

SUPPORTING STATEMENT

A. Justification:

The Commission is seeking OMB approval for an extension of this information collection in order to obtain the full three year clearance. There are no changes to the reporting requirements. There is no change to the Commission's previous burden estimates.

1. Subject to certain exceptions, Section 1.2105(c)(1) of the Commission's rules prohibits auction applicants that are eligible 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 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 the Part 1 *Seventh Report and Order*, the Commission amended Section 1.2105(c) to require auction applicants that make or receive a communication of bids or bidding strategies prohibited under Section 1.2105(c)(1) to report such a communication to the Commission in writing immediately, but in no case later than five business days after the communication occurs.

The Commission has found that even when a 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 asymmetry of information. Section 1.2105(c)(1) of the Commission's rules attempts to address this concern by prohibiting auction applicants from communicating their bids or bidding strategies to each other. In enforcing Section 1.2105(c)(1), however, the Commission has encountered auction applicants engaging in communications prohibited by the rule. In some instances, there has been concern expressed about the obligation of a bidder to report information received from another bidder that potentially violates the rule, and the Commission has previously counseled applicants that the safest course of action for a recipient of a prohibited communication during the period in which Section 1.2105(c)(1) prohibitions are in effect would be to terminate the discussion and promptly report the communication to the Commission. The Commission believes that the anti-collusion rule to include such a reporting requirement, as a deterrent to would-be disseminators of prohibited information regarding bids or bidding strategies, will make clear the responsibility to report such behavior and will thereby enhance the competitiveness and fairness of its spectrum auctions. Under the amendment the Commission adopted in the *Seventh Report and Order*, an applicant's failure to report a prohibited communication pursuant to Section 1.2105(c) may constitute a rule violation distinct from any act of collusion that violates Section 1.2105(c)(1).

Applicants have always had, under Section 1.65(a) of the Commission's rules, 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 agreements, the Commission has sought to ensure the integrity and transparency of its auction processes. The reporting requirement adopted in the *Seventh Report and Order* 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 Section 1.65(a). By now amending its rules to include this affirmative reporting requirement that applies even if a communication does not rise to the level of that which must be reported under Section 1.65(a), the Commission can ensure that all bidders remain on a level playing field throughout the course of an auction.

Statutory authority for this collection of information is contained in 47 U.S.C. §§ 154(i) and 309(j).

2. The reporting requirement will enable the Commission to ensure that no bidder gains an unfair advantage over other bidders in its spectrum auctions and thus enhance the competitiveness and fairness of its auctions. The information collected will be reviewed and, if warranted, referred to the Commission's Enforcement Bureau for possible investigation and administrative action. The Commission may also refer allegations of anticompetitive auction conduct to the Department of Justice for investigation.

3. Section 1.2105(c)(6) of the Commission's rules requires applicants that make or receive a prohibited communication to report such communication in writing to the Commission within the time period specified in the rules. This submission reflects the Commission's recent adoption of a non-material, non-substantive change to the rule that specifies how parties make reports required pursuant to 47 C.F.R. § 1.2105(c)(6). The current rule provides that "[s]uch reports shall be filed with the Office of the Secretary, and a copy shall be sent to the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau." The revised rule requires parties to make the reports as directed by public notice or only to the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, rather than to the Chief and the Office of the Secretary of the Commission, as required prior to the modification. Applicants are not required to make the disclosure required by Section 1.2105(c)(6) by electronic submission. OMB has already issued a Notice of Action approving this change as non-material and non-substantive (January 28, 2010).

4. The Commission does not obtain this information or similar information in any other collection. There are no similar data available.

5. As explained in the Final Regulatory Flexibility Analysis of the reporting requirements, the Commission does not believe the overall impact on small businesses is significant. The Commission believes that the filing requirement places 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 Section 1.2105(c)(1) to send a letter to the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau describing the facts of a communication that appears to be prohibited. Moreover, 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 Commission's rules and do not engage in prohibited behavior, and that this will continue to be the case. Therefore, the Commission expects this reporting requirement to have little impact on small businesses generally. Nonetheless, recognizing that small businesses would be subject to the reporting requirement, the Commission decided against imposing a shorter deadline for such reports. Allowing five business days lessens the burden of the reporting requirement, particularly for small businesses.

The Commission is committed to reducing regulatory burdens on small businesses whenever possible, consistent with the Commission's other public interest responsibilities. In conformance with the Paperwork Reduction Act of 1995, the Commission is making an effort to minimize the burden on all respondents.

6. The Commission believes that this reporting requirement acts as a deterrent to would-be disseminators of prohibited information and thereby enhances the competitiveness and fairness of its auctions. The Commission also believes generally that any burden associated with this reporting requirement 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. The reporting requirement benefits all bidders, including small businesses. First, it enhances the competitiveness and fairness of the auction process. Second, general confidence in the integrity of the Commission's auctions should increase. In short, the Commission concludes that the public policy benefits substantially outweigh the minimal impact the reporting requirement imposes. The Commission cannot further reduce the burden of this requirement by exempting certain parties such as small businesses. The Commission has found that it cannot in good conscience alter the uniform standards of behavior required of all auction participants, even if to do so might assist small businesses.

7. Auction applicants that make or receive a communication of bids or bidding strategies prohibited under Section 1.2105(c)(1) are required to report such a communication to the Commission immediately, but in no case later than five business days after the communication occurs, even if the communication does not result in an agreement, arrangement or understanding. Applicants are required only to submit a letter to the Commission describing the facts of a communication that appears to be prohibited.

8. The Commission published a 60-day notice in the *Federal Register* on November 12, 2010 (75 FR 69439). The Commission has received no PRA comments.

9. Respondents will not receive any payments.

10. Respondents are entitled to request confidentiality in accordance with Section 0.459 of the Commission's rules.

11. The reporting requirement does not address private matters of a sensitive nature.

12. The reporting requirement only arises when auction applicants make or receive a communication of bids or bidding strategies prohibited under 47 CFR Section 1.2105(c)(1). The

Commission expects there to be few instances of prohibited communications to be reported. Thus, while it is difficult to estimate the number of respondents, the Commission expects that there will be no more than **10 respondents** in any given year.

With regard to the time burden, the Commission believes that, depending on the complexity and level of communication involved, it will take each applicant approximately **2 hours** to investigate the communication with in-house staff.

Further, the Commission believes that it will take each applicant approximately **1.5 hours** to consult with in-house counsel regarding the information to be reported.

The Commission also believes that it will take each applicant approximately **1.5 hours** to prepare and file a letter with the Commission to report the communication.

10 respondents x 2 hours to consult with in-house staff = 20 hours

10 respondents x 1.5 hours to consult with in-house counsel = 15 hours

10 respondents x 1.5 hours to prepare and file a letter with the FCC = 15 hours

Total: 50 hours

13. The Commission estimates that respondents will prepare the submission with in-house staff, such as in-house counsel or the equivalent, and, if necessary, consult with outside counsel. The Commission assumes that most of the legal work will be performed by in-house counsel.

Where outside counsel is used, the Commission believes that the time burden will be approximately **1.5 hours** for consultation and **1.5 hours** for preparation of the submission. Assuming a **\$200/hour** rate for outside counsel, the cost of consultation and/or submission preparation will be:

10 respondents x 1.5 hours for legal consultation x \$200/ hour = \$ 3,000

10 respondents x 1.5 hours for legal document preparation/submission x \$200/hour = \$3,000.

Total Annual Cost: \$3,000 + \$3,000 = \$6,000.

14. The Commission estimates that four staff attorneys (GS-15/5, at \$67.21/hour) will review these filings for approximately 1 hour = \$268.84.

(4) attorneys @ \$67.21 /per hour x 10 responses = \$2,688.40

Total Annual Cost to the Federal Government is: \$2,688.40

15. There are no changes in the Commission's burden estimates.

16. The collection will not be published for statistical use.
17. The Commission is not seeking OMB approval to not display the expiration date for OMB approval. The Commission publishes a list of OMB-approved information collections under 47 CFR 0.408 of the Commission's rules.
18. There are no exceptions to the certification.

B. Collections of Information Employing Statistical Methods:

This collection does not employ any statistical methods.