



FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 73

[AU Docket No. 21-39; DA 21-131; FR ID 17492]

Auction of AM and FM Broadcast Construction Permits Scheduled for July 27, 2021; Comment Sought on Competitive Bidding Procedures for Auction 109

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; proposed auction procedures.

SUMMARY: The Office of Economics and Analytics (OEA), in conjunction with the Media Bureau (MB), announces an auction of certain AM and FM broadcast construction permits. This document seeks comment on minimum opening bid amounts and the procedures to be used in Auction 109.

DATES: Comments are due on or before March 15, 2021, and reply comments are due on or before March 22, 2021. Bidding in this auction is scheduled to begin July 27, 2021.

ADDRESSES: Interested parties may file comments or reply comments in AU Docket No. 21-39. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. All filings in response to the *Auction 109 Comment Public Notice* must refer to AU Docket No. 21-39. The Commission strongly encourages interested parties to file comments electronically.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS at <https://www.fcc.gov/ecfs/>. Follow the instructions for submitting comments.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
- Filings in response to the Auction 109 Comment Public Notice can be sent by commercial courier or by the U.S. Postal Service. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial deliveries (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Dr., Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, or Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.

- Until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals and to mitigate the transmission of COVID-19.
- *Email:* OMB and MB also request that a copy of all comments and reply comments be submitted electronically to the following address: auction109@fcc.gov.

FOR FURTHER INFORMATION CONTACT:

Auction legal questions: Lynne Milne or Lyndsey Grunewald at 202-418-0660.

General auction questions: Auctions Hotline at 717-338-2868.

AM/FM service questions: James Bradshaw or Lisa Scanlan or Tom Nessinger at (202) 418-2700.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction 109 Comment Public Notice*, AU Docket No. 21-39, DA 21-131, released on February 8, 2021. The complete text of the *Auction 109 Comment Public Notice*, including its attachment, is available on the Commission's website at www.fcc.gov/auction/109 or by using the search function for AU Docket No. 21-39 on the Commission's ECFS web page at www.fcc.gov/ecfs. Alternative formats are available to persons with disabilities by sending an email to FCC504@fcc.gov or by calling the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

I. INTRODUCTION

1. By the *Auction 109 Comment Public Notice*, the Commission announces an auction of four AM construction permits and 136 FM construction permits, with bidding to start on July 27, 2021, and seeks comment on the procedures to be used to conduct Auction 109, as well as upon minimum opening bids for the permits.

2. Auction 109 will offer all of the FM radio permits that were previously included in the inventory for Auction 106, as well as six additional FM permits. Auction 106 was postponed on March 25, 2020, with no appointed date for resumption, due to the Covid-19 pandemic. That auction is now canceled; applications submitted by entities seeking to participate in Auction 106 have been dismissed. All applicants wishing to participate in Auction 109, regardless of whether they may have previously filed a short-form application (FCC Form 175) for Auction 106, will be required to file a new short-form application to participate in Auction 109. A window for filing short-form applications to participate in

Auction 109 will be announced in a subsequent public notice in this proceeding.

II. CONSTRUCTION PERMITS

3. Auction 109 will offer four AM construction permits and 136 FM construction permits. Attachment A to the *Auction 109 Comment Public Notice* lists each permit to be offered. Under the policies established in the *Broadcast Competitive Bidding Order*, 63 FR 48615, September 11, 1998, an applicant may apply for any AM construction permit or vacant FM allotment listed in Attachment A to the *Auction 109 Comment Public Notice*. If two or more short-form applications (FCC Form 175) specify the same AM permit or FM allotment, they will be considered mutually exclusive, mutual exclusivity exists for auction purposes, and the construction permit will be awarded by competitive bidding procedures. Once mutual exclusivity exists for auction purposes, even if only one applicant is qualified to bid for a particular construction permit in Auction 109, that applicant is required to submit a bid in order to obtain the construction permit.

4. *AM Construction Permits.* Auction 109 will offer four construction permits in the AM broadcast service. Attachment A to the *Auction 109 Comment Public Notice* lists the community of license, channel, class, and coordinates for each AM permit being offered.

5. The construction permits to be auction are for four previously licensed AM stations, listed in Attachment A to the Auction 109 Comment Public Notice, the license renewals of which were dismissed with prejudice in a hearing before the Commission's Administrative Law Judge and the call signs deleted.

6. To facilitate the auction of the four AM permits, the four AM facilities will be treated as existing allotments, using the coordinates, AM station frequency and class, and community of license of the respective AM facility as listed in Attachment A to the *Auction 109 Comment Public Notice*. The Media Bureau has protected these four AM stations by freezing the filing of any minor modification applications that would be mutually exclusive with the facilities of the four AM stations. Because protections extend to the previously licensed facility parameters, applicants will be limited in their opportunities to modify these AM permits.

7. *FM Construction Permits.* Auction 109 will also offer 136 construction permits in the FM broadcast service. The construction permits to be auctioned include all of the 130 FM allotments that

had previously been listed in the inventory for Auction 106 as well as six additional FM allotments. The FM allotments offered in Auction 109 include 34 construction permits that were offered but not sold or were defaulted upon in prior auctions. Attachment A identifies those previously offered permits and the auctions in which they were offered.

8. Attachment A to the *Auction 109 Comment Public Notice* lists the specific vacant FM allotments for which the Commission will offer construction permits in this auction, along with the reference coordinates for each vacant FM allotment. These comprise FM channels added to the Table of FM Allotments, 47 CFR 73.202(b), pursuant to the Commission's established rulemaking procedures and assigned at the indicated communities.

9. Each applicant in the FM service has the opportunity to submit a set of preferred site coordinates as an alternative to the reference coordinates for the vacant FM allotment upon which the applicant intends to bid. A future public notice announcing the procedures for Auction 109 will provide guidelines for completing FCC Form 175 and exhibits, including detailed instructions for specifying preferred site coordinates.

III. PROPOSED BIDDING PROCEDURES

10. *Simultaneous Multiple-Round Auction Design.* OEA and MB propose to use the Commission's simultaneous multiple-round auction format for Auction 109. As described further below, this type of auction offers every construction permit for bid at the same time and consists of successive bidding rounds in which qualified bidders may place bids on individual construction permits. Typically, bidding remains open on all construction permits until bidding stops on every construction permit. OEA and MB invite comment on this proposal.

11. *Bidding Rounds.* The Commission will conduct Auction 109 over the Internet using the FCC auction bidding system. A bidder will also have the option of placing bids by telephone through a dedicated auction bidder line.

12. Under this proposal, Auction 109 will consist of sequential bidding rounds, each of which would be followed by the release of round results. The initial bidding schedule will be announced in a public notice to be released at least one week before the start of bidding.

13. OEA and MB propose that the initial bidding schedule may be adjusted in order to foster

an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. Under this proposal, such changes may include the amount of time for the bidding rounds, the amount of time between rounds, or the number of rounds per day, depending upon bidding activity and other factors. OEA and MB request comment on this proposal. Commenters on this issue should address the role of the bidding schedule in managing the pace of the auction, specifically discussing the tradeoffs in managing auction pace by bidding schedule changes, by changing the activity requirement(s) or bid amount parameters, or by using other means.

14. *Stopping Rule.* In accordance with 47 CFR 1.2104(e), stopping rules are established before or during multiple round auctions in order to complete the auction within a reasonable time. For Auction 109, OEA and MB propose to employ a simultaneous stopping rule approach, which means all construction permits remain available for bidding until bidding stops on every construction permit. Specifically, bidding will close on all construction permits after the first round in which no bidder submits any new bid, applies a proactive activity rule waiver, or withdraws any provisionally winning bid (if bid withdrawals are permitted in this auction). Thus, under the proposed simultaneous stopping rule, bidding would remain open on all construction permits until bidding stops on every construction permit. Consequently, under this approach, it is not possible to determine in advance how long the bidding in this auction will last.

15. Further, OEA and MB propose to retain the discretion to exercise any of the following stopping options during Auction 109: (1) The auction would close for all construction permits after the first round in which no bidder applies a waiver, no bidder withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or no bidder places any new bid on a construction permit for which it is not the provisionally winning bidder. Absent any other bidding activity, a bidder placing a new bid on a construction permit for which it is the provisionally winning bidder would not keep the auction open under this modified stopping rule. (2) The auction would close for all construction permits after the first round in which no bidder applies a waiver, no bidder withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or no bidder places any new bid on a construction permit that already has a provisionally winning bid. Absent any other bidding activity, a bidder placing a new bid on an FCC-held construction permit (a construction permit that does not already have a provisionally

winning bid) would not keep the auction open under this modified stopping rule. (3) The auction would close using a modified version of the simultaneous stopping rule that combines (1) and (2) above. (4) The auction would close after a specified number of additional rounds (special stopping rule) to be announced in advance in the FCC auction bidding system. If this special stopping rule is invoked, bids will be accepted in the specified final round(s), after which the auction will close. (5) The auction would remain open even if no bidder places any new bid, applies a waiver, or withdraws any provisionally winning bid (if withdrawals are permitted in this auction). In this event, the effect will be the same as if a bidder had applied a waiver. The activity rule will apply as usual, and a bidder with insufficient activity will either lose bidding eligibility or use a waiver.

16. OEA and MB propose to exercise these options only in certain circumstances, for example, where the auction is proceeding unusually slowly or quickly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time or will close prematurely. Before exercising these options, OEA and MB will likely attempt to change the pace of the auction by changing the number of bidding rounds per day or the minimum acceptable bids, for example. OEA and MB propose to retain the discretion to exercise any of these options with or without prior announcement during the auction. OEA and MB request comment on these proposals. Commenters should provide specific reasons for supporting or objecting to these proposals.

17. *Auction Delay, Suspension, or Cancellation.* Pursuant to 47 CFR 1.2104(i), OEA and MB may delay, suspend, or cancel bidding in the auction, at any time before or during the bidding process of Auction 109, in the event of a natural disaster, technical obstacle, network interruption, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding. Notification of any such delay, suspension, or cancellation will be provided by public notice or through the FCC auction bidding system's messages function. If bidding is delayed or suspended, the auction may resume starting from the beginning of the current round or from some previous round, or the auction may be cancelled in its entirety. This authority will be exercised solely at the discretion of OEA and MB, and not as a substitute for situations in which bidders may wish to apply activity rule waivers. OEA and MB seek comment on this proposal.

18. *Upfront Payments and Bidding Eligibility.* In keeping with the usual practice in spectrum auctions, OEA and MB propose that applicants be required to submit upfront payments in accordance with 47 CFR 1.2106 as a prerequisite to becoming qualified to bid. As described below, the upfront payment is a refundable deposit made by an applicant to establish its eligibility to bid on construction permits. Upfront payments that are related to the specific construction permits being auctioned protect against frivolous or insincere bidding and provide the Commission with a source of funds from which to collect payments owed at the close of the bidding. As required by 47 CFR 1.2106(a), a former defaulter must submit an upfront payment equal to 50 percent more than the amount that would otherwise be required.

19. OEA and MB seek comment on an appropriate upfront payment for each construction permit being auctioned, taking into account such factors as the efficiency of the auction process and the potential value of similar construction permits. With these considerations in mind, upfront payments are specified in Attachment A to the *Auction 109 Comment Public Notice*. OEA and MB seek comment on those proposed upfront payment amounts.

20. It is proposed also that the amount of the upfront payment submitted by a bidder will determine its initial bidding eligibility in bidding units, which are a measure of bidder eligibility and bidding activity. OEA and MB propose to assign each construction permit a specific number of bidding units, equal to one bidding unit per dollar of the upfront payment amount listed in Attachment A to the *Auction 109 Comment Public Notice*. The number of bidding units for a given construction permit is fixed and does not change during the auction as prices change. If an applicant is found to be qualified to bid on more than one permit being offered in Auction 109, such bidder may place bids on multiple construction permits, provided that the total number of bidding units associated with those construction permits does not exceed that bidder's current eligibility. A bidder cannot increase its eligibility during the auction; it can only maintain its eligibility or decrease its eligibility. In calculating its upfront payment amount and hence its initial bidding eligibility, an applicant must determine the maximum number of bidding units on which it may wish to bid (or hold provisionally winning bids) in any single round and submit an upfront payment amount covering that total number of bidding units. OEA and MB request comment on these proposals.

21. Any applicant that submits a short-form application, but fails to timely submit an upfront payment, will retain its status as an applicant in Auction 109 and will remain subject to the rules prohibiting certain communications but, having purchased no bidding eligibility, will not be eligible to bid. An applicant that fails to become a qualified bidder for any other reason also will retain its status as an Auction 109 applicant and will remain subject to the rules prohibiting certain communications.

22. *Activity Rule.* To ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. For purposes of the activity rule, the FCC auction bidding system calculates a bidder's activity in a round as the sum of the bidding units associated with any construction permits upon which it places bids during the current round and the bidding units associated with any construction permits for which it holds provisionally winning bids. See 47 CFR 1.2104(f). Bidders are required to be active on a specific percentage of their current bidding eligibility during each round of the auction. OEA and MB propose a single-stage auction with the following activity requirement: In each bidding round, a bidder desiring to maintain its current bidding eligibility is required to be active on 100% of its bidding eligibility. Thus, the activity requirement would be satisfied when a bidder has bidding activity on construction permits with bidding units that total 100% of its current eligibility in the round. If the activity rule is met, then the bidder's eligibility does not change in the next round. Failure to maintain the requisite activity level will result in the use of an activity rule waiver, if any remain, or a reduction in the bidder's eligibility for the next round of bidding, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction. OEA and MB seek comment on these activity requirements.

Commenters that oppose a 100% activity requirement should explain their reasons with specificity.

23. *Activity Rule Waivers and Reducing Eligibility.* Pursuant to the proposed simultaneous multiple round auction format, when a bidder's activity in the current round is below the required minimum level, it may preserve its current level of eligibility through an activity rule waiver, if available. An activity rule waiver applies to an entire round of bidding, not to a particular construction permit. Activity rule waivers can be either proactive or automatic. Activity rule waivers are primarily a mechanism for a bidder to avoid the loss of bidding eligibility in the event that exigent circumstances prevent it from bidding in a particular round.

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

25. A bidder with insufficient activity may wish to reduce its bidding eligibility rather than use an activity rule waiver. If so, the bidder must affirmatively override the automatic waiver mechanism during the bidding round by using the reduce eligibility function in the FCC auction bidding system. In this case, the bidder's eligibility would be permanently reduced to bring it into compliance with the activity rule described above. Reducing eligibility is an irreversible action; once eligibility has been reduced, a bidder cannot regain its lost bidding eligibility.

26. Under the proposed simultaneous stopping rule, a bidder would be permitted to apply an activity rule waiver proactively as a means to keep the auction open without placing a bid. If a bidder proactively applies an activity rule waiver (using the proactive waiver function in the FCC auction bidding system) during a bidding round in which no bid is placed or withdrawn (if bid withdrawals are permitted in this auction), the auction will remain open and the bidder's eligibility will be preserved. An automatic waiver applied by the FCC auction bidding system in a round in which there is no new bid, no bid withdrawal (if bid withdrawals are permitted in this auction), or no proactive waiver would not keep the auction open.

27. Consistent with prior Commission auctions of broadcast construction permits, OEA and MB propose that each bidder in Auction 109 be provided with three activity rule waivers that may be used as set forth above at the bidder's discretion during the course of the auction. Comment is sought on this proposal of three activity rule waivers.

28. *Reserve Price or Minimum Opening Bids.* Pursuant to 47 U.S.C. 309(j)(4)(F) and 47 CFR 1.2104(c), (d), OEA and MB seek comment on the use of a minimum opening bid amount and a

reserve price prior to the start of bidding in this auction. Normally, a reserve price is an absolute minimum price below which a construction permit or license will not be sold in a given auction. A minimum opening bid, on the other hand, is the minimum bid price set at the beginning of the auction below which no bids are accepted. It is generally used to accelerate the competitive bidding process.

29. OEA and MB propose not to establish separate reserve prices for the construction permits offered in this auction. OEA and MB propose to establish minimum opening bid amounts for Auction 109. Based on experience in past broadcast auctions, setting a minimum opening bid amount judiciously is an effective bidding tool for accelerating the competitive bidding process.

30. For Auction 109, proposed minimum opening bid amounts were determined by taking into account the type of service and class of facility offered, market size, population covered by the proposed broadcast facility, and recent broadcast transaction data, to the extent such information is available. Attachment A to the *Auction 109 Comment Public Notice* lists a proposed minimum opening bid amount for each construction permit available in Auction 109. OEA and MB seek comment on the minimum opening bid amounts specified in Attachment A to the *Auction 109 Comment Public Notice*.

31. If commenters believe that these minimum opening bid amounts will result in unsold construction permits, are not reasonable amounts at which to start bidding, or should instead operate as reserve prices, they should explain why this is so and comment on the desirability of an alternative approach. Commenters should support their claims with valuation analyses and suggested amounts or formulas for reserve prices or minimum opening bids. In establishing the minimum opening bid amounts, OEA and MB seek comment particularly on factors that could reasonably have an impact on bidders' valuation of the broadcast spectrum, including the type of service and class of facility offered, market size, population covered by the proposed AM or FM broadcast facility and any other relevant factors. Commenters also may wish to address the general role of minimum opening bids in managing the pace of the auction. For example, commenters could compare using minimum opening bids—e.g., by setting higher minimum opening bids to reduce the number of rounds it takes for construction permits to reach their final prices—to other means of controlling auction pace, such as changes to bidding schedules, percentage increments, or activity requirements.

32. *Bid Amounts.* OEA and MB propose that if a qualified bidder has sufficient eligibility to

place a bid on a particular construction permit, in each round, the bidder will be able to place a bid on the given construction permit in any of up to nine different amounts: the minimum acceptable bid amount or one of the additional bid amounts.

33. *Minimum Acceptable Bid Amounts.* The first of the acceptable bid amounts is called the minimum acceptable bid amount. The minimum acceptable bid amount for a construction permit will be equal to its minimum opening bid amount until there is a provisionally winning bid for the construction permit. Once there is a provisionally winning bid for a construction permit, the minimum acceptable bid amount for that construction permit will be equal to the amount of the provisionally winning bid plus a specified percentage of that bid amount. The percentage used for this calculation, the minimum acceptable bid increment percentage, is multiplied by the provisionally winning bid amount, and the resulting amount is added to the provisionally winning bid amount. If, for example, the minimum acceptable bid increment percentage is 10%, then the provisionally winning bid amount is multiplied by 10%. The result of that calculation is added to the provisionally winning bid amount, and that sum is rounded using the Commission's standard rounding procedure for auctions as described in the public notice. If bid withdrawals are permitted in this auction, in the case of a construction permit for which the provisionally winning bid has been withdrawn, the minimum acceptable bid amount will equal the second highest bid received for the construction permit.

34. *Additional Bid Amounts.* Under this proposal, the FCC auction bidding system will calculate the eight additional bid amounts using the minimum acceptable bid amount and an additional bid increment percentage. The minimum acceptable bid amount is multiplied by the additional bid increment percentage. The result then will be rounded using the Commission's standard rounding procedures for auctions as described in the public notice. That result is the additional increment amount. The first additional acceptable bid amount equals the minimum acceptable bid amount plus the additional increment amount. The second additional acceptable bid amount equals the minimum acceptable bid amount plus two times the additional increment amount; the third additional acceptable bid amount is the minimum acceptable bid amount plus three times the additional increment amount; etc. If, for example, the additional bid increment percentage is 5%, then the calculation of the additional increment amount would be (minimum acceptable bid amount) * (0.05), rounded. The first additional acceptable bid

amount equals (minimum acceptable bid amount) + (additional increment amount); the second additional acceptable bid amount equals (minimum acceptable bid amount) + (2*(additional increment amount)); the third additional acceptable bid amount equals (minimum acceptable bid amount) + (3*(additional increment amount)); etc.

35. For Auction 109, a minimum acceptable bid increment percentage of 10% is proposed. This means that the minimum acceptable bid amount for a construction permit will be approximately 10% greater than the provisionally winning bid amount for the construction permit. To calculate the additional acceptable bid amounts, a bid increment percentage of 5% is proposed. OEA and MB request comment on these proposals.

36. *Bid Amount Changes.* Consistent with past practice, OEA and MB propose to retain the discretion to change the minimum acceptable bid amounts, the minimum acceptable bid percentage, the additional bid increment percentage, and the number of acceptable bid amounts if circumstances so dictate. See 47 CFR 1.2104(d). OEA and MB propose to retain the discretion to do so on a construction permit-by-construction permit basis. OEA and MB propose also to retain the discretion to limit (a) the amount by which a minimum acceptable bid for a construction permit may increase compared with the corresponding provisionally winning bid, and (b) the amount by which an additional bid amount may increase compared with the immediately preceding acceptable bid amount. For example, a \$1,000 limit could be set on increases in minimum acceptable bid amounts over provisionally winning bids. In this example, if calculating a minimum acceptable bid using the minimum acceptable bid increment percentage results in a minimum acceptable bid amount that is \$1,200 higher than the provisionally winning bid on a construction permit, the minimum acceptable bid amount would instead be capped at \$1,000 above the provisionally winning bid. OEA and MB also seek comment on the circumstances under which such a limit should be employed, factors to consider when determining the dollar amount of the limit, and the tradeoffs in setting such a limit or changing other parameters, such as changing the minimum acceptable bid percentage, the bid increment percentage, or the number of acceptable bid amounts. Bidders would be notified by announcement in the FCC auction bidding system during the auction if this discretion is exercised.

37. OEA and MB seek comment on these proposals. If commenters disagree with the

proposal to begin the auction with nine acceptable bid amounts per construction permit, they should suggest an alternative number of acceptable bid amounts to use. Commenters may wish to address the role of the minimum acceptable bids and the number of acceptable bid amounts in managing the pace of the auction and the tradeoffs in managing auction pace by changing the bidding schedule, activity requirement, bid amounts, or by using other means.

38. *Provisionally Winning Bids.* The FCC auction bidding system will determine provisionally winning bids consistent with practice in past auctions. At the end of a bidding round, the bidding system will determine a provisionally winning bid for each construction permit based on the highest bid amount received for that permit. The FCC auction bidding system will advise bidders of the status of their bids when round results are released. A provisionally winning bid will remain the provisionally winning bid until there is a higher bid on the same construction permit at the close of a subsequent round, unless the provisionally winning bid is withdrawn (if bid withdrawals are permitted in this auction). Provisionally winning bids at the end of the auction become the winning bids. As a reminder, provisionally winning bids count toward activity for purposes of the activity rule.

39. The FCC auction bidding system assigns a pseudo-random number generated by an algorithm to each bid when the bid is entered. If identical high bid amounts are submitted on a construction permit in any given round (i.e., tied bids), the FCC auction bidding system will use a pseudo-random number generator to select a single provisionally winning bid from among the tied bids. The tied bid with the highest pseudo-random number wins the tiebreaker and becomes the provisionally winning bid. The remaining bidders, as well as the provisionally winning bidder, can submit higher bids in subsequent rounds. However, if the auction were to end with no other bids being placed, the winning bidder would be the one that placed the provisionally winning bid. If the construction permit receives any bids in a subsequent round, the provisionally winning bid again will be determined by the highest bid amount received for the construction permit.

40. *Bid Removal.* The FCC auction bidding system allows each bidder to remove any of the bids it placed in a round before the close of that round. By removing a bid placed within a round, a bidder effectively unsubmitted the bid. In contrast to the bid withdrawal provisions described below, a bidder removing a bid placed in the same round is not subject to a withdrawal payment. Once a round closes, a

bidder may no longer remove a bid. Consistent with the design of the bidding system, bidders in Auction 109 would be permitted to remove bids placed in a round before the close of that round.

41. *Bid Withdrawal.* OEA and MB propose not to permit bidders in Auction 109 to withdraw bids. When permitted in an auction, bid withdrawals provide a bidder with the option of withdrawing bids placed in prior rounds that have become provisionally winning bids. A bidder would be able to withdraw its provisionally winning bids using the withdraw function in the FCC auction bidding system. A bidder that withdraws its provisionally winning bid(s), if permitted, is subject to the bid withdrawal payment provisions of 47 CFR 1.2104(g), 1.2109.

42. The Commission has recognized that bid withdrawals may be a helpful tool for bidders seeking to efficiently aggregate licenses or implement backup strategies in certain auctions. The Commission has also acknowledged that allowing bid withdrawals may encourage insincere bidding or increased opportunities for undesirable strategic bidding in certain circumstances. The Commission stated that this discretion should be exercised assertively, with consideration of limiting the number of rounds in which bidders may withdraw bids and preventing bidders from bidding on a particular market if a bidder is abusing the Commission's bid withdrawal procedures. In managing the auction, therefore, OEA and MB have discretion to limit the number of withdrawals to prevent bidding abuses.

43. Based on this guidance and on experience with past auctions of broadcast construction permits, the public notice proposes to prohibit bidders from withdrawing any bid after the close of the round in which that bid was placed. In light of the site-specific nature and wide geographic dispersion of the permits available in this auction, which suggests that potential applicants for this auction may have fewer incentives to aggregate permits through the auction process (as compared with bidders in many auctions of wireless licenses), it is unlikely that bidders will have a need to withdraw bids in this auction. Further, bid withdrawals, particularly if they were made late in this auction, could result in delays in licensing new broadcast stations and attendant delays in the offering of new broadcast service to the public. OEA and MB seek comment on this proposal to prohibit bid withdrawals in Auction 109. Commenters advocating alternative approaches should support their arguments by taking into account the construction permits offered, the impact of auction dynamics and the pricing mechanism, and the effects on the bidding strategies of other bidders.

44. *Post Auction Payment: Interim Withdrawal Payment Percentage.* In the event bid withdrawals are permitted in Auction 109, OEA and MB propose that the interim bid withdrawal payment be 20% of the withdrawn bid. As required by 47 CFR 1.2104(g)(1), a bidder that withdraws a provisionally winning bid during an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or a subsequent auction. However, if a construction permit for which a bid has been withdrawn does not receive a subsequent higher bid or winning bid in the same auction, the Commission cannot calculate the final withdrawal payment until that construction permit receives a higher bid or winning bid in a subsequent auction. In such cases, when that final withdrawal payment cannot yet be calculated, the Commission imposes on the bidder responsible for the withdrawn bid an interim bid withdrawal payment, which will be applied toward any final bid withdrawal payment that is ultimately assessed.

45. The percentage amount of the interim bid withdrawal payment is established in advance of bidding in each auction and may range from 3% to 20% of the withdrawn bid amount. The Commission has determined that the level of interim withdrawal payment in a particular auction will be based on the nature of the service and the inventory of the licenses being offered. The Commission noted specifically that a higher interim withdrawal payment percentage is warranted to deter the anti-competitive use of withdrawals when, for example, bidders will not need to aggregate the licenses being offered in the auction or when there are few synergies to be captured by combining licenses. In light of these considerations with respect to the construction permits being offered in this auction, OEA and MB propose to use the maximum interim bid withdrawal payment percentage permitted by 47 CFR 1.2104(g)(1) in the event bid withdrawals are allowed in this auction. OEA and MB request comment on using 20% for calculating an interim bid withdrawal payment amount in Auction 109. Commenters advocating the use of bid withdrawals should also address the percentage of the interim bid withdrawal payment.

46. *Post Auction Payment: Additional Default Payment Percentage.* Any winning bidder that defaults or is disqualified after the close of an auction (*i.e.*, fails to remit the required down payment by the specified deadline, fails to make full and timely final payment, fails to submit a timely long-form application, or whose long-form application is not granted for any reason, or is otherwise disqualified) is

liable for a default payment under 47 CFR 1.2104(g)(2). As required by 47 CFR 1.2109, this payment consists of a deficiency payment, equal to the difference between the amount of the Auction 109 bidder's winning bid and the amount of the winning bid the next time a construction permit covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less.

47. In advance of each auction, a percentage between 3% and 20% of the applicable winning bid is set pursuant to 47 CFR 1.2104(g)(2) to be assessed as an additional default payment. As the Commission has indicated, the level of this additional payment in each auction will be based on the nature of the service and the construction permits being offered.

48. Consistent with the percentage in prior auctions of broadcast construction permits, OEA and MB propose for Auction 109 to establish an additional default payment of 20%. As the Commission has noted, defaults weaken the integrity of the auction process and may impede the deployment of service to the public, and an additional 20% default payment will be more effective in deterring defaults than the 3% used in some earlier auctions. In light of these considerations, for Auction 109 an additional default payment of 20% of the relevant bid is proposed. OEA and MB seek comment on this proposal.

IV. PROCEDURAL MATTERS

49. *Paperwork Reduction Act.* The Office of Management and Budget (OMB) has approved the information collections in the Application to Participate in an FCC Auction, FCC Form 175. OMB Control No. 3060-0600. The *Auction 109 Comment Public Notice* does not propose new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. Therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198. See 44 U.S.C. 3506(c)(4).

50. *Ex Parte Rules.* This proceeding has been designated as a permit but disclose proceeding in accordance with the ex parte rules. Participants in this proceeding should familiarize themselves with the Commission's ex parte rules, especially 47 CFR 1.1200(a) and 1.1206.

IV. SUPPLEMENTAL INITIAL REGULATORY FLEXIBILITY ANALYSIS

51. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), 5 U.S.C. 601

– 612, the Commission prepared Initial Regulatory Flexibility Analyses (IRFAs) in connection with the *Broadcast Competitive Bidding Notice of Proposed Rulemaking* (NPRM), 62 FR 65392, December 12, 1997, and other Commission NPRMs (collectively, Competitive Bidding NPRMs) pursuant to which Auction 109 will be conducted. Final Regulatory Flexibility Analyses (FRFAs) likewise were prepared in the *Broadcast Competitive Bidding Order*, 63 FR 48615, September 11, 1998, and other Commission rulemaking orders (collectively, Competitive Bidding Orders) pursuant to which Auction 109 will be conducted. The Office of Economics and Analytics (OEA), in conjunction with the Media Bureau (MB), has prepared this Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in the *Auction 109 Comment Public Notice*, to supplement the Commission’s Initial and Final Regulatory Flexibility Analyses completed in the *Competitive Bidding NPRMs* and the *Competitive Bidding Orders* pursuant to which Auction 109 will be conducted. Written public comments are requested on this Supplemental IRFA. Comments must be identified as responses to the Supplemental IRFA and must be filed by the same filing deadlines for comments specified on the first page of the *Auction 109 Comment Public Notice*. Pursuant to 5 U.S.C. 603(a), the Commission will send a copy of the *Auction 109 Comment Public Notice*, including this Supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

52. *Need for, and Objectives of, the Public Notice.* The proposed procedures for the conduct of Auction 109 as described in the *Auction 109 Comment Public Notice* would constitute the more specific implementation of the competitive bidding rules contemplated by Parts 1 and 73 of the Commission’s rules, adopted by the Commission in multiple notice-and-comment rulemaking proceedings, including the Commission’s establishing in the underlying rulemaking orders additional procedures to be used on delegated authority. More specifically, the *Auction 109 Comment Public Notice* seeks comment on proposed procedures, terms and conditions governing Auction 109, and the post-auction application and payment processes, as well as seeking comment on the minimum opening bid amounts for the specified construction permits, and is fully consistent with the underlying rulemaking orders, including the *Broadcast Competitive Bidding Order* and other relevant competitive bidding orders.

53. The *Auction 109 Comment Public Notice* provides notice of proposed auction procedures and adequate time for Auction 109 applicants to comment on those proposed procedures. See 47 U.S.C. 309(j)(3)(E)(i). To promote the efficient and fair administration of the competitive bidding process for all Auction 109 participants, including small businesses, the *Auction 109 Comment Public Notice* seeks comment on the following proposed procedures: use of a simultaneous multiple-round auction format, consisting of sequential bidding rounds with a simultaneous stopping rule (with discretion to exercise alternative stopping rules under certain circumstances); a specific minimum opening bid amount for each construction permit to be offered in this auction; a specific number of bidding units for each construction permit; a specific upfront payment amount for each construction permit; establishment of a bidder's initial bidding eligibility in bidding units based on that bidder's upfront payment through assignment of a specific number of bidding units for each construction permit; use of an activity requirement so that bidders must bid actively during the auction rather than waiting until late in the auction before participating; a single-stage auction in which a bidder is required to be active on 100% of its bidding eligibility in each bidding round; provision of three activity waivers for each bidder to allow it to preserve eligibility during the course of the auction; use of minimum acceptable bid amounts and additional bid increments, along with a proposed methodology for calculating such amounts, while retaining discretion to change the methodology if circumstances dictate; a procedure for breaking ties if identical high bid amounts are submitted on a construction permit in a given round; whether to permit use of bid withdrawals; establishment of an interim bid withdrawal percentage of 20% of the withdrawn bid in the event bid withdrawals are allowed in Auction 109; and establishment of an additional default payment of 20% under 47 CFR 1.2104(g)(2) in the event that a winning bidder defaults or is disqualified after the auction closes.

54. *Legal Basis.* The Commission's statutory obligations to small businesses participating in a spectrum auction are found in 47 U.S.C. 309(j)(3)(B) and 309(j)(4)(D). The statutory basis for the Commission's competitive bidding rules is found in 47 U.S.C. 154(i), 301, 303(e), 303(f), 303(r), 304, 307, and 309(j). The Commission has established a framework of competitive bidding rules pursuant to which it has conducted auctions since the inception of the auction program in 1994 and would conduct Auction 109, including 47 CFR Part 1, Subpart Q. See 47 CFR 73.5000, 73.5002-73.5003, 73.5005-

73.5009. In promulgating those rules, the Commission conducted numerous Initial Regulatory Flexibility Act Analyses (IRFAs) to consider the possible impact of those rules on small businesses that might seek to participate in Commission auctions. In addition, multiple Final Regulatory Flexibility Analyses (FRFAs) were included in the rulemaking orders which adopted or amended rule provisions relevant to *Auction 109 Comment Public Notice*. The Commission has directed that OEA, in conjunction with MB, under delegated authority, seek comment on a variety of auction-specific procedures prior to the start of bidding in each auction. See 47 CFR 1.2104(c), (d), (e), (f), (g), (i).

55. *Description and Estimate of the Number of Small Entities to which the Proposed Procedures Will Apply.* The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed procedures, if adopted. 5 U.S.C. 603(b)(3). The RFA generally defines the term small entity as having the same meaning as the terms small business, small organization, and small government jurisdiction. 5 U.S.C. 601(6). In addition, the term small business has the same meaning as the term small business concern under the Small Business Act. See 5 U.S.C. 601(3) (adopting by reference the definition of small business concern in the Small Business Act, 15 U.S.C. 632). A small business concern is one which: (1) is independently owned and operated, (2) is not dominant in its field of operation, and (3) satisfies any additional criteria established by the SBA. See 15 U.S.C. 632.

56. The specific procedures and minimum opening bid amounts on which comment is sought in the *Auction 109 Comment Public Notice* will directly affect all applicants participating in Auction 109. The number of entities that may apply to participate in Auction 109 is unknown. Based on the number of applicants in prior FM auctions, OEA and MB estimate that the number of applicants for Auction 109 may range from approximately 130 to 260. This estimate is based on the number of applicants who filed short-form applications to participate in previous open auctions of FM construction permits held to date, an average of 1.8 short-form applications were filed per construction permit offered, with a median of 1.2 applications per permit. The actual number of applicants for Auction 109 could vary significantly as any individual's or entity's decision to participate may be affected by a number of factors beyond the Commission's control.

57. *Radio Stations.* This U.S. Economic Census category comprises establishments primarily

engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources. According to the most recent *Report and Order*, 85 FR 37364, June 22, 2020, to assess annual regulatory fees, Commission staff identified from the Media Bureau's licensing databases 9,636 licensed radio facilities subject to annual regulatory fees as of October 1, 2019, excluding from this count radio stations exempt from required annual regulatory fees.

58. In 13 CFR 121.201, the SBA established a small business size standard for this category, NAICS code 515112, as firms having \$41.5 million or less in annual receipts. Economic Census data from 2012 shows that 2,849 radio station firms operated during that year. Of that number, 2,806 firms operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999, and 26 with annual receipts of \$50 million or more. Therefore, based on the SBA's size standard, the majority of such entities are small entities.

59. According to Commission staff review of the BIA/Kelsey, LLC's Media Access Pro Radio Database (BIA) as of January 26, 2021, nearly all AM and FM full-service radio stations (approximately 15,478 of 15,483 total stations, or 99.97%) had revenues of \$41.5 million or less and thus qualify as small entities under the SBA definition. The SBA size standard data, however, does not enable a meaningful estimate of the number of small entities who may participate in Auction 109.

60. Also, in assessing whether a business entity qualifies as small under the SBA definition, 13 CFR 121.103(a)(1), business control affiliations must be included. Business concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both. The estimate therefore likely overstates the number of small entities that might be affected by this auction because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. Moreover, the definition of small business also requires that an entity not be dominant in its field of operation and that the entity be independently owned and operated. The estimate of small businesses to which the proposed competitive bidding rules may apply does not exclude any radio station from the definition of a small business on these bases and is therefore over-inclusive to that extent. Furthermore, it is not possible at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. In addition, it is difficult to assess these criteria in the context of media entities and therefore estimates of

small businesses to which they apply may be over-inclusive to this extent.

61. Further, it is not possible to accurately develop an estimate of how many of the entities in this auction would be small businesses based on the number of small entities that applied to participate in prior broadcast auctions, because that information is not collected from applicants for broadcast auctions in which bidding credits are not based on an applicant's size (as is the case in auctions of licenses for wireless services).

62. In 2013, the Commission estimated that 97% of radio broadcasters met the SBA's prior definition of small business concern, based on annual revenues of \$7 million. The SBA has since increased in NAICS code 515112 of 13 CFR 121.201 that revenue threshold to \$41.5 million, which suggests that an even greater percentage of radio broadcasters would fall within the SBA's definition. The Commission has estimated the number of licensed commercial AM radio stations to be 4,347 and the number of commercial FM radio stations to be 6,699 for a total number of 11,046. As of January 2021, 4,347 AM stations and 6,694 FM stations had revenues of \$41.5 million or less, according to Commission staff review of the BIA Database. Accordingly, based on this data, OEA and MB estimate that the majority of Auction 109 applicants would likely meet the SBA's definition of a small business concern.

63. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities.* In the *Auction 109 Comment Public Notice*, no new reporting, recordkeeping, or other compliance requirements for small entities or other auction applicants are proposed. The Commission designed the auction application process itself to minimize reporting and compliance requirements for applicants, including small business applicants. To participate in this auction, parties will file streamlined, short-form applications in which they certify under penalty of perjury as to their qualifications. Eligibility to participate in bidding is based on an applicant's short-form application and certifications, as well as its upfront payment. In the second phase of the auction process, there are additional compliance requirements for winning bidders. Thus, a small business that fails to become a winning bidder does not need to file a long-form application and provide the additional showings and more detailed demonstrations required of a winning bidder.

64. *Steps Taken to Minimize the Significant Economic Impact of Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant, specifically

small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities. 5 U.S.C. 603(c)(1)-(4).

65. OEA and MB intend that the proposals of the *Auction 109 Comment Public Notice* to facilitate participation in Auction 109 will result in both operational and administrative cost savings for small entities and other auction participants. In light of the numerous resources that will be available from the Commission at no cost, the processes and procedures proposed in the *Auction 109 Comment Public Notice* should result in minimal economic impact on small entities. For example, prior to the start of bidding, the Commission will hold a mock auction to allow qualified bidders the opportunity to familiarize themselves with both the bidding processes and systems that will be used in Auction 109. During the auction, participants will be able to access and participate in bidding via the Internet using a web-based system, or telephonically, providing two cost-effective methods of participation and avoiding the cost of travel for in-person participation. Further, small entities as well as other auction participants will be able to avail themselves of a telephone hotline for assistance with auction processes and procedures as well as a telephone technical support hotline to assist with issues such as access to or navigation within the electronic FCC Form 175 and use of the FCC's auction system. In addition, all auction participants, including small business entities, will have access to various other sources of information and databases through the Commission that will aid in both their understanding of and participation in the process. These mechanisms are made available to facilitate participation by all qualified bidders and may result in significant cost savings for small business entities that utilize these mechanisms. These steps, coupled with the advance description of the bidding procedures, should ensure that the auction will be administered efficiently and fairly, thus providing certainty for small entities, as well as other auction participants.

66. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.* None.
Federal Communications Commission.

Marlene Dortch,
Secretary

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