

SUPPORTING STATEMENT

The Federal Communications Commission (Commission) requests approval from the Office of Management and Budget (OMB) for an extension without change of a currently approved information collection under OMB Control Number 3060-0995 for a period of three years.

**A. Justification:**

1. *Circumstances that make the collection necessary.* Section 1.2105(c)(1) of the Commission’s rules prohibits auction applicants 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. In its September 2001 *Seventh Report and Order* (FCC 01-270), the Commission amended section 1.2105(c) of its rules 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.

In its June 2014 *Incentive Auction Report and Order* (FCC 14-50), the Commission adopted general rules to govern the broadcast incentive auction (BIA), including rules for reverse auction applicants prohibiting certain communications, requiring a covered party to file a report of any potentially prohibited communication with the Commission, and procedures for filing such reports (*see* 47 C.F.R. §§ 1.2205(b), (c), (d)).<sup>1</sup> The Commission also adopted a corresponding rule for forward auction applicants in the context of the BIA (*see* 47 C.F.R. §1.2105(c)).

In its July 2015 *Part 1 Report and Order* (FCC 15-80), the Commission amended many of its Part 1 competitive bidding rules, including the prohibited communications rule in section 1.2105(c)(1) of its rules.<sup>2</sup>

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<sup>1</sup> *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402, 6403, 125 Stat. 156 (2012) (Spectrum Act), codified at 47 U.S.C. §§ 309(j)(8)(G), 1452 (authorizing the Commission to conduct incentive auctions and directing it to conduct an incentive auction of broadcast television spectrum). The BIA had three main components: (1) a “reverse auction” in which broadcast television licensees submitted bids to voluntarily relinquish their spectrum usage rights in exchange for defined shares of proceeds from the “forward auction”; (2) a “repacking” of the broadcast television bands; and (3) a “forward auction” of initial licenses for flexible use of the newly available spectrum. *See* Spectrum Act § 6403(a), (b) and (c) (codified at 47 U.S.C. § 1452(a), (b), (c)); *see also* Spectrum Act § 6001(16) and (30) (defining “forward auction” and “reverse auction,” respectively).

<sup>2</sup> The Commission made no changes to the scope or substance of the existing prohibited communications reporting requirement and procedures, however, as a result of amendments to various other provisions in section 1.2105(c) adopted in the *Part 1 Report and Order*, the reporting requirement was redesignated as section 1.2105(c)(4) from section 1.2105(c)(6). The redesignation of the section reference for this rule became effective on November 17, 2015 (*see* 80 FR 56764 (Sept. 18, 2015)).

Statutory authority for this information collection is contained in sections 154(i), 309(j), and 1452(a)(3) of the Communications Act, as amended, and sections 1.2105(c), 1.2205(c), and 1.2205(d) of the Commission's rules. See 47 U.S.C. §§ 4(i), 309(j)(5), 1452(a)(3); 47 C.F.R. §§ 1.2105(c), 1.2205(c), (d).

This information collection does not affect individuals or households; thus, there are no impacts under the Privacy Act.

2. *Use of information.* The Commission's rules prohibiting certain communications in Commission auctions are intended to reinforce existing antitrust laws, facilitate detection of collusive conduct, and deter anticompetitive behavior, without being so strict as to discourage pro-competitive arrangements between auction participants. They also help assure participants that the auction process will be fair and objective, and not subject to collusion. The information collected through the Commission's reporting requirement allows the Commission to enforce the prohibition on covered parties by making clear the responsibility of parties who receive information that potentially violates the rules to promptly report to the Commission, thereby enhancing the competitiveness and fairness of the Commission's auctions and enabling the Commission to ensure that no bidder gains an unfair advantage over other bidders. 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. *Technological collection techniques.* Pursuant to the Commission's rules, parties that make or receive a prohibited communication must file reports as directed in public notices detailing procedures for the bidding that was the subject of the reported communication or, if no public notice provides direction, the party making the report shall do so in writing to the Chief of the Auctions Division, Office of Economics and Analytics,<sup>3</sup> by the most expeditious means available, including electronic transmission such as email (see 47 C.F.R. §§ 1.2105(c)(4), 1.2205(d)). The Commission has centralized the reporting of this information to the Chief of the Auctions Division, Office of Economics and Analytics, and permits the reporting and collection of this information by e-mail to reduce both public and agency administrative burden. Because parties must respond in writing by the most expeditious means available, the Commission expects that in almost all cases, parties will submit their reports by e-mail.

4. *Efforts to identify duplication.* There will be no duplicative information collected. The information sought is unique to covered parties and is not already available because the Commission does not impose a separate similar information collection on such parties. Thus, there is no similar data available under another information collection.

5. *Impact on small entities.* As explained in the Final Regulatory Flexibility Analyses included in the *Seventh Report and Order* and in the *Incentive Auction Report and Order*, the Commission does not believe that the costs and/or administrative burdens associated with the reporting requirements will unduly burden small entities. The Commission believes that the filing requirement places a *de minimis* reporting burden upon covered parties because it merely requires those who make or receive a communication prohibited by the Commission's rules to send an e-mail or 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

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<sup>3</sup> In January 2018, the Commission adopted an Order that established the Office of Economics and Analytics and, among other things, generally shifted the functions of the Auctions and Spectrum Access Division in the Wireless Telecommunications Bureau to the Auctions Division in the Office of Economics and Analytics. See *Establishment of the Office of Economics and Analytics*, Order, 33 FCC Rcd 1539 (2018); 83 FR 63073 (Dec. 7, 2018).

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 prohibited communications rule. The Commission believes that the vast majority of applicants and other covered parties 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.

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. The Commission has therefore made available tutorials and related information to assist respondents, including small entities, in understanding their reporting obligations. *See, e.g., Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd 10794 (2015).

6. *Consequences if information is not collected.* The Commission believes that the reporting requirement acts as a deterrent to would-be disseminators of prohibited information and thereby enhances the competitiveness and fairness of the incentive auction. 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 of the reporting requirement. The Commission cannot further reduce the burden of this requirement by exempting certain parties such as small businesses. The Commission cannot alter the uniform standards of behavior required of all auction participants, even if to do so might assist small businesses.

7. *Special circumstances.* The reporting requirement as currently approved does not have any of the characteristics that would require separate justification under 5 C.F.R. § 1320.5(d)(2). Covered parties that make or receive a communication prohibited by the Commission's rules are required to report such a communication to the Commission immediately, but in no case later than five business days after the communication occurs. Covered parties are required only to submit a report to the Commission describing the facts of a communication that appears to be prohibited.

8. *Federal Register notice; efforts to consult with persons outside the Commission.* Pursuant to 5 C.F.R. § 1320.8, the Commission published a 60-day notice in the Federal Register on February 7, 2022 (*see* 87 FR 6864) regarding the extension of the information collection requirements under OMB Control Number 3060-0995. No comments were received in response to this notice.

9. *Payments or gifts to respondents.* Respondents will not receive any payments or gifts.

10. *Assurances of confidentiality.* The Commission will take all reasonable steps to protect the confidentiality of all Commission-held data of a reverse broadcast incentive auction applicant consistent with the confidentiality requirements of the Spectrum Act and the Commission's rules. *See* 47 U.S.C. § 1452(a)(3); 47 C.F.R. § 1.2206. In addition, to the extent necessary, auction applicants and other covered parties may request confidential treatment pursuant to section 0.459 of the Commission's rules for any report of a prohibited communication submitted to the Commission that is not already being treated as confidential. *See* 47 C.F.R. § 0.459.

11. *Questions of a sensitive nature.* This information collection does not ask questions of a sensitive nature.

12. *Estimate of the time burden of the collection on respondents.* The reporting requirement only arises when covered parties make or receive a communication prohibited under the Commission's rules. 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 filing and 10 responses** 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 party approximately **2 hours** to investigate and consult with in-house staff regarding the communication.

Further, where consultation with outside counsel regarding the information to be reported is necessary, the Commission believes that it will take each party approximately **1.5 hours** to consult with outside counsel.

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

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

10 respondents x 1.5 hours to consult with outside counsel as necessary = 15 hours

10 respondents x 1.5 hours to prepare and file a report with the Commission = 15 hours

**Total: 50 hours**

**In-house Cost:** Where in-house staff is used, assuming a rate equivalent to the hourly rate of a GS-15, Step 5 government staff member (\$80.63/hour), the cost of consultation and/or submission preparation will be:

10 respondents x 2 hours for legal investigation and consultation x \$80.63/hour = **\$1,612.60.**

10 respondents x 1.5 hours to consult with outside counsel as necessary x \$80.63/hour = **\$1,209.45.**

10 respondents x 1.5 hours for legal document preparation/submission x \$80.63/hour = **\$1,209.45.**

**Total In-House Cost: \$1,612.60 + \$1,209.45 + \$1,209.45 = \$4,031.50.**

13. *Estimate of the cost burden of the collection on respondents.* Some respondents may work exclusively with in-house staff to prepare and file the report, however, the Commission anticipates that respondents may also consult with outside counsel regarding the information to be reported, and may have outside counsel prepare and submit the report. Where outside counsel is used, the Commission estimates that it will take outside counsel approximately **1.5 hours** for consultation and **1.5 hours** for preparation and submission of the report.

Assuming a **\$300/hour** rate for outside counsel, the cost of consultation and/or preparation and submission of the report will be:

10 respondents x 1.5 hours for legal consultation x \$300/hour = **\$4,500.**

10 respondents x 1.5 hours for legal document preparation/submission x \$300/hour = **\$4,500.**

**Total Annual Cost: \$4,500 + \$4,500 = \$9,000.**

14. *Estimate of the cost burden of the collection on the Commission.* The Commission estimates that four staff attorneys (GS-15, Step 5, at \$80.63/hour) will each review these reports for approximately 1 hour.

Four (4) attorneys x 1 hour x \$80.63/hour x 10 responses = \$3,225.20.

**Total Annual Cost to the Federal Government: \$3,225.20.**

15. *Program changes or adjustments from the collection.* The Commission is reporting no change in burden for the collection. Therefore, there are no program changes or adjustments to this collection.

16. *Collections of information whose results will be published.* The information collected under this collection will not be published for statistical use.

17. *Display of expiration date for OMB approval of information collection.* The Commission seeks continued approval to not display the expiration date for this information collection. The Commission publishes a list of OMB-approved information collections in section 0.408 of the Commission's rules, 47 C.F.R. § 0.408, and will continue to publish the OMB control number and OMB expiration date for this collection in the list contained in section 0.408 of its rules.

18. *Exceptions to certification statement for Paperwork Reduction Act submissions.* There are exceptions to the certification statement.

**B. Collections of Information Employing Statistical Methods:**

This information collection does not employ any statistical methods, and the use of such methods would not reduce the burden or improve accuracy of results.