

2000; and May 11, 2001 submittals adequately addressed the conditions of the interim approval which expires on December 1, 2001. The State is hereby granted final full approval effective on November 28, 2001.

(b) City of Huntsville Division of Natural Resources:

(1) Submitted on November 15, 1993, and supplemented on July 20, 1995; interim approval effective on December 15, 1995; interim approval expires on December 1, 2001.

(2) Revisions submitted on March 21, 1997; July 21, 1999; December 4, 2000; February 22, 2001; April 9, 2001; and September 18, 2001. The rule revisions contained in the March 21, 1997; April 9, 2001; and September 18, 2001 submittals adequately addressed the conditions of the interim approval which expires on December 1, 2001. The City is hereby granted final full approval effective on November 28, 2001.

(c) Jefferson County Department of Health:

(1) Submitted on December 14, 1993, and supplemented on July 14, 1995; interim approval effective on December 15, 1995; interim approval expires on December 1, 2001.

(2) Revisions submitted on February 5, 1998; September 20, 1999; August 8, 2000; March 30, 2001; May 18, 2001; and September 11, 2001. The rule revisions contained in the August 8, 2000; May 18, 2001; and September 11, 2001 submittals adequately addressed the conditions of the interim approval which expires on December 1, 2001. The County is hereby granted final full approval effective on November 28, 2001.

\* \* \* \* \*

[FR Doc. 01-27105 Filed 10-26-01; 8:45 am]

BILLING CODE 6560-50-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

[WT Docket No. 97-82; FCC 01-270]

### Competitive Bidding Procedures

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document the Commission adopts modifications to its competitive bidding "anti-collusion" rule. These modifications codify Commission practices with respect to application of the anti-collusion rule and require applicants to report to the Commission prohibited communications.

**DATES:** Effective November 28, 2001.

**FOR FURTHER INFORMATION CONTACT:** David Hu of the Auctions and Industry Analysis Division at (202) 418-0660.

**SUPPLEMENTARY INFORMATION:** This is a summary of a Seventh Report and Order (7th R&O) in WT Docket No. 97-82,

adopted on September 19, 2001 and released on September 27, 2001. The full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

### I. Introduction

1. In the 7th R&O, the Commission adopts modifications to § 1.2105(c) of the Commission's rules, the competitive bidding "anti-collusion rule." Specifically, the Commission amends the rule so that its language clearly reflects the Commission's practice of prohibiting communications regarding bids or bidding strategies only between auction applicants that have applied to bid on licenses in any of the same geographic areas. In addition, the Commission amends the rule to (i) clarify that it prohibits an auction applicant from discussing a competing applicant's bids or bidding strategies even if the first applicant does not discuss its own bids or bidding strategies, and (ii) require auction applicants that make or receive a prohibited communication of bids or bidding strategies to report the communication immediately to the Commission in writing.

### II. Background

2. The Commission adopted § 1.2105(c)(1) to deter anticompetitive conduct during auctions of spectrum licenses and to ensure the competitiveness of post-auction markets. The Commission's anti-collusion rule seeks to foster a level competitive playing field during auctions and to "ensure that the government receives a fair market price for the use of the spectrum." In promulgating the rule, the Commission was particularly concerned that some firms might engage in behavior that would unfairly disadvantage other bidders. Communications that violate § 1.2105(c)(1) have the potential to undermine the competitiveness of our auction process and public confidence in the integrity of that process.

3. In the Third Further Notice of Proposed Rule Making (FNPRM), 65 FR 6113 (February 8, 2000) the Commission proposed to amend § 1.2105(c)(1) to prohibit an auction applicant from discussing another applicant's bids or

bidding strategies even if the first applicant does not discuss or disclose its own bids or bidding strategies. The Commission also proposed to amend § 1.2105(c) to require any auction applicant that makes or receives a communication of bids or bidding strategies prohibited under § 1.2105(c)(1) to report such a communication to the Commission promptly. In addition, the Commission sought comment on whether other changes to § 1.2105(c)(1) may be warranted at this time in light of Congress's mandate that the Commission ensure competitive auctions. The Commission received one comment on the amendments proposed in the FNPRM.

### III. Discussion

#### A. Amendments to § 1.2105(c)(1)

4. *Background.* Subject to certain exceptions, § 1.2105(c)(1) prohibits auction applicants that have applied to bid on any common license area from communicating their bids or bidding strategies with each other from the short-form application filing deadline to the post-auction down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding agreement reported on their short-form applications. In other words, if two auction applicants (that have not entered into an agreement and identified each other on the FCC Form 175) are each eligible to bid on numerous license areas but there is only one license area for which they are both eligible to bid, they may not discuss or disclose to each other their bids or bidding strategies relating to any license area that either of them is eligible to bid on.

5. *Discussion.* Applicants subject to § 1.2105(c)(1). Section 1.2105(c)(1) of the Commission's rules states that "all applicants" are prohibited from discussing or disclosing their bids or bidding strategy from the short-form application filing deadline until after the down payment deadline. Notwithstanding the term "all applicants," the Commission has applied the prohibitions of the rule only to auction applicants that have applied to bid for licenses in any of the same geographic license areas, and thus are competing applicants. Thus, as noted, even if two auction applicants that have not identified each other as parties to an agreement on the FCC Form 175 are each eligible to bid on only one license area in common, they may not discuss or disclose to each other their bids or bidding strategies relating to any license area that either of them is eligible to bid

on. For example, two applicants not listed on each other's short-form applications for an auction of broadband PCS licenses may not discuss bids or bidding strategies with each other if they are bidding for licenses in any of the same MTAs or BTAs, even if they are not bidding for the same frequency blocks. On the other hand, auction applicants that have not applied to bid on licenses in any of the same geographic areas, and thus are not competing applicants, are not subject to the prohibitions of § 1.2105(c)(1).

6. The Commission finds that it would be helpful to auction applicants to amend § 1.2105(c)(1) so that it accurately reflects the Commission's application of the rule. Thus, the Commission amends § 1.2105(c)(1) to make clear that only auction applicants that have applied for licenses in any of the same geographic license areas are prohibited from discussing with or disclosing to each other their bids or bidding strategy. The Commission also cautions auction applicants that apply to bid for licenses in any of the same geographic license areas (and that are not listed on each other's FCC Form 175) against indirectly communicating their bids or bidding strategies to each other through third-party discussions or disclosures to other auction applicants that have not applied to bid on licenses in any of the same geographic license areas.

7. *Communications regarding other applicants' bids or bidding strategies.* In the *Western PCS Order*, 14 FCC Record 21571 (1999), the Commission provided auction applicants with official notice that § 1.2105(c)(1) prohibits an auction applicant from cooperating or collaborating with respect to, or discussing or disclosing, another applicant's bids or bidding strategies. Thus, an auction applicant may violate § 1.2105(c)(1) even if it does not discuss its own bids or bidding strategies. Nevertheless, the Commission stated in the *FNPRM* that it believes that auction applicants would benefit if the text of the rule plainly stated that it prohibits an auction applicant from discussing another applicant's bids or bidding strategies even if it does not discuss or disclose its own bids or bidding strategies.

8. The Commission amends § 1.2105(c)(1) to clarify the prohibition against an auction applicant cooperating or collaborating with respect to, discussing with, or disclosing to a competing applicant the substance of the bids or bidding strategies of any competing applicant. The Commission believes that the rule's prohibition against discussing, or disclosing, bids or

bidding strategy would have minimal deterrent force if an applicant to whom a competing applicant's bidding information is disclosed could discuss such information with either that or another competing applicant without violating the rule. For instance, absent such a prohibition, it would be easy to circumvent the rule's prohibitions as Bidder A could pass on to competing Bidder C bidding strategy information of Bidder B with whom Bidder A has a bidding agreement. The Commission believes that an applicant's discussion with a competing applicant of any other competing applicant's bids or bidding strategy could have a deleterious effect on the integrity and competitiveness of our auctions and that it is therefore essential to explicitly prohibit such discussions.

#### *B. Required Disclosure of Communications Regarding Bids or Bidding Strategies*

9. *Background.* Whenever the information furnished in a pending application is no longer substantially accurate and complete in all significant respects, § 1.65(a) of the Commission's rules requires the applicant to amend the application so as to furnish additional or corrected information "as promptly as possible and in any event within 30 days \* \* \*." Pursuant to § 1.65(a), auction applicants are required to maintain the accuracy and completeness of their pending short-form applications. Because the short-form application contains a certification under penalty of perjury that the applicant has not entered and will not enter into any agreements other than those identified in its application, auction applicants that engage in communications of bids or bidding strategies that result in a bidding agreement, arrangement or understanding not already identified on their short-form applications are required to promptly disclose any such agreement, arrangement or understanding to the Commission by amending their pending applications. Thus, even though competing applicants are prohibited by § 1.2105(c)(1) from communicating their bids or bidding strategies to each other after the short-form application filing deadline, applicants that engage in such prohibited discussions are nonetheless required by § 1.65(a) to promptly disclose any resulting agreements or understandings by amending their pending applications. Failure to make the notification required by § 1.65(a) would constitute a separate violation of our rules in addition to the underlying violation of § 1.2105(c)(1).

10. In the *FNPRM*, the Commission sought comment on whether the integrity and competitiveness of its auction process would be enhanced if it required auction applicants that make or receive communications prohibited under § 1.2105(c)(1) to report promptly such communications to the Commission even if the communications do not result in an agreement, arrangement or understanding that must be reported to the Commission under § 1.65(a). The Commission invited comment on whether would-be disseminators of prohibited bidding or bidding strategy information, knowing that recipients of such prohibited information would have an affirmative duty to disclose promptly such communications to the Commission, would be deterred from making such communications. The Commission also solicited comment on any potential burden that may be associated with such a reporting requirement, and the appropriate deadline for making such a report.

11. *Discussion.* The Commission amends § 1.2105(c) to require auction applicants that make or receive a communication of bids or bidding strategies prohibited under § 1.2105(c)(1) to report such a communication to the Commission immediately, even if the communication does not result in an agreement, arrangement or understanding that must be reported under § 1.65(a). As it noted in the *FNPRM*, the Commission has found that even when a prohibited communication of bids or bidding strategies is limited to one applicant's bids or bidding strategies, it may unfairly disadvantage the other bidders in the market by creating an impermissible asymmetry of information. Thus, when one bidder is privy to a competing bidder's strategic bidding information without reporting this fact, it may use such information to manipulate the auctions process and gain an unfair competitive advantage over other bidders in the market who are unable to access, analyze, and act upon this strategic information in making bidding decisions. Section 1.2105(c)(1) of the Commission's rules attempts to address this concern by prohibiting all auction applicants that have applied to bid on any of the same geographic areas from cooperating or collaborating with respect to, discussing or disclosing to each other in any manner the substance of their bids or bidding strategies. The Commission has encountered instances of violations of § 1.2105. In some instances, there has been concern expressed about a bidder's

obligation to report information received from another bidder that potentially violates the Commission's rule, and it has previously counseled applicants that the safest course of action for a recipient of a prohibited communication during the period in which § 1.2105(c) prohibitions are in effect would be to terminate the discussion and promptly report the communication to the Commission. Therefore, the Commission further clarifies the anti-collusion rule by including a reporting requirement, as a deterrent to would-be disseminators of prohibited information regarding bids or bidding strategies. This will, the Commission believes, make clear the responsibility to report such behavior and will thereby enhance the competitiveness and fairness of our spectrum auctions.

12. Thus, an applicant's duty under § 1.2105(c) is two-fold. Applicants may not engage in prohibited communications with competing applicants, and they are obligated to report to the Commission all communications prohibited under § 1.2105(c)(1). Thus, an applicant's failure to report a prohibited communication pursuant to § 1.2105(c)(6) may constitute a rule violation distinct from any act of collusion that violates § 1.2105(c)(1). Moreover, the § 1.2105(c)(6) reporting requirement the Commission adopts today applies even if the communication of bids or bidding strategies does not result in a bidding arrangement, agreement or understanding that must be reported to the Commission under § 1.65(a). As explained previously, applicants have always had, under § 1.65(a), an affirmative duty to report any communications of bids or bidding strategies that result in a bidding arrangement, agreement or understanding after the filing of a short-form application. By requiring applicants to update pending applications to reflect such prohibited collusive agreements and communications, the Commission has sought to ensure the integrity and transparency of its auction processes. By now amending its rules to include an affirmative reporting requirement that applies even if a communication does not rise to the level of that which must be reported under § 1.65(a), the Commission can ensure that all bidders remain on a level playing field throughout the course of an auction. The reporting requirement the Commission adopts today does not relieve any applicant from its duty

pursuant to § 1.65(a) to update its pending application any time a communication of bids or bidding strategies results in an arrangement, agreement, or understanding. Of course, the fact that a party complies with the reporting requirements of § 1.65(a) and § 1.2105(c)(6) will not insulate it from any sanctions that may be appropriate in connection with a violation of the § 1.2105(c)(1) prohibition against collusive communications.

13. The Commission disagrees with one commenter's suggestion that recipients of bidding information should be exempt from the requirement to report such communications to the Commission. Section 1.2105(c) does not distinguish between initiators and recipients in terms of their duty to avoid a collusive communication. Rather, the anti-collusion rule focuses on the content of the communication (i.e., the discussion or disclosure must involve direct or indirect information that affects, or could affect, bids or bidding strategy, or the negotiation of settlement agreements) that occurs between auction applicants for any of the same geographic license areas after the short-form filing deadline. Thus, all auction applicants that have applied for a license in the same geographic area, and have not reported in their short-form applications that they have an agreement with each other, must affirmatively avoid all communications with each other that disclose their or a competing applicant's bids or bidding strategy. In light of the fact that the Commission's current rules do not focus on whether a party is initiating or receiving a communication, the Commission does not believe that it should limit the reporting requirement it adopts today to initiators of prohibited communications. Moreover, because initiators of collusive communications are less likely to report such communications, the Commission considers recipients of prohibited oral or written communications regarding bids or bidding strategies to be an important deterrent against collusive behavior. The Commission also believes that recipients should be held to the same reporting standard as initiators because, even if a recipient does not reach an agreement or understanding with the initiator, a recipient nevertheless derives substantial benefit from obtaining details of a competitor's bids or bidding strategy prior to or during an auction. If the Commission were to allow recipients to possess strategic bidding information that other applicants are not privy to, it would unfairly disadvantage other bidders in

the market by sanctioning an asymmetry of information that could be used to manipulate the auction process. Therefore, the mere occurrence of a communication by or among auction applicants for the same geographic license area about their own or a competing applicant's bids or bidding strategy triggers the reporting requirement.

14. The Commission does not believe that there is any merit to one commenter's assertion that compliance with this reporting requirement will expose recipients of communications to substantial legal liability. In the past the Commission has indicated that auction applicants, rather than the Commission, are in the best position to determine in the first instance when communications may constitute potential violations of the rule. The Commission continues to believe that this is the case and that, rather than requiring it to take on the impossible task of screening all applicant communications, it should place the responsibility for identifying potentially unauthorized communications on auction applicants. Applicants, during the course of their day-to-day operations, are better equipped to identify and report such communications. Nonetheless, the Commission emphasizes that applicants are not responsible for deciding whether a violation of the anti-collusion rule has occurred. Thus, the purpose of the reporting requirement the Commission adopts today is to obligate parties to notify the Commission of communications that appear to violate the anti-collusion rule and to allow the Commission to determine whether a violation has occurred. The determination of whether a violation of the rule has occurred rests with the Commission, not with bidders. Thus, while the reporting requirement places an affirmative duty on all auction applicants to report what they perceive to be prohibited communications, auction applicants are required only to act in good faith and to report truthfully the facts and circumstances of what they perceive to be a communication covered by § 1.2105(c). The Commission will then investigate these reports and reach a judgment as to whether a violation has occurred. By simply reporting the facts, auction applicants can insulate themselves from liability.

15. The Commission also finds that any burden associated with the reporting requirement it establishes today will be slight, particularly in comparison with the potential benefits to the auction process and bidders. Applicants will be required only to submit a letter to the Commission

describing the facts of a communication that appears to be prohibited.

16. In sum, the Commission amends § 1.2105(c) to require all auction applicants to report prohibited discussions or disclosures regarding bids or bidding strategy to the Commission in writing immediately, but in no case later than five business days after the communication occurs. Thus, an auction applicant must report a prohibited communication within five business days even if the communication does not result in an agreement or understanding regarding bids or bidding strategy. Although the Commission believes that applicants generally should need less than five business days to make such reports, it will not impose a shorter deadline because it finds that there may be circumstances in which applicants, particularly small businesses, may need five business days to file a report. An auction applicant that receives a communication prohibited under § 1.2105(c)(1) orally should respond immediately and unequivocally that it is unwilling to participate in any violation of § 1.2105(c)(1). If a prohibited communication is received other than orally, an auction applicant should respond immediately in writing that it is unwilling to participate in any violation of § 1.2105(c)(1). In either case, the auction applicant must report the improper communication to the Commission in writing within five business days after the communication occurs.

#### IV. Conclusion

17. In the 7th R&O, the Commission amends § 1.2105(c)(1) of the Commission's rules to clarify that the rule prohibits only auction applicants that have applied to bid for licenses in any of the same geographic license areas from cooperating or collaborating with respect to, or discussing or disclosing to each other bids or bidding strategies. The Commission also amends the rule to clarify that it prohibits such auction applicants from cooperating or collaborating with respect to, or discussing or disclosing to each other any competing applicant's bids or bidding strategies. Thus, the rule may be violated even if an applicant does not discuss or disclose its own bids or bidding strategies. Finally, the Commission amends § 1.2105(c) to require any auction applicant that makes or receives a communication of bids or bidding strategies prohibited under § 1.2105(c)(1) of our rules to report such communication to the Commission in writing immediately, but

in no case later than five business days after the communication occurs.

#### V. Procedural Matters

##### A. Regulatory Flexibility Act

18. The Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") of the possible significant economic impact on small entities of the rule amendments adopted herein. The Commission's Reference Information Center, Consumer Information Bureau, will send a copy of the 7th R&O, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

##### B. Final Paperwork Reduction Act of 1995 Analysis

19. The 7th R&O contains a new information collection, which was proposed in the *FNPRM*. As required by the Paperwork Reduction Act of 1995, the Commission sought comment from the public and from the Office of Management and Budget (OMB) on this proposed change to the Commission's information collection requirements. This new information collection was submitted to OMB for approval, as prescribed by the Paperwork Reduction Act. On October 17, 2001, the Commission received emergency approval from OMB for the information collection contained in the rules (OMB No. 3060-0995).

##### C. Ordering Clauses

20. Authority for issuance of the 7th R&O is contained in sections 4(i), 4(j), 303(r), 309(j) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), 309(j) and 403.

21. Accordingly, it is ordered that part 1 of the Commission's rules is amended as specified herein and shall become effective November 28, 2001.

22. It is further ordered that the Commission's Reference Information Center, Consumer Information Bureau, shall send a copy of the 7th R&O, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

#### VI. Final Regulatory Flexibility Analysis

23. As required by the Regulatory Flexibility Act ("RFA"), an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *FNPRM* in this proceeding. The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA. This present Final Regulatory

Flexibility Analysis ("FRFA") conforms to the RFA.

24. An RFA certification, rather than an analysis, is appropriate where "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." The Commission believes that the rule amendments it has adopted will not have a significant economic impact on a substantial number of small entities. The Commission nonetheless voluntarily performs this FRFA in order to thoroughly explain this conclusion and to address concerns raised in comments submitted by the Small Business Administration ("SBA"). The Commission discusses our conclusion further in section B, *infra*.

##### A. Need for and Objectives of the Report and Order

25. The amendments to 47 CFR 1.2105(c) adopted in the 7th R&O are intended to enhance the competitiveness and integrity of the Commission's auctions. First, the Commission amends § 1.2105(c)(1) so that its language clearly reflects the Commission's application of the rule to prohibit communications regarding bids or bidding strategies only between applicants that have applied to bid on licenses in any of the same geographic areas. Second, the Commission clarifies § 1.2105(c)(1) to explicitly prohibit auction applicants that have applied to bid on licenses in any of the same geographic areas from discussing with or disclosing to each other any competing applicant's bids or bidding strategies. Although the Commission has previously interpreted the rule to prohibit an applicant's discussion of a competing applicant's bids or bidding strategies, it believes that all auction applicants would benefit from this amendment, which ensures that the text of the rule is unambiguous. Third, the Commission amends § 1.2105(c) to require any auction applicant that makes or receives a communication of bids or bidding strategies prohibited by 47 CFR 1.2105(c)(1) to report such communication to the Commission. The Commission believes that this reporting requirement will act as a deterrent to would-be disseminators of prohibited information and will thereby enhance the competitiveness and fairness of our auctions.

##### B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

26. The SBA filed comments in response to the IRFA. The SBA asserts that the Commission failed to describe the impact its proposed rules would

have on small businesses as required by the RFA. Further, the SBA states that the Commission's proposals would expand the obligations that applicants must meet when they participate in an auction. The SBA states that the amended anti-collusion rule would impose reporting requirements on applicants, cover a broader range of communications, and increase the risk of punitive action, including monetary forfeitures. The SBA asserts that small businesses have far fewer financial resources than their larger counterparts and they are therefore less able to absorb the costs of forfeitures. According to the SBA, the Commission did not discuss the potential burden posed by the risk of punishment as it should have. The SBA also states that the Commission failed to propose any alternatives designed to minimize the impact of its proposed rules on small business, as the RFA requires.

27. The Commission acknowledges that the amendment to § 1.2105(c) that it proposed in the *FNPRM*, and that it adopts today, imposes a reporting requirement on all auction participants, including small businesses. However, the Commission has previously urged parties to report communications prohibited under § 1.2105(c)(1) to the Commission, and parties have done so in the past. Thus, the Commission views the adoption of this requirement as consistent with conduct that the Commission has urged on applicants in the past. Further, the amendment to § 1.2105(c)(1) that the Commission adopts today to prohibit auction applicants from discussing the bids or bidding strategies of competing applicants merely clarifies the text of the rule to make it consistent with the interpretation it announced in the *Western PCS Order*. Nonetheless, the Commission recognizes that these amendments to our anti-collusion rule impose increased duties and present the possibility of sanctions against auction applicants, including small entities, that do not comply with the revised rules.

28. Based on past experience, however, the Commission does not believe the impact of these amendments on small businesses will be significant. In all of its auctions held to date except for the auctions for broadcast licenses, 1,513 out of a total of 1,881 qualified bidders have been small businesses as that term has been defined under rules adopted by the Commission for specific services, but only two forfeitures have been assessed in all, *i.e.*, against businesses of all sizes. Thus, despite the large number of small businesses that have participated in the auctions program since its inception, an

extremely small percentage of auction participants have made or received communications that have violated the anti-collusion rule. The Commission believes that the vast majority of applicants comply with the its rules and do not engage in prohibited behavior, and that this will continue to be the case. Therefore, the Commission expects these amendments to have little impact on small businesses generally. The amended rules will deter the few that would try to gain an advantage unfairly by creating an asymmetry of information that is detrimental to other participants.

29. Moreover, while the Commission acknowledges that the reporting requirement it adopts today constitutes a potential burden, it expects the actual burden to be slight. In addition to the fact that the Commission expects there to be few instances of prohibited communications to be reported, it notes that the new filing requirement will place a *de minimis* reporting burden upon auction participants because it merely requires those who make or receive a communication of bids or bidding strategies prohibited by § 1.2105(c)(1) to send a letter to the Secretary. Furthermore, section 223 of the SBREFA allows agencies to reduce or eliminate fines or other enforcement actions taken against small entities. Indeed, section 223 requires agencies to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities. In amending § 1.80 of its rules in 1997 to incorporate guidelines for assessing forfeitures, the Commission also made clear that its forfeiture policies are consistent with this approach. The Commission cannot in good conscience alter the uniform standards of behavior required of all auction participants, even if to do so might assist small businesses. Public confidence in the fairness of our auction process could be undermined if all entities were not subject to the same standards of behavior. However, in light of the provisions of the SBREFA and for the other reasons discussed, the Commission concludes that the amendments it adopts today are not likely to have a significant economic impact on a substantial number of small entities.

30. The Commission also believes generally that any burden associated with these rule amendments is outweighed by the advantages presented by a fair auction process that does not

allow some bidders to gain an advantage over others through collusive behavior. Thus, the Commission finds that the rule amendments that it adopts today will benefit all bidders, including small businesses. First, the Commission believes that the amendments will enhance the competitiveness and fairness of its auction process to the benefit of small auction applicants. Second, under the amendments, general confidence in the integrity of our auctions should increase. In short, the Commission concludes that the public policy benefits of the amendments substantially outweigh the minimal impact the reporting requirement imposes on small entities.

#### *C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply*

31. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small organization," "small business," and "small governmental jurisdiction." The term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 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. A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 1992, there were approximately 275,801 small organizations. "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000." As of 1992, there were approximately 85,006 such jurisdictions in the United States. This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, the Commission estimates that 81,600 (91 percent) are small entities. According to SBA reporting data, there were 4.44 million small business firms nationwide in 1992.

32. The amendments to § 1.2105(c) adopted in the 7th R&O will apply to all entities that apply to participate in Commission auctions, including small

entities. The number of entities that may apply to participate in future Commission auctions is unknown. The number of small businesses that have participated in prior auctions has varied. As stated previously, small businesses, as defined under the Commission's rules, have accounted for 1,513 out of a total of 1,881 qualified bidders in all prior auctions, not including broadcast auctions. Given these statistics, the Commission expects a large percentage of participants in its auctions program generally to be small businesses in the future, although this may not be the case in each individual auction.

*D. Description of Reporting, Recordkeeping and Other Compliance Requirements*

33. As a result of the actions taken in the 7th R&O, disseminators and recipients of communications prohibited by § 1.2105(c)(1) will be required to report such communications to the Commission, in writing, within five business days after the communication occurs.

*E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

34. The RFA requires an agency to describe any significant 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 or reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. In the 7th R&O, the Commission amends § 1.2105(c) to require auction applicants that make or receive a communication of bids or bidding strategies prohibited by

§ 1.2105(c)(1) of its rules to report such a communication in writing to the Commission immediately, but in no case later than five business days after the communication occurs. The Commission considered, but decided against, imposing a shorter deadline for such reports. The Commission believes that five business days will lessen the burden of the reporting requirement, particularly for small businesses. The Commission also considered not applying the requirement to recipients of prohibited communications. However, the Commission believes that recipients of prohibited communications are more likely to report such communications and thus serve as an important deterrent against collusive behavior. Moreover, the Commission believes that recipients of prohibited communications must be held to the same enforcement standard as initiators, because a recipient may derive substantial unfair benefit from obtaining details of a competitor's bids or bidding strategy.

*F. Report to Congress*

35. The Commission will send a copy of the 7th R&O, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the 7th R&O, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

**Magalie Roman Salas,**  
*Secretary.*

**Rule Changes**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

**PART 1—PRACTICE AND PROCEDURE**

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

**Authority:** Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 1.2105 is amended by revising paragraph (c)(1), redesignating paragraph (c)(6) as (c)(7) and adding new paragraph (c)(6) to read as follows:

**§ 1.2105 Bidding application and certification procedures; prohibition of collusion.**

\* \* \* \* \*

(c) *Prohibition of collusion.* (1) Except as provided in paragraphs (c)(2), (c)(3), and (c)(4) of this section, after the short-form application filing deadline, all applicants for licenses in any of the same geographic license areas are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements, until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to § 1.2105(a)(2)(viii).

\* \* \* \* \*

(6) Any applicant that makes or receives a communication of bids or bidding strategies prohibited under paragraph (c)(1) of this section shall report such communication in writing to the Commission immediately, and in no case later than five business days after the communication occurs. Such reports shall be filed with the Office of the Secretary, and a copy shall be sent to the Chief of the Auctions and Industry Analysis Division, Wireless Telecommunications Bureau.

\* \* \* \* \*

[FR Doc. 01-27103 Filed 10-26-01; 8:45 am]

BILLING CODE 6712-01-P