“The biggest players in the computer, communications, and information industries anticipate a new stage in technology, which, as the microprocessor did in the 1980s, will create vast new markets and new fortunes. They see empires in the air.”

The Federal Communications Commission (“FCC” or “Commission”), created by the Communications Act of 1934 (“1934 Act”), was given explicit authority to regulate the radio frequency spectrum. In granting licenses for the use of a broadcast frequency, the Commission was required to determine whether the use would serve the “public convenience, interest, or necessity.” Further, the Commission was to ensure that the frequencies were distributed in a “fair, efficient, and equitable” manner.

Prior to conferring this regulatory authority on the FCC, Congress had enacted legislation, as needed, to regulate the assignment and use of the radio frequency spectrum. The first major problem requiring such government action involved spectrum frequency interference. The Radio Act of 1927, enacted to resolve interference problems, created the Federal Radio Commission, which was given regulatory authority over all spectrum, except that owned by the government. The passage of the 1934 Act consolidated all regulatory authority over the spectrum, but Congress still struggled with legislation that strove to apportion the limited amount of available spectrum to meet the disparately high demand.
for licenses for new telecommunications technologies.\textsuperscript{10} Consequently, the focus shifted from controlling the licensees that used the spectrum to distributing the licenses through a "fair, efficient, and equitable" process.\textsuperscript{11}

In regulating the radio frequency spectrum and in attempting to maintain the policy goals associated with the use and distribution of the spectrum as a valuable and scarce resource, two views have emerged characterizing the unique attributes of this public asset.\textsuperscript{12} The first view compares spectrum licenses with trusteeships where licensees serve as trustees to the public interest and in return are given use of the valuable public spectrum.\textsuperscript{13} The second view applies a market system approach where, although not part of the 1934 Act, competition is seen as fostering the public interest goal through private ownership of the public resource.\textsuperscript{14} Thus, licenses are viewed as public trusts, but also have attributes indicative of private property.\textsuperscript{15} "In theory, the Government, serving as guardian of the airwaves, awards licenses to promote public goals; in practice, it gives away what is valuable property that can be bought and sold like real estate."\textsuperscript{16}

These divergent views of the nature and use of the spectrum, however, appear to have narrowed. With emerging technological innovations and the increasing demand for this valuable resource, the focus has shifted from the trusteeship approach to the private property approach. While public interest goals still pervade the system, the financial incentives inherent in this resource have gained momentum in the process of awarding spectrum licenses.

The Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act")\textsuperscript{17} is a recent development that clearly accentuates the valuable financial attributes of the radio frequency spectrum. President Clinton's Budget Act, passed by Congress on August 10, 1993, gave the FCC, for the first time, the authority to auction licenses through a competitive bidding process.\textsuperscript{18} The process is projected to raise over $10.2 billion in revenue over the next five years.\textsuperscript{19}

Critics of competitive bidding, however, are concerned that the development of the latest technologies will be hindered if there is a waiting period prior to the implementation of the competitive bidding process.\textsuperscript{20} Furthermore, opponents worry that small and minority-owned businesses will not have the opportunity to participate in the bidding process.\textsuperscript{21} Such effects essentially would violate the fairness and public interest goals of the 1934 Act.\textsuperscript{22} Nonetheless, Congress has given the FCC the authority to establish auction rules and procedures.\textsuperscript{23} Therefore, in order to maintain the purpose of the 1934 Act and still be of financial benefit to the United States, the competitive bidding process must be implemented with a focus on both the public policy and revenue incentives.

This Comment discusses the financial incentives of the competitive bidding process in light of the public policy goals embodied in the Communications Act of 1934. Part I examines the spectrum assignment process used prior to the competitive bidding legislation, focusing on the inefficiency of these processes to meet the demands of emerging telecommunications technologies that require licenses. Part II studies the competitive bidding process included in the Omnibus Budget Reconciliation Act of 1993. Part II then reviews the legislative action that was essential to the final language of the competitive bidding amendment.

\textsuperscript{10} NTIA Policy Review, supra note 4, para. 6. One of the goals of the 1934 Act was to encourage the birth of new technologies. Kurt A. Wimmer, Netting Federal Revenues from Thin Air - Issuing Spectrum Licenses by Auction, COMM. LAW., Summer 1993, at 11.

\textsuperscript{11} NTIA Policy Review, supra note 4, para. 5.

\textsuperscript{12} Rau, supra note 6, at 149-50. See also NTIA Policy Review, supra note 4, para. 4; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 399 (1969) ("It is enough to say that [spectrum] is . . . of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress."). The Rau article cited herein discusses these approaches for the purpose of examining the FCC's regulation of the use to which allotted spectrum is put. The approaches, however, are also relevant to the ideas further discussed here regarding the process by which licenses are awarded.

\textsuperscript{13} Rau, supra note 6, at 149.

\textsuperscript{14} Id. at 150. This approach is purely theoretical because in delineating the purpose of the Communications Act of 1934, it clearly was emphasized that licenses for frequencies were awarded only for the use, not the ownership of spectrum. 47 U.S.C. § 301 (1988); see also FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 475 (1940) ("The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.").

\textsuperscript{15} Rau, supra note 6, at 149-50.


\textsuperscript{18} Pub. L. No. 103-66, sec. 6002(a), 107 Stat. at 388 (to be codified at 47 U.S.C. § 309(j)(1)).


\textsuperscript{20} See discussion infra part II.C.2.

\textsuperscript{21} Id.

\textsuperscript{22} See supra notes 4-5 and accompanying text.

\textsuperscript{23} Pub. L. No. 103-66, sec. 6002(a), 107 Stat. at 388 (to be codified at 47 U.S.C. § 309(j)(3)).
to the 1934 Act. Finally, Part II focuses on the ultimate advantages and disadvantages of the system. Part III analyzes how the auction process will work and focuses on who will benefit from competitive bidding. Part IV concludes that while implementation of the auctioning process is premised on raising much needed revenue, this process will not curtail the public policy goals of the 1934 Act. Instead, the public first will benefit directly from a fair and efficient licensing process when new services are implemented more quickly. Second, the public will enjoy the indirect benefit of financial gains to the U.S. Treasury.

I. THE NEED FOR COMPETITIVE BIDDING

A. Radio Spectrum Licensing Procedures of the Past: Inefficient Systems and Windfalls for Private Parties

The FCC currently uses either comparative hearings or lotteries to award licenses to mutually exclusive applicants. Both processes, however, have become too inefficient to accommodate the increasing demand for licenses and have resulted in unfair financial gains to private parties.

1. Comparative Hearings

Mutually exclusive applications for broadcast services are subject to a comparative hearing process, in which the FCC analyzes a variety of factors to determine to whom a broadcast license should be given. The comparative hearing process is not based on clearly established criteria. The Commission tends to give preference, however, to applicants who plan to manage the station and live in that community, thus ensuring that licenses are awarded to applicants who are committed to providing a service to the public. Minorities and first-time licensees also are given preference in the comparative hearing process. The comparative hearing process is not without some flaws. First, the nature of the process has prompted nonsensical challenges by other applicants to incumbent licensees during the license renewal period, where the challenger simply contests the renewal to extract large settlements from the renewing applicant. In response, the FCC has restricted settlements by forbidding any form of payment in exchange for an applicant’s withdrawal of an application without Commission approval. Second, the comparative hearing process can be extremely lengthy and burdensome. In addition, it can be

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48 7 U.S.C. § 309(e) (1988); see Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945) (holding that “where two bona fide applications are mutually exclusive the grant of one without a hearing to both depriv[es] the loser of the opportunity which Congress chose to give him.”).
56 “Two or more timely filed applications for the same frequency or for frequencies whose use would electronically interfere with each other are generally referred to as ‘mutually exclusive.’” Lottery NPRM, supra note 25, para. 5 n.4.
57 Wimmer, supra note 10, at 12; see also Lottery NPRM, supra note 25, para. 51.
58 In re Comparative Broadcast Hearings, Policy Statement, 1 F.C.C.2d 393, 394-400 (1965) [hereinafter Comparative Hearings Policy Statement]. Comparative hearings have been used only for licensing broadcast services. Wimmer, supra note 10, at 11.
59 Comparative Hearings Policy Statement, supra note 28, at 393. “The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable.” Id. See also Johnston Broadcasting v. FCC, 175 F.2d 351, 357 (D.C. Cir. 1949) (stating that “there are no established criteria by which a choice between the applicants must be made”). The important factors the Commission listed included: diversification of control of the media of mass communications, full-time participation in station operation by owners, proposed program service, past broadcast record, efficient use of frequency, character, and other factors that are relevant to the particular case. Comparative Hearings Policy Statement, supra note 28, at 394-400; see also West Michigan Broadcasting Co. v. FCC, 735 F.2d 601, 604-05 (D.C. Cir. 1984) (discussing the six factors), cert. denied, 470 U.S. 1027 (1985); see TV 9, Inc. v. FCC, 495 F.2d 929, 936 (D.C. Cir. 1973) (stating that the public interest “is a broad concept, to be given realistic content.”), cert. denied, 419 U.S. 986 (1974).
61 Id. There is no longer a female preference policy in the licensing process as this was found to violate the Equal Protection Clause of the U.S. Constitution. See Lamprecht v. FCC, 958 F.2d 382, 398 (D.C. Cir. 1992). Preference, however, is still given to applicants based on race, ethnicity or surname. See Metro Broadcasting v. FCC, 497 U.S. 547, 600 (1990) (holding that “minority ownership policies bear the imprimatur of long-standing congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity.”).
64 The Emerging Telecommunications Technologies Act of 1993: Hearings on S. 335 Before the Subcomm. on Comm. of the Senate Comm. on Com., Science and Transp., 103d Cong., 1st Sess. 12 (1993) [hereinafter S. 335 Hearings] [prepared state-
some time before the station is constructed and in
full operation, resulting in idle spectrum, and there-
fore undermining the public policy benefits. From
a financial perspective, comparative hearings dimin-
ish valuable FCC administrative assets, and impose
high litigation expenses on applicants who are chal-
egened. Some argue, however, that comparative
hearings are effective because the FCC can structure
the broadcasting industry so that licenses are
awarded to those who are serious about developing
stations that serve the public needs.

Overall, comparative hearings provide an equal
opportunity for all license applicants to be heard and
help ensure that the license will be used to benefit
the public. However, the process may be too bur-
densome for applicants and may not result in any
corresponding benefit to the public when the choice
of the final licensee is “based on minimal differences
lacking any public interest significance.”

2. Lotteries

The FCC uses lotteries as another method of issu-
ing licenses, “adopted both to expedite the assign-
ment process and to choose fairly among appli-
cants.” Lotteries are used for a variety of services,
including cellular telephones, low power television
and specialized mobile radio (“SMR”) spectrum. The
lottery is a random selection procedure, whereby applicants are chosen at random manually
or by computer. As compared to the comparative
hearing process, lotteries have been considered “sub-
stantially superior.” Lotteries are easier to facil-
tate because the process is much simpler and more
objective than comparative hearings. Thus, with
lotteries, licenses can be awarded faster, which in
turn expedites the implementation of new services
from which the public can benefit. Furthermore,
lotteries are less expensive for applicants, so anyone
interested in applying is not hindered by a lack of
capital.

Nevertheless, lotteries have shortcomings as well.
This random selection process encourages specula-
tion, where one applies for a license with no inten-
tion of using it and sells it for the highest price soon
after issuance. “The results of lotteries are ‘second-

ment of Thomas P. Stanley, Chief Engineer at the
FCC) (“Comparative hearings are slow and are of limited utility
in picking licenses for services where one qualified would-be service
provider is not clearly better than another.”); see also Wimmer,
supra note 10, at 12 (“Comparative hearings, however,
have been criticized . . . for requiring hair-splitting speculative
judgments about which applicant is the most qualified.”) (citing
Star Television, Inc. v. FCC, 416 F.2d 1086, 1095 (D.C. Cir.)
(Levithal, J., dissenting), cert. denied, 396 U.S. 888 (1969)).
“[I]t is highly questionable whether our elaborate and costly
comparative process actually results in a material benefit to the
public. This is especially true in those cases where the comparat-
ive distinction between a winning and losing applicant, both of
whom are basically qualified, is marginal.” Lottery NPRM,
supra note 25, para. 2. See also id. paras. 5-17 for a detailed
discussion of the extensive process.

Andrews, supra note 16, at A7 (noting the laxity of the
rules for applicants since, “[i]n addition to allowing those who
win licenses freedom to sell them after a year, the rules let al-
most anybody buy them, short of a convicted felon, a foreigner or
someone who owns another station in the same market.”).
Lottery NPRM, supra note 25, para. 2.

Andrews, supra note 16, at A7 (quoting Media Access
Project Director Andrew Jay Schwartzman). See also S. 335
Hearings, supra note 34, at 28 (prepared statement of Edward
O. Fritts) (emphasizing that “[i]n a world of broadcast spectrum
auctions, only those who already have large financial backing
would have a real chance to win licenses, and I fail to see how
that situation assures that the nation’s broadcast service con-
tinues to serve the needs of our citizens.”).

Comparative Hearings Policy Statement, supra note 28,
at 394 (noting that every applicant has a right to a full hearing
and that one of the main objectives of the process is to provide
the best service to the public).

Lottery NPRM, supra note 25, para. 2.

Lottery NPRM, supra note 25, para. 2.

Lottery NPRM, supra note 25, para. 2.

Lottery NPRM, supra note 25, para. 2.

Lottery NPRM, supra note 25, para. 2.

Lottery NPRM, supra note 25, para. 2.

Lottery NPRM, supra note 25, para. 2.

Id. para. 33(a)-(b).

Id. para. 33(c).

Id. para. 33(d)-(e); Andrews, supra note 16, at A1. For
example, the government does not charge a fee for cellular tele-
phone licenses, whose market value is about $42 billion. Id. at
A7. Lotteries were expected to be less costly for the FCC, but
because there is no fee or strict requirements for filing, the FCC
must sort through thousands of applications, increasing admin-
istrative costs. Wimmer, supra note 10, at 12 n.8.

Wimmer, supra note 10, at 12. In re Implementation of
Section 309(j) of the Communications Act Competitive Bidding,
ary' auctions with a windfall that should have gone to the U.S. Treasury going to the lucky ticket holder. For example, in 1990, a rural cellular license was issued in Columbia County, Wisconsin through a lottery and 190 days after issuance, it sold for $62.3 million, with the FCC noting, 'the public received none of this revenue.' In addition, as with comparative hearings, losing applicants often file petitions to deny the grant of licenses. These petitions only lead to hearings on the issue, again using valuable FCC administrative resources and impeding service to the public.

Ultimately, lotteries are considered better than comparative hearings for the ease in awarding licenses. Lotteries, however, appear to misappropriate the profits made from license sales, and because of the relaxed application process, unfairly affect applicants who intend to provide a service that will be beneficial to the public.

B. Technological Developments in the Telecommunications Industry: Comparative Hearings and Lotteries are Ineffective

The expanding technological world, with innovations from cellular phones to handheld computer systems, has made the competition for spectrum licenses so intense that comparative hearings and lotteries have proven problematic as a method of issuing licenses... they attracted some applicants that had little interest in building and operating high-quality communications systems." Wimmer, supra note 10, at 12. In addition, with current legislation freeing more government spectrum to accommodate new technologies, lotteries and comparative hearings neglect the financial value of the spectrum that could benefit the federal budget. "The value of spectrum, as an invisible resource, is sometimes overlooked. Yet over the years, demand for spectrum for both commercial and governmental purposes has continued to increase."

The radio frequency spectrum is in great demand as it is used for a wide variety of business enterprises in the United States, including radio and television broadcasting, cellular telephones, taxi dispatch services, air traffic control, law enforcement, public safety and national security. Consequently, "the U.S. spectrum management system should be reviewed, and potential improvements developed and evaluated, particularly in light of increases in the demand for spectrum, rapidly changing developments in spectrum-related technology, and the new forms of spectrum management implemented in other countries." An excellent example of how demand can exceed supply is in specific geographical areas, mainly urban areas, where frequency bands become extremely congested. Senate Bill 335 was drafted specifically to address this problem of excess demand or "shortage of spectrum for a host of new technologies." The bill also was expected to "boost American industry, technology, and competitiveness."

House Committee reports also have noted "that the lack of available spectrum is stifling the introduction of new technologies. The Committee anticipates that the passage of this legislation will reverse this situation, and allow the Commission to allocate additional frequencies to new and innovative technologies." Even with the abundance of existing services

First Report and Order, 74 Rad. Reg. 2d (P&F) 700, para. 4 (1994) [hereinafter First Report and Order]. "[L]otteries have proved problematic as a method of issuing licenses... they attracted some applicants that had little interest in building and operating high-quality communications systems." Wimmer, supra note 10, at 12.

59 S. 335 Hearings, supra note 34, at 44 (prepared statement of Robert S. Foosaner).
61 Wimmer, supra note 10, at 12.
62 Id.
63 Lottery NPRM, supra note 25, para. 32.
64 See generally Wimmer, supra note 10, at 12 (noting the "private auctions" that take place and the thousands of applicants that file having no interest in providing communications services to the public).
65 See generally S. 335 Hearings, supra note 34, at 43-44 (prepared statement of Robert S. Foosaner) (noting that comparative hearings are time consuming and costly and that lotteries invite speculation).
68 NTIA Policy Review, supra note 4, para. 3.
69 Id.
70 Spectrum management is a twofold process, first the FCC must decide to what use the band should be put and then decide who should be licensed to use it. Id. para. 18. A discussion of the use to which a band should be put is beyond the scope of this Comment, which focuses solely on the process of determining who should be licensed to use the band. See generally Rau, supra note 6 (describing the process by which the FCC determines the use of frequency bands).
71 NTIA Policy Review, supra note 4, para. 6.
72 Id. para. 33.
74 S. 335 Hearings, supra note 34, at 8 (statement of Thomas B. Stanley, Chief Engineer at the FCC).
75 Id.
76 H.R. Rep. No. 19, 103d Cong., 1st Sess. (1993). The market for wireless data services is expected to equal that of personal computers, which is roughly 30 million units a year. Zie-
that use frequencies, the licensing process still should continue to "encourage efficient technologies" to benefit consumers. Clearly, new legislation was necessary to accommodate technological advances and the increasing need for radio frequency spectrum licenses.

C. Competitive Bidding Proposals

The widespread dissatisfaction with the current licensing processes for some services has prompted several major proposals that offer competitive bidding as a profitable and efficient alternative. At various times in the past thirty-four years "conservative economists" and Republican administrations have proposed the use of auctions.

Competitive bidding proposals are premised upon a market-based approach. The market system concept—focused on competition—has several advantages. First, it provides an incentive to use the spectrum efficiently and economically because spectrum licenses would be awarded at high prices. Next, it eliminates inefficient and time-consuming processes by simply awarding licenses to the highest bidder. This in turn, ascertains the market value of the spectrum. Finally, and perhaps the most significant advantage is that competitive bidding can raise federal revenue. Thus, with an auction process, license awards would be based on the financial value of the spectrum, not on subjective administrative decisions as to the appropriate qualities of each license applicant.

The disadvantages of handling spectrum licensing through a market-based approach, however, include the potential to stray from public policy goals and to create a monopolization effect. Specifically, the unfairness inherent in this approach has caused critics to fervently oppose such a process because the only licensees would be those who could afford to pay the highest price. Public interest goals of fairness and equal opportunity embodied in the 1934 Act, without safeguards, essentially would be removed from the spectrum licensing process by barring applicants who lack the financial resources, yet are committed to providing a public service. On the other hand, comparative hearings and lotteries tend to highlight spectrum rights as transferable property rights because licenses are sold for a profit soon after being awarded. Consequently, private auctions already constitute a major source of income for private parties when the spectrum's financial value could be shared publicly through the U.S. Treasury.

In 1992, Fleet Call, Inc., one of the largest SMR system operators, urged the FCC to consider competitive bidding for unused bands of frequency spectrum for SMR networks. An auction system used in the spectrum assignment process, they argued, would "assure that scarce spectrum resources are made

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87 NTIA Policy Review, supra note 4, para. 8; see Wimmer, supra note 10, at 14.
88 "The frequency allocation process must be more responsive if it is to accommodate increasing demand and complexity of spectrum use as technology evolves." NTIA Policy Review, supra note 4, para. 29.
89 Wimmer, supra note 10, at 11 (citing R.H. Coase, The Federal Communications Commission, 2 J.L. & Econ. 1 (1959) (economists' auction proposal) and Mark Fowler & Daniel Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207 (1982) (examining the first recognition of an auction proposal by an executive administration)). In 1985, then-Chairman of the FCC Mark Fowler proposed competitive bidding. Ervin S. Duggan, Spectrum Auctions and the Common Good, Remarks of Ervin S. Duggan, Commissioner, Federal Communications Commission Before the TeleStrategies Spectrum Auctions Conference, Washington, D.C., at 2 (Nov. 1, 1993) (transcript on file with the FCC). Another alternative that has been suggested was the flexible radio service proposal. Rau, supra note 6, at 152. Such a system would allow bands to change services on their own as the marketplace changes, with no governmental approval needed. Id. at 168. Economic incentives would then be the main focus. Id. Spectrum assignment initially would require a hearing process to assign licenses, but after that, transfers would be through a buying and selling process by licensees on their own and would ultimately have the same effects as the current system. Id. at 182. The FCC should be more involved so profits go to the U.S. Treasury rather than to private parties.
90 Rau, supra note 6, at 172. See also The National Information Infrastructure: Agenda for Action, Administration Policy Statement, 58 Fed. Reg. 49,025, 49,030 (1992) (where the call for action was specifically to promote market principles in spectrum distribution).
91 NTIA Policy Review, supra note 4, para. 55.
92 Id.
93 A market-based approach "would allow users to determine how spectrum should be allocated and assigned based on their perceived needs as expressed by willingness to pay, thus bringing demand into equilibrium with supply." Id.
94 Rau, supra note 6, at 173.
95 NTIA Policy Review, supra note 4, para. 54.
96 Rau, supra note 6, at 173-74. The other problem with a market-based approach is that some services are limited as to their market because only certain frequencies can be assigned for some purposes. See Fowler & Brenner, supra note 69, at 210-13.
97 NTIA Policy Review, supra note 4, para. 57.
98 Id.
99 Id. para. 61.
100 Id.
101 S. 335 Hearings, supra note 34, at 41 (prepared statement of Robert S. Foosaner).
available to those who will put them to their highest and best use” and would raise revenue for the U.S. Treasury instead of for speculators. The FCC dismissed Fleet Call’s Petition for Rule Making on the issue of competitive bidding although the Private Radio Bureau stated, “[w]hile we support many of Fleet Call’s objectives, we currently have no explicit authority to hold spectrum auctions.” Thus, support for auctions was widespread, but the process was continually rejected.

In 1993, however, the support for auctions gained momentum and Congress began to consider competitive bidding legislation more seriously. Supporters asserted that “the effective use and management of the spectrum will increasingly play a critical role in promoting U.S. economic well-being and global competitiveness.” Thus, the importance of competitive bidding as a means of distributing spectrum-based licenses finally was recognized.

II. COMPETITIVE BIDDING FINALLY ACCEPTED

A. The Omnibus Budget Reconciliation Act of 1993, Section 6002.

1. The 1993 Budget Act and Future Regulations

President Clinton’s Omnibus Budget Reconciliation Act of 1993 gave the FCC, for the first time, the authority to assign frequencies through a competitive bidding process. The legislation amends section 309 of the 1934 Act. Section 309(j)(3) provides the FCC with the authority to implement regulations governing the competitive bidding process and specifically states that these regulations “shall include safeguards to protect the public interest in the use of the spectrum ...” In addition, four main objectives are to be met:

- (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
- (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
- (D) efficient and intensive use of the electromagnetic spectrum.

The objectives clearly attempt to balance financial incentives and efficiency goals with equal opportunity and fairness to all applicants. The question, however, is whether the FCC’s final regulations on competitive bidding can achieve these objectives.

In order to meet the objectives of paragraph (B) above, the Commission’s regulations must include payment schedules and specific calculation methods to determine the amount of each payment. Also, performance requirements have to be standardized so services can be delivered soon after licensing, thus ensuring that no spectrum will lie fallow and that new technologies will be implemented faster. Next, the regulations must distribute bandwidth assignments equally among geographic areas, provide financial opportunities to all types of license applicants, and ensure investment in and faster disbursement of new services, thereby maintaining “the public interest, convenience and necessity” standard. The regulations also have to provide bidding opportunities to small businesses, rural telephone companies, and businesses owned by women and minorities. Finally, the regulations must mandate full disclosure of any license transfers and promulgate antitrafficking rules, thereby preventing “unjust enrichment as a result of the methods employed to issue licenses and permits.”

Furthermore, section 6002 of the 1993 Budget Act emphasizes that the competitive bidding process should not change the provisions of the 1934 Act regarding spectrum allocation standards and procedures, take away any Commission authority in regulating or revoking licenses, transfer any rights other

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83 Id.
84 See supra note 69 and accompanying text.
85 Duggan, supra note 69, at 3.
86 NTIA Policy Review, supra note 4, para. 3.
88 Pub. L. No. 103-66, sec. 6002(a), 107 Stat. at 388 (to be codified at 47 U.S.C. § 309(j)(1)).
90 Id. at 388 (to be codified at 47 U.S.C. § 309(j)(3)).
91 Id. at 388 (to be codified at 47 U.S.C. § 309(j)(3)(A)-(D)).
92 Id. (to be codified at 47 U.S.C. § 309(j)(4)(A)).
93 Id. (to be codified at 47 U.S.C. § 309(j)(4)(B)).
94 Id. (to be codified at 47 U.S.C. § 309(j)(4)(D)) (the FCC is to “consider the use of tax certificates, bidding preferences, and other procedures.”).
than what the 1934 Act already provides, or lessen the public interest obligation of the Commission.96 Also, “the Commission may not base a finding of public interest, convenience, and necessity . . . on the expectation of Federal revenues from the use of a system of competitive bidding” when awarding licenses.97 Thus, the competitive bidding system appears to be structured specifically to balance both financial and policy objectives.

Auctions are to be used for license applications that meet three requirements.98 First, the application must be for an initial license or construction permit.99 Finally, the use of the license must be for a service provided to subscribers for compensation.100 If these requirements are not met, an alternative system of awarding licenses most likely will be used, either comparative hearings or lotteries.

The FCC’s authority to implement competitive bidding included the reassignment of government spectrum.102 Section 6001 of the 1993 Budget Act empowers the Secretary of Commerce to take 200 megahertz of spectrum that had been allocated to the federal government, which is currently not in use, and transfer it to the FCC which can then award it to the private sector.103

2. The Financial Stimulus and Efficiency Incentives of Competitive Bidding

The revenue-generating opportunities of competitive bidding are overwhelming.104 The Clinton administration supported competitive bidding largely for the projected revenue.105 President Clinton stated that “[t]oday many multimillion-dollar industries - including television and radio - are built around the free use of a scarce and valuable federal resource.”106

The second main consideration for the Clinton administration and the reason for the auction legislation was to speed up the licensing process and eliminate speculators that pervade the lottery system.107 The Clinton administration did not want to alter the licensing period or the renewal conditions for any spectrum-based service, nor did it plan to provide new property interests in the spectrum.108 Rather, the goal was to promote a more fair and efficient licensing process for some services, so that the public will benefit from the use of those services and ultimately benefit from the financial value of the resource through the revenue collected by the U.S. Treasury.109

B. Competitive Bidding’s Journey Through Congress: Perfecting the Language

Although it is unclear whether the goals of the competitive bidding legislation will be met, it is apparent from the legislative language that section 6002 attempts to balance revenue and policy objectives. The legislation concentrates mainly on achieving a compromise between encompassing the revenue capabilities of the process and ensuring that small, minority and rural businesses with advanced com-

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96 Id. at 389-90 (to be codified at 47 U.S.C. § 309(j)(6)).
97 Id. at 390 (to be codified at 47 U.S.C. § 309(j)(7)(B)).
99 Id. See also Pub. L. No. 103-66, sec. 6002(a), 107 Stat. at 388 (to be codified at 47 U.S.C. § 309(j)(1)).
100 Pub. L. No. 103-66, sec. 6002(a), 107 Stat. at 388 (to be codified at 47 U.S.C. § 309(j)(1)).
101 Id. (to be codified at 47 U.S.C. § 309(j)(2)(A)).
103 Id. at 380, 385 (to be codified at 47 U.S.C. § 901).
104 Auctions have been projected to raise $10.2 billion. FCC Adopts Rules to Expand Wireless Communications Services, DAILY REP. FOR EXECUTIVES, Sept. 24, 1993, at A-26. The FCC is not required to meet an estimate in raising revenue through section 6002. Currently, all of the revenue will go to the U.S. Treasury, minus a portion that will be retained by the FCC for the costs of implementing the competitive bidding process. Pub. L. No. 103-66, sec. 6002(a), 107 Stat. at 390 (to be codified at 47 U.S.C. § 309(B)(A)-(B)). Commissioner Duggan, however, has suggested that the money be used “also to advance other important social goals.” Duggan, supra note 69, at 8.
106 Randy Sukow & Geoffrey Foisie, Clinton Puts Fifth Estate on Alert; Broadcasters Cautious About Clinton Economic Plan, BROADCASTING, Feb. 22, 1993, at 4 (quoting President Clinton). Among the reasons for the Clinton administration’s support of competitive bidding were: “efficiency of the licensing process and use of spectrum; financial return to US taxpayers; and spectrum assignment process improvement without altering the rights and duties associated with the services license [sic].” Spectrum Auctions: A Look at the Commerce Department’s Views, SPECTRUM REP., Apr. 1993, at 6; see also S. 335 Hearings, supra note 34, at 5 (letter from Ronald H. Brown, Secretary of Commerce to Senator Daniel K. Inouye) (emphasizing the Commerce Department’s support of spectrum reallocation and competitive bidding).
107 Warner, supra note 105, at 12; see Spectrum Auctions Appear to Be a Foregone Conclusion, MOBILE PHONE NEWS, Mar. 29, 1993, at 3.
Communications technologies will still have opportunities to obtain necessary spectrum licenses. The language of the legislation, when completed, was paramount in determining whether these two issues could be resolved in a competitive bidding process. Essentially, the goals are to implement a process that will raise money for the government as well as serve policy concerns of a fair and efficient distribution of licenses by providing opportunity to all applicants and by increasing public access to new services.

1. The House Debate

House Bill 707, the Emerging Telecommunications Act of 1993, initiated debate in the House of Representatives that eventually led to a separate bill on competitive bidding. The purpose of House Bill 707 was to reallocate spectrum available for government licenses to private parties in order to encourage the development of new communications technologies. The bill concluded that much of the government spectrum—approximately forty percent of the entire electromagnetic spectrum—was being used inefficiently, thereby undermining the public interest mandates of the 1934 Act. Reallocating these frequencies, it was proposed, could “produce significant economic returns.”

The bill reflected some legislators’ concerns that if the Commission did not have more spectrum to license, the communications industry would suffer significant setbacks, including a reduction in the development and sale of new telecommunications technologies; a hindered and inefficient U.S. telecommunications system; a decrease in the availability of frequencies for state and local safety services, including police, fire and emergency services; and a less productive and international competitive system for the U.S. economy.

The competitive bidding issue was considered later in House Bill 857. A major concern during hearings on competitive bidding in the House was whether the revenue projections were worth hindering the introduction of new communications services or worth hampering employment opportunities. The House also debated the extent to which the auction implementation process could accommodate all types of services and the special needs of each service provider.

The House Telecommunications Subcommittee Chairman, Edward Markey, insisted that the auctioning proposal should ensure that small and minority-owned businesses have an opportunity to bid. At the first hearing on the bill, Chairman Markey specifically supported an auction bill that would satisfy financial concerns, but did not adversely affect communications policy objectives. Chairman Markey stated, “[m]y goal in this process is to come up with an auction bill that gets the administration the revenue it seeks and does not trample upon sound communications policy.”

Several personal communications service ("PCS") advocates who testified at the competitive bidding hearings disapproved of spectrum auctions. “This [auction] issue will have a negative impact on the personal communications industry as it exists today, on the incredible promise of future wireless services and on the benefits which a diverse and highly competitive personal communications services industry can bring to the American economy,” noted William deKay, Chairman of the Board of Telocator. Similarly, R. Craig Roos, President of Personal Communications Network Services of New York, Inc., a Locate Company, argued that profits for the PCS industry would be stifled by the payments those licensees would have to make after the auctions, thus considerably affecting the taxes collected from PCS profitmakers. Emerging Telecommunications Technologies: Hearings on H.R. 707 Before the Subcomm. on Telecomm. and Finance of the House Comm. on Energy and Com., 103d Cong., 1st Sess. 107-8 (1993) [hereinafter H.R. 707 Hearings]. Another concern brought out at the hearings was that large corporations with existing services could bid on new spectrum simply to thwart the entrance of new technologies developed by smaller companies or individuals into the market because the smaller companies or individuals would compete with the existing services. Id. at 133 (testimony of R. Craig Roos, CEO of Personal Communications Network Services of New York, Inc., a Locate Company).

As Opposition Falls, Auctions Appear on Fast Track to Approval, ADVANCED WIRELESS COMM., Apr. 28, 1993, at 5.

H.R. 707 Hearings, supra note 118, at 81-82 (opening statement of Chairman Edward Markey).

Id. at 131.
communications Network Services of New York, Inc., stated that "[i]f Congress authorizes the FCC to award radio frequency spectrum licenses by competitive bidding, I fear that small, innovative telecommunications companies will become a part of this nation's history rather than a part of its future."\textsuperscript{125}

2. The Senate Debate

Comparable competitive bidding legislation also was debated in the Senate. Senate Bill 335, introduced by Senator Daniel Inouye, reallocated 200 megahertz of government spectrum to private use and permitted the FCC to test auction thirty megahertz of this spectrum.\textsuperscript{126}

The Senate legislation on competitive bidding goes as far back as January 1989 with the Spectrum Assignment Improvements Act of 1989, Senate Bill 170.\textsuperscript{127} The purpose of this bill was to "introduce fair market principles into the system whereby portions of the audio spectrum are distributed, which will give the Federal Government the opportunity to realize the full value of these assets."\textsuperscript{128} The attributes of this bill were quite similar to those accepted later in Senate Bill 335 and those eventually approved in the 1993 Budget Act.\textsuperscript{129} Senate Bill 170 authorized competitive bidding for licenses of unassigned spectrum when there are mutually exclusive applicants who would submit statements of intent prior to bidding and after the license was awarded.\textsuperscript{130} The Commission also was given authority to implement the competitive bidding regulations.\textsuperscript{131}

The Senate debated similar issues addressed in the House of Representatives regarding the competitive bidding process. At hearings on the competitive bidding issue, Thomas P. Stanley, Chief Engineer for the FCC Office of Engineering and Technology, supported the bill and suggested ways in which small businesses could participate in the process.\textsuperscript{132} He suggested deferred payments or payments over several years, favorable-term loans, setting aside spectrum only for small businesses to bid on, or setting aside spectrum to be assigned in a manner other than auctioning.\textsuperscript{133} Mr. Jay Kitchen, the President of the National Association of Business and Educational Radio, was concerned with the unfair advantage large companies would have over small creative groups or individuals who were not established in the communications industry.\textsuperscript{134} On the other hand, Mr. Robert S. Foosaner, the Senior Vice President for Government Affairs of Fleet Call, Inc., praised spectrum auctions, highlighting that the system would ensure that those who win the licenses would make the best use of the resource and that the revenue raised clearly would benefit the federal government.\textsuperscript{135} Mr. Wayne Perry, Vice Chairman of McCaw Cellular Communications, Inc., also supported auctions, pointing out that competitive bidding "can facilitate the development of these advanced wireless infrastructure."\textsuperscript{136}

3. The Final Language of the House and Senate Bills Included in the 1993 Budget Act

The House and Senate telecommunications committees spent weeks working on compromise language for the Licensing Improvement Act of 1993, later to be incorporated into the President's budget proposal.\textsuperscript{137} The 1993 Budget Act included the reallocation of 200 megahertz of spectrum for new services.\textsuperscript{138} The final budget bill also added language that permitted the FCC to collect regulatory fees that were projected to raise $80 million per year for the FCC.\textsuperscript{139} In addition, the 1993 Budget Act gave the FCC authority to use the auctioning process un-

\textsuperscript{125} Id. at 127 (statement of R. Craig Roos).
\textsuperscript{126} S. 335, supra note 63, at 1, 26.
\textsuperscript{127} S. 170, 101st Cong., 1st Sess. 2 (1989).
\textsuperscript{128} 135 Cong. Rec. S24-25 (daily ed. Jan. 25, 1989) (statement of Mr. Gramm). Mr. Gramm noted that "American taxpayers should be the beneficiaries of the sale of spectrum licenses, and setting the market price of that license through a competitive bidding process can assure that they are." Id.
\textsuperscript{129} Compare S. 170, supra note 127 with S. 335, supra note 63, at 26 and Pub. L. No. 103-66, sec. 6002(a), 107 Stat. at 388 (to be codified at 47 U.S.C. § 309(j)).
\textsuperscript{130} S. 170, supra note 127, at 2.
\textsuperscript{131} Id. at 5.
\textsuperscript{132} See S. 335 Hearings, supra note 34, at 9-10 (statement of Thomas P. Stanley).
\textsuperscript{133} Id.
\textsuperscript{134} See id. at 38-9 (Mr. Kitchen preferred "an equitable outcome for all").
\textsuperscript{135} Id. at 41 (excluding from the competitive bidding process broadcasting, radio astronomy, amateur radio services, and public safety services).
\textsuperscript{136} Id. at 22 (noting that the rapid development of the cellular industry and its creation of jobs and new services as part of the advanced wireless infrastructure).
\textsuperscript{137} State's Cellular Regulation Fate Lies in Congress' Hands, TELEPHONE NEWS, May 31, 1993, at 1.
\textsuperscript{139} Pub. L. No. 103-66, sec. 6003(a), 107 Stat. at 397 (to be codified at 47 U.S.C. § 901). This language was not in either the House or Senate version of the bill.
C. The Advantages and Disadvantages of Competitive Bidding

1. Advantages Clearly Outweigh the Disadvantages

Advocates of competitive bidding have emphasized the advantages of spectrum auctions in awarding licenses. The most often cited benefit is the revenue raising capability of the competitive bidding process. In a Notice of Inquiry concerning the use and management of the spectrum, the National Telecommunications and Information Administration noted that the government supplies the spectrum, therefore the government should retain the proceeds on that which the public uses. Thus, financially valuable public resources should benefit the public as a whole, through the U.S. Treasury, rather than be concentrated in a few private parties. In terms of the 1934 Act, if the public benefits from the financial value of the spectrum, the “public interest” standard will be served.

Another advantage to the use of a spectrum auctioning system is that licenses most likely will be awarded to those who will put the spectrum to its most efficient use. Auctions “would allow users to determine how spectrum should be allocated and assigned based on their perceived needs as expressed by willingness to pay, thus bringing demand into equilibrium with supply.” The competitive bidding process requires applicants to establish the service, determine demand for the service, and secure themselves financially to make a proper bid. “The goal should be to use bidding as a mechanism to ensure that licenses are awarded to those who will use them most efficiently.” As a result, services will be available to the public much sooner if the license winner is the one who actually will provide the service as opposed to having another sale, subsequent to the awarding of a license, to the highest bidder. The “public convenience, interest and necessity” would be hindered in subsequent sales because the service would be held back and the revenue that could have been enjoyed publicly would be in the hands of a private party.

2. The Disadvantages of Competitive Bidding Compensated for in the Final Language

A major concern for opponents of the competitive bidding process is that those who cannot afford to bid, but are still innovative producers of services that require spectrum licenses, will have little opportunity to implement new products. With comparative hearings, there were non-economic factors to examine in awarding spectrum licenses—factors with

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141 Id. (to be codified at 47 U.S.C. § 309(j)(12)).
142 Id. No. 103-66, 107 Stat. at 312.
143 NTIA Policy Review, supra note 4, para. 2.
144 Id. para. 68. Several others have noted the financial capabilities of the spectrum and have voiced concerns about where the money should go. See The Emerging Telecommunications Technologies Act of 1989: Hearings on H.R. 2965 Before the Subcomm. on Telecom. and Finance of the House Comm. on Energy and Comm., 101st Cong., 1st Sess. 24, 27 (1989) (statement of Alfred C. Sikes, Chairman of the Federal Communications Commission) (stating, “the 200 MHz of spectrum which H.R. 2965 proposes to transfer to non-Government use could be valued as high as $100 billion”); see also Randy Sukow, Spectrum Auction Argument Begins Again, Broadcasting, Feb. 8, 1993, at 12 (quoting Michael Oxley (R-Ohio), in that “it seems foolish to give away a valuable resource such as the spectrum reserve”); see also S. 335 Hearings, supra note 34, at 12 (statement of Thomas P. Stanley) (emphasizing that “competitive bidding could raise significant new revenues for the Treasury”); see also Warner, supra note 105, at 12 (noting that “the administration sees auctions as a needed revenue-raiser”).
147 NTIA Policy Review, supra note 4, para. 54 n.47.
148 Wimmer, supra note 10, at 12-13. As Wimmer predicted, “[e]xperts will emerge to assist the uninitiated in making these essential assessments...” Id. at 13. The time, effort and/ or capital necessary to participate in the competitive bidding process is likely to discourage applicants who do not intend to actually utilize the spectrum they purchase. Id. “On balance, however, it is likely that an auction environment will discourage most less sincere and less financially committed applicants.” Id. at 11; see also S. 335 Hearings, supra note 34, at 12 (“The winning bidder is likely to be keenly interested in developing the most efficient and effective (and most prompt) use of the spectrum.”).
149 Competitive Bidding NPRM, supra note 146, para. 34. 149
150 Id.
151 Wimmer, supra note 10, at 11.
public policy goals in mind. The risk of excluding some applicants solely because of financial barriers would be unfair and contrary to the policy goals of the 1934 Act. Thus, if the auction legislation was passed blindly, with no safeguards for equal opportunity, the financial attributes would overtake the policy objectives.

Another major concern is that implementation of the auctioning process will delay the introduction of new products. While the process is being implemented, wireless services will have to wait for licenses. Such a delay could affect the economy because fewer new jobs will be provided and there will be less taxable earnings of service providers. In response to this concern, Congress put a time limit of 180 days after passage of the 1993 Budget Act to implement competitive bidding regulations for PCS and a 270 day limit as to when PCS competitive bidding must begin. Although the 1993 Budget Act mandates these time limits, as of the date of this Article, the auctioning of PCS services has not begun and may be delayed until 1995.

Despite the allure of the revenue-generating potential of spectrum auctioning, the public policy goals of the 1934 Act must remain paramount. With the possibility that the use of a competitive bidding process could result in unfairness to a select group of providers or delay the introduction of new services, the 1993 Budget Act requires the FCC to implement spectrum auctioning regulations that focus on the public policy goals, while minimizing the potential detriments that may result from the use of such a process. The question then becomes whether the regulations will, in reality, meet these objectives.

IV. THE EFFECT OF THE COMPETITIVE BIDDING LEGISLATION

A. The FCC's Competitive Bidding Rules

On March 8, 1994, the FCC adopted a Second Report and Order announcing rules to implement the competitive bidding process. The rules were fairly general, but will be supplemented by future report and orders. The results of the rules are expected to hasten the introduction of new technologies and services, encourage efficiency in the use of spectrum, provide opportunities for all applicants to participate in the bidding process, and ensure that the inherent financial value of the spectrum is enjoyed by the U.S. Treasury as opposed to private parties in post-licensing transactions.

The regulations will apply to mutually exclusive applications for an initial license or construction permit where the services to be provided entail the transmission or reception of communications services...

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183 NTIA Policy Review, supra note 4, para. 57; see also discussion supra part I.A.1.

184 "Traditional policy goals of fostering opportunities for small businesses and minority-controlled entities also could fall by the wayside in a pure auction environment." Wimmer, supra note 10, at 11.

185 In response to this concern, the 1993 Budget Act mandated equal opportunity to obtain licenses for all applicants and prohibited consideration of expected revenue in awarding licenses. Pub. L. No. 103-66, sec. 6002(a), 107 Stat. at 389-90 (to be codified at 47 U.S.C. § 309(j)(4)(D), (7)(A)).

186 H.R. 707 Hearings, supra note 118, at 114 (statement of William D. deKay); see also id. at 144 (statement of Wayne Schelle, Chairman of American Personal Communications) (noting that "any delay in the timing or retarding of the scope of PCS will necessarily lessen its value, reduce the revenues raised through auctions, and diminish our opportunities to gain the lead in the immense international PCS market").

187 Id. (stating that "[y]ou also have to balance the revenue to be received from auctions against the significant negative costs to the economy which will result from the delay in introduction of new services").


190 See supra part II.A.

191 Action in Docket Case—FCC Adopts Rules to Implement Competitive Bidding to Award Spectrum Licenses (PP Dkt. No. 93-253), FCC News, Mar. 8, 1994, at 1. This Second Report and Order was released on April 20, 1994. In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order in PP Dkt. No. 93-253, FCC 94-61 (Apr. 20, 1994) [hereinafter Second Report and Order]. The Commission's First Report and Order on competitive bidding discussed the problem of unjust enrichment with lotteries because the 1993 Budget Act required the FCC to address this problem. First Report and Order, supra note 48, paras. 1, 4. The Commission concluded that there is no need to establish new lottery rules at this time because a limited number of services will use lotteries in the future, ones which do not cause the unjust enrichment problem. Id. para. 10.

192 See Second Report and Order, supra note 161, para. 68. In order to provide the maximum flexibility and address the Congressional mandate to ‘design and test multiple alternative methodologies under appropriate circumstances,’ the Commission established a broad menu of competitive bidding methods that it can employ to auction licenses with different characteristics. FCC Adopts Competitive Bidding Rules, supra note 161, at 2.

193 FCC Adopts Competitive Bidding Rules, supra note 161, at 2. The Commission believes that the new rules will implement a process that will “increase competition for spectrum-based services” in comparison with the licensing procedures used in the past. Id.
to subscribers for compensation.\textsuperscript{164} These eligibility requirements are part of the competitive bidding statutory requirements.\textsuperscript{168} As a result of these requirements, the Commission decided that "[m]ost spectrum-based common carrier services, some private mobile radio services, some private fixed services, and commercial mobile radio services will be subject to competitive bidding, assuming the other statutory criteria are met."\textsuperscript{166} As each service may require a different method of bidding, the auction design will be selected "on a service by service basis."\textsuperscript{169} The Commission concluded that awarding licenses to those that would value the licenses most highly, would best achieve the goals of promoting economic growth, enhancing access to telecommunications services, and recovering the financial value of the spectrum.\textsuperscript{168}

One of the goals of the 1993 Budget Act's competitive bidding amendment is to provide an opportunity for all entities to participate in the bidding process.\textsuperscript{169} To provide opportunities to small businesses, businesses owned by women and minorities, and rural telephone companies, the Commission adopted specific preferences to ensure that these groups can participate in the bidding as designated entities.\textsuperscript{170} Specifically, small businesses, including those owned by women and minorities, will be allowed to pay for licenses in installments over the license period.\textsuperscript{171} The Commission also may use set-asides\textsuperscript{172} to ensure that designated entities still have an opportunity to bid.\textsuperscript{173} Another method is to use a bidding credit system for designated entities.\textsuperscript{174} Although not adopted as a main method of assisting designated entities, the FCC may also use tax certificates in combination with some of the other methods.\textsuperscript{175} Other options include royalty payments, innovator's preference, and distress sales to designated entities, all of which the FCC discussed and reserved as possible methods, but chose not to adopt at this time.\textsuperscript{176} Future report and orders will detail the specific procedure to be used depending on each service.\textsuperscript{177}

Those eligible for the bidding preferences must fit the Small Business Association's ("SBA") definition of small businesses, which encompasses "all independently-owned businesses with a net worth not exceeding $6 million and an average net income after Federal income taxes for the two preceding years not in excess of $2 million."\textsuperscript{178}

Finally, to prevent unjust enrichment, transfer disclosure requirements were adopted to ensure that the preference measures are not abused and to enable the Commission to monitor the profits from the transfer and sale of a license by the initial auction winner.\textsuperscript{179}

B. Who Will Benefit from Competitive Bidding?

1. The Objectives

While the legislature was careful to address both the financial and policy concerns in the competitive bidding process, and the final language appears to have achieved a balance between these issues, the actual effect of the legislation will remain unclear until the FCC conducts the auctions. It is apparent, how-

\textsuperscript{164} Second Report and Order, supra note 161, paras. 12, 20.
\textsuperscript{166} Pub. L. No. 103-66, sec. 6002(a), 107 Stat. at 388 (to be codified at 47 U.S.C. § 309(j)(1)-(2)).
\textsuperscript{169} Second Report and Order, supra note 161, para. 48. The specific services the FCC discussed as subject to competitive bidding were: interactive video data service, PCS; and common carrier and commercial mobile radio services. Id. paras. 49-67.
\textsuperscript{170} FCC Adopts Competitive Bidding Rules, supra note 161, at 2.
\textsuperscript{168} Second Report and Order, supra note 161, paras. 2, 70. The Commission also noticed, however, that this conclusion was subject to certain safeguards being established in the rules. Id. para. 70.
\textsuperscript{171} Id. para. 223. "Allowing installment payments is equivalent to the government extending credit to the winner. This would reduce the amount of private financing needed by a prospective license, but it burdens the government with the risk of default." Competitive Bidding NPRM, supra note 146, para. 69.
\textsuperscript{172} Set-asides are where "certain designated spectrum blocks to be awarded in auctions [would be] open only to applicants that fall under one of the definitions for the eligible entities . . . " Competitive Bidding NPRM, supra note 146, para. 73.
\textsuperscript{175} Second Report and Order, supra note 161, para. 247.
\textsuperscript{176} Id. para. 241. With this method, eligible applicants would receive a payment discount or credit for their bid where they would pay only a certain percentage of their bid. Id.
\textsuperscript{177} Id. para. 253. Tax certificates would be issued on the sale of stock interests to owners and investors of minority-owned and controlled licenses as long as the entities are still owned and controlled by minorities. Id. para. 249.
\textsuperscript{178} See id. paras. 252-7.
\textsuperscript{179} Id. para. 229.
\textsuperscript{179} FCC Adopts Competitive Bidding Rules, supra note 161, at 4. This definition may be modified for some services to be included. Id. Those eligible as businesses owned by minorities or women must have 50.1% equity ownership and 50.1% controlling interest owned by women or minorities. Id. at 5. Rural telephone companies, to qualify, must be independently owned, have access lines of 50,000 or less and provide services to communities of 10,000 or less inhabitants. Id.
\textsuperscript{179} Second Report and Order, supra note 161, paras. 258-59.
ever, that the competitive bidding process has to meet three major goals in order to effectuate the public policy interests set forth in the 1934 Act, while still meeting the financial objectives. The first goal is to provide the U.S. Treasury with the revenue generated from the use of the public’s radio frequency spectrum. The second objective involves the policy concern of meeting the public interest standard of the 1934 Act. The public will benefit from the financial value of the spectrum when licenses are auctioned and the proceeds are deposited in the U.S. Treasury, as well as from the rapid deployment of new services. Finally, the third objective and another policy consideration is the fair and efficient distribution of licenses. All industry participants should have an opportunity to bid and should benefit from a process where licenses are not conditioned on waiting for hearings or on luck. Who will benefit from the competitive bidding process? If each of these objectives is established simultaneously, it is possible that everyone can benefit.

2. Meeting the Objectives

First, the financial objective of the competitive bidding process clearly will be effectuated from the inception of the process. Currently, the revenue goes to private applicants who sell licenses to the highest bidder. Once the auctions are controlled by the FCC, the revenue will go mainly to the U.S. Treasury.

The second objective is less elementary, yet still within reach—the public benefits from the financial gains to the U.S. Treasury and the faster implementation of new services. If the revenue is added to the U.S. Treasury, the public will benefit economically from a healthier budget that can aid public programs or reduce the deficit. The public also will benefit from the competitive bidding process with the faster implementation of new services. Licenses can be awarded quickly through auctions as opposed to waiting for the outcome of a long hearing to determine the winning applicant. However, the process was supposed to begin 270 days after the 1993 Budget Act was enacted, but there has been a delay. Thus, this objective already may have been compromised.

It is the final objective that is the most troublesome, that is, ensuring that this economically-based process will still provide equal opportunities to all citizens who apply for a radio frequency license. The “public convenience, interest or necessity” standard certainly will not be served if advancements in communications technology are stymied because a less wealthy innovator could not obtain a frequency for his or her product. The 1993 Budget Act merely “instructs the FCC to ensure that small businesses, rural telephone companies, and businesses owned by women and minorities have the opportunity to participate in competitive bidding.” To accomplish this, the FCC competitive bidding regulations must ensure that these aforementioned groups have the same opportunities to obtain spectrum necessary for their services. It is unclear whether the regulations will assure these groups the opportunity to bid because the specific bidding provisions will be implemented on a service-by-service basis.

Many commenters to the FCC’s Competitive Bidding NPRM, supported the separate treatment of designated groups, including Lightcom International, Inc. (“Lightcom”), of Washington, D.C., a minority-owned and controlled telecommunications company. Lightcom was “enthusiastic about the FCC’s proposal to disseminate licenses for [PCS] among certain designated groups, including small businesses, minority-owned businesses and women-owned businesses.” The American Women in Radio and Television, Inc. (“AWRT”) also supported “a scheme of preferences for small businesses and minority and female-owned businesses in the competitive bidding process including tax certificates, spectrum set-asides, bidding preferences, and prefer-

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181 Id. See also id. at 388 (to be codified at 47 U.S.C. § 309(j)(2)(C)) (stating as one of the objectives of competitive bidding, the “recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource.”).
182 Id. at 389 (to be codified at 47 U.S.C. § 309(j)(4)(C)(ii)).
184 Id. at 388 (to be codified at 47 U.S.C. § 309(j)(3)(B)).
186 Sugawara, supra note 159, at D11.
187 Duggan, supra note 69, at 7; see also Pub. L. No. 103-66, sec. 6002(a), 107 Stat. at 389 (to be codified at 47 U.S.C. § 309(j)(4)(D)).
188 Competitive Bidding NPRM, supra note 146, para. 73.
189 FCC Adopts Competitive Bidding Rules, supra note 161, at 4.
190 Letter from David R. Smith, to William F. Caton, Acting Secretary, FCC 1 (Nov. 10, 1993) (on file with the FCC).
ential payment terms.  

Commenters placed particular emphasis on the difficulties small, minority-owned and women-owned businesses have in attaining capital that is necessary to obtain licenses and other telecommunications services. To compensate for this barrier, Lightcom supported set-asides, installment plans and even programs where capital could be available for these groups through various financial institutions.

The SBA recommended that the preferred groups be based on the SBA’s small business definition. These designated groups would receive some type of special treatment in the competitive bidding process. Most of these safeguards generally were carried through in the Commission’s Second Report and Order. However, “[w]hether these proposed benefits will survive and, if they do, whether they are indeed the best way to create real opportunity for such persons and groups, cannot [be said] today.” Commissioner Duggan made an important point when he said that giving smaller entities the opportunity to compete “will hasten the actual arrival of PCS services especially outside major metropolitan markets. It will also create new jobs . . . in smaller communities throughout the United States.” If this prediction is correct, the FCC certainly will have accomplished some of the competitive bidding goals of the 1993 Budget Act.

With the proper safeguards, competitive bidding is an available regulatory scheme. While the policy concerns should remain paramount, it is clear that the financial incentives cannot be overlooked because of the nature of the spectrum, the need for revenue and the hope for facilitating communications services to the public. Competitive bidding is important because it involves a public resource and any financial gain should be shared by the public. Thus, competitive bidding can work or at least provide a broader benefit from the financial value of the radio frequency spectrum.

V. CONCLUSION

The competitive bidding amendment to the Communications Act is based on three major goals: 1) the financial gain to the federal budget; 2) the fair, efficient assignment of licenses to satisfy the public interest; and 3) the rapid deployment of new services to the public. The financial goals have merit, especially in light of the existing economic conditions, but these incentives cannot supersede the original goals embodied in the 1934 Act. Thus, “traditional public interest considerations will continue to be paramount. But the procedural and economic changes that will be provoked by an auction atmosphere will have a lasting impact on the composition of the telecommunications industry.”

This Comment asserts that the focus on raising revenue with spectrum auctions could trample on communications policy. However, the shifting of revenue from private parties to the U.S. Treasury as a result of the sale of spectrum licenses, the expedited deployment of new services, and the assurance of equal opportunities for all applicants through a more fair, efficient and sensitive licensing method, will promote the public interest. Congress debated the exact language of the amendment with industry experts and, as it appears, ultimately satisfied both goals in the language of the amendment. It is unclear, however, if the final process will completely achieve what has been mandated in the 1993 Budget Act.

In the months to come, as the regulations promulgated by the FCC on competitive bidding are implemented, it will become clear whether both goals can be met. For public policy reasons, the Act must be complied with, although the ability to assist the economy is equally important. New technology in the telecommunications industry will benefit the public if it is distributed as soon as possible. Furthermore, the government will benefit financially through taxes collected on profits made from the sale of these new services. As a result, meeting the budget

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194 Comments of American Women in Radio and Television, Inc., to the Notice of Proposed Rule Making in PP Dkt. No. 93-253, at 3-4 (Nov. 9, 1993)[hereinafter AWRT Comments]. “AWRT is a non-profit, national organization of professional women and men who work in radio, television, cable, broadcast advertising, and other communications related fields.” Id. at 1.
195 Letter from David R. Smith to William F. Caton, supra note 192, at 2.
196 Id.
197 The definition states in part, that “a small-business concern, including but not limited to enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, agriculture, and all other farming and agricultural related industries, shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation . . .” 15 U.S.C. § 632(a) (1988); Letter from Robert J. Moffitt, Associate Administrator for Procurement Assistance, United States Small Business Administration, to Office of the Secretary, FCC 1-2 (Nov. 4, 1993) (letter on file with the FCC).
198 FCC Adopts Competitive Bidding Rules, supra note 161, at 4.
199 Duggan, supra note 69, at 5.
200 Id.
201 Wimmer, supra note 10, at 15.
and upholding public policy goals is certainly possible in a wireless world through competitive bidding.