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the original defaulted bid. It is unclear from the existing rule whether, if there is a subsequent withdrawn bid equal to or exceeding the defaulted bid, the Commission must wait until there is a subsequent winning bid before calculating the additional payment. To clarify the rule, the Commission proposed that when, in a subsequent auction, there was a higher withdrawn bid on a license that corresponded to a defaulted license, the additional default payment would be determined as 3 percent (or 25 percent) of the defaulting bidder's bid. The Commission also proposed a further clarification of the additional payment rule for certain situations in which no deficiency payment is owed. The existing rule leaves unclear whether the additional payment should be based on the net defaulted bid or on the gross defaulted bid. Pursuant to the Commission's proposal, the additional payment in such a situation would be 3 (or 25) percent of the net defaulted bid amount. Having received no objections to these clarifications, the Commission adopted its proposals.

64. *Interim withdrawal and additional default payment rules.* When a license for which there has been a withdrawn bid is neither subject to a subsequent higher bid nor won in the same auction, the final withdrawal payment cannot be calculated until a corresponding license is either subject to a higher bid or won in a subsequent auction. In such a case, under the Commission's existing rule, the bidder responsible for the withdrawn bid is assessed an interim bid withdrawal payment equal to 3 percent of the amount of its withdrawn bid, and this interim payment is applied toward any final bid withdrawal payment that is ultimately assessed. As noted in the previous paragraph, a winning bidder that defaults or is disqualified after the close of an auction is subject to a default payment consisting of a deficiency payment and an additional payment. Currently, the additional payment is calculated as 3 percent (or, in the case of defaults or disqualifications after the close of a package bidding auction, 25 percent) of the defaulting bidder's bid or the subsequent winning bid, whichever is less, except that no deficiency payment is assessed when either the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the original defaulted bid.

65. In an effort to deter improper withdrawals and defaults, both of which

pose an ongoing threat to the integrity of the auctions process, the Commission proposed to set the upper limits on both the interim withdrawal payment and the additional default payment at 20 percent, with the specific percentage to be established by the Commission in advance of each auction. The two commenters that spoke to this issue, both endorsed the proposal. The Commission adopted the proposal, noting that the 3 to 20 percent range would allow it to use more than one percentage in an auction for either the interim withdrawal payment or the additional default payment, or both. The Commission did not alter the size of the 25 percent additional payment for defaults or disqualifications following combinatorial bidding auctions.

66. *Package bid and license apportionment.* In combinatorial (package) bidding, bidders may place single all-or-nothing bids on groups (or packages) of licenses. Thus, there are no identifiable bid amounts on the individual licenses composing packages of more than one license. Similarly, when the Commission reconfigures licenses, with respect to either geographic or spectral dimensions, following an initial auction, it may not be appropriate to compare bids on licenses before the reconfiguration to post-reconfiguration bids on corresponding licenses. However, there are several situations in which an individual bid amount is needed for one of the Commission's regulatory calculations, such as calculating a small business bidding credit, an unjust enrichment payment obligation related to such a credit, a tribal land bidding credit limit, or a withdrawal or default payment obligation. In some situations such as when determining withdrawal or default payment obligations, bids in different auctions must be compared. Accordingly, the Commission proposed to specify a method for apportioning bids among the individual licenses composing a package and/or among a license's component parts in advance of each auction that (a) used a combinatorial bidding design, (b) included spectrum previously subject to a combinatorial auction, or (c) included licenses that had been reconfigured following an initial auction.

67. The only commenter on this issue, fully supported the proposals, and the Commission adopted them with the following modification. Because any license, not just a reconfigured license, might at some point need to be apportioned in order to compare it to one or more other licenses or license components, the Commission decided that it would apportion a license among

its component parts whenever it was necessary to compare bids on corresponding yet non-identical licenses.

68. *Broadcast construction permit rules.* The Commission's Part 1 competitive bidding rules provide that, unless otherwise specified by public notice, auction winners must pay the balance of their winning bids in a lump sum within ten business days following the release of a public notice establishing the payment deadline. In recent wireless spectrum auctions, winning bidders have been required to submit the balance of the net amount of their winning bids within ten business days after the deadline for submitting down payments. This procedure helps guard against defaults and bankruptcy filings that may tie up the availability of the defaulted licenses. Specific Part 73 and 74 rules, however, provide that winning bidders in broadcast service auctions must render their final payment for construction permits won through competitive bidding only after their long-form applications have been processed, any petitions to deny have been dismissed or denied, and the public notice announcing that broadcast construction permits are ready to be granted has been released. In order to provide consistency throughout the Commission's competitive bidding rules and help to ensure that only sincere, financially qualified applicants participate in competitive bidding, the Commission proposed to adopt for broadcast auctions the final payment procedures in its Part 1 competitive bidding rules.

69. The commenter discounting the Commission's concerns about the potential for bankruptcy filings to interfere with payment obligations, opposed the proposal. The commenter recommended that the Commission instead conform its Part 1 final payment rule to the payment procedures for broadcast auctions or, alternatively, require only "a 50 percent down payment, rather than payment in full." The commenter argued that the Part 1 final payment rule is disproportionately burdensome to smaller carriers. Disagreeing with the commenter, the Commission adopted the rule as proposed. With particular regard to the effect on smaller carriers, the Commission noted, as it had in the *NPRM*, that winning bidders, including small businesses, have been able to comply with the Commission's new final payment procedure without difficulty. Accordingly, the Commission believes that, in broadcast auctions, winning bidders, regardless of size,

should be able to comply with this change with similar ease.

70. *Consortium exception to the designated entity and entrepreneur aggregation rule.* For purposes of determining whether an applicant or licensee is eligible for small business or broadband personal communications services ("PCS") entrepreneur status, the Commission attributes to the applicant the gross revenues (and, when determining entrepreneur eligibility, the total assets) of the applicant's affiliates, its controlling interests, and the affiliates of its controlling interests, and aggregates these amounts with the applicant's own gross revenues (and total assets). However, under an exception to this aggregation rule, when an applicant or licensee is a consortium comprised exclusively of members eligible for small business bidding credits or broadband PCS entrepreneur status, or both, the gross revenues (and total assets) of the consortium members are not aggregated. The consortium exception has been seldom used, perhaps because of the absence of clear direction from the Commission as to how consortium members should be formally organized and how (and when) members should allocate and own the licenses they win. In order to provide additional guidance to those interested in taking advantage of the consortium exception and to reduce the likelihood of complications resulting from the exception's use, the Commission sought comment on three possible policy options for improving the pre- and post-auction procedures governing the exception. These options included, first, requiring each member of a consortium to file an individual long-form application for its respective, mutually agreed-upon license(s); second, requiring two or more consortium members seeking to be licensed together to form a legal business entity, such as a corporation, partnership, or limited liability company; and, third, not considering such a newly formed legal business entity a consortium for purposes of evaluating its eligibility for small business or entrepreneur status at the long-form application stage. There was no opposition to these options. Believing that they will promote use of the consortium exception, the Commission adopted all three options. The Commission also clarified that the consortium exception, and, indeed, the consortium structure, is available only to short-form applicants seeking a size-based benefit for auction participation and not to prospective lessees, assignees, or transferees.

71. No comments were filed in response to the IRFA; however,

comments addressing small business concerns with regard to changes in the payment rules for broadcast auctions and changes in the consortium exception to the designated entity and entrepreneur aggregation rule were filed in response to the *NPRM*. The commenter opposed the proposal to conform the Part 73 and Part 74 payment rules applicable to broadcast construction permits won at auction to the final payment procedures in Part 1 of the Commission's rules. The commenter argued that the Part 1 final payment rule, which permits the Commission to require full license payment before being prepared to grant the licenses, is disproportionately burdensome to smaller carriers. Moreover, winning bidders, including small businesses, have been able to comply with the Part 1 final payment procedure without difficulty. The Commission explained that it was in the public interest to require final payments soon after the close of an auction in that such a rule allowed the Commission to limit the risk that bankruptcy filings might interfere with payment obligations and well as with the provision of service to the public.

72. With regard to modifying the consortium exception, a commenter warned that such changes would not eliminate the adverse consequences of package bidding for small bidders, and another commenter, in reply comments, agreed. Neither of the commenters, however, opposed adoption of the rule changes.

73. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term small entity as having the same meaning as the terms small organization, small business, and small governmental jurisdiction. The term small business has the same meaning as the term small business concern under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

74. A small organization is generally any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Nationwide, as of 2002, there were approximately 1.6 million small organizations. The term small governmental jurisdiction is defined as governments of cities, towns, townships, villages, school districts, or

special districts, with a population of less than fifty thousand. As of 1997, there were approximately 87,453 governmental jurisdictions in the United States. This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, the Commission estimates the number of small governmental jurisdictions overall to be 84,098 or fewer. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.

75. The changes and additions to the Commission's Part 1 rules adopted in the Report and Order are of general applicability to all services, applying to all entities of any size that apply to participate in Commission auctions. The changes adopted in the *Report and Order* to parts 73 and 74 of the Commission's rules would apply to all entities of any size that win broadcast construction permits in future competitive bidding. Accordingly, this FRFA provides a general analysis of the impact of the proposals on small businesses rather than a service-by-service analysis. The number of entities that may apply to participate in future Commission auctions is unknown. The number of small businesses that have participated in prior auctions has varied. In all of our auctions held to date, 1973 out of a total of 3303 qualified bidders either have claimed eligibility for small business bidding credits or have self-reported their status as small businesses as that term has been defined under rules adopted by the Commission for specific services. In addition, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

76. Modifying the tribal land bidding credit rule adopted in the *Report and Order* is the least burdensome of all methods contemplated for complying with the CSEA revenue requirement or implementing a non-CSEA reserve price while permitting both a speedy auction conclusion and an equitable allocation of available tribal land bidding credits among all qualified applicants.

77. The increase in the limits on the interim withdrawal payment and the additional default payment from 3

percent to 20 percent each will, to the extent that the respective payment has been set at more than 3 percent, increase the financial burden on entities of any size that withdraw a bid or default on a payment obligation. However, by refraining from withdrawing bids and defaulting on payment obligations, entities will be able to avoid entirely such increased financial burden.

78. Adopting for broadcast auctions the final payment procedures of the Commission's Part 1 competitive bidding rules might require future winners of broadcast construction permits, both large and small, to submit their final payments for such permits sooner than would have been required in the absence of the proposed rule changes. License winners of all sizes in all recent non-broadcast auctions have, however, been able to comply with the Part 1 procedure without difficulty.

79. Requiring each member of a consortium to file an individual long-form application for its respective, mutually agreed-upon license(s) or requiring two or more consortium members seeking to be licensed together to form a legal business entity might increase the reporting requirements and/or regulatory compliance burdens on auction applicants using the consortium exception, all of which will be small businesses or broadband PCS entrepreneurs. However, adopting these requirements clarifies parties' obligations without necessarily increasing them and is expected to increase use of the consortium exception, thus increasing the availability of small business bidding credits and entrepreneur eligibility.

80. None of the other rules adopted in the *Report and Order* will alter reporting, recordkeeping, or other compliance requirements.

81. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule or any part thereof for small entities. The Commission has considered the economic impact on small entities of the rule changes adopted in the *Report and Order* and has taken steps to minimize the burdens on small entities.

82. The Commission sought comment on several options for modifying its tribal land bidding credit rule in order to determine which of the options would best ensure that the Commission would be able to comply with CSEA's reserve price requirement while at the same time preserving the availability of tribal land bidding credits in auctions subject to CSEA. The Commission selected the pro rata option, described above, as the best method of equitably apportioning tribal land bidding credits among the largest number of qualified applicants, while still allowing a speedy determination of whether the CSEA reserve price had been met in auctions of eligible frequencies.

83. Adoption of the increased limits for interim withdrawal payments and additional default payments is expected to benefit small entities more than it is expected to burden them. For example, the rule change providing the Commission with the option of increasing the size of the interim withdrawal payment is intended to discourage strategic withdrawals. Such bid withdrawals can have a significant adverse effect on the competitiveness of small entities in the auctions process. Moreover, to the extent that the increase in the additional default payment encourages bidders to realistically assess in advance their ability to pay for their bids, a larger payment requirement will help deter bidders from placing bids they cannot afford.

84. The Commission believes that adopting the modifications to its payment rules for broadcast construction permits to conform to them to the rules for non-broadcast auctions will provide consistency throughout its competitive bidding rules and promote its objective that only sincere, financially qualified applicants participate in competitive bidding. The Commission further believes that providing greater certainty to all winning bidders regarding when final payment is due will also benefit them as they compete with other sincere bidders that have also secured the financing necessary to participate in an auction and pay for their licenses. The Commission has observed that in wireless spectrum auctions, winning bidders, including small businesses, have been able to comply with the Commission's new final payment procedure without difficulty, and it therefore surmises that winning bidders of all sizes in broadcast auctions will be able to comply with this change with similar ease.

85. The Commission has adopted modifications and clarifications to the consortium exception to the small

business and entrepreneur aggregation rule with the goal of promoting wider use of the exception and thus of increasing the competitive bidding opportunities available to small entities facing capital formation constraints.

86. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the SBREFA. In addition, the Commission will send a copy of the *R&O*, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *R&O* and the FRFA (or summaries thereof) will also be published in the **Federal Register**.

VI. Ordering Clauses

87. Accordingly, *it is ordered* that, pursuant to sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 309(j), the *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures Report and Order* is hereby ADOPTED, and 47 CFR 1.2103, 1.2104, 73.3571, 73.3573, 73.5003, 73.5006, 74.1233 of the Commission's rules, 47 CFR 1.2103, 1.2104, 73.3571, 73.3573, 73.5003, 73.5006, 74.1233, are amended as set forth in Appendix A of the *Report and Order*, effective 60 days after publication in the **Federal Register**.

88. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

89. *It is further ordered* that, pursuant to 47 U.S.C. 155(c) and 47 CFR 0.131(c) and 0.331, the Chief of the Wireless Telecommunications Bureau *is granted delegated authority* to prescribe and set forth procedures for the implementation of the provisions adopted herein, including the authority to seek comment on and set forth mechanisms relating to the day-to-day conduct of specific auctions.

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Auctions, Licensing, Telecommunications.

47 CFR Parts 73 and 74

Auctions, Licensing, Radio, Television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the FCC amends parts 1, 73, and 74 of Title 47 of the Code of Federal Regulations to read as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, and 303(r).

■ 2. Amend § 1.2103 by adding new paragraphs (b)(1) and (b)(2) to read as follows:

§ 1.2103 Competitive bidding design options.

* * * * *

(b) * * *

(1) *Apportioned package bid.* The apportioned package bid on a license is an estimate of the price of an individual license included in a package of licenses in an auction with combinatorial (package) bidding. Apportioned package bids shall be determined by the Commission according to a methodology it establishes in advance of each auction with combinatorial bidding.

(2) *Substitute for bid amount.* The apportioned package bid on a license included in a package shall be used in place of the amount of an individual bid on that license when the bid amount is needed to determine the size of a designated entity bidding credit (see § 1.2110(f)(1) and (f)(2)), a new entrant bidding credit (see § 73.5007), a bid withdrawal or default payment obligation (see § 1.2104(g)), a tribal land bidding credit limit (see § 1.2110(f)(3)(iv)), or a size-based bidding credit unjust enrichment payment obligation (see § 1.2111(d), (e)(2) and (e)(3)), or for any other determination required by the Commission's rules or procedures.

* * * * *

■ 3. Amend § 1.2104 by revising paragraphs (c), (g)(1), and (g)(2), removing paragraph (g)(3), and adding paragraph (j) to read as follows:

§ 1.2104 Competitive bidding mechanisms.

* * * * *

(c) *Reserve Price.* The Commission may establish a reserve price or prices, either disclosed or undisclosed, below

which a license or licenses subject to auction will not be awarded. For any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2)) requiring the recovery of estimated relocation costs, the Commission will establish a reserve price or prices pursuant to which the total cash proceeds from any auction of eligible frequencies shall equal at least 110 percent of the total estimated relocation costs provided to the Commission by the National Telecommunications and Information Administration pursuant to section 113(g)(4) of such Act (47 U.S.C. 923(g)(4)).

* * * * *

(g) * * *

(1) *Bid withdrawal prior to close of auction.* A bidder that withdraws a bid during the course of an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction(s). In the event that a bidding credit applies to any of the bids, the bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less. No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids equals or exceeds that withdrawn bid. The withdrawal payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission. In the case of multiple bid withdrawals on a single license, the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn in the same or subsequent auction(s). In the event that a license for which there have been withdrawn bids subject to withdrawal payments is not won in the same auction, those bidders for which a final withdrawal payment cannot be calculated will be assessed an interim bid withdrawal payment of between 3 and 20 percent of their withdrawn bids, according to a percentage (or percentages) established by the Commission in advance of the auction. The interim bid withdrawal payment will be applied toward any final bid withdrawal payment that will be assessed at the close of a subsequent auction of the corresponding license.

Example 1 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$90 and withdraws. In that same auction, Bidder C wins the license at a bid of \$95. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100–\$95). Bidder B owes nothing.

Example 2 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$95 and withdraws. In that same auction, Bidder C wins the license at a bid of \$90. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100–\$95). Bidder B owes \$5 (\$95–\$90).

Example 3 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, in that same auction, Bidder B places a bid of \$90 and withdraws. In a subsequent auction, Bidder C places a bid of \$95 and withdraws. Bidder D wins the license in that auction at a bid of \$80. Assuming that the Commission established an interim bid withdrawal payment of 3 percent in advance of the first auction, withdrawal payments are assessed as follows: At the end of the first auction, Bidder A and Bidder B are each assessed an interim withdrawal payment equal to 3 percent of their withdrawn bids pending Commission assessment of a final withdrawal payment (Bidder A would owe 3% of \$100, or \$3, and Bidder B would owe 3% of \$90, or \$2.70). At the end of the second auction, Bidder A would owe \$5 (\$100–\$95) less the \$3 interim withdrawal payment for a total of \$2. Because Bidder C placed a subsequent bid that was higher than Bidder B's \$90 bid, Bidder B would owe nothing. Bidder C would owe \$15 (\$95–\$80).

(2) *Default or disqualification after close of auction.* A bidder assumes a binding obligation to pay its full bid amount upon acceptance of the winning bid at the close of an auction. If a bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to a default payment consisting of a deficiency payment, described in § 1.2104(g)(2)(i), and an additional payment, described in § 1.2104(g)(2)(ii) and (g)(2)(iii). The default payment will be deducted from any upfront payments or down payments that the defaulting bidder has deposited with the Commission.

(i) *Deficiency payment.* The deficiency payment will equal the difference between the amount of the defaulted bid and the amount of the winning bid in a subsequent auction, so long as there have been no intervening withdrawn bids that equal or exceed the defaulted bid or the subsequent winning bid. If the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the defaulted bid, no deficiency payment will be assessed. If there have been intervening subsequent withdrawn bids that are lower than the defaulted bid and higher than the subsequent winning bid, but no intervening withdrawn bids that equal or exceed the defaulted bid, the

deficiency payment will equal the difference between the amount of the defaulted bid and the amount of the highest intervening subsequent withdrawn bid. In the event that a bidding credit applies to any of the applicable bids, the deficiency payment will be based solely on net bids or solely on gross bids, whichever results in a lower payment.

(ii) *Additional payment—applicable percentage.* When the default or disqualification follows an auction without combinatorial bidding, the additional payment will equal between 3 and 20 percent of the applicable bid, according to a percentage (or percentages) established by the Commission in advance of the auction. When the default or disqualification follows an auction with combinatorial bidding, the additional payment will equal 25 percent of the applicable bid.

(iii) *Additional payment—applicable bid.* When no deficiency payment is assessed, the applicable bid will be the net amount of the defaulted bid. When a deficiency payment is assessed, the applicable bid will be the subsequent winning bid, using the same basis—i.e., net or gross—as was used in calculating the deficiency payment.

* * * * *

(j) *Bid apportionment.* The Commission may specify a method for apportioning a bid among portions of the license (i.e., portions of the license's service area or bandwidth, or both) when necessary to compare a bid on the original license or portions thereof with a bid on a corresponding reconfigured license for purposes of the Commission's rules or procedures, such as to calculate a bid withdrawal or default payment obligation in connection with the bid.

■ 4. Amend § 1.2107 by adding paragraph (g) to read as follows:

§ 1.2107 Submission of down payment and filing of long-form applications.

* * * * *

(g)(1)(i) A consortium participating in competitive bidding pursuant to § 1.2110(b)(3)(i) that is a winning bidder may not apply as a consortium for licenses covered by the winning bids. Individual members of the consortium or new legal entities comprising individual consortium members may apply for the licenses covered by the winning bids of the consortium. An individual member of the consortium or a new legal entity comprising two or more individual consortium members applying for a license pursuant to this provision shall be the applicant for purposes of all related requirements and filings, such as filing FCC Form 602.

However, the members filing separate long-form applications shall all use the consortium's FCC Registration Number ("FRN") on their long-form applications. An application by an individual consortium member or a new legal entity comprising two or more individual consortium members for a license covered by the winning bids of the consortium shall not constitute a major modification of the application or a change in control of the applicant for purposes of Commission rules governing the application.

(ii) Within ten business days after release of the public notice announcing grant of a long-form application, that licensee must update its filings in the Commission's Universal Licensing System ("ULS") to substitute its individual FRN for that of the consortium.

(2) The continuing eligibility for size-based benefits, such as size-based bidding credits or set-aside licenses, of a newly formed legal entity comprising two or more individual consortium members will be based on the size of such newly formed entity as of the filing of its long-form application.

(3) Members of a consortium intending to partition or disaggregate license(s) among individual members or new legal entities comprising two or more individual consortium members must select one member or one new legal entity comprising two or more individual consortium members to apply for the license(s). The applicant must include in its applications, as part of the explanation of terms and conditions provided pursuant to § 1.2107(d), the agreement of the applicable parties to partition or disaggregate the relevant license(s). Upon grant of the long-form application for that license, the licensee must then apply to partition or disaggregate the license pursuant to those terms and conditions.

■ 5. Amend § 1.2110 by revising paragraphs (b)(3)(i), (f)(2) introductory text, (f)(3)(ii)(B), and (f)(3)(ii)(C), redesignating paragraphs (f)(3)(v) through (f)(3)(vii) as paragraphs (f)(3)(vi) through (f)(3)(viii), adding a new paragraph (f)(3)(v), and by revising newly designated paragraphs (f)(3)(vi) and (f)(3)(viii) to read as follows:

§ 1.2110 Designated entities.

* * * * *

- (b) * * *
- (3) * * *

(i) *Consortium.* Where an applicant to participate in bidding for Commission licenses or permits is a consortium either of entities eligible for size-based bidding credits an/or for closed bidding

based on gross revenues and/or total assets, the gross revenues and/or total assets of each consortium member shall not be aggregated. Each consortium member must constitute a separate and distinct legal entity to qualify for this exception. Consortia that are winning bidders using this exception must comply with the requirements of § 1.2107(g) of this chapter as a condition of license grant.

* * * * *

- (f) * * *

(2) *Size of bidding credits.* A winning bidder that qualifies as a small business may use the following bidding credits corresponding to its respective average gross revenues for the preceding 3 years:

* * * * *

- (3) * * *
- (ii) * * *

(B) In addition, within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and file a certification that it will comply with the construction requirements set forth in paragraph (f)(3)(vii) of this section and consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land.

(C) If the winning bidder fails to submit the required certifications within the 180-day period, the bidding credit will not be awarded, and the winning bidder must pay any outstanding balance on its winning bid amount.

* * * * *

(v) *Bidding credit limit in auctions subject to specified reserve price(s).* In any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2) with reserve price(s) and in any auction with reserve price(s) in which the Commission specifies that this provision shall apply, the aggregate amount available to be awarded as bidding credits for serving qualifying tribal land with respect to all licenses subject to a reserve price shall not exceed the amount by which winning bids for those licenses net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the applicable reserve price. If the total amount that might be awarded as tribal land bidding credits based on applications for all licenses subject to the reserve price exceeds the aggregate amount available to be awarded, the Commission will award eligible applicants a pro rata tribal land bidding credit. The Commission may determine at any time that the total amount that

might be awarded as tribal land bidding credits is less than the aggregate amount available to be awarded and grant full tribal land bidding credits to relevant applicants, including any that previously received pro rata tribal land bidding credits. To determine the amount of an applicant's pro rata tribal land bidding credit, the Commission will multiply the full amount of the tribal land bidding credit for which the applicant would be eligible excepting this limitation ((f)(3)(v)) of this section by a fraction, consisting of a numerator in the amount by which winning bids for licenses subject to the reserve price net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the reserve price and a denominator in the amount of the aggregate maximum tribal land bidding credits for which applicants for such licenses might have qualified excepting this limitation ((f)(3)(v)) of this section. When determining the aggregate maximum tribal land bidding credits for which applicants for such licenses might have qualified, the Commission shall assume that any applicant seeking a tribal land bidding credit on its long-form application will be eligible for the largest tribal land bidding credit possible for its bid for its license excepting this limitation ((f)(3)(v)) of this section. After all applications seeking a tribal land bidding credit with respect to licenses covered by a reserve price have been finally resolved, the Commission will recalculate the pro rata credit. For these purposes, final determination of a credit occurs only after any review or reconsideration of the award of such credit has been concluded and no opportunity remains for further review or reconsideration. To recalculate an applicant's pro rata tribal land bidding credit, the Commission will multiply the full amount of the tribal land bidding credit for which the applicant would be eligible excepting this limitation ((f)(3)(v)) of this section by a fraction, consisting of a numerator in the amount by which winning bids for licenses subject to the reserve price net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the reserve price and a denominator in the amount of the aggregate amount of tribal land bidding credits for which all applicants for such licenses would have qualified excepting this limitation ((f)(3)(v)) of this section.

(vi) *Application of credit.* A pending request for a bidding credit for serving qualifying tribal land has no effect on a bidder's obligations to make any auction

payments, including down and final payments on winning bids, prior to award of the bidding credit by the Commission. Tribal land bidding credits will be calculated and awarded prior to license grant. If the Commission grants an applicant a pro rata tribal land bidding credit prior to license grant, as provided by paragraph (f)(3)(v) of this section, the Commission shall recalculate the applicant's pro rata tribal land bidding credit after all applications seeking tribal land biddings for licenses subject to the same reserve price have been finally resolved. If a recalculated tribal land bidding credit is larger than the previously awarded pro rata tribal land bidding credit, the Commission will award the difference.

(viii) *Performance penalties.* If a recipient of a bidding credit under this section fails to provide the post-construction certification required by paragraph (f)(3)(vii) of this section, then it shall repay the bidding credit amount in its entirety, plus interest. The interest will be based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted. Such payment shall be made within thirty (30) days of the third anniversary of the initial grant of its license. Failure to repay the bidding credit amount and interest within the required time period will result in automatic termination of the license without specific Commission action. Repayment of bidding credit amounts pursuant to this provision shall not affect the calculation of amounts available to be awarded as tribal land bidding credits pursuant to (f)(3)(v) of this section.

PART 73—RADIO BROADCAST SERVICES

■ 6. The authority citation for part 73 continues to read as follows:

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

■ 7. Amend § 73.3571 by revising paragraph (h)(4)(ii) to read as follows:

§ 73.3571 Processing AM broadcast station applications.

- (h) * * *
- (4) * * *

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to § 1.2109(a). Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and

announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served.

* * * * *

■ 8. Amend § 73.3573 by revising paragraph (f)(5)(ii) to read as follows:

§ 73.3573 Processing FM broadcast station applications.

- (f) * * *
- (5) * * *

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to § 1.2109(a) of this chapter. Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served.

* * * * *

■ 9. Section 73.5003 is revised to read as follows:

§ 73.5003 Submission of full payments.

Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to § 1.2109(a) of this chapter. If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five (5) percent of the amount due in accordance with § 1.2109(a) of this chapter. Broadcast construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees and in accordance with the provisions of this section.

■ 10. Amend § 73.5006 by revising paragraph (d) to read as follows:

§ 73.5006 Filing of petitions against long-form applications.

* * * * *

(d) Broadcast construction permits will be granted by the Commission only if the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, and after full and timely payment of winning bids and any applicable late fees. See 47 CFR 73.5003. Construction of broadcast stations shall not commence until the grant of such permit or license to the winning bidder and only after full and timely payment of winning bids and any applicable late fees.

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

■ 11. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, 336(f), 336(h) and 554.

■ 12. Amend § 74.1233 by revising paragraph (d)(5)(ii) to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

* * * * *

(d) * * *

(5) * * *

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to § 1.2109(a) of this chapter. Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the

public interest, convenience and necessity will be served. If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five (5) percent of the amount due in accordance with § 1.2109(a) of this chapter. Construction of the FM translator station shall not commence until the grant of such permit to the winning bidder and only after full and timely payment of winning bids and any applicable late fees.

* * * * *

[FR Doc. 06-1100 Filed 2-6-06; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17****Endangered and Threatened Wildlife and Plants; Addition of White Abalone and the United States Distinct Vertebrate Population Segment of the Smalltooth Sawfish to the List of Endangered and Threatened Wildlife; Correction**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; correction.

SUMMARY: We, the Fish and Wildlife Service (Service), published a final rule to add two marine taxa to the List of Endangered and Threatened Wildlife in accordance with the Endangered Species Act of 1973, as amended, on November 16, 2005. For one of the two taxa, the white abalone (*Haliotis sorenseni*), we incorrectly published in the List of Endangered and Threatened Wildlife at § 17.11(h) that the species was Threatened, when it is actually listed as Endangered. We now correct that error.

EFFECTIVE DATE: November 16, 2005.

FOR FURTHER INFORMATION CONTACT: Marjorie Nelson, Branch of Listing, Endangered Species Program, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Mail Stop 420, Arlington, Virginia 22203 (703-358-2105).

SUPPLEMENTARY INFORMATION: In the November 16, 2005, **Federal Register** (70 FR 69464), we published a final rule to add two marine taxa to the List of Endangered and Threatened Wildlife (List) in accordance with the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). For one of the two taxa, the white abalone (*Haliotis sorenseni*), we incorrectly indicated in the List at § 17.11(h) that this species was Threatened, when we should have indicated that it was Endangered. We now correct that error. This correction is typographical in nature and involves no substantial changes to the substance in the contents of our prior final rule.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Correction**PART 17—[CORRECTED]**

■ For reasons set forth in the preamble, we make the following correcting amendment to 50 CFR part 17:

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11 by adding the following, in alphabetical order under CLAMS, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and Threatened Wildlife.

* * * * *

(h) * * *