

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

In the Matter of)
)
 Amendment of the Commission's)
 Rules Regarding Installment Payment) WT Docket No. 97-82
 Financing for Personal Communications)
 Services (PCS) Licensees)

FOURTH REPORT AND ORDER

Adopted: July 27, 1998

Released: August 19, 1998

By the Commission:

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I. INTRODUCTION

1. In this *C Block Fourth Report and Order*, we resolve the Commission's proposals in its *C Block Further Notice of Proposed Rule Making ("C Block Further Notice")*.¹ In so doing, we set forth the rules that will govern reauctions of C block spectrum surrendered to the Commission pursuant to the *C Block Second Report and Order*² and the *C Block Order on Reconsideration of the Second Report and Order ("C Block Reconsideration Order")*,³ as well as any other C block spectrum available for reauction.

II. BACKGROUND

A. C Block Proceedings

2. Consistent with Congress' mandate to promote the participation of small business and other "designated entities" in the provision of spectrum-based services,⁴ the Commission limited eligibility in the initial C block auctions to entrepreneurs and small businesses.⁵ The C block auction concluded on May 6,

¹ See Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 ("*C Block Second Report and Order*" and "*C Block Further Notice*"). The Commission received 14 comments, 11 reply comments and one ex parte filing in response to the *C Block Further Notice*. Appendix A contains a list of full and abbreviated names of commenting parties.

² Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 ("*C Block Second Report and Order*" and "*C Block Further Notice*").

³ Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1988) ("*C Block Reconsideration Order*"). We have received 11 petitions for reconsideration and clarification of the *C Block Reconsideration Order*. See *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Report No. 2283, 63 Fed. Reg. 38,404 (July 16, 1998).

⁴ See Communications Act of 1934, as amended ("Communications Act"), § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

⁵ See 47 C.F.R. §§ 24.709 and 24.720; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994), *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994), *Sixth Report and Order*, 11 FCC Rcd 136 (1995).

1996,⁶ and the subsequent reauction of defaulted licenses concluded on July 16, 1996,⁷ with a total of 90 bidders winning 493 licenses. The winning bidders were permitted to pay 90 percent of their net bid price over the ten-year license term.⁸

3. The Commission decided in the *C Block Second Report and Order* (as modified by the *C Block Reconsideration Order*) to allow each C block licensee to elect one of four options for each of its licenses: resumption of payments under the licensee's original installment payment plan, disaggregation, amnesty, or prepayment. The array of choices was intended to provide limited relief to financially troubled licensees without harming the integrity of the auction process.⁹ The Commission required C block licensees to file a written election notice, specifying whether they would resume payments under the terms of the original installment payment plan or would proceed under one of the alternative options.¹⁰ Included with the *C Block Second Report and Order* was the *C Block Further Notice*, in which the Commission sought comment on proposed changes to the C block rules to govern the reauction of surrendered spectrum in the C block.¹¹ The Wireless Telecommunications Bureau (the "Bureau") announced by public notice on April 17, 1998 an election date of June 8, 1998 and a payment resumption date for C block licensees of July 31, 1998.¹²

B. Part 1 Proceedings

4. On December 31, 1997, we released the *Part 1 Third Report and Order* in which we adopted general competitive bidding rules to supplant, wherever practicable, auction rules that were specific

⁶ See "FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas: Auction Event No. 5," *Public Notice*, DA 96-716 (released May 8, 1996).

⁷ See "FCC Announces Winning Bidders in the Reauction of 18 Licenses to Provide Broadband PCS in Basic Trading Areas: Auction Event No. 10," *Public Notice*, DA 96-1153, 11 FCC Rcd. 8183 (released July 17, 1996).

⁸ See 47 C.F.R. § 24.711(b)(3). The net bid price is equal to the winning bid less any bidding credit for which the licensee was eligible. See 47 C.F.R. § 24.712.

⁹ See *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2 and 16,444-46 paras. 15-17.

¹⁰ See *C Block Second Report and Order*, 12 FCC Rcd at 16,470-76 paras. 70-76; *C Block Reconsideration Order* at para. 61-65; and "Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees," *Public Notice*, DA 98-741 (released April 17, 1998).

¹¹ *Second Report and Order*, 12 FCC Rcd at 16,437 para. 1. The language of the *C Block Second Report and Order* suggests that there will be a single C block reauction; however, for reasons discussed below, we now anticipate that there could be more than one reauction.

¹² See "Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees," *Public Notice*, DA 98-741 (released April 17, 1998).

to each auctionable service or class of service.¹³ Our purpose was to streamline competitive bidding regulations, eliminate unnecessary rules, and increase the overall efficiency and consistency of the auction process.¹⁴ In the process, we resolved many of the issues that had been raised in the *C Block Further Notice*.¹⁵ Accordingly, future C block reactions will adhere to Part 1 rules,¹⁶ as amended, to the extent applicable. Where our rules in Part 1 are not determinative, bidders will continue to look to Part 24 rules,¹⁷ as amended in this *C Block Fourth Report and Order*.

III. LICENSES TO BE REAUTIONED

A. Background

5. In the *C Block Further Notice*, the Commission proposed that it react: (1) all licenses representing C block spectrum returned pursuant to the disaggregation, prepayment, or amnesty options; and (2) all C block licenses held as a result of defaults.¹⁸ The Commission believed that including all available licenses in a reaction would allow it fairly and efficiently to facilitate the rapid provision of service to the public and also would allow for the most efficient aggregation of licenses.¹⁹

B. Discussion

6. We adopt the Commission's proposal in the *C Block Further Notice* to react all available C block licenses held by the Commission. Several commenters agree, and no commenter disagrees,

¹³ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (released December 31, 1997) ("*Part 1 Third Report and Order*" and "*Part 1 Further Notice*"); see also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 ("*Competitive Bidding Second Report and Order*"); Amendment of Part 1 of the Commission Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket No.97-82, 12 FCC Rcd 5686 (1997) ("*Part 1 Notice*").

¹⁴ See *Part 1 Third Report and Order*, 13 FCC Rcd at 376 para.1

¹⁵ Issues addressed in the *C Block Further Notice* and subsequently resolved, either in whole or in part under the *Part 1 Third Report and Order* include: competitive bidding design, bidding procedures; activity rules; reserve price, minimum opening bid, and minimum bid increments; pre-auction application procedures; upfront payment; down payment and full payment; amendments and modifications of applications; bid withdrawal, default, and disqualification; anti-collusion rules; small business size and bidding credits; and the installment payment program.

¹⁶ See 47 C.F.R. Part 1--Practice and Procedure.

¹⁷ See 47 C.F.R. Part 24--Personal Communications Services.

¹⁸ *C Block Further Notice*, 12 FCC Rcd at 16,474 para. 83.

¹⁹ *Id.*

with this proposal.²⁰ Our recent modifications to the C block payment options in the *C Block Reconsideration Order* provide no reason to deviate from this basic approach. Any C block license that becomes available for reauction after the next C block reauction will be reauctioned in a subsequent reauction as soon as practicable.

7. NatTel, Starcom, and CPCS I argue that the next reauction should include licenses owned by entities that have filed for bankruptcy protection.²¹ CPCS I maintains that if licenses held by C block bankruptcy petitioners are excluded from the next reauction, the uncertainty surrounding the fate of those licenses will make business planning difficult for other C block entities.²² NatTel urges the Commission to amend its rules in order to be able to revoke automatically the licenses of licensees that have declared bankruptcy.²³

8. In the *Part 1 Third Report and Order*, we addressed the issue of whether the Commission can immediately reclaim and reauction licenses held by a licensee that declares bankruptcy.²⁴ As we stated there, we are confident of our position that the Commission can reclaim licenses quickly since the Commission conditions licenses upon payment and requires automatic cancellation in the event of nonpayment.²⁵ Nevertheless, until controlling precedent is established by the courts, or legislation addressing conflicting rights is enacted, a delay in the reauction of licenses in bankruptcy litigation may occur.²⁶ The pendency of bankruptcy proceedings involving certain C block licenses²⁷ makes it impossible for us to resolve at this time whether those licenses will be available in the next C block reauction. We do not intend,

²⁰ See AirGate Comments at 2, 3; Conestoga Comments at 7; Duluth Comments at 1; NextWave Comments at 1, 2; Starcom Comments at 1; Airgate Reply at 2; and NextWave Reply at 1-2.

²¹ NatTel Comments at 2-8; Starcom Comments at 1; and CPCS I Reply at 1-3.

²² CPCS I Reply at 2-3.

²³ NatTel Comments at 6-8.

²⁴ *Part 1 Third Report and Order*, 13 FCC Rcd at 398 para. 39.

²⁵ *Id.*

²⁶ *Id.*; see also FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, *Report*, FCC 97-353 (released October 9, 1997) at 39 (recommending that Congress clarify that FCC licensees that default on their installment payments may not use bankruptcy litigation to refuse to relinquish their spectrum licenses for reauction); Statement of Dan Phythyon, Chief, Wireless Telecommunications Bureau Before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, on Wireless Telecommunications Bureau Oversight (May 13, 1998) (asking that Congress act to protect spectrum licenses from being held captive by bankruptcy delays); and Third Annual Commercial Mobile Radio Service (CMRS) Competition Report, Report No. WT 98-13, *Third Report*, FCC 98-91 (released June 11, 1998) at Separate Statement of Chairman William E. Kennard (suggesting that Commission should work with Congress to eliminate regulatory obstacles to the development of wireless communications services posed by bankruptcy delays).

²⁷ *In re GWI PCS I, Inc.*, No. 397-39676-SAF-11 (Bankr. N.D.Tex. April 24, 1998); *In re Pocket Communications, Inc.*, No. 97-5-4105(ESD) (Bankr. D.Md.); *In re NextWave Personal Communications, Inc.*, 98-21529 (ASH) (Bankr. S.D.N.Y.).

however, to delay a reauction of other available C block licenses because of such litigation. Such a delay easily could become the first in an interminable series of delays, undermining our primary goal of getting licenses into the hands of parties that will provide service to the public and competition in the market. For this reason, we believe that the public will realize a greater benefit if we auction all available C block spectrum as soon as practicable than it will if we postpone a reauction until we have resolved all issues connected with every bankruptcy proceeding. Licenses made available in any bankruptcy proceeding will be included in the next appropriate reauction.

9. CPCSI asks that the Commission also address the issue of whether a reauction will additionally encompass licenses, such as those won by CPCSI, that are the subject of petitions pending before the Commission.²⁸ Because the Commission granted CPCSI's application for review on December 24, 1997,²⁹ and granted its license applications on December 29, 1997,³⁰ CPCSI's request is moot as to the licenses at issue in its application for review. The decision will be made on a case by case basis whether to include in a reauction any other C block licenses held by the Commission that are the subject of pending Commission or judicial proceedings.

²⁸ CPCSI Comments at 9-10; *see also* CPCSI Reply at 3-5.

²⁹ *See* Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding BTA Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, Frequency Block C, *Memorandum Opinion and Order*, 12 FCC Rcd 22,938 (1997).

³⁰ *See* "Application Grants to Carolina PCS I Limited Partnership," *Public Notice*, DA 97-2714 (released December 29, 1997).

IV. ELIGIBILITY FOR PARTICIPATION

A. Background

10. In the *C Block Second Report and Order*, the Commission decided that the public interest considerations mandated by Section 309(j) of the Communications Act³¹ would be furthered by applying to a C block reauction the same eligibility rules that had been used for the original C block auction.³² The Commission, therefore, deemed eligible to participate in a C block reauction: (1) all applicants qualifying, as of the start of the reauction, as entrepreneurs under the Commission's rules;³³ and (2) all entities that had filed a short-form application (FCC Form 175) to participate in, and had been eligible to participate in, the original C block auction.³⁴ Accordingly, the Commission decided that all entities that had participated in the original C block auction would be eligible to participate in the next reauction; however, the Commission prohibited C block licensees that return spectrum pursuant to the disaggregation or prepayment options from reacquiring their returned spectrum for a period of two years from the start date of the next C block reauction.³⁵ This prohibition extended to qualifying members of the licensee's control group, and their affiliates.³⁶

11. In the *C Block Further Notice*, the Commission sought comment on whether it should restrict participation in the C block reauction to entities that have not defaulted on any payments owed the Commission.³⁷ The Commission asked for comment on possible alternatives to excluding defaulters from participation in a reauction. One possibility was for the Commission to have an expedited hearing on a winning defaulter's financial qualifications, allowing the defaulter to attempt to rebut a presumption that it is not financially qualified.³⁸ Another idea was for the Commission to require defaulters to submit either more detailed financial information at the application stage or a larger upfront payment.³⁹ The Commission observed that C block licensees would not be in default simply by virtue of having elected the alternative payment options established in the *C Block Second Report and Order*.⁴⁰

³¹ See 47 U.S.C. § 309(j)(3).

³² *C Block Second Report and Order*, 12 FCC Rcd at 16,448 paras. 21-22.

³³ See 47 C.F.R. § 24.709.

³⁴ *C Block Second Report and Order*, 12 FCC Rcd at 16,448 para. 22.

³⁵ *Id.* at 16,457 para. 42 and 16,470 para. 69.

³⁶ *Id.*; see 47 C.F.R. § 24.709.

³⁷ *C Block Further Notice*, 12 FCC Rcd at 16,474 para. 84; see also 47 U.S.C. § 309(j)(5).

³⁸ *C Block Further Notice* at 12 FCC Rcd at 16,474 para. 84; see also 47 C.F.R. § § 24.832(e), 1.2108(d)(3).

³⁹ *C Block Further Notice*, 12 FCC Rcd at 16,474 para. 84.

⁴⁰ *Id.*

12. In the *C Block Reconsideration Order*, we modified the alternative payment options to, *inter alia*, divide the amnesty option into two categories: "pure amnesty" and "amnesty/prepayment."⁴¹ We decided that, while licensees returning spectrum pursuant to the "pure amnesty" option would not be prohibited from reacquiring their returned spectrum, licensees returning spectrum pursuant to the "amnesty/prepayment" option would have to forgo, for a period of two years from the start date of next C block reaction, eligibility to reacquire their spectrum.⁴² This prohibition extends to qualifying members of a licensee's control group, and their affiliates.⁴³ In addition, we retained the two-year prohibition on the reacquisition of spectrum returned pursuant to the disaggregation or prepayment options established in the *C Block Second Report and Order*.⁴⁴ We also responded to petitions for reconsideration of the *C Block Second Report and Order* filed by Cellexis International, Inc. and RFW PCS Inc., both of which disagree with comments filed by Nextel in response to the *C Block Further Notice*.⁴⁵ As discussed below, Nextel asks that the Commission open eligibility for a reaction to "all qualified bidders." We disagreed with Nextel's proposal, affirming the Commission's ruling in the *C Block Second Report and Order* to limit eligibility for participation in C block reactions to applicants meeting the Commission's definition of entrepreneur.⁴⁶

B. Discussion

13. We retain the C block eligibility parameters established in the *C Block Second Report and Order*. The following entities will be eligible for C block reactions: (1) entities that filed an FCC Form 175 short-form application for, and were eligible for, the original C block auction and (2) entities qualifying as entrepreneurs under Section 24.709 of the Commission's rules, as of the deadline for the filing of short-form

⁴¹ *C Block Reconsideration Order*, 13 FCC Rcd at 8360 para. 37.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 8360 para. 38, 8361-62 para. 41, 8367 para. 50, and 8374-76 paras. 68-72.

⁴⁵ See petitions for reconsideration of the *C Block Second Report and Order* filed by Cellexis International, Inc. at 7-8 and RFW PCS Inc. at 6-7; see also Reply of MFRI Incorporated at 6-7 and Reply of Wireless Ventures, Inc. at 4, both responding to oppositions to petitions for reconsideration of the *C Block Second Report and Order*.

⁴⁶ *C Block Reconsideration Order*, 13 FCC Rcd at 8374 para. 69; see also *C Block Second Report and Order*, 12 FCC Rcd at 16,448 para. 22. Section 24.709 of the Commission's rules defines an entrepreneur for purposes of C and F block auctions without actually using the term 'entrepreneur':

No application is acceptable for filing and no license shall be granted for frequency block C or frequency block F, unless the applicant, together with its *affiliates* and persons or entities that hold interests in the applicant and their *affiliates*, have *gross revenues* of less than \$125 million in each of the last two years and *total assets* of less than \$500 million at the time the applicant's short-form application (Form 175) is filed.

[emphasis in original; italicized terms are defined in 47 C.F.R. §§ 1.2110, 24.720] 47 C.F.R. § 24.709(a)(1); see also *id.* § 24.709(a)(2).

applications for the reauction.⁴⁷ While, under these rules, entities that participated in the original C block reauction will be eligible for C block reauctions, we retain the eligibility restriction established in the *C Block Second Report and Order*, as modified in the *C Block Reconsideration Order*, for licensees that surrender licenses pursuant to the disaggregation, prepayment, and/or "amnesty/prepayment" options. Such licensees will be ineligible to reacquire their surrendered licenses through reauction or by any other means for a period of two years from the start date of the next C block reauction.⁴⁸

14. The Commission's decision in the *C Block Second Report and Order* to impose a two-year bar on the eligibility of licensees to reacquire licenses they return pursuant to the disaggregation and prepayment options sparked comment. NextWave wants all licensees to be permitted to participate in a reauction, regardless of their election of an alternative payment option.⁴⁹ Sprint, on the other hand, urges the Commission to bar licensees electing the amnesty option from bidding on their surrendered spectrum in a reauction.⁵⁰ We dealt with the respective concerns of NextWave and Sprint in the *C Block Reconsideration Order*.⁵¹ As we stated there, we believe that the modified approach we adopted in that order addresses the concerns of both of these parties.⁵² Therefore, we affirm the decision we made in that order. Starcom asks that the qualifications of licensees electing any of the alternative payment options be subjected to a higher level of scrutiny regarding their financial qualification to deal with the requirements of additional licenses.⁵³ We believe that a higher level of scrutiny is not warranted. As noted above, C block licensees that have elected alternative payment options are not defaulters.⁵⁴ Moreover, all applicants for C block reauctions will be required to pay a substantial upfront payment, which should help ensure that only serious, qualified bidders participate.⁵⁵

⁴⁷ See 47 C.F.R. § 24.709.

⁴⁸ *C Block Reconsideration Order*, 13 FCC Rcd at 8360-61 paras. 37, 38, and 41 and 8367 para. 50. Licensees that surrender licenses pursuant to the "pure amnesty" option will remain eligible to reacquire those surrendered licenses in a reauction or through a secondary market transaction. *Id.* at para. 37.

⁴⁹ NextWave Comments at 3-4.

⁵⁰ Sprint Reply at 1-4.

⁵¹ *C Block Reconsideration Order*, 13 FCC Rcd at 8376 paras. 71-72.

⁵² See *id.* at para. 72.

⁵³ Starcom Comments at 2.

⁵⁴ See *C Block Further Notice*, 12 FCC Rcd at 16,474 para. 84.

⁵⁵ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 at para. 169 (1994); see also *infra* Section V.B.5.

15. Because we are not planning to include C block licenses that remain involved in bankruptcy proceedings in the next C block reauction,⁵⁶ there likely will be more than one reauction for C block. Accordingly, we must evaluate whether to allow applicants for and participants in the original C block auction to remain eligible to participate in all future C block reauctions, regardless of whether they still qualify as entrepreneurs under the Commission's rules at the deadline for filing a short-form application. While we believe that flexibility in this regard is appropriate, we believe that fairness to other future bidders prevents our providing an open eligibility standard indefinitely. Consequently, in order to be eligible for any C block reauction that begins more than two years from the start date of the next C block reauction, an applicant must qualify as an entrepreneur under the Commission's rules at the time of filing its short-form application.⁵⁷

16. Several parties commented on the eligibility rules established in *C Block Second Report and Order*, with most commenters supporting the Commission's decision.⁵⁸ As mentioned, however, Nextel urges the Commission not to limit a reauction just to entrepreneurs but rather to allow "all qualified bidders" to participate.⁵⁹ Nextel argues that a restricted auction skews the marketplace and that the increasing level of competition in the wireless arena makes it less likely that small business entrepreneurs can survive.⁶⁰ According to Nextel, the Commission could enable small businesses to bid competitively by providing them bidding credits and permitting them to partition and disaggregate 30 MHz licenses after the auction.⁶¹ No other commenter supports Nextel's views, and several parties oppose them.⁶² As stated, we recently denied Nextel's request in the *C Block Reconsideration Order*, and the record in this proceeding provides us with no basis to alter our decision.

17. The Commission received considerable comment on whether and how defaulters on payments owed the Commission should be able to participate in a reauction. Several parties would preclude defaulters from eligibility, with some commenters identifying parties that have defaulted on any Commission payment, one commenter specifying entities that have defaulted on a PCS license obligation, and another commenter targeting parties in default on Commission payments at the time their reauction upfront payment

⁵⁶ See *supra* para. 8.

⁵⁷ An entity will not be eligible to receive bidding credits unless it meets our small business size requirements at the time of the reauction. See discussion *infra* Section V.B.10.

⁵⁸ Alpine Comments at 2; CIRI Comments at ii, 2-4; Conestoga Comments at 5-6; NextWave Comments at 2; Omnipoint Comments at 2-3; Alpine Reply at para. 1, 2-5; DiGiPH Reply at 2-5, 6; Fidelity Reply at 2-3; NextWave Reply at 2; Omnipoint Reply at 1-3.

⁵⁹ Nextel Comments at i-ii, 1-12.

⁶⁰ *Id.* at 4, 7, 11-12.

⁶¹ *Id.* at ii, 5, 9-11, 12.

⁶² See, e.g., Alpine Reply at 1, 2-5; DiGiPH Reply at 2-5, 6; Fidelity Reply at 2-3; NextWave Reply at 2; and Omnipoint Reply at 1-3.

is due.⁶³ CPCSI, however, would allow defaulters to participate under the rationale that they are no different from licensees electing an alternative payment option.⁶⁴ CIRI argues that a reauction should be restricted to parties that have neither defaulted on Commission payment obligations nor sought bankruptcy protection,⁶⁵ pointing out that "[t]he Debt Collection Improvement Act generally prohibits the provision of any federal loan to an entity that is delinquent on any non-tax debt owed to a federal agency⁶⁶. . . ." Commenters oppose allowing (or requiring) defaulters to submit more detailed financial information at the application stage,⁶⁷ but exhibit little reaction to the idea of holding an expedited hearing or requiring defaulters to submit a higher upfront payment amount.⁶⁸

18. The Commission's FCC Form 175 short-form application for all auctions requires applicants to certify that they are not in default on any Commission debt and that they are not delinquent on any non-tax debt owed to any Federal agency.⁶⁹ We believe that, in order to preserve the integrity of C block reauctions and to support our ongoing effort to streamline the licensing process, it is necessary to limit participation in C block reauctions to entities that can make the certification. Consequently, to be eligible to participate in any future C block reauction, an applicant must certify on its short-form application that it is not in default on any Commission licenses and not delinquent on any non-tax debt owed to any Federal agency.⁷⁰ At the same time, we believe that past business misfortunes do not inevitably preclude an entity from being able to meet its present and future responsibilities as a Commission licensee. Therefore, we will allow "former defaulters," i.e., applicants that have defaulted or been delinquent in the past, but have since paid all of their

⁶³ See AirGate Comments at 2, 4-5 (Defaulters on PCS license obligations should be excluded.); Conestoga Comments at 6 ("The FCC should restrict participation in a reauction to entities that have not defaulted on any FCC payments."); CIRI Comments at 5-6 ("[R]estrict participation in the C block reauction to entities that have neither defaulted on any Commission installment payment obligations nor sought bankruptcy protection." [citation omitted]); NatTel Comments at 6-8 (The Commission should amend its rules so that it can find automatically that any licensee that declares bankruptcy is financially unfit to be a licensee. Prior defaulters should be allowed to participate in a reauction, provided that they make good on all outstanding indebtedness to the Commission prior to or at the time that their reauction upfront payment is due.); and Fidelity Reply at 3 ("[E]ntities that have defaulted on FCC payment obligations should not be eligible to participate in the C-Block re-auction.").

⁶⁴ CPCSI Comments at ii, 10-12.

⁶⁵ CIRI Comments at 5-6.

⁶⁶ See 31 U.S.C. § 3720B(a).

⁶⁷ See AirGate Comments at 2, 4-6; Duluth Comments at 1; Starcom Comments at 1.

⁶⁸ See CPCSI Comments at ii, 10-12, (opposing both ideas) for the only comment.

⁶⁹ See 47 C.F.R. § 1.2105(a)(2)(x).

⁷⁰ Under the Commission's rules, a licensee that fails to submit payment on an installment obligation will automatically have an additional 90 days in which to submit its required payment without being considered delinquent. Any licensee making its required payment during this period will be assessed a late fee equal to five percent of the amount of the past due payment. If any licensee fails to make the required payment at the close of the 90-day period, it will automatically be provided with a subsequent 90-day grace period. Any licensee making a required payment during this subsequent period will be assessed a late payment fee equal to 10 percent of the amount of the past due payment. *Id.* §1.2110(f)(4).

outstanding non-Internal Revenue Service Federal debts and all associated charges or penalties, to be eligible to participate in C block reauctions, provided that they are otherwise qualified.

19. In its comments, CIRI asks that eligibility for a reauction include the Indian tribal affiliation exemption featured in the Commission's rules for broadband PCS auctions.⁷¹ CIRI's request is unnecessary. Neither the Commission nor any party has proposed eliminating or altering this exemption, which applied in the original C block auction. Moreover, in our recent *Part 1 Third Report and Order*, we adopted a proposal by CIRI to include this exemption in our general definition of the term "affiliate."⁷²

V. APPLICATION OF GENERAL AUCTION RULES TO C BLOCK

A. Background

20. The Commission tentatively concluded in the *C Block Further Notice* that the next reauction will be conducted in conformity with the general competitive bidding rules in Part 1, Subpart Q, of the Commission's rules, as revised, consistent with other auctions for wireless services. The Commission also proposed to use Part 24 rules to the extent they do not conflict with the Commission's Part 1 rules or with rules specifically adopted or proposed in the *C Block Second Report and Order* and *C Block Further Notice*. The Commission sought comment on the application of Part 1 rules to the following aspects of the C block reauction: competitive bidding mechanisms;⁷³ bidding application and certification procedures and prohibition of collusion;⁷⁴ submission of upfront payment, down payment and filing of long-form applications;⁷⁵ procedures for filing long-form applications;⁷⁶ and procedures regarding license grant, denial, and default.⁷⁷

21. Subsequently, in the *Part 1 Third Report and Order*, we adopted general competitive bidding rules that apply to each auctionable service or class of service, including the C block of broadband personal communications services.⁷⁸ In that order, we addressed, and in some cases completely or partly resolved, the issues raised in the *C Block Further Notice*, except for the two issues discussed above in this *C Block Fourth Report and Order*, i.e., licenses to be reaucted and eligibility for participation in C block reauctions. We also clarified that specific auction procedures not established by Commission rules will be

⁷¹ CIRI Comments at 7-9; see 47 C.F.R. § 24.720(l)(11).

⁷² *Part 1 Third Report and Order*, 13 FCC Rcd at 392-393 para. 28; 47 C.F.R. § 1.2110(b)(4)(xi).

⁷³ 47 C.F.R. § 1.2104.

⁷⁴ *Id.* § 1.2105

⁷⁵ *Id.* §§ 1.2106, 1.2107.

⁷⁶ *Id.* § 1.2108.

⁷⁷ *Id.* § 1.2109; see *C Block Further Notice*, 12 FCC Rcd at 16,476 para. 90.

⁷⁸ See *Part 1 Third Report and Order*, 13 FCC Rcd at 376 para. 1.

established by the Bureau in advance of each auction, pursuant to public notice and comment.⁷⁹ However, the Commission received sufficient comment in response to the *C Block Further Notice* to make further comment unnecessary for many of the C block reaction procedures. Consequently, in the remainder of this *C Block Fourth Report and Order*, we review the issues raised in the *C Block Further Notice* and addressed in the *Part 1 Third Report and Order*. Where necessary, we clarify the effect of the *Part 1 Third Report and Order* on the rules for future C block reactions. In cases where C block auction rules are the same as or parallel to F block auction rules, we also clarify the effect of the *Part 1 Third Report and Order* on the rules for F block reactions. We have included, as Appendix B herein, a discussion of the comments relevant to these issues filed in response to the *C Block Further Notice*.

B. Discussion

1. Competitive Bidding Design

22. The Commission tentatively concluded in the *C Block Further Notice* that it would award all licenses and spectrum in the C block reaction by means of a simultaneous multiple-round electronic auction.⁸⁰ This type of auction would facilitate any aggregation strategies of bidders and provide the most information about license values during the auction. The Commission further tentatively concluded that telephonic bidding (instead of electronic bidding) should be permitted only in exceptional circumstances, and that those circumstances would be determined by the Bureau in each instance.⁸¹ This tentative conclusion was prompted by the Commission's desire to conduct the reaction quickly, as well as by recent improvements in the Commission's electronic bidding software.⁸² In the *Part 1 Third Report and Order*, we clarified that the Bureau, consistent with its existing delegated authority,⁸³ would seek comment in advance of each auction on auction-specific issues, including the competitive bidding design of the auction.⁸⁴ We note, as previously mentioned, that there likely will be more than one C block reaction.⁸⁵

⁷⁹ See Balanced Budget Act of 1997 ("Balanced Budget Act"), Pub. L. 105-33, 111 Stat. 251, 259 (1997) (requiring that, in the scheduling of any competitive bidding, an adequate period be allowed before issuance of bidding rules, to permit notice and comment on proposed auction procedures).

⁸⁰ *C Block Further Notice*, 12 FCC Rcd at 16,475 paras. 86-88.

⁸¹ *Id.* at 16,476 para. 89.

⁸² *Id.*

⁸³ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5697 para. 16 (1997).

⁸⁴ *Part 1 Third Report and Order*, 13 FCC Rcd at 452 para. 134.

⁸⁵ See *supra* para. 15.

23. Even though the Bureau normally would determine the bidding design of an auction, because no commenter opposed the proposal for a simultaneous multiple-round auction,⁸⁶ we believe that the simultaneous multiple-round design is appropriate for the next C block reauction. If, however, in preparing for a C block reauction, the Bureau determines that another design might be warranted, it remains within the Bureau's authority to seek comment on, and to modify, the competitive bidding design of the reauction. The Commission received two comments addressing the subject of telephonic bidding, with one party supporting the proposal that telephonic bidding be permitted only in exceptional circumstances and the other party asking that telephonic bidding remain an option.⁸⁷ We have decided, on further consideration, to permit the use of telephonic bidding as an alternative to electronic bidding in the next C block reauction. In the recent local multipoint distribution service (LMDS) auction (Auction No. 17),⁸⁸ telephonic bidding was a viable option; and telephonic bidding is being made available to bidders in the upcoming phase II 220 MHz service auction (Auction No. 18).⁸⁹ We believe that allowing parties to use either electronic or telephonic bidding, as their circumstances dictate, will promote auction participation by as many qualified applicants as possible and is not inconsistent with our decision to require that, beginning January 1, 1999, all short and long-form applications for auctionable services be filed electronically.⁹⁰

2. Activity Rules

24. In the *C Block Further Notice*, the Commission tentatively concluded that a reauction should be conducted in three stages, as the Commission has done in other simultaneous multiple-round auctions.⁹¹ The Commission proposed to use high activity requirements in C block reauctions, with bidders required to be more active in each subsequent stage than they had been in the last. These activity levels would be similar to those used in other auctions, such as requiring bidders to be active on eighty percent of their eligible licenses in Stage I, ninety percent in Stage II, and ninety-eight percent in Stage III. The Commission also proposed requiring the Bureau to use its delegated authority to schedule bidding rounds aggressively, to move quickly into the next stage of the auction when bidding activity falls, and to use higher minimum bid increments for very active licenses. In the *Part 1 Third Report and Order*, we directed the Bureau to seek

⁸⁶ See *infra* Appendix B.

⁸⁷ *Id.*

⁸⁸ See "Auction of Local Multipoint Distribution Service (LMDS) Licenses 138 Qualified Bidders," *Public Notice*, DA 98-230 (released February 6, 1998) (showing that telephonic bidding was an option for all LMDS auction bidders).

⁸⁹ "Auction of the Phase II 220 MHz Service Licenses," *Public Notice*, DA 98-1010, at 3 (released May 29, 1998).

⁹⁰ See *Part 1 Third Report and Order*, 13 FCC Rcd at 410-11 para. 59 (amending 47 C.F.R. §§ 1.2105(a) and 1.2107(c)).

⁹¹ *C Block Further Notice*, 12 FCC Rcd at 16,476 para. 91.

comment prior to the start of each auction on activity requirements for each stage of the auction and activity rule waivers.⁹²

25. We believe that the proposal to conduct reactions in three stages is reasonable for the next C block reaction, particularly in the absence of opposing comment and in light of the general interest in beginning the reaction as soon as possible.⁹³ The Bureau normally would determine this structure, however; and it remains within the Bureau's discretion to deviate from the proposed three-stage structure if, after appropriate notice and comment, it determines that a different structure would better serve the public interest. Given that the *C Block Further Notice* mentioned the eighty, ninety, and ninety-eight percent activity levels as an example,⁹⁴ we continue to delegate to the Bureau determination of the specific activity levels to employ for each C block reaction. As proposed, the Bureau will use its delegated authority to schedule bidding rounds aggressively, move quickly into the next stage of the auction when bidding activity falls, and use higher minimum bid increments for very active licenses.

3. Reserve Price, Minimum Opening Bid, and Minimum Bid Increments

26. The Balanced Budget Act of 1997⁹⁵ requires the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid established, unless the Commission determines that neither is in the public interest.⁹⁶ The terms "minimum opening bid" and "reserve price" are generally employed for different purposes.⁹⁷ A minimum opening bid is the minimum bid price set at the beginning of an auction below which no bids are accepted.⁹⁸ A reserve price is the minimum price below which an auctioneer will not sell an object.⁹⁹

27. In the *C Block Further Notice*, the Commission stated that, in the C block reaction, employing a minimum opening bid would help make certain that the public is fairly compensated, the auction is expedited, and the Commission is able to make adjustments based on the competitiveness of the auction.¹⁰⁰ The Commission sought comment on its proposal to use a minimum opening bid for a reaction, as well as on

⁹² *Part 1 Third Report and Order*, 13 FCC Rcd at 447-48 paras. 124-25.

⁹³ *See infra* Appendix B.

⁹⁴ *C Block Further Notice*, 12 FCC Rcd at 16,476 para. 91.

⁹⁵ Pub. L. 105-33, 111 Stat. 251 (1997) (codified at 47 U.S.C. § 309(j)(4)(F)).

⁹⁶ *See C Block Further Notice*, 12 FCC Rcd at 16,477-78 para. 92.

⁹⁷ *Part 1 Third Report and Order*, 13 FCC Rcd at 455 para. 140.

⁹⁸ *C Block Further Notice*, 12 FCC Rcd at 16,477-78 para. 92.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

which methodology to employ and factors to consider in establishing minimum opening bids.¹⁰¹ The Commission proposed minimum opening bids for each market equal to ten percent of the corresponding net high bid for the market in the original C block auction.¹⁰² The Commission asked commenters to explain whether this proposal would be reasonable or would result in a substantial number of unsold licenses.¹⁰³ The Commission asked further whether the amount of the minimum opening bid should be capped and whether the Commission should establish a different amount.¹⁰⁴

28. After requesting comment on minimum opening bids in the *C Block Further Notice*, we clarified in the *Part I Third Report and Order* that the Bureau has the authority to seek comment on minimum opening bids and reserve prices and to establish such mechanisms for each auction, consistent with the Bureau's role in managing the auction process and setting valuations for other purposes.¹⁰⁵ We instructed the Bureau to consider such factors as the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands, and any other relevant factors that could reasonably affect valuation of the spectrum being auctioned.¹⁰⁶

29. For the next C block reauction, we believe that the proposal of a minimum opening bid for each market equal to ten percent of the corresponding net high bid for the market in the original C block auction is appropriate. Because the Commission has already sought and received comment on this issue,¹⁰⁷ and because there is a strong public interest in beginning the next C block reauction as soon as possible, the Bureau will not seek further comment on a specific amount for a minimum opening bid for the next reauction. Instead, the specific amount of the minimum opening bid for each market will be listed in a public notice to be released by the Bureau in advance of the next C block reauction. The Bureau may exercise its discretion to set forth a minimum opening bid smaller than ten percent if, based upon further evaluation, the Bureau believes that a smaller amount is warranted.

4. Electronic Filing

30. In the *C Block Further Notice*, the Commission sought comment on its tentative conclusion to require electronic filing of all short-form applications in a reauction. The Commission believed that

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Part I Third Report and Order*, 13 FCC Rcd at 454-55 para. 139.

¹⁰⁶ *Id.*

¹⁰⁷ Appendix B, *infra*, summarizes comments received by the Commission on reserve price, minimum opening bid, and minimum bid increments.

electronic filing of applications would serve the best interests of auction participants and members of the public monitoring a reauction.¹⁰⁸ Commission policies have consistently encouraged electronic filing. In the *Part 1 Third Report and Order*, we pointed out that electronic filing helps ensure the accuracy and completeness of applications prior to submission, and we required electronic filing of all short-form and long-form applications by January 1, 1999, unless operationally infeasible.¹⁰⁹ More recently, we proposed mandatory electronic filing of applications for all wireless services, whether auctionable or non-auctionable.¹¹⁰ Accordingly, we will require electronic filing of both short-form and long-form applications for C block reauctions.

5. Upfront Payment

31. In accordance with Section 1.2106 of the Commission's rules, which requires submission of an upfront payment as a prerequisite to participation in spectrum auctions,¹¹¹ the Commission proposed in the *C Block Further Notice* to set an upfront payment for the next C block reauction at \$.06 per MHz per pop.¹¹² The Commission determined that this amount was appropriate to further its goal of allowing only serious, qualified applicants to participate in a reauction.¹¹³ The Commission noted that it had adopted the same upfront payment for its most recent broadband PCS auction, the D, E, and F block auction.¹¹⁴ The Commission explained that, in the *Competitive Bidding Second Report and Order*, it had indicated that the upfront payment should be set using a formula based upon the amount of spectrum and population ("pops")

¹⁰⁸ *C Block Further Notice*, 12 FCC Rcd at 16,477 para. 93.

¹⁰⁹ *Part 1 Third Report and Order*, 13 FCC Rcd at 410-11 para. 59 (amending 47 C.F.R. §§ 1.2105(a) and 1.2107(c)).

¹¹⁰ See Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, WT Docket No. 98-20, *Notice of Proposed Rule Making*, 13 FCC Rcd 9672, 9681-83 paras. 19-22 (1998) ("*Universal Licensing System Notice of Proposed Rule Making*") (proposing mandatory electronic filing of all forms used for wireless radio services by January 1, 1999); Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, *Report and Order*, 12 FCC Rcd 2170, 2195, para. 47 (1997), *recon. pending*, ("*Electronic Tariff Filing Report and Order*"). The Electronic Tariff Filing System was established on November 17, 1997; see "Common Carrier Bureau Implements Electronic Tariff Filing System," *Public Notice*, DA 97-2491 (released November 25, 1997).

¹¹¹ 47 C.F.R. § 1.2106

¹¹² *C Block Further Notice*, 12 FCC Rcd at 16,478-79 para. 94.

¹¹³ The amount of the upfront payment is intended to approximate five percent of the expected amount of the winning bid for a given license. See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, *Report and Order*, 10 FCC Rcd 9589, 9650 para. 136 (1995).

¹¹⁴ *Id.*; see 47 C.F.R. § 24.716(a)(1).

covered by the license(s) for which the parties intend to bid.¹¹⁵ It had also concluded that the best approach would be to determine the amount of the upfront payment on an auction-by-auction basis.¹¹⁶ In the *C Block Further Notice*, the Commission sought comment on its \$.06 per MHz per pop proposal, as well as on alternative methods of establishing an upfront payment and, in particular, on how the Commission may estimate the present market value of the spectrum to be auctioned.¹¹⁷ Subsequently, in the *Part 1 Third Report and Order*, we affirmed the Commission's reasoning in the *Competitive Bidding Second Report and Order*, stating our belief that we should maintain the current competitive bidding rules, which allow the amount of the upfront payment and the terms under which it is assessed to be determined on an auction-by-auction basis.¹¹⁸

32. Deciding the amount and terms of the upfront payment amount on an auction-by-auction basis pursuant to the Part 1 rule is consistent with past auction procedure. The Bureau normally establishes the upfront payment after public notice and comment. We therefore find that specific provisions contained in Part 24 of the Commission's rules addressing the upfront payment amount for C block (and F block) auctions are unnecessary.¹¹⁹ Accordingly, and consistent with our ongoing streamlining effort, we repeal those Part 24 provisions as of the effective date of this order.

33. There is support among the commenters for setting the upfront payment amount at the proposed \$.06 per MHz per pop,¹²⁰ and we believe that in the next C block reauction the upfront payment should be no higher than this amount. The Bureau may establish a lower upfront payment if it deems a lower amount to be reasonable.¹²¹ Because the Commission has already sought and received comment on this issue, and because there is a strong public interest in beginning the next C block reauction as soon as possible, there is no need for the Bureau to seek further comment on the upfront payment amount for the next reauction. Instead, the specific upfront payment amount for each market will be listed in a public notice to be released by the Bureau in advance of the next C block reauction.

34. While we have decided not to prohibit "former defaulters" from participating in C block reauctions,¹²² we believe that the integrity of the auctions program and the licensing process dictates requiring

¹¹⁵ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2346, 2377-78 (1994) ("*Competitive Bidding Second Report and Order*").

¹¹⁶ *Id.* at 2378.

¹¹⁷ *C Block Further Notice*, 12 FCC Rcd at 16,478-79 para. 94.

¹¹⁸ *Part 1 Third Report and Order*, 13 FCC Rcd at 425 para. 86; see 47 C.F.R. § 1.2106.

¹¹⁹ See 47 C.F.R. §§ 24.711(a)(1) and 24.716(a)(1).

¹²⁰ See *infra* Appendix B.

¹²¹ The Bureau is securing the services of a firm to provide guidance concerning spectrum valuation methodology.

¹²² See *supra* para. 18.

a more stringent financial showing from applicants with a poor Federal financial track record. Consequently, we amend our rules to require that the upfront payment amount for "former defaulters" be fifty percent more than the normal amount set by the Bureau for any given license in a C block reauction. So that the Bureau may implement this rule, we will require applicants to make an additional certification on their short-form applications revealing whether they have ever been in default on any Commission debt or have ever been delinquent on any non-tax debt owed to any Federal agency. Our policy here is analogous to the Congressional policy reflected in the Debt Collection Improvement Act, which bars delinquent Federal debtors from obtaining Federal loans, loan insurance, or guarantees.¹²³

6. Down Payment and Full Payment

35. The Commission tentatively concluded in the *C Block Further Notice* that each winning bidder should be required to tender a down payment sufficient to bring its total amount on deposit with the Commission up to twenty percent of its winning bid within ten business days after issuance of a public notice announcing the winning bidder for the license.¹²⁴ The Commission also proposed to require a winning bidder to file an FCC Form 600 long-form application (since renumbered FCC Form 601) with a timely down payment,¹²⁵ pursuant to Section 1.2107 of the Commission's rules.¹²⁶ Upon review of the long-form applications and receipt of the down payments, the Commission would announce the applications that were accepted for filing, triggering the filing window for petitions to deny.¹²⁷ If any or all petitions to deny were dismissed or denied, a public notice announcing that the Commission was prepared to grant the license conditioned upon final and full payment would be issued.¹²⁸ The winning bidder would then have ten days following release of that public notice to submit the balance of its winning bid in order to be awarded its license(s). The *C Block Further Notice* proposed having a period of fifteen days, following the issuance of the public notice announcing that an application had been accepted for filing, in which to file petitions to deny.¹²⁹

¹²³ See 31 U.S.C. § 3720B.

¹²⁴ *C Block Further Notice*, 12 FCC Rcd at 16,479 para. 95; see also 47 C.F.R. § 1.2107(b).

¹²⁵ *C Block Further Notice*, 12 FCC Rcd at 16,479 para. 96; see also *Universal Licensing System Notice of Proposed Rule Making* at App. A (proposed revisions to FCC Form 600).

¹²⁶ 47 C.F.R. § 1.2107; see *C Block Further Notice*, 12 FCC Rcd at 16,479 para. 96; 47 C.F.R. § 1.2107(c).

¹²⁷ *C Block Further Notice*, 12 FCC Rcd at 16,479 para. 96.

¹²⁸ *Id.*

¹²⁹ *Id.* at 16,479 para. 96. The Balanced Budget Act of 1997 authorizes the Commission to establish a period as short as 5 days for the filing of petitions to deny applications for licenses won at auction. See Balanced Budget Act of 1997, § 3008; P.L. 105-33, 111 Stat. 251 (1997).

36. The *Part 1 Third Report and Order* adopted a standard down payment of twenty percent of an applicant's high bids, which is similar to the proposal in the *C Block Further Notice*.¹³⁰ It also amended Sections 1.2109(a) of the Commission's rules¹³¹ to permit auction winners to make their final payments within ten business days after the designated deadline, provided that they also pay a late fee equal to five percent of the amount due.¹³² In accordance with the 1997 Balanced Budget Act,¹³³ the *Part 1 Third Report and Order* amended Sections 1.2108(b) and (c) to prohibit the Commission from granting a license earlier than seven days following issuance of the public notice announcing the application is accepted for filing.¹³⁴ Additionally, the *Part 1 Third Report and Order* established that the filing periods for petitions to deny, oppositions, and replies are to be no shorter than five days.¹³⁵

37. The conclusions we reached in the *Part 1 Third Report and Order* do not conflict with our proposals in the *C Block Further Notice*. Accordingly, we will apply the Part 1 rules, as amended. The Bureau will announce by public notice the deadline for petitions to deny. As discussed in the *Part 1 Third Report and Order*, in order to preserve the integrity of the auction process, it is important to use an indicator of potential licensees' financial capability to attract capital to build out and operate systems. We believe that the use of one substantial down payment is a necessary tool to gauge an applicant's financial viability, its seriousness in building its system, and the likelihood of default.¹³⁶ For these reasons, we repeal the Part 24 C

¹³⁰ *Part 1 Third Report and Order*, 13 FCC Rcd at 427 para. 91.

¹³¹ 47 C.F.R. § 1.2109(a).

¹³² *See Part 1 Third Report and Order*, 13 FCC Rcd at 429 para. 94.

¹³³ *See* Balanced Budget Act of 1997, Pub. L. 105-33, § 3008, 111 Stat. 251, 269 (1997). The relevant provision states:

Notwithstanding section 309(b) of the Communications Act of 1934 (47 U.S.C. 309(b)), no application for an instrument of authorization for frequencies assigned under this title . . . shall be granted by the Commission earlier than 7 days following issuance of a public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereto. Notwithstanding section 309(d)(1) of such Act (47 U.S.C. 309(d)(1)), the Commission may specify a period (no less than 5 days following issuance of such public notice) for the filing of petitions to deny any application for an instrument of authorization for such frequencies.

See Part 1 Third Report and Order, 13 FCC Rcd at 431-32 para. 98 (seeking comment in the *Second Further Notice of Proposed Rule Making* to have the period for filing petitions to deny not be shorter than five days) .

¹³⁴ 47 C.F.R. §§ 1.2108(b) and (c).

¹³⁵ *Part 1 Third Report and Order*, 13 FCC Rcd at 431-32 para. 98; *see also* Balanced Budget Act of 1997, Pub. L. 105-33, § 3008, 111 Stat. 251, 269 (1997).

¹³⁶ *See id.*, 13 FCC Rcd at 427 para. 90.

block rules on down payment and full payment.¹³⁷ Pursuant to the same rationale, we also repeal the Part 24 F block rules on down payment and full payment.¹³⁸

7. Amendments and Modifications of Applications

38. In the *C Block Further Notice*, the Commission proposed to allow applicants to amend or modify their short-form applications at any time before or during the auction, pursuant to Section 1.2105 of the Commission's rules.¹³⁹ In the *Part 1 Third Report and Order*, we created a uniform definition of minor and major amendments to an applicant's short-form application (FCC Form 175).¹⁴⁰ We also amended Section 1.2105 of the Commission's rules so that it would mirror our Part 24 rule, Section 24.822, and allow applicants, after the short-form filing deadline, to make minor amendments to their short-form applications both prior to and during the auction. The amendment to Section 1.2105 of the Commission's rules has rendered Section 24.822 unnecessary. Accordingly, we repeal Section 24.822 of the rules.

39. The Commission also proposed in the *C Block Further Notice* to create an exception to the general rule prohibiting major amendments and permit short-form amendments to reflect the departure of a consortium member.¹⁴¹ In the *Part 1 Third Report and Order*, we determined that, under Part 1 of the Commission's rules, major amendments to the short-form include changes in license areas, ownership changes constituting a change in control, and the addition of members to a bidding consortium.¹⁴² Minor amendments include, *inter alia*, any amendment not identified as major.¹⁴³ We did not identify the deletion of members to a bidding consortium as a major amendment. Consequently, it would be a minor amendment under the Part 1 rules, as amended, and permitted after the short-form filing deadline. Accordingly, the Commission's proposal in the *C Block Further Notice* to allow short-form amendments reflecting the departure of a consortium member is no longer necessary.

¹³⁷ See 47 C.F.R. § 24.711(a)(2).

¹³⁸ See *id.* § 24.716(a)(2).

¹³⁹ See *C Block Further Notice*, 12 FCC Rcd at 16,480 para. 97; 47 C.F.R. § 1.2105(b).

¹⁴⁰ *Part 1 Third Report and Order*, 13 FCC Rcd at 413-414 paras. 65-66; see also 47 C.F.R. § 24.822.

¹⁴¹ See *C Block Further Notice*, 12 FCC Rcd at 16,480 para. 97.

¹⁴² *Part 1 Third Report and Order*, 13 FCC Rcd at 414 para. 66.

¹⁴³ *Id.*

8. Bid Withdrawal, Default, and Disqualification

40. The Commission tentatively concluded in the *C Block Further Notice* that the withdrawal, default, and disqualification rules for a reauction should be based upon the procedures established in our general competitive bidding rules.¹⁴⁴ In the *Part 1 Third Report and Order*, we recognized that bidders sometimes improperly withdraw bids (e.g., to delay the close of an auction for strategic purposes), and we suggested that the Bureau exercise its discretion to prevent such abuses of the auction process.¹⁴⁵ We asked the Bureau to consider limiting the number of rounds in which bids may be withdrawn, thereby preventing any entities that violate the Commission's withdrawal procedures from continuing to bid on that particular market.¹⁴⁶ The Bureau has announced that, in the upcoming phase II 220 MHz service auction (Auction No. 18), it will limit the number of rounds in which bids may be withdrawn,¹⁴⁷ and it has proposed such a limitation for the upcoming 156-162 MHz VHF public coast station spectrum auction.¹⁴⁸ Similarly, the Bureau will seek comment in advance of the next C block reauction on limiting the number of rounds in that reauction in which bids may be withdrawn.

41. For bids submitted in error, the Commission proposed in the *C Block Further Notice* to follow the guidelines it had developed to provide relief from the bid withdrawal payment requirements under certain circumstances.¹⁴⁹ In the *Part 1 Third Report and Order*, we decided that when a winning bidder or licensee defaults, and its license has yet to be reauctioned, the Commission will assess an initial default payment of at least three percent, but not exceeding twenty percent, of the defaulted bid amount.¹⁵⁰ Once the license has been reauctioned, when the total default payment can be determined, the Commission will either assess the balance of the remaining default payment or refund any amounts due.¹⁵¹ As a result of "click box bidding" and other mechanisms employed to reduce erroneous bids, we concluded that a decreased bid withdrawal payment rule, meant to provide some bidders relief from full application of bid withdrawal

¹⁴⁴ 47 C.F.R. § 1.2101

¹⁴⁵ *Part 1 Third Report and Order*, 13 FCC Rcd at 459-60 para. 150.

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., "Auction of the Phase II 220 MHz Service Licenses," *Public Notice*, DA 98-1010, at 32-34 (released May 29, 1998).

¹⁴⁸ "156-162 MHz VHF Public Coast Station Spectrum Auction Scheduled for December 3, 1998," *Public Notice*, DA 98-1469 (released July 23, 1998).

¹⁴⁹ *C Block Further Notice*, 12 FCC Rcd at 16,480 para. 98.

¹⁵⁰ *Part 1 Third Report and Order*, 13 FCC Rcd at 434 para. 102.

¹⁵¹ *Id.*

payments, is not necessary.¹⁵² We direct the Bureau to follow the Part 1 rule on bid withdrawal, default, and disqualification, Section 1.2104(g), to the extent applicable.¹⁵³

9. Anti-Collusion Rules

42. The Commission proposed in the *C Block Further Notice* to apply the anti-collusion rules enumerated in the *Competitive Bidding Second Report and Order*.¹⁵⁴ In the *Part 1 Third Report and Order*, we created an exception to the Commission's general anti-collusion rules.¹⁵⁵ Under this exception, a non-controlling attributable interest holder in an applicant may obtain an ownership interest in, or enter into a consortium arrangement with, another applicant for a license in the same geographic area, provided that the original applicant has withdrawn from the auction, is no longer placing bids, and has no further eligibility.¹⁵⁶ The exception provides flexibility for non-controlling investors to invest in other auction applicants if their original applicant fails to complete the auction.¹⁵⁷

43. Although one commenter to the *C Block Further Notice* raised the issue of creating a "safe harbor" for discussions of non-auction related business matters between applicants in the same license area,¹⁵⁸ we determined in the *Part 1 Third Report and Order* that there was no need to create a "safe harbor."¹⁵⁹ Section 1.2105(c) of the Commission's rules places significant limitations on applicants seeking business opportunities in geographic license areas where they plan to bid. We concluded that interpretations of the anti-collusion rules provided by the Bureau instruct the public as to permissible non-auction discussions, obviating the need for a "safe harbor" in the auction process.¹⁶⁰

¹⁵² *Id.* at 458 para. 147.

¹⁵³ *See* 47 C.F.R. § 1.2104(g).

¹⁵⁴ *C Block Further Notice*, 12 FCC Rcd at 16,480 para. 99; *see* *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-88, codified at 47 C. F. R. § 1.2105(c); *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245-7254 (1994); *Erratum*, Mimeo No. 50278, 1994, WL 575828 (released October 19, 1994).

¹⁵⁵ *See* 47 C.F.R. § 1.2105(c).

¹⁵⁶ *Part 1 Third Report and Order*, 13 FCC Rcd at 465-66 para. 160.

¹⁵⁷ *Id.*

¹⁵⁸ *See infra* Appendix B.

¹⁵⁹ *Part 1 Third Report and Order*, 13 FCC Rcd at 466-67 para. 162.

¹⁶⁰ *Id.* *See, e.g.*, Public Notice, "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rules for D, E and F Block Bidders," DA 96-1460 (August 28, 1996) ("*August 28 Public Notice*"); Public Notice, "FCC Staff Clarifies Application of Anti-Collusion Rule to Broadband PCS 'C' Block Reaction," DA 96-929 ("*June 10 Public Notice*") 11 FCC Rcd 7031 (released June 10, 1996); *Public Notice*, "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules, DA 95-2244 (released October 26, 1995); News Release, "Staff Adopts Order and Releases Letters Clarifying Issues on Broadband PCS

44. As we noted in the *Third Report and Order*, however, auction applicants should be aware that communications concerning, but not limited to, issues such as management, resale, roaming, interconnection, partitioning and disaggregation may all raise impermissible subject matter for discussion because they may convey pricing information and bidding strategy. Because auction applicants should avoid all communication with each other that will likely affect bids or bidding strategies, we believe that individual applicants, and not the Commission, are in the best position to determine in the first instance which communications are permissible and which are not.¹⁶¹ Bidders should familiarize themselves with Commission rules and rule interpretations regarding unauthorized communications in auction proceedings, and they should report any such communications to the Bureau.¹⁶² As always, the Commission retains the right to investigate possible instances of collusion or to refer any allegations of collusion to the United States Department of Justice for investigation.¹⁶³

10. Bidding Credits

45. The original C block auction offered winning bidders qualifying as a small business or a consortium of small businesses a bidding credit of twenty-five percent of winning bids. The Commission's rules defined a small business as "an entity that, together with its affiliates and persons or entities that hold interest in such entity and their affiliates, has average annual gross revenues that are not more than forty million dollars for the preceding three years."¹⁶⁴ Subsequent to that auction, we amended our rules to define also a *very* small business in the C or F blocks as "an entity that, together with its affiliates and persons or entities that hold interest in such entity and their affiliates, has average annual gross revenues that are not more than fifteen million dollars for the preceding three years."¹⁶⁵ The Commission proposed in the *C Block*

Auctions" (released October 26, 1994); Letter from William E. Kennard, FCC, to Gary M. Epstein & James H. Barker, October 25, 1994; Letter from Rosalind K. Allen, FCC, to R. Michael Senkowski, Dec. 1, 1994; Letter from Rosalind K. Allen, FCC, to Leonard J. Kennedy, Dec. 14, 1994; Letter from Kathleen O'Brien Ham, FCC, to Mark Grady, April 16, 1996; Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, September 17, 1996.

¹⁶¹ *Part I Third Report and Order*, 13 FCC Rcd at 467-68 para. 163.

¹⁶² *See, e.g.*, letter from Carl W. Northrop, attorney, Paul, Hastings, Janofsky & Walker LLP, to Kathleen O'Brien Ham, FCC (April 14, 1998) (on file with the FCC); letter from Glenn B. Manishin, attorney, Blumenfeld & Cohen, to Carl W. Northrop, Esq. (April 14, 1998) (copy on file with the FCC).

¹⁶³ *See Application of US West Communications, Inc., Notice of Apparent Liability for Forfeiture*, FCC 98-41 (released March 16, 1998); *Application of Western PCS BTA I Corp., Notice of Apparent Liability for Forfeiture*, FCC 98-42 (released March 16, 1998); letter from Joel I. Klein, Assistant Attorney General, Antitrust Division, Department of Justice, to Reed Hundt, Chairman, Federal Communications Commission (dated October 8, 1997, filed with the Commission October 17, 1997).

¹⁶⁴ 47 C.F.R. § 24.720(b)(1).

¹⁶⁵ *Id.* § 24.720(b)(2); *see* Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824 at para. 60 (1996).

Further Notice to have two tiers of bidding credits for the next C block reauction, a twenty-five percent bidding credit for small businesses and a thirty-five percent bidding credit for very small businesses.¹⁶⁶

46. In order to provide continuity and certainty for auction participants, we adopted a schedule of bidding credits in the *Part 1 Third Report and Order* to be used in future auctions for all services.¹⁶⁷ The schedule sets the bidding credit percentage according to the average annual gross revenues of the designated entity.¹⁶⁸ Applying the Part 1 schedule to the gross revenue thresholds for small and very small businesses under our rules for C and F block auctions, we conclude that a small business will receive a fifteen percent bidding credit,¹⁶⁹ and a very small business will receive a bidding credit of twenty-five percent.¹⁷⁰ We recognize that the amount of bidding credits differs from the Commission's proposal in the *C Block Further Notice*; however, use of the Part 1 schedule benefits potential bidders by providing them with certainty about the size of available bidding credits well in advance of C block reauctions. We will amend Sections 24.712 and 24.717 of the Commission's rules¹⁷¹ to reflect our application of the Part 1 bidding credits schedule to C and F block reauctions.

47. Eligibility for bidding credits will be determined at the deadline for filing short-form applications. Thus, if an entity no longer qualifies as a small business as of the deadline for filing short-form applications, but is eligible to participate in the next C block reauction because it was eligible to participate in the original C block auction,¹⁷² it will *not* be eligible for bidding credits. Because of the complex issues involved in the original C block auction,¹⁷³ we are willing to allow former C block auction participants and eligible applicants to participate in the next reauction (and in reauctions for the ensuing two years). However, we do not feel that it is in the best interests of the public and, in particular, of competing small business bidders and licensees to provide a discount to applicants that no longer meet the small business size standards.

48. We remind applicants that, under Section 1.2111(d) of our rules, as amended, C block licensees that utilize a bidding credit, and during their initial license term seek to make a change in the ownership or control of a license that would result in the license's being owned or controlled by an entity that

¹⁶⁶ *C Block Further Notice*, 12 FCC Rcd at 16,481 paras. 100-101.

¹⁶⁷ *Part 1 Third Report and Order*, 13 FCC Rcd at 402-04 paras. 44-48.

¹⁶⁸ *Id.* at 388, 403 paras. 18, 46-47.

¹⁶⁹ *See* 47 C.F.R. § 1.2110(e)(2)(iii).

¹⁷⁰ *See Part 1 Third Report and Order*, 13 FCC Rcd at 403-04 para. 47; 47 C.F.R. §§ 1.2110(e)(2)(ii), 24.720.

¹⁷¹ 47 C.F.R. §§ 24.712, 24.717.

¹⁷² *See supra* para. 13.

¹⁷³ *See C Block Reconsideration Order*, 13 FCC Rcd 8348 at para. 7.

does not meet the eligibility criteria for a bidding credit, or that is eligible for a lower bidding credit, will have to reimburse the U.S. Government for a percentage of the amount of the bidding credit.¹⁷⁴ This percentage, in some circumstances, will be as high as the full amount of the bidding credit plus interest.¹⁷⁵

11. Installment Payment Program

49. The Commission tentatively concluded in the *C Block Further Notice* that it would not provide an installment payment program in the next reauction.¹⁷⁶ Subsequently, in the *Part 1 Third Report and Order* we suspended the installment payment program for the immediate future.¹⁷⁷

50. We will apply our decision in the *Part 1 Third Report and Order* and not offer installment payments in the next reauction. It is our responsibility to balance the competing goals in Section 309(j) that require, *inter alia*, that the Commission promote the development and rapid deployment of new spectrum-based services, while ensuring that designated entities are given an opportunity to participate in the provision of such services.¹⁷⁸ We recognize that conditioning receipt of a license upon payment requires greater financial resources.¹⁷⁹ However, many C block licensees have requested relief from their installment payment obligations and three have sought bankruptcy protection.¹⁸⁰ The objective of Section 309(j) to speed service to the public cannot be achieved when licenses are held in abeyance in bankruptcy court. Other financing alternatives, such as the provision of bidding credits,¹⁸¹ will help to ensure meaningful small business participation.¹⁸²

VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Final Regulatory Flexibility Analysis

¹⁷⁴ See 47 C.F.R. § 1.2111(d).

¹⁷⁵ *Id.*

¹⁷⁶ *C Block Further Notice*, 12 FCC Rcd at 16,481 para. 101.

¹⁷⁷ *Part 1 Third Report and Order*, 13 FCC Rcd at 397-98 para. 38.

¹⁷⁸ 47 U.S.C. §§ 309(j)(3), (4).

¹⁷⁹ *C Block Further Notice*, 12 FCC Rcd at 16,481 para. 101.

¹⁸⁰ *Part 1 Third Report and Order*, 13 FCC Rcd at 396, 397-98 paras. 36, 38. See *In re GWI PCS1, Inc.*, No. 397-39676-SAF-11 (Bankr. N.D.Tex. April 24, 1998); *In re Pocket Communications, Inc.*, No. 97-5-4105(ESD) (Bankr. D.Md.); *In re NextWave Personal Communications, Inc.*, 98 21529 (ASH) (Bankr. S.D.N.Y.).

¹⁸¹ See Communications Act, § 309(j)(4)(D); 47 U.S.C. § 309(j)(4)(D).

¹⁸² See *Part 1 Third Report and Order*, 13 FCC Rcd at 397-98 para. 38.

51. The Final Regulatory Flexibility analysis, pursuant to the Regulatory Flexibility Act, *see* 5 U.S.C. § 604, is attached as Appendix D.

B. Paperwork Reduction Act Analysis

52. This Order contains a modified information collection that was submitted to the Office of Management and Budget requesting clearance under the Paperwork Reduction Act of 1995.

C. Ordering Clauses

53. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), this *Fourth Report and Order* is hereby ADOPTED, and Sections 1.2105, 24.703, 24.704, 24.705, 24.706, 24.707, 24.709, 24.711, 24.712, 24.716, 24.717, 24.822 of the Commission's rules, 47 C.F.R. Sections 1.2105, 24.703, 24.704, 24.705, 24.706, 24.707, 24.709, 24.711, 24.712, 24.716, 24.717, 24.822, are amended as set forth in Appendix C, effective 60 days after publication in the Federal Register.

54. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Fourth Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

55. IT IS FURTHER ORDERED THAT, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 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.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A**List of Parties Filing Comments and Reply Comments****Parties Filing Comments:**

1. Airgate Wireless, L.L.C. ("Airgate")
2. Alpine PCS, Inc. ("Alpine")
3. Carolina PCS I Limited Partnership ("CPCSI")
4. ClearComm., L.P. ("ClearComm")
5. Conestoga Wireless Company ("Conestoga")
6. Cook Inlet Region, Inc. ("CIRI")
7. DiGiPH PCS Inc. ("DiGiPH")
8. Duluth PCS, Inc., St. Joseph PCS, Inc. and West Virginia PCS, Inc ("Duluth")
9. MFRI Incorporated ("MFRI")
10. National Telecom PCS, Inc. ("NatTel")
11. Nextel Communications, Inc. ("Nextel")
12. NextWave Telecom. Inc. ("NextWave")
13. Omnipoint Corporation ("Omnipoint")
14. Starcom Telecommunications ("Starcom")

Parties Filing Reply Comments:

1. Airgate Wireless, L.L.C. ("Airgate")
2. Alpine PCS, Inc. ("Alpine")
3. AT&T Wireless Services, Inc. ("AT&T")
4. Carolina PCS I Limited Partnership ("CPCSI")
5. DiGiPH PCS Inc. ("DiGiPH")
6. Fidelity Capital ("Fidelity")
7. Meretel Communications, L.P. ("Meretel")
8. NextWave Telecom. Inc. ("NextWave")
9. Omnipoint Corporation ("Omnipoint")
10. PrimeCo Personal Communications, L.P. ("PrimeCo")
11. Sprint Corporation ("Sprint")

Ex Parte Filings:

1. NextWave Telecom. Inc. ("NextWave")

Appendix B**Comments on Issues Addressed in *Part 1 Third Report and Order***

- **Competitive Bidding Design**

Omnipoint supports the Commission's proposal to have a single simultaneous, multiple-round reauction.¹ Duluth also supports the proposal, provided that telephonic bidding remains as an option; whereas, NextWave asks for a requirement that all bids be submitted electronically with emergency telephone backup.²

- **Bidding Procedures**

Duluth suggests the initial C block competitive bidding rules contained in Part 24 would be appropriate for a reauction since both the initial auction and the next reauction involve the provision of only one frequency block.³

- **Activity Rules**

Parties commenting on activity rules for a reauction generally support the Commission's tentative conclusion and its proposal.⁴

- **Reserve Price, Minimum Opening Bid, and Minimum Bid Increments**

Conestoga asks that the Commission set neither a minimum opening bid nor a reserve price for any C block license or spectrum.⁵ Duluth opposes any minimum opening bid or reserve price that differs from that used in the original C block auction.⁶ Several parties disagree with setting the minimum opening bids for

¹ Omnipoint Comments at 4.

² Duluth Comments at 1; NextWave Comments at 4-5.

³ Duluth Comments at 1.

⁴ See Duluth Comments at 2; NextWave Comments at 5 (asking that the Commission continue its practice of reviewing potential changes with bidders and soliciting online input).

⁵ Conestoga Comments at 2, 3-4.

⁶ Duluth Comments at 2. We note that no minimum opening bids or reserve prices were employed for the original C block auction.

each market at 10 percent of the corresponding high bid for the market in the original C block auction.⁷ AT&T asks that the Commission set a reserve price of not less than fifty percent of the corresponding high bid in the original C block auction.⁸

- **Electronic Filing**

Only one commenter addressed this proposal, supporting mandatory electronic filing for short-form applications.⁹

- **Upfront Payment**

Several parties filed comments addressing this issue. While some commenters believe that \$.06 per MHz per pop is excessive,¹⁰ others agree that this upfront payment amount is appropriate.¹¹

- **Down Payment and Full Payment**

Two commenters oppose requiring full cash payment upon winning a license.¹²

- **Bid Withdrawal, Default, and Disqualification**

NextWave proposes to prohibit a bidder from rebidding on the same market from which it withdraws a bid, once overall auction activity falls below a certain level.¹³ ClearComm suggests that no withdrawal payment be imposed when an unintended bidding error is made.¹⁴

⁷ See Airgate Comments at 2, 7-9; CIRI Comments at ii, 10-13; Omnipoint Comments at 5-6; Starcom Comments at 2-5; Airgate Reply at 3-4; and Fidelity Reply at 4; *see also* NextWave Reply at 7-9.

⁸ AT&T Reply at 1-3.

⁹ Duluth Comments at 2.

¹⁰ Airgate Comments at 2, 7; Conestoga Comments at 4-5; NextWave Comments at 6-7; Airgate Reply at 4; and NextWave Reply at 2.

¹¹ Duluth Comments at 2; Omnipoint Comments at 5.

¹² Duluth Comments at 2; Alpine Comments at 5.

¹³ NextWave Comments at 7.

¹⁴ ClearComm Comments at 4-9; *see* Application for Review of PCS 2000, L.P. [now ClearComm, L.P.], filed January 21, 1997 (asking for a waiver of a \$3,273,374 bid withdrawal payment assessed against it); letter from Daniel B. Phythyon, FCC, to Tyrone Brown, ClearComm, L.P., DA 98-1074, June 12, 1998 (granting ClearComm's request for reduction of its bid withdrawal payment to \$425,000); In the Matter of ClearComm, L.P., *Order*, DA 98-1081, (released June 12, 1998) (granting ClearComm's request for dismissal of its Application for Review).

- **Anti-Collusion Rules**

NextWave proposes the creation of a "safe harbor."¹⁵ Two commenters propose that the Commission clarify specific aspects of the anti-collusion rules.¹⁶

- **Bidding Credits**

CIRI supports the Commission's proposal in the *C Block Further Notice* to adopt a "very small business" definition, but urges the adoption of "heightened" bidding credits of 45 percent for very small businesses and 35 percent for small businesses.¹⁷ CIRI also suggests limiting eligibility for bidding credits to participants that are not delinquent on installment payments at the time short-form applications are filed for a reauction.¹⁸ AirGate suggests that eligibility for bidding credits be determined at the time the short-form is filed for a reauction, so that an entity that was initially eligible for bidding credits, but has grown beyond that classification, would not continue to receive that benefit.¹⁹ Omnipoint disagrees, arguing that if an entity received bidding credits in the initial auction, it should be awarded bidding credits in a reauction, even though it no longer meets our criteria for bidding credits.²⁰ Otherwise, according to Omnipoint, the Commission will be punishing such entities for their "financial progress."²¹ Omnipoint further argues that the Commission's *Competitive Bidding Fifth Memorandum Opinion and Order* states a licensee's increased gross revenues or total assets or that of its attributable entities should not be counted against that licensee's continuing eligibility as an entrepreneur.²²

¹⁵ NextWave Comments at 8 - 11.

¹⁶ AirGate Comments at 11 (seeking clarification as to prohibited "disclosures"); Duluth Comments at 2. (requesting a definition of collusion and its penalties).

¹⁷ See CIRI Comments at 13-15; id. at 6; DiGiPH Comments at 8-9; Nextel Comments at 10; 47 C.F.R. §1.2110(b)(1).

¹⁸ CIRI Comments at 5.

¹⁹ See AirGate Comments at 10-11; AirGate Reply Comments at 4; NextWave Reply Comments at 2-4 (requesting that the Commission clarify that those exceeding the revenue caps, and not qualified as small businesses, will not be able to take advantage of bidding credits).

²⁰ Omnipoint Comments at 2-3.

²¹ *Id.*

²² *Id.* at 3 (arguing that our *Fifth Memorandum Opinion and Order* states a licensee's increased gross revenues or total assets or that of its attributable entities should not be counted against that licensee's continuing eligibility as an entrepreneur); see also *Fifth Memorandum Opinion and Order* at 420 para. 27.

- **Installment Payment Program**

Several commenters favor continuation of the installment payment program.²³

²³ See AirGate Comments at 9-10; Alpine Comments at 5-6; CPCI Comments at 3; DiGiPH Comments at 3-7; *see also* Duluth Comments at 2; NatTel Comments at 10; Airgate Reply Comments at 2 -3; DiGiPH Reply Comments at 2 -3, 5 - 6.

Appendix C**REVISED RULES****PART 1 - PRACTICE AND PROCEDURE**

1. Section 1.2105 is revised by adding (a)(2)(xi) to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of collusion

* * * * *

(xi) For C block applicants, an attached statement made under penalty of perjury indicating whether or not the applicant has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency.

PART 24 - PERSONAL COMMUNICATIONS SERVICES

2. Section 24.703 is removed.

§ 24.703 [Removed]

3. Section 24.704 is revised to read as follows:

§ 24.704 Withdrawal, default and disqualification penalties.

See § 1.2104 of this chapter.

4. Section 24.705 is removed.

§ 24.705 [Removed]

5. Section 24.706 is revised to read as follows:

§ 24.706 Submission of upfront payments and down payments.

(a) All auction participants are required to submit an upfront payment in accordance with § 1.2106 of this chapter. Any C block applicant that has previously been in default on any Commission licenses or has previously been delinquent on any non-tax debt owed to any Federal agency must submit an upfront payment equal to 50 percent more than that set for each particular license.

(b) * * *

6. Section 24.707 is removed.

§ 24.707 [Removed]

7. Section 24.709 is revised by adding paragraphs (a)(4) and (a)(5) and revising paragraphs (b)(9)(i) and (e) to read as follows:

§ 24.709 Eligibility for licenses for frequency Blocks C and F.

(a) * * *

(4) In order to be eligible for participation in a C block auction, an applicant must certify that it is not in default on any Commission licenses and that it is not delinquent on any non-tax debt owed to any Federal agency. *See* § 24.706.

(5) An applicant for participation in a C block auction must state under penalty of perjury whether or not it has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency. *See* § 24.706.

(b) * * *

(9) * * *

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the auction for frequency block C, which began on December 18, 1995, or the reauction for frequency block C, which began on July 3, 1996, will be eligible to bid in any reauction of block C spectrum that begins within two years of the start date of the first reauction of C block spectrum following the effective date of this rule.

* * * * *

(e) Definitions. The terms affiliate, business owned by members of minority groups and/or women, and gross revenues used in this section are defined in § 1.2110. The terms consortium of small businesses, control group, existing investor, institutional investor, nonattributable equity, preexisting entity, publicly traded corporation with widely dispersed voting power, qualifying investor, small business, and total assets used in this section are defined in § 24.720.

8. Section 24.711 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 24.711 Upfront payments, down payments and installment payments for licenses for frequency Block C.

(a) Upfront Payments and Down Payments.

(1) Each eligible bidder for licenses subject to auction on frequency Block C shall pay an upfront payment as set forth in a Public Notice pursuant to the procedures in § 1.2106 of this chapter.

(2) Each winning bidder shall make a down payment and the balance of its winning bids pursuant to § 1.2107 and § 1.2109 of this chapter.

* * * * *

9. Section 24.712 is revised to read as follows:

§ 24.712 Bidding credits for licenses for frequency Block C.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 24.720(b)(1) or § 24.720(b)(4) may use a bidding credit of fifteen percent, as specified in § 1.2110(e)(2)(iii), to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in § 24.720(b)(2) or § 24.720(b)(5) may use a bidding credit of twenty-five percent as specified in § 1.2110(e)(2)(ii), to lower the cost of its winning bid.

(c) Unjust Enrichment. *See* § 1.2111 of this chapter.

10. Section 24.716 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 24.716 Upfront payments, down payments and installment payments for licenses for frequency Block F.

(a) Upfront Payments and Down Payments.

(1) Each eligible bidder for licenses subject to auction on frequency Block F shall pay an upfront payment as set forth in a Public Notice pursuant to the procedures in § 1.2106 of this chapter.

(2) Each winning bidder shall make a down payment and the balance of its winning bids pursuant to § 1.2107 and § 1.2109 of this chapter.

* * * * *

11. Section 24.717 is revised to read as follows:

§ 24.717 Bidding credits for licenses for frequency Block F.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 24.720(b)(1) or § 24.720(b)(4) may use a bidding credit of fifteen percent, as specified in § 1.2110(e)(2)(iii), to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in § 24.720(b)(2) or § 24.720(b)(5) may use a bidding credit of twenty-five percent, as specified in § 1.2110(e)(2)(ii), to lower the cost of its winning bid.

(c) Unjust Enrichment. *See* § 1.2111 of this chapter.

* * * * *

12. Section 24.822 is removed.

§ 24.822 [Removed]

APPENDIX D

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *C Block Further Notice of Proposed Rule Making* in WT Docket No. 97-82 ("*C Block Further Notice*").² The Commission sought written public comment on the proposals in the *C Block Further Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and objectives of, the *C Block Fourth Report and Order* in WT Docket No. 97-82

This *C Block Fourth Report and Order* sets forth the rules that will govern reauctions of C block spectrum surrendered to the Commission pursuant to the *C Block Second Report and Order*⁴ and the *C Block Order on Reconsideration of the Second Report and Order* ("*C Block Reconsideration Order*"),⁵ as well as any other C block spectrum available for reauction. The *C Block Fourth Report and Order* also reflects the Commission's ongoing effort to streamline auction procedures by eliminating overlapping or redundant rules and simplifying procedures for auction participants.

B. Summary of significant issues raised by public comments in response to the IRFA

There were no comments filed directly in response to the IRFA. The Commission, however, has considered the economic impact on small businesses of the rules adopted herein. *See* section E, *infra*.

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("*SBREFA*").

² See Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436, 16,497 ("*C Block Second Report and Order*" and "*C Block Further Notice*").

³ See 5 U.S.C. § 604.

⁴ *C Block Second Report and Order*, 12 FCC Rcd 16,436.

⁵ Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1988) ("*C Block Reconsideration Order*").

C. Description and estimate of the number of small entities to which the rules will apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.⁶ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁷ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁸ Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration ("SBA").⁹

The rule changes effected by this *C Block Fourth Report and Order* affect all small businesses that participate in future reactions of C block and F block spectrum, including small businesses currently holding C block and F block broadband personal communications services (PCS) licenses that choose to participate and other small businesses that may acquire licenses through reaction. The Commission grants C block and F block licenses only to applicants that, together with their affiliates and persons or entities that hold interests in the applicants and their affiliates, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million.¹⁰ The Commission, with respect to broadband PCS, defines small businesses as entities that, together with their affiliates and persons or entities that hold interest in such entities and their affiliates, have average annual gross revenues that are not more than forty million dollars for the preceding three years.¹¹ This definition has been approved by the SBA.¹²

On May 6, 1996, the Commission concluded the broadband PCS C block auction. The broadband PCS D, E, and F block auction closed on January 14, 1997. Ninety bidders (including the C block reaction winners, prior to any defaults by winning bidders) won 493 C block licenses and 88 bidders won 491 F block licenses. Small businesses placing high bids in the C and F block auctions were eligible for bidding credits and installment payment plans. For purposes of our evaluations and conclusions in this RFA, we assume that all of the 90 C block broadband PCS licensees and 88 F block broadband PCS licensees, a total of 178 licensees potentially affected by this *C Block Fourth Report and Order*, are small entities. In addition to the

⁶ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

⁷ *Id.* § 601(6).

⁸ *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

⁹ *Id.* § 632.

¹⁰ 47 C.F.R. § 24.709.

¹¹ *Id.* § 24.720(b)(1).

¹² See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 (1995); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5581-5584 (1994); 47 C.F.R. §§ 24.320(b) and 24.720(b).

178 current small business licensees that may participate at the reauction of C block licenses, a number of additional small business entities may seek to acquire licenses through reauction and would thus be affected by these rules.

In addition, the Commission will provide small business bidders and very small business bidders in C block and F block reauctions with bidding credits, with a greater discount given to very small businesses.¹³ Under Commission rules, very small businesses in the C block and F block are entities that, together with their affiliates and persons or entities that hold interest in such entities and their affiliates, have average annual gross revenues of not more than fifteen million for the preceding three years.¹⁴ As discussed below, small businesses will receive a fifteen percent bidding credit, and very small businesses will receive a bidding credit of twenty-five percent.

D. Description of reporting, recordkeeping, and other compliance requirements

As a result of the *C Block Fourth Report and Order*, each applicant for a C block reauction will be required to attach to its short-form application a statement indicating whether or not the applicant has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency.¹⁵

E. Steps taken to minimize significant economic impact on small entities, and significant alternatives considered

The Commission will include in the next C block reauction all licenses representing C block spectrum returned to the Commission under the disaggregation, prepayment, or amnesty options established in the *C Block Second Report and Order*, as modified in the *C Block Reconsideration Order*, as well as all C block licenses held by the Commission as a result of defaults. While some commenters argue that the next reauction should include licenses that have filed for bankruptcy protection,¹⁶ the Commission believes that the public and C block reauction applicants will realize a greater benefit if the Commission auctions all available C block spectrum as soon as practicable than they will if the Commission postpones a reauction until it has resolved all issues connected with ongoing bankruptcy proceedings.

¹³ In the C block auction, a winning bidder that qualified as a small business or a consortium of small businesses was able to use a bidding credit equal to 25 percent of its winning bid. For the reauction, the Commission proposes tiered bidding credits, as were offered for F block and, more recently, Local Multipoint Distribution Service (LMDS) small business bidders.

¹⁴ 47 C.F.R. § 24.720(b)(2).

¹⁵ See *C Block Fourth Report and Order*, *supra*, at para. 34.

¹⁶ Certain C block licensees have filed for bankruptcy protection. See *In re GWI PCSI, Inc.*, No. 397-39676-SAF-11 (Bankr. N.D.Tex. April 24, 1998); *In re Pocket Communications, Inc.*, No. 97-5-4105(ESD) (Bankr. D.Md.); *In re NextWave Personal Communications, Inc.*, 98 21529 (ASH) (Bankr. S.D.N.Y.).

The following two types of entities will be eligible to participate in C block reauctions: (1) entities that filed an FCC Form 175 short-form application for, and were eligible for, the original C block auction, and (2) entities qualifying under Section 24.709 of the Commission's rules¹⁷ as of the deadline for the filing of short-form applications for the reauction. All but two of the entities that applied for and were eligible to participate in the original C block auction qualified as small businesses under Section 24.720 of the Commissions rules.¹⁸ In order to ensure the integrity of C block reauctions, the Commission retains the eligibility restriction established in the *C Block Second Report and Order*, as modified in the *C Block Reconsideration Order*, for licensees that surrender licenses pursuant to the disaggregation, prepayment, and/or "amnesty/prepayment" options. Such licensees will be ineligible to reacquire their surrendered licenses through reauction or by any other means for a period of two years from the start date of the next C block reauction.¹⁹

To further ensure auction integrity for the benefit of applicants as well as the general public, the Commission will restrict C block reauctions to entities not in default on any Commission debt and not delinquent on any non-tax debt owed to any Federal agency. However, the Commission believes that past business misfortunes do not inevitably preclude an entity from being able to meet its present and future responsibilities as a Commission licensee. Therefore, the Commission will allow "former defaulters," i.e., applicants that have defaulted or been delinquent in the past, but have since paid all of their outstanding non-Internal Revenue Service Federal debts and all associated charges or penalties, to be eligible to participate in C block reauctions, provided that they are otherwise qualified.

In the *Part 1 Third Report and Order*,²⁰ the Commission adopted general competitive bidding rules to supplant, wherever practicable, specific auction rules for each auctionable service or class of service. Accordingly, future C block reauctions will adhere to Part 1 rules, insofar as applicable. Part 1 rules are determinative for the following aspects of C block reauctions: competitive bidding design; activity rules; reserve price, minimum opening bid, and minimum bid increments; electronic filing; upfront payment; down payment and full payment; amendments and modifications of applications; bid withdrawal, default, and disqualification; anti-collusion, and installment payment financing. Based upon the record in this proceeding, the Commission sets a ceiling for minimum opening bids that is no more than ten percent of the amount of the net high bid for the corresponding market in the original C block auction. The Commission also sets the upfront payment amount for the next C block reauction at no higher than \$.06 per MHz per pop. The Commission will require that the upfront payment for "former defaulters" be 50 percent more than that

¹⁷ 47 C.F.R. § 24.709.

¹⁸ See FCC, Wireless Telecommunications Bureau, *Broadband PCS: C Block Auction, Fact Sheet* (last reviewed/updated April 17, 1998) <<http://www.fcc.gov/wtb/auctions/>>; see also 47 C.F.R. § 24.720.

¹⁹ *C Block Reconsideration Order*, 13 FCC Rcd at 8360 para. 37, 8360-61 para. 38, 8361-62 para. 41, and 8367 para. 50. Licensees that surrender licenses pursuant to the "pure amnesty" option will remain eligible to reacquire those surrendered licenses in a reauction or through a secondary market transaction. *Id.* at para. 37.

²⁰ Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (released December 31, 1997) ("*Part 1 Third Report and Order*" and "*Part 1 Further Notice*").

required from applicants that do not have a history of default. This increased upfront payment formula reflects the increased risk associated with these parties.

In the *Part 1 Third Report and Order*, the Commission adopted a schedule of bidding credits to be used in future auctions for all services. Applying the Part 1 schedule to the gross revenue thresholds under the Part 24 rules for small and very small C block and F block businesses, gives small business applicants in C block reauctions a fifteen percent bidding credit and very small business applicants a twenty-five percent bidding credit. Eligibility for bidding credits will be determined by the size of the applicant as of the deadline for filing short-form applications.

Section 309(j) of the Communications Act of 1934, as amended, directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses and other designated entities.²¹ Section 309(j) also requires that the Commission ensure the development and rapid deployment of new technologies, products, and services for the benefit of the public, and recover for the public a portion of the value of the public spectrum resource made available for commercial use.²² The Commission believes that the *C Block Fourth Report and Order* promotes these goals while maintaining the fair and efficient execution of the auctions program.

F. Report to Congress

The Commission will send a copy of the *C Block Fourth Report and Order*, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. See 5 U.S.C. § 801(a)(1)(A). A copy of the *C Block Fourth Report and Order* and this FRFA (or summary thereof) will be published in the Federal Register. See 5 U.S.C. § 604(b). A copy of the *C Block Fourth Report and Order* and this FRFA will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

²¹ 47 U.S.C. § 309(j)(3)(B).

²² *Id.* § 309(j)(3)(A), (C).