Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD)
Yellow Creek:	
2.5 miles upstream of confluence with Ohio River	*397
Just downstream of State Road 144	*391
Van Buren Creek 70 (flooding controlled by Ohio River):	
At confluence of Van Buren Creek 70 and Yellow River	*391
Unnamed Tributary to Van Buren Creek 70:	
At confluence of unnamed tributary to Van Buren Creek 70 and Van Buren Creek	*391
Approximately 1,000 feet upstream of State Road 390	*391
Maps available for inspection at the Daviess County Courthouse, 212 St. Ann Street, Owensboro, Kentucky.	
NEW HAMPSHIRE	
Keene (City), Cheshire County (FEMA Docket No. 7199)	
Black Brook:	
Downstream side of Wilson Pond Dam	*501
Approximately 1.19 miles upstream of State Route 12	*520
Maps available for inspection at the Code Enforcement Department, 3 Washington Street, 4th Floor, Keene, New Hampshire.	
PENNSYLVANIA	
Lock Haven (City), Clinton County (FEMA Docket No. 7195)	
Sugar Run:	
At its confluence with West Branch Susquehanna River	*572
Approximately 330 feet upstream of State Route 120	*572
Maps available for inspection at the Lock Haven City Engineer's Office, Lock Haven City Hall, 20 East Church Street, Lock Haven, Pennsylvania.	
Woodward (Township), Clinton County (FEMA Docket No. 7195)	
West Branch Susquehanna River:	
Approximately 1 mile downstream of Woodward Avenue	*564
Approximately 800 feet upstream of CONRAIL	*579
Reeds Run:	
At confluence with West Branch Susquehanna River	*566
Approximately 900 feet upstream of Church Street	*566
Queens Run:	
At confluence with West Branch Susquehanna River	*576
Approximately 550 feet upstream of Farransville Road	*576
Maps available for inspection at the Woodward Township Building, 101 Riverside Terrace, Lock Haven, Pennsylvania.	

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: April 16, 1997.

Richard W. Krimm,

Executive Associate Director, Mitigation Directorate.

[FR Doc. 97–11002 Filed 4–28–97; 8:45 am]

BILLING CODE 6718–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 74, 78, 95, and 101

[CC Docket No. 92–297: FCC 97–82]

Use of the 28 GHz and 31 GHz Bands for Local Multipoint Distribution Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission adopts a *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking* in this proceeding. A summary of the *Fifth Notice of Proposed Rulemaking* portion of this decision was published in the April 7, 1997 issue of the **Federal Register** (62 FR 16514),and seeks comment on specific rules to be applied for the partitioning and disaggregation of LMDS licenses. The *Second Report and Order* designates an additional 300 megahertz of spectrum in the 31 GHz band to LMDS and adopts service rules for LMDS, as well as competitive bidding rules for LMDS spectrum. The *Order on Reconsideration* denies petitions for reconsideration of the Commission's dismissal of applications for waiver of the Commission's point-to-point rules governing the 28 GHz band. The *Second Report and Order* contains modified information collections subject to the Paperwork Reduction Act of 1995 and has been submitted to the Office of Management and Budget (OMB) for review under the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collections contained in this proceeding.

DATES: The rules in this document will become effective June 30, 1997; applications to modify existing 31 GHz licenses must be filed no later than July 14, 1997. Written comments by the public on the revised information collections are due by April 21, 1997.

ADDRESSES: Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov., and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725—17th Street, N.W., Washington, D.C. 20503 or via the Internet at fain__t@al.eop.gov. For additional information regarding the information collections contained herein, contact Dorothy Conway at 202–418–0217 or via the Internet at dconway@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Bob James, Private Wireless Division, (202)418–0680, Mark Bollinger or Jay Whaley, Auctions Division, (202)418–0660, or Joseph Levin or Jane Phillips, Policy Division, (202) 418–1310.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Second Report and Order and Order on Reconsideration* segment of the *Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking* in CC Docket No. 92–297, PP–22, FCC 97–82, adopted March 11, 1997, and released March 13, 1997. A summary of the *Fifth Notice of Proposed Rulemaking* portion of this decision was published in the April 7, 1997 issue of the **Federal Register** (62 FR 16514). The complete text of this decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, DC 20037.

Paperwork Reduction Act

The *Second Report and Order* contains a modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in the *Second Report and Order*, as required by the Paperwork Reduction Act of

1995, Public Law 104–13. Public and agency comments are due May 29, 1997; OMB notification of action is due June 30, 1997. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060–0531.

Title: Redesignation of 27.5 GHz Frequency Band, Establishing Rules and Policies for Local Multipoint Distribution (NPRM CC Docket No. 92–297).

Form No.: N/A.

Type of Review: Reinstatement, with change, of a previously approved collection for which approval has expired.

Respondents: Business or other for-profit entities.

Number of Respondents: 986.

Estimated Time Per Response: 41 hours.

Total Annual Burden: 30,381.5 hours.

Total Annual Cost: $2,025,400.

Needs and Uses: The information requested will be used by FCC personnel to determine whether the applicant is qualified legally and technically to be licensed to use the radio spectrum. The original NPRM sought comment on rules governing a substantial number of filings that an estimated 10,000 applicants would make. It was estimated that an average of 8 hours per respondent would be required to comply with the proposed requirements. The *Second Report and Order* revised these requirements and burdens to three specific burdens involving frequency coordination, discontinuance of service, and certification of construction requirements/renewal expendancy for an estimated 986 respondents that would take an average of 41 hours to comply with the rules.

I. Designation and Licensing of Spectrum

A. 31 GHz Band and Number of Licenses

1. The *Second Report and Order* allocates an additional 300 megahertz of spectrum in the 31 GHz band (31.0–31.3) for LMDS. It also adopts the use of Basic Trading Areas (BTAs) for licensing areas. Two licenses, of unequal size, are proposed for each BTA. The larger license is for 1150 megahertz, 1000 megahertz of which is located in the 28 GHz band (27.5–29.5) and 150 of which is located in the center of the 300 megahertz segment in the 31 GHz band. The smaller license is for a total of 150 megahertz, consisting of 75 megahertz at either end of the 150 megahertz segment in the 31 GHz band allocated to LMDS. Incumbent governmental licensees and private business users presently operating in the 75-megahertz segments of the band encompassed by the smaller, 150 megahertz LMDS license, will be accorded protection from interference from the LMDS operator in that band. (No interference protection will be accorded to incumbents operating on a temporary basis in the 31 GHz band.) The reverse will be the case with the 1150 megahertz LMDS license. The 1150 megahertz LMDS licensee will be accorded protection from interference from all incumbents operating in the center 150 megahertz segment of the 31 GHz band. However, incumbent governmental licensees and private business users in that segment will be permitted to migrate to the 75-megahertz segments encompassed by the smaller LMDS license in order to obtain the protections offered such incumbents in that band, provided they file an application to modify their licenses no later than July 14, 1997. These applications will not be subject to petitions to deny. Applications for new facilities in the 31 GHz band are frozen.

B. Eligibility

2. LECs and cable companies are barred from owning 1150 megahertz LMDS licenses that are ''in-region.'' Incumbent LECs and cable companies may participate fully in the auction of 1150 MHz licenses, including the auction of in-region licenses, so long as they come into compliance with the restrictions within 90 days by divesting telephone or cable assets, or partitioning the LMDS license. An incumbent will be defined as in-region if its authorized service area represents 10 percent or more of the population of the BTA; a 20 percent or greater ownership level will constitute an attributable interest in a license. These restrictions will terminate on the third anniversary of the close of the auction, unless extended by the Commission. Parties may seek waivers to shorten the restriction period.

C. Buildout and Flexibility of Use

3. LMDS licensees will be subject to liberal construction requirements. LMDS licensees may disaggregate or partition a license at any time, with certain restrictions for licensees taking advantage of bidding credits or installment payments. (The *Fifth Notice of Proposed Rulemaking* portion of this decision proposes specific provisions regarding partitioning and disaggregation.) Licensees also have the flexibility to choose whether they want to offer common carrier or private carrier services, or both.

D. Petitions for Reconsideration and Pioneer's Preference

4. The Commission has also deferred decision on CellularVision's pioneer's preference request until completion of a peer review of CellularVision's technology, and issues concerning the pioneer's preference license for the portion of the New York Basic Trading Area lying outside of the New York Primary Metropolitan Statistical Area already licensed to CellularVision are pending the outcome of such review process and final disposition of its preference request. Finally, the Order denies the petitions for reconsideration of the Commission's decision to dismiss waiver applications filed by entities seeking a license under *Hye Crest Management, Inc.*

II. Competitive Bidding Rules and Procedures

A. Use of Competitive Bidding

5. The Commission concludes that auctioning LMDS licenses would further the Communications Act's objectives. First, based on its previous experience in conducting auctions for other services, the Commission believes that use of competitive bidding to award LMDS licenses, as compared with other licensing methods, would speed the development and deployment of this new technology, products and services to the public with minimal administrative or judicial delay, and would encourage efficient use of the spectrum as required by Sections 309(j)(3)(A) and 309(j)(3)(D), 47 U.S.C. §§ 309(j)(3)(A) & 309(j)(3)(D). Second, auctions meet the objectives of Section 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B), because the Commission is adopting competitive bidding rules that foster economic opportunity and the distribution of licenses among a wide variety of applicants, including small businesses.

6. The Commission also has determined that the use of auctions to assign LMDS licenses will advance the goals of 47 U.S.C. § 309(j)(3)(C) by enabling the public to recover a portion of the value of the public spectrum. If the Commission uses a licensing

methodology that ensures that licenses are assigned to those who value them most highly, it follows that such licensees can be expected to make the most efficient and intensive use of the spectrum. Because LMDS is eligible for competitive bidding under the statutory requirements set forth in 47 U.S.C. § 309(j)(2)(A), the Commission is precluded from using lotteries to award LMDS licenses. Accordingly, the Commission rejects the suggestion that the Commission use lotteries to award LMDS licenses.

7. The Commission also declines at this time to set aside LMDS spectrum for educational purposes. While the Commission is not adopting public interest programming obligations at this time, it reserves the right to do so on LMDS providers who provide video services. Licensees are specifically on notice that the Commission may adopt public interest requirements at a later date. If public interest obligations are found to be warranted, one option would be to adopt rules similar to those Congress enacted for Direct Broadcast Satellite providers, including a 4 percent to 7 percent set-aside of capacity for non-commercial educational and informational programming. *See* 47 U.S.C. § 335. Another option would be to hold LMDS licensees to a ''promise *versus* performance'' type standard.

B. Competitive Bidding Design for LMDS Licenses

8. Based on the record in this proceeding and its successful experience conducting simultaneous multiple round auctions for other services, the Commission believes a simultaneous multiple round auction is the most appropriate competitive bidding design for LMDS. First, for certain bidders, the value of these licenses will be significantly interdependent because of the desirability of aggregation across geographic regions. Simultaneous multiple round bidding will generate more information about license values during the course of the auction, and provide bidders with more flexibility to pursue back-up strategies, than auctioning licenses separately. Simultaneous multiple round bidding therefore is most likely to award licenses to the bidders who value them the most highly and to provide bidders with the greatest likelihood of obtaining the license combinations that best satisfy their service needs. The Commission currently does not have the operational capability to use combinatorial bidding but will consider doing so in future auctions.

9. The Commission will conduct simultaneous auctions of two licenses in each of 492 BTAs for LMDS, for a total of 984 licenses. Each BTA will have one license consisting of 1,150 megahertz: 1,000 megahertz in the 28 GHz band (27.5–28.35 GHz and 29.1–29.25 GHz) and 150 megahertz in the 31 GHz band (31.075 GHz–31.225 GHz); and a second license consisting of 150 megahertz in the 31 GHz band (31.0–31.075 GHz and 31.225–31.399 GHz) will be auctioned concurrently. The Commission will not include the New York BTA at this time in the licensing process because of the outstanding issues connected with the CellularVision pioneer preference request.

10. The Commission will use the competitive bidding procedures of part 1, subpart Q, for LMDS with modifications as indicated below.

1. Bid Increments and Tie Bids

11. As it has done for previous auctions, the Commission will announce by Public Notice prior to the LMDS auction the general guidelines for bid increments. The Commission retains the discretion to set and, by announcement before or during the auction, vary the minimum bid increments for individual licenses or groups of licenses. Where a tie bid occurs, the Commission will determine the high bidder by the order in which the Commission received the bids. The Commission retains the discretion to vary both absolute and percentage bid increments for specific licenses.

2. Stopping Rules

12. The Commission will use a simultaneous stopping rule for LMDS. The auction will close after one round passes in which no new valid bids, proactive activity rule waivers, or bid withdrawals are submitted. The Commission will retain the discretion, however, to keep the auction open even if no new valid bids, proactive waivers, or bid withdrawals are submitted. In the event that this discretion is exercised, the effect will be the same as if a bidder had submitted a proactive waiver. This will help ensure that the auction is completed within a reasonable period of time, because it will enable the Commission to utilize larger bid increments, which speed the pace of the auction, without risking premature closing of the auction. Since it also imposes an activity rule, the Commission believes that allowing simultaneous closing for all licenses will afford bidders flexibility to pursue back-up strategies without running the risk that bidders will hold back their bidding until the final rounds. In addition, the Commission retains the discretion to declare after forty rounds that the auction will end after some specified number of additional rounds. If this option is used, the Commission will only accept bids on licenses where the high bid has increased in at least one of the last three rounds.

3. Duration of Bidding Rounds

13. Because in simultaneous multiple round auctions bidders may need a significant amount of time to evaluate back-up strategies and develop their bidding plans, the Commission reserves the discretion to vary the duration and frequency of bidding rounds. The Commission will announce any changes to the duration of and intervals between bidding either by Public Notice prior to the auction or by announcement during the auction.

4. Bid Withdrawals

14. Because the Commission is awarding two licenses of different size (1,150 megahertz and 150 megahertz) per geographic area, the Commission finds it unnecessary to address the merits of comments predicated on the assumption that the Commission would award two LMDS licenses of equal size. The Commission will not make use of a bid withdrawal period within each round as in previous auctions, but will permit a high bidder to withdraw the high bid from a previous round subject to the bid withdrawal payments discussed below. If a high bid is withdrawn (and not bid upon in the same round), the license will be offered in the next round at the second highest bid price. The Commission may at its discretion adjust the offer price in subsequent rounds until a valid bid is received on the license. In addition, to prevent a bidder from strategically delaying the close of the auction, the Commission retains the discretion to limit the number of times that a bidder may re-bid on a license from which it has withdrawn a high bid.

5. Activity Rules

15. For LMDS auctions, the Commission will use the Milgrom-Wilson activity rule with some variations. Milgrom and Wilson divide the auction into three stages. The Commission will set, by announcement before the auction, the minimum required activity levels for each stage of the auction. The Commission retains the discretion to set and, by announcement before or during the auction, vary the required minimum activity levels (and associated eligibility calculations) for each auction stage. Retaining this flexibility will improve its ability to

control the pace of the auction and help ensure that the auction is completed within a reasonable period of time.

16. For the LMDS auctions, the Commission will use the following transition guidelines: The auction will begin in Stage One and will generally move from Stage One to Stage Two and from Stage Two to Stage Three when the auction activity level is below ten percent for three consecutive rounds. Under no circumstances can the auction revert to an earlier stage. However, the Commission retains the discretion to determine and announce during the course of an auction when, and whether, to move from one auction stage to the next, based on a variety of measures of bidder activity, including, but not limited to, the auction activity level as defined above, the percentage of licenses (measured in terms of bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue.

17. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission in a particular round, the Commission will provide bidders with a limited number of waivers of the above-described activity rule. The Commission believes that some waiver procedure is needed because the Commission does not wish to reduce a bidder's eligibility due to an accidental act or circumstances not under the bidder's control.

18. The Commission will provide bidders with five activity rule waivers that may be used in any round during the course of the auction. If a bidder's activity is below the required activity level, a waiver will be applied automatically. That is, for example, if a bidder fails to submit a bid in a round, and its activity from any standing high bids (that is, high bids at the end of the previous round) falls below its required activity level, a waiver will be automatically applied. A waiver will preserve current eligibility in the next round. An activity rule waiver applies to an entire round of bidding and not to a particular BTA service area.

19. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level. If a bidder overrides the automatic waiver mechanism, its eligibility will be permanently reduced, and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no new valid bids will not keep the auction open. Bidders will have the option of entering a proactive activity rule waiver during any round. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

20. The Commission retains the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. The Commission also retains the flexibility to adjust by Public Notice prior to an auction the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction.

C. Procedural and Payment Issues

21. The Commission will generally follow the procedural and payment rules established in subpart Q of part 1 of the Commission's Rules. Any service-specific modifications based on the particular characteristics of LMDS will be set forth by Public Notice by the Wireless Telecommunications Bureau.

1. Upfront Payments

22. The Commission recognizes that for purposes of LMDS the formula of $0.02 per MHz-pop can yield very high upfront payments given the amount of spectrum offered in each service area. The Commission believes that the concerns of commenters about potentially high payments may be alleviated by lowering the amount per MHz-pop used to calculate the payment. The Commission delegates authority to the Chief, Wireless Telecommunications Bureau, to determine an appropriate calculation for the upfront payment, which the Bureau will announce by Public Notice. In calculating the upfront payment, the Bureau should take into consideration the value of similar spectrum.

2. Down Payments, Long-Form Applications, and Payment in Full

23. The Commission will require all winning bidders in LMDS auctions to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). Winning bidders, except for small businesses and businesses with annual gross revenues between $40 million and $75 million, will be required to submit this payment by wire transfer to the Commission's lock-box bank within ten business days following release of a public notice announcing the close of bidding and high bidders. Winning bidders will also be required to file a long-form application within ten business days of the announcement of the high bidders. If, pursuant to section 309(d) of the Communications Act, the Commission dismisses or denies any and all petitions to deny filed against a long-form application, or if no petitions to deny are filed, the Commission will issue an announcement to this effect, and the winning bidder will then have ten business days to submit the balance of its winning bid, unless it qualifies for an installment payment plan.

3. Bid Withdrawal, Default, and Disqualification Payments

24. For the LMDS auctions, the Commission adopts the bid withdrawal, default and disqualification rules contained in sections 1.2104(g) and 1.2109 of the Commission's Rules. If a license is re-offered by auction, the ''winning bid'' refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay an amount equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license that is the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the ''winning bid'' refers to the bid of the highest bidder who accepts the offer. The Commission recently addressed the issue of how its bid withdrawal provisions apply to bids that are mistakenly placed and withdrawn in a decision involving the 900 MHz Specialized Mobile Radio (''SMR'') and broadband personal communications services (''PCS'') C block auctions. *See* Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Request To Waive Bid Withdrawal Payment Provisions, FCC 96–203, Order (released May 3, 1996) (summarized in 61 FR 25,807 (May 23, 1996)), *recon. pending.*

25. If a bidder has withdrawn a bid or defaulted on one or more licenses but the amount of the withdrawal or default payment cannot yet be determined, the bidder will be required to make a deposit of up to 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the withdrawal or default payment, any excess deposit will be refunded. Upfront payments will be applied to such deposits and to bid withdrawal and default payments due before being applied toward the bidder's down

payment on licenses the bidder has won and seeks to acquire.

26. In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission retains the option to declare the applicant and its principals ineligible to bid in future auctions, or take any other action the Commission deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.

D. Regulatory Safeguards

1. Transfer Disclosure

27. The Communications Act directs the Commission to ''require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.'' 47 U.S.C. § (j)(4)(E). The Commission will adopt the transfer disclosure requirements contained in Section 1.2111(a) of the Commission's Rules, 47 CFR § 1.2111(a), for all LMDS licenses obtained through the competitive bidding process.

2. Anti-Collusion Rules

28. The Commission will apply the anti-collusion rules set forth in Sections 1.2105 and 1.2107 of the Commission's Rules, 47 CFR §§ 1.2105 & 1.2107, to LMDS auctions. In addition, where specific instances of collusion in the competitive bidding process are alleged in petitions to deny, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions.

E. Treatment of Designated Entities

1. Overview

29. The Commission is committed to meeting the objectives of 47 U.S.C. § 309(j) of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies 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. In *Adarand Constructors* v. *Peña,* 115 S. Ct. 2097 (1995), the Supreme Court held that federal race-based measures are subject to strict scrutiny. Gender-based measures, on the other hand, are required to meet an intermediate standard of review. *United States* v. *Commonwealth of Virginia,* 116 S. Ct. 2264 (1996). Because commenters have submitted no evidence or data to support LMDS race- or gender-based auction provisions, the Commission concludes that it does not have a sufficient record to support such special provisions at this time. The Commission therefore adopts installment payments and bidding credits for small businesses in LMDS auctions as detailed below. The Commission believes that these special provisions will provide small businesses with a meaningful opportunity to obtain LMDS licenses. Moreover, many minority- and women-owned entities are small businesses and will therefore qualify for these same special provisions.

2. Installment Payments, Upfront Payments, Down Payments, and Unjust Enrichment

30. In order to promote the innovation that small businesses can bring to the development of LMDS, the Commission adopts installment payments for small businesses bidding for LMDS licenses. The Commission will define small businesses as entities that, together with affiliates and controlling principals, have average gross revenues not exceeding $40 million for the three preceding years. Because considerable capital will be needed to bring LMDS to the public, the Commission also makes provision for entities with gross revenues exceeding $40 million and will provide for installment payments for entities with $75 million or less in average gross revenues for the three preceding years. The Commission believes that the high cost of LMDS and the presence of very large companies in the markets for various LMDS services make this option fully consistent with Congress's intent in enacting 47 U.S.C. § 309(j)(4)(A) to avoid a competitive bidding program that has the effect of favoring communications providers with established revenue streams over smaller entities.

31. Under the rules adopted, installment payments will be available to applicants that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of more than $40 million but not more than $75 million. Interest on their installment payments will be equal to the rate for U.S. Treasury obligations of maturity equal to the license term, fixed at the time of licensing, plus 2.5 percent. Payments of interest and principal shall be amortized over the ten years of the license term. Small businesses—*i.e.,* applicants that, together with affiliates and controlling principals, have average gross revenues for the three preceding years not exceeding $40 million—will be eligible for installment payments at an interest rate based on the rate for U.S. Treasury obligations of maturity equal to the license term, fixed at the time of licensing, plus 2.5 percent (the same rate as that imposed on entities with $40 million to $75 million in average gross revenues). Payments for small businesses shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term. The rate of interest on the ten-year U.S. Treasury obligations will be determined by taking the coupon rate of interest on the ten-year U.S. Treasury notes most recently auctioned by the Treasury Department before licenses are conditionally granted.

32. The Commission believes it is appropriate to also adopt the unjust enrichment provisions of its broadband PCS rules in order to prevent large companies from becoming the unintended beneficiaries of these installment payment plans. The Commission believes that these rules are preferable to its current general unjust enrichment rules set forth at 47 CFR § 1.2111(c) because they provide greater specificity about funds due at the time of transfer or assignment and specifically address changes in ownership that would result in loss of eligibility for installment payments, which the general rules do not address. These rules specify that applicants seeking to assign or transfer control of a license to an entity not meeting the eligibility standards for installment payments must pay not only unpaid principal as a condition of Commission approval but also any unpaid interest accrued through the date of assignment or transfer.

33. Additionally, these rules provide that if a licensee utilizing installment payment financing seeks to change its ownership structure in such a way that would result in a loss of eligibility for installment payments, it must pay the unpaid principal and accrued interest as a condition of Commission approval of the change. Finally, in recognition of the tiered installment payment plans offered to broadband PCS licensees, the rule provides that if a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan, it must seek Commission approval of such

a change and adjust its payment plan to reflect its new eligibility status. A licensee, under this rule, may not switch its payment plan to a more favorable plan.

34. For purposes of determining small business status, or status as a business with average gross revenues of more than $40 million but not more than $75 million, the Commission will attribute the gross revenues of all controlling principals and affiliates of the small business applicant. The Commission chooses not to impose specific equity requirements on controlling principals. The Commission will still require, however, that in order for an applicant to qualify as a small business, qualifying small business principals must maintain control of the applicant. The term ''control'' includes both *de facto* and *de jure* control of the applicant. Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) The entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensees; and (3) the entity plays an integral role in all major management decisions. The Commission cautions that while it is not imposing specific equity requirements on small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business.

35. The Commission adopts a uniform upfront payment for all bidders. Its experience in previous auctions indicates that the Commission has underestimated the value of spectrum and that upfront payments have not created a barrier to small business participation in its auctions. The Commission believes that this action is consistent with its policy reason for requiring upfront payments—to deter insincere and speculative bidding and to ensure that bidders have the financial capacity to build out their systems.

36. With regard to reduced down payments for small businesses, its experience in previous auctions leads the Commission to adopt a uniform 20 percent down payment provision for all bidders. The Commission believes that this sizeable down payment will discourage insincere bidding and increase the likelihood that licenses are awarded to parties who are best able to serve the public. A 20 percent down payment should also provide a strong assurance against default and sufficient funds to cover default payments in the unlikely event of default. Small businesses and entities with average gross revenues for the preceding three years of between $40 million and $75 million will be required to supplement their upfront payments to bring their total payment to 10 percent of their winning bids within 10 business days of a public notice announcing the close of the auction. Prior to licensing, they will be required to pay an additional 10 percent. The government will then finance the remaining 80 percent of the purchase price.

3. Bidding Credits and Unjust Enrichment

37. Based on the record before it, the Commission adopts a 25 percent bidding credit for small businesses in LMDS auctions, and a 15 percent bidding credit for entities with average gross revenues of more than $40 million but not exceeding $75 million. Commenters who advocated higher credits offered no data upon which to base such credits. The Commission declines to adopt a bidding credit for commercial entities that set aside part of their capacity for educational institutions at preferential rates. At this time, the Commission does not believe that it has an adequate record regarding the legal and policy implications of such bidding credits.

38. The Commission believes it is appropriate to align its unjust enrichment rules for LMDS with its narrowband PCS and 900 MHz SMR unjust enrichment rules as they relate to bidding credits. These rules provide that, during the initial license term, licensees utilizing bidding credits and seeking to assign or transfer control of a license to an entity that does not meet the eligibility criteria for bidding credits will be required to reimburse the government for the total value of the benefit conferred by the government, that is, the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer will be permitted.

39. The rules which the Commission now adopts additionally provide that, if, within the original term, a licensee applies to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest at the rate imposed for installment financing at the time the license was awarded, must be paid to the United States Treasury as a condition of approval of the assignment or transfer. If a licensee that utilizes bidding credits seeks to make any change in ownership structure that would render the licensee ineligible for bidding credits, or eligible only for a lower bidding credit, the licensee must first seek Commission approval and reimburse the government for the amount of the bidding credit, or the difference between its original bidding credit and the bidding credit for which it is eligible after the ownership change, plus interest at the rate imposed for installment financing at the time the license was awarded. Additionally, if an investor subsequently purchases an interest in the business and, as a result, the gross revenues of the business exceed the applicable financial caps, this unjust enrichment provision will apply.

40. The amount of this payment will be reduced over time as follows: (1) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of small businesses transferring to businesses having average gross revenues between $40 million and $75 million, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible); (2) in year three of the license term the payment will be 75 percent; (3) in year four the payment will be 50 percent; and (4) in year five the payment will be 25 percent, after which there will be no required payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment, transfer, or ownership change.

4. Rural Telephone Companies

41. The Commission does not believe that special provisions are needed to ensure adequate participation by rural telephone companies in the provision of LMDS services for the same reasons stated in the Third Notice of Proposed Rulemaking (*Third NPRM*) (60 FR 43740, August 23, 1995). Further, because the Commission is providing installment payments for entities with average annual gross revenues as high as $75 million, the Commission believes that many rural telephone companies may qualify for installment payments. Also, the degree of flexibility the Commission will afford in the use of this spectrum, including provisions for partitioning or disaggregating spectrum, should assist in satisfying the spectrum needs of rural telephone companies at low cost. Therefore, the Commission

concludes that the interests of rural telephone companies are adequately addressed by its LMDS rules.

Final Regulatory Flexibility Analysis

42. As required by the Regulatory Flexibility Act of 1980, Public Law 96–354, 94 Stat. 1164, as amended by the Contract with America Advancement Act of 1996, Public Law 104–121, 110 Stat. 847, 5 U.S.C. § 601 *et seq.*, the Commission has prepared a Final Regulatory Flexibility Analysis of the expected impact of the rule changes adopted in this proceeding on small entities. The Secretary shall send a copy of this *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the SBA, in accordance with paragraph 603(a) of the Regulatory Flexibility Act.

Final Regulatory Flexibility Analysis

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43. As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the First Notice of Proposed Rulemaking (*First NPRM*) (58 FR 06400, January 28, 1993), the Third Notice of Proposed Rulemaking (*Third NPRM*) (60 FR 43740, August 23, 1995), and the Fourth Notice of Proposed Rulemaking (*Fourth NPRM*) (61 FR 39425, July 29, 1996) in this proceeding. The Commission sought written public comments on the proposals in each of the Notices, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Second Report and Order (hereinafter in this Appendix referred to as the ''Order'') conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Public Law No. 104–121, 110 Stat. 847 (1996). (Title II of the Contract with America Act is ''The Small Business Regulatory Enforcement Fairness Act of 1996'' (SBREFA), codified at 5 U.S.C. §§ 601 *et seq.*)

I. Need for and Objectives of Action

44. We adopt licensing and service rules to establish a flexible regulatory framework for the implementation of Local Multipoint Distribution Service (LMDS), a new broadband wireless communications service. We designate spectrum in the 31.0–31.3 GHz (31 GHz) band for LMDS, in addition to the 28 GHz designated in the *First Report and Order* (61 FR 44177, August 28, 1996), to ensure adequate spectrum needed for the broad array of video programming and one-way or two-way telecommunications and data services that may be offered by LMDS providers and to promote competition with incumbent cable and local exchange telephone service (LEC) providers.

45. We provide for licenses based on broad geographic areas known as BTAs and issued in two sizes for each area, 1,150 megahertz and 150 megahertz. The larger size service areas may offer economies of scale, while the smaller service areas may encourage new entrants and technological experiments to meet local or special needs. We limit the eligibility of incumbent LECs and cable companies from being issued the larger license in their areas of operation for three years, in order to promote the development of LMDS and ensure a meaningful increase in competition in the local telephone and cable markets.

46. The adoption of competitive bidding rules promotes the expedited delivery of this technology to the public and permits recovery for the public of a portion of the value of the public spectrum resource made available for commercial use. Additional objectives in adopting these rules are to assure that the spectrum is used efficiently, to provide entities of any size a meaningful opportunity to bid on this spectrum despite limited capital resources, and to avoid unjust enrichment through the methods used to award uses of this resource.

47. We deny petitions for reconsideration of our dismissal in the *First NPRM* of applications for waiver which sought to allow petitioners to provide LMDS in the 28 GHz band under the existing point-to-point rules. We defer consideration of the comments filed in response to our tentative decision in the *Third NPRM* to grant CellularVision a Pioneer Preference, until the record is supplemented upon conclusion of a peer review process that we require in the Order.

II. Summary of Issues Raised by Public Comments in Response to Initial Regulatory Flexibility Analysis

A. IRFA Issues

48. We received one comment in direct response to the IRFA in the *Fourth NPRM* based on our request for comment on our proposal to designate, on a primary protected basis, the 31.0–31.3 GHz (31 GHz) band to LMDS. SBA opposes our proposed designation because it contends that the *Fourth NPRM* fails to consider the impact on existing users of the spectrum, which it argues are largely small governmental entities and small businesses. SBA contends that, in Section IV of the IRFA, the description and estimate of the number of small entities to which the proposed rule will apply misconstrues and underestimates the small entities that are incumbent licensees. It asserts that rather than 25 or 26 licensees, as we estimated, the comments of Sunnyvale indicate there are more than 40 incumbent local governments holding licenses. SBA contends that Sierra asserts there are as many as 100 incumbent licensees and there are over a dozen marketers or resellers of its equipment that are small businesses. We consider in the Order the comments of SBA and other commenters on the number of licensees in the 31 GHz service, as discussed fully in paragraphs 44–51 of the Order, and later in this FRFA.

49. SBA further argues that, in Section VI of the IRFA, we failed to consider significant alternatives to redesignating the entire 31 GHz band to LMDS that might minimize the impact on the incumbent licensees that are small entities. It argues that the only alternative to the proposed 31 GHz designation that we considered in the IRFA involved alternative spectrum bands for LMDS to use, rather than any alternatives for the incumbent licensees.

50. We consider in the Order the comments of SBA and other commenters on numerous alternatives to accommodate existing licensees in the 31 GHz services, as discussed fully in paragraphs 69–103 of the Order, and later in this FRFA. The IRFA itself did not identify any alternatives to our

proposed designation of 31 GHz for LMDS in order to reduce the impact on incumbent licensees. However, the text of the *Fourth NPRM,* in paragraphs 100–104, specifically identified several alternative methods by which incumbent operations could be accommodated if LMDS were authorized on a primary protected basis in the 31 GHz band. We requested comments on those alternatives and any other options we should consider that would not impose undue economic burdens on the new LMDS operations. We modify our proposal and adopt a band-sharing plan that provides non-LTTS incumbent licensees with protection from LMDS on a portion of the 31 GHz band, while designating the entire band for LMDS.

B. Other Service Issues

51. We also consider significant issues raised in comments to our proposals in the *First NPRM, Third NPRM,* and *Fourth NPRM* that may have a significant economic impact on a substantial number of small entities. In response to the *Fourth NPRM,* several comments were filed in response to our proposal to designate, on a primary protected basis, the 31 GHz band for LMDS and our request for comments on various alternatives for accommodating the incumbent 31 GHz licensees. Several comments were received from proponents of LMDS, including CellularVision, in favor of designating 31 GHz for LMDS, while several comments were received from proponents of the existing 31 GHz services that oppose changes to the services and their being relegated to secondary status to LMDS.

52. We received several comments in response to the accommodation proposals. All of the comments opposing our proposal, including IMSA and ITE on behalf of their members, argue that permitting LMDS to operate in the entire 300 megahertz on a primary basis essentially would eliminate their operations and that co-existence under these circumstances would not be possible. Palm Springs argues that it would be forced to disband its 31 GHz traffic communication system, creating undue hardship. On the other hand, CellularVision and Endgate assert that, as LMDS licensees, they would offer leasing options to incumbents, if available. Several comments argue against our suggestion that current 31 GHz services could move to another frequency band where protection for such operations is provided under our rules, such as 23 GHz. Sierra, as the primary manufacturer of the 31 GHz equipment, asserts that the cost of modifying equipment for other bands would be more than replacement costs and also would require the development of new equipment. Topeka argues that moving to the 21 GHz band would cause financial hardship that would require allocating funds through local tax dollars and it seeks to avoid the costs of converting or replacing equipment that may be required by a move.

53. In response to our request for cooperation among the LMDS providers and existing licensees to explore methods for allowing the services to coexist, CellularVision and Sierra submit two different band-sharing plans. In CellularVision's plan for 25 megahertz at each end of band for incumbent services, Sierra argues that the equipment for 31 GHz would not function in the narrow bandwidth and important traffic signal services could not be provided. It argues that the 75 megahertz at each end that it proposes in its plan would not require expensive modifications and would accommodate existing services. Sierra argues that its plan is supported by current 31 GHz licensees. SBA and USDOT, as Federal Government entities, support the Sierra plan and argue that incumbent services should be maintained to assist in meeting national goals of reducing traffic congestion and air pollution.

54. The governmental entities, manufacturers, and organizations in support of incumbent services argue that we should accept new applications, modifications, and renewal applications in the band for traffic control systems. For example, Palm Springs asserts that it plans to build out its 31 GHz microwave system from the current 35 signals to a total of 70 signals over the next three years. It requests that we maintain their ability to use the band for their systems. Topeka argues that, if we adopt our proposal, we at least grandfather existing licensees in the LMDS rules to permit renewals and modifications and to ensure their protection from LMDS interference.

55. Of the remaining issues, some commenters oppose our proposal in the *Fourth NPRM* that both the 28 GHz band and the 31 GHz band be assigned as a single block in an LMDS license. For example, the Ad Hoc RTC and others request that the 31 GHz block be licensed as a separate unit in each LMDS service area. Emc^3 argues that as little as 150 megahertz of spectrum could be used to provide a viable service using digital technology. WCA argues for three licenses per geographic area, the smallest being 150 megahertz. These commenters argue that additional licenses of smaller bandwidth would provide for smaller operators, encourage the development of niche markets, and promote economical services similar to those in narrower bandwidth licenses, particularly in rural areas.

56. Some commenters, including M3ITC, oppose our proposal in the *Third NPRM* to license LMDS on broad geographic areas based on the Rand McNally Commercial and Marketing Guide Basic Trading Areas (BTAs). They argue that use of the smaller designations of Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs) would provide more manageable territories within which to initiate service and be more affordable for entrepreneurs.

57. CellularVision and other commenters support our proposal to permit the disaggregation of spectrum by LMDS licensees and to permit the geographic partitioning of any part of an LMDS license.

58. Many comments support our request for comments in the *Fourth NPRM* on whether to temporarily restrict eligibility of incumbent LECs and cable companies that seek to obtain LMDS licenses in their geographic service areas. CVTT and SkyOptics argue that LECs and cable companies should be permanently ineligible in order to ensure that smaller companies enter the new market. Other comments, including WebCel, advocate restrictions limited to those areas in which LECs and cable companies currently operate. Other parties, including CellularVision, argue that we should impose restrictions on the largest LECs and cable companies or allow incumbents to hold only one LMDS license. Some parties oppose our proposal to define in-region incumbent LECs or cable companies based on a 20 percent population threshold and to define an attributable interest to be an ownership interest of 10 percent. Some parties, including RioVision and other small entities, agree that the restrictions could end when competition is sufficient, either after a five-year period or under a test established by the Commission.

59. Virtually all the comments support our proposal in the *First NPRM* to designate a new LMDS service from the existing point-to-point microwave common carrier service to a local multipoint distribution service that allows non-common carrier service as well as common carrier service. CellularVision, M3ITC, and other small entities seek a broad service definition that allows the LMDS provider to choose any common or non-common carrier service within the technical rules. CellularVision and other commenters oppose our proposal to

apply a presumption that a service is common carriage. They argue that the licensing framework should be sufficiently open and flexible to allow the business judgments of licensees to shape the nature of the services to be offered.

60. Some comments, including M3ITC, oppose our proposal in the *Third NPRM* to impose construction requirements on licensees and require service to be available to a minimum of one-third of the population of their geographic areas within five years from the date of license grant, and to two-thirds of the population within ten years from the date of the grant of the license. M3ITC alternatively argues that a time limit such as eight years would be sufficient to claim a service area, after which unserved areas should be opened for licensing. ComTech, on the other hand, supports the requirements and requests that we impose a faster requirement for companies that acquire a license adjacent to their existing service area to ensure against anti-competitive behavior.

61. With respect to the technical rules proposed in the *Third NPRM,* CellularVision, Endgate, and other commenters oppose an alternative proposal to establish a power flux density (PFD) rather than require applicants to coordinate frequencies among themselves at their service area boundaries. They argue that LMDS development is in its infancy and it would be difficult to determine a PFD standard to be protective of all LMDS system designs. CellularVision opposes requiring LMDS operators to use active power control and interlock techniques in their systems, which it contends are unnecessary, expensive, and will complicate designs. Next, Endgate opposes our proposal to restrict the use of various signal polarizations and require orthogonally-polarized signals as unnecessary. Further, Endgate opposes our proposal to restrict the maximum equivalent isotropically radiated power (EIRP) at which LMDS systems operate in the 28 GHz band to a –52 dBW/Hz. It opposes any limit less than –18 dBW/Hz and contends that the proposed limit will not provide coverage to justify an LMDS systems economically. CellularVision offers a compromise maximum limit of –35 dBW/Hz, which it argues is sufficient to meet the needs of LMDS subscribers and is conducive to frequency coordination. CellularVision and ComTech also argue that our proposal to adopt a frequency tolerance standard for subscriber transceiver equipment would be too costly.

C. Competitive Bidding Issues

62. With respect to competitive bidding (para. 303 of the Order), most commenters supported the Commission's proposal to auction LMDS spectrum. M3ITC, however, disagreed and proposed the use of lotteries, expressing a concern that small businesses may lack the financial ability to participate in the auction, particularly in the major markets. It suggested the imposition of a royalty or other fee on lottery winners to generate revenue in lieu of auctions.

63. The Commission's proposal to require participants in LMDS auctions to tender to the Commission a substantial upfront payment was generally supported (paras. 328–330 of the Order), but CellularVision and ComTech objected to establishing an upfront payment of $0.02 per MHz-pop for the largest combination of MHz-pops a bidder anticipates being active on in any single round of bidding, as this would yield an upfront payment of approximately $20 million for a BTA with one million pops and an upfront payment of approximately $5 billion for the whole Nation.

64. The Commission proposed adoption of the transfer disclosure requirements contained in 47 CFR § 1.2111(a) for all LMDS licenses obtained through the competitive bidding process. CellularVision agreed with the Commission's proposal not to limit transfers and assignments of LMDS licenses.

65. The Commission sought comment on the best way to promote opportunities for businesses owned by minorities and women in light of the Supreme Court's decision in *Adarand Constructors* v. *Peña,* which held that federal race-based programs are subject to strict scrutiny. Commenters were also asked to document discrimination against such businesses. RioVision argued that the Commission should develop special provisions to provide designated entities with realistic opportunities to participate in the auction process, but RioVision and other commenters failed to supply evidence of discrimination against such businesses (paras. 344–346 of the Order).

66. The Commission's proposal to establish a small business definition for LMDS and adopt installment payments for small businesses bidding for LMDS licenses met with general approval from commenters. However, CellularVision recommended that the Commission establish a higher limit on average annual gross revenues in its definition of small business, arguing that the proposed limit of $40 million in average annual gross revenues was too low to help small businesses. The Commission's request for comment on the related issue of reduced upfront payments for small businesses yielded comments from CellularVision and Emc³ in favor of reduced upfront payments for these entities (paras. 344–345 of the Order).

67. The Commission's proposal to make the unjust enrichment provisions adopted in the Competitive Bidding Second Report and Order applicable to installment payments by small business applicants (paras. 344–345 of the Order) received general support, although CellularVision argued against restrictions after the seventh year of the license term. ComTech urged the Commission to adopt transfer rules which would relieve the transferor of any regulatory or other burdens associated with the newly created license. The Commission's proposal to make available a bidding credit of 25 percent for small businesses and the corresponding imposition of a payment requirement on transfers of such licenses to entities that are not small businesses was supported by commenters M3ITC, Emc³, and CellularVision, the latter encouraging the Commission to consider other regulatory measures, including a small business bidding credit higher than 25 percent. (para. 355 of the Order).

III. Description and Estimate of Small Entities Subject to Rules

68. The service regulations we adopt to implement LMDS would apply to all entities seeking an LMDS license, including small entities. In addition, the in-region, temporary eligibility restrictions we adopt would apply to qualifying LECs and cable companies. Finally, the rules we adopt to designate additional spectrum for LMDS in the 31.0–31.3 GHz band would apply to all entities providing incumbent services under existing rules for 31 GHz services. We consider these three groups of affected entities separately below.

A. Estimates of Potential Applicants of LMDS

69. SBA has developed definitions applicable to radiotelephone companies and to pay television services. We are using these definitions that SBA has developed because these categories approximate most closely the services that may be provided by LMDS licensees. The definition of radiotelephone companies provides that a small entity is a radiotelephone company employing fewer than 1,500 persons. (13 CFR § 121.201, Standard

Industrial Classification (SIC) 4812.) The definition of a pay television service is one which has annual receipts of $11 million or less. (SIC 4841)

70. The size data provided by SBA do not enable us to make an accurate estimate of the number of telecommunications providers which are small entities because it combines all radiotelephone companies with 500 or more employees. We therefore use the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. Likewise, the size data provided by SBA do not enable us to make a meaningful estimate of the number of cable and pay television providers which are small entities because it combines all such providers with revenues of $11 million or less. We therefore use the 1992 Census of Transportation, Communications, and Utilities (Table 2D), conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 36 of 1,788 firms providing cable and pay television service have a revenue of greater than $10 million. Therefore, the majority of LMDS entities to provide video distribution and telecommunications services may be small businesses under SBA's definition.

71. The Commission has not developed a definition of small entities applicable to LMDS licensees, which is a new service being licensed in the Order. The RFA amendments were not in effect until shortly before the *Fourth NPRM* was released, and no data has been received establishing the number of small businesses associated with LMDS. However, in the *Third NPRM* we proposed to auction the spectrum for assignment and requested information regarding the potential number of small businesses interested in obtaining LMDS spectrum, in order to determine their eligibility for special provisions such as bidding credits and installment payments to facilitate participation of small entities in the auction process. In the Order we adopt criteria for defining small businesses for purposes of determining such eligibility. We will use this definition for estimating the potential number of entities applying for auctionable spectrum that are small businesses.

72. As discussed in Section II.D.2.e. of the Order, we adopt criteria for defining small businesses and other eligible entities for purposes of defining eligibility for bidding credits and installment payments. We define a small business as an entity that, together with affiliates and controlling principals, has average gross revenues not exceeding $40 million for the three preceding years (paras. 345 and 348 of the Order). Additionally, bidding credits and installment payments are available to applicants that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of more than $40 million but not more than $75 million (paras. 349 and 358 of the Order).

73. SBREFA was not in effect until the record in the *Third NPRM* closed, and we did not seek comment on the potential number of prospective applicants for LMDS that might qualify as small businesses. Therefore, we are unable to predict accurately the number of applicants for LMDS that would fit the definition of a small business for competitive bidding purposes. However, using the definition of small business we adopted for auction eligibility, we can estimate the number of applicants that are small businesses by examining the number of applicants in similar services that qualified as small businesses. For example, MDS authorizes non-common carrier services similar to what may be developed through LMDS. The MDS rules provide a similar definition of a small business as an entity that, together with its affiliates, has annual gross revenues for the three preceding years not in excess of $40 million. A total of 154 applications were received in the MDS auction, of which 141, or 92 percent, qualified as small businesses.

74. We plan to issue 2 licenses for each of the 492 BTAs, excluding New York, that are the geographic basis for licensing LMDS. Thus, 984 licenses will be made available for authorization in the LMDS auction. Inasmuch as 92 percent of the applications were received in the MDS auction were from entities qualifying as small businesses, we anticipate receiving at least the same from LMDS applicants interested in providing non-common carrier services.

75. There is only one company, CellularVision, that is currently providing LMDS video services. Although the Commission does not collect data on annual receipts, we assume that CellularVision is a small business under both the SBA definition and our proposed auction rules.

B. Estimates of LECs and Cable Companies Ineligible Under the Temporary, In-Region Eligibility Restriction

1. Local Exchange Carriers

76. Neither the Commission nor the SBA has developed a definition for small providers of local exchange services (LECs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. (13 CFR § 121.201, SIC 4813) The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet.* According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs.

77. Because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of ''small entity'' and ''small business concerns.'' Accordingly, our use of the terms ''small entities'' and ''small businesses'' does not encompass small incumbent LECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term ''small incumbent LECs'' to refer to any incumbent LECs that arguably might be defined by SBA as ''small business concerns.''

2. Cable Services or Systems

78. The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in revenue annually. (13 CFR § 121.201, SIC 4841) This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,788 total cable and

other pay television services and 1,423 have $11 million or less in revenue.

79. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's Rules, a ''small cable company,'' is one serving fewer than 400,000 subscribers nationwide. (47 CFR § 76.901(e)) Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators.

80. The Communications Act also contains a definition of a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450. We do not request nor do we collect information concerning whether cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, and thus are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

81. We find that the definition of small entities developed by SBA includes categories of services that are not included in LMDS, such as satellite master antenna systems. Thus, the estimated figure that 1,423 cable systems are small businesses that would be affected by our rule would be an overstatement. There is no other definition for us to use, since none has been developed for cable systems limited to LMDS-type services. Moreover, there is no harm in relying on the SBA number, which overestimates rather than underestimates potential cable systems that might be affected.

C. Estimates of Incumbent Services in 31 GHz Band

82. We proposed in the *Fourth NPRM* to designate the 31 GHz band for LMDS, on a primary protected basis, and requested comment on how to accommodate incumbent licensees, which are not protected from harmful interference under their licenses. In the IRFA, we estimated the number of small entities to which the proposed rule would apply based on the number of incumbent licensees in the 31 GHz band that are governmental entities. We stated there are 27 incumbent licensees and that a total of 25 or 26 are small entities. Our adjustment was based on the requirement that we estimate the number of governmental entities with populations of less than 50,000 that would be affected by our new rules. (*See* 5 U.S.C. § 601(5).) We then applied the Census Bureau ratio that 96 percent of all counties, cities, and towns in the Nation have populations of fewer than 50,000. We requested comment in the IRFA on the number of small entities significantly impacted by our proposed designation of 31 GHz for LMDS.

83. We address SBA's comments in paras. 44–46 of the Order, where we agree that we did not reflect the correct number of total licensees in the 31 GHz band. We consider the lists of licensees and users submitted by Sunnyvale and Sierra, which we find include duplicates and several users that are not licensed. Based on a review of our database, we found there are a total of 86 licensees for 31 GHz services under the current rules. We found that licensees fall into three categories of services, as follows: (1) Governmental entities using the band primarily for traffic control systems; (2) cellular and other communications companies providing LTTS; and (3) private business users.

84. Of the total licensees, 59 licensees are LTTS licensees, 8 are private business users, and 19 are governmental entities. Of the 19 governmental entities, 14 are municipalities and the remainder are counties or states. The cities appear small in size, except for the Cities of Charlotte, San Diego, and Topeka. Thus, the correct number of small governmental entities that are licensees in the 31 GHz services should be 11 or less, rather than the 26 or 27 we stated in the IRFA. As for the entire number of licensees that qualify as small entities, we cannot determine from the remaining 59 LTTS licensees or 8 private business licensees which are small. Many of the LTTS licensees are not small, such as MCI or Bell Atlantic New Jersey, Inc. Nevertheless, to ensure that no small interests are overlooked, we will assume that most of these are small licensees and, together with the 11 small governmental entities, will consider at least 50 of all 86 licensees to be small entities.

IV. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements

85. The Order adopts a number of rules that will entail reporting, recordkeeping, and third party consultation. We find that these requirements are the minimum needed to ensure the integrity and efficiency of LMDS licensing and serve the public interest, as reflected in this record.

86. In designating the 31 GHz band for LMDS, we adopt in the Order a band-sharing plan that designates the two outer 75 megahertz segments for non-LTTS incumbent licensees to be protected from harmful interference from LMDS. We adopt technical rules that require LMDS licensees to coordinate frequencies with incumbent licensees. We adopt a procedure to allow non-LTTS incumbent licensees in the middle 150 megahertz segment that is not protected to relocate to the outer segments within 15 days after the effective date of the Order and to file an application to modify their licenses to reflect the new frequencies (paras. 91–92 of the Order). Relocation and protection are accorded to all incumbents except LTTS, which are temporary services that operate on a secondary basis and in any band, so that the protections would not benefit them. Many of the non-LTTS incumbent licensees are small entities. We find that the relocation and coordination process we have established does not impose undue cost burdens and we believe it is administratively manageable. Moreover, we have found that while relocation of such incumbents to adjacent bands will involve some costs for adjusting equipment, we do not expect at this time that such costs will impose an undue burden on small incumbents.

87. We limit the eligibility of incumbent LECs and cable companies to hold the larger license of 1,150 megahertz in each BTA for LMDS. They are barred (for a period of three years from the effective date of LMDS rules) from holding an attributable interest is such a license in the service area in which they operate. We adopt rules similar to the CMRS spectrum cap that defines in-region if 10 percent or more of the population of the BTA is within the applicant's service area. We adopt attribution rules that apply when an ownership interest is at least 20 percent. However, we permit incumbent LECs

and cable companies to participate fully in the auction of any in-region license, so long as they come into compliance after conclusion of the auction. We require such LMDS licensees to divest overlapping ownership interests by selling their existing system or by partitioning within 90 days after the grant of their license. We find that these requirements should not affect many small entities, which are not likely to be incumbents LECs or cable companies. These requirements may also create opportunities for small businesses who wish to bid for LMDS licenses and compete in the LMDS market.

88. We adopt a number of service rules to initiate LMDS under procedures for licensing and filing applications, conducting operations, and establishing technical parameters. Applicants are required to submit a completed FCC Form 175. Auction winners are required to file a completed FCC Form 600. All applications are submitted for 30-day public notice and applicants are required to keep FCC Form 600 up-to-date concerning all of the foreign ownership information requested on the form. Licensees may change status between common carriage and non-common carriage or add an additional status to conduct both operations upon notification to the Commission that does not require prior approval. However, common carriers discontinuing or reducing operations must adhere to statutory notification requirements imposed in Part 63 of the Commission's Rules.

89. We adopt limited technical regulations. We impose a coordination process on each LMDS licensee prior to initiating service in the 27.5–28.35 GHz band in which each adjacent LMDS licensee and each potentially-affected, adjacent-channel FSS licensee must provide values for the appropriate operational parameters. Coordinating parties must supply information related to their channelization and frequency plan, receiver parameters, and system geometry. Coordination between adjacent LMDS systems need only encompass hubs located within 20 kilometers of BTA boundaries. We would resolve any conflicts between licensees. LMDS licensees in the two outer segments of the 31 GHz band also must coordinate with non-LTTS incumbent licensees to protect those licensees from harmful interference. In some cases, the services of persons with technical or engineering expertise may be required to assist with the coordination information.

90. We are directed by Section 309(j)(4)(E) of the Communications Act to ''require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.'' The Commission adopted safeguards designed to ensure that the requirements of this section are satisfied, including a transfer disclosure requirements for licenses obtained through the competitive bidding process for LMDS. An applicant seeking approval for a transfer of control or assignment of a license within three years of receiving a new license through competitive bidding procedures must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license.

91. With respect to small businesses, we have adopted unjust enrichment provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use the competitive bidding process to obtain a license at a lower cost than they would otherwise have to pay and to later sell it at a profit, and to ensure that large businesses do not become the unintended beneficiaries of measures meant to help small firms. Small business licensees seeking to transfer their licenses to entities which do not qualify as small businesses, or entities with more than $40 million but not more than $75 million in average gross revenues for the three preceding years that seek to transfer their licenses to larger entities, as a condition of approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government.

V. Significant Alternatives to Proposed Rules Which Minimize Significant Economic Impact on Small Entities and Accomplish Stated Objectives

92. We modify a number of our proposals in the *Third NPRM* and *Fourth NPRM* to minimize any significant economic impact on small entities consistent with the objectives of the Order based on the comments we have received in this proceeding.

A. Alternatives To Minimize Impact of Redesignation of 31 GHz for LMDS

93. Specifically, we decided that LMDS needed the additional 300 megahertz of spectrum at 31 GHz in order to obtain the 1 gigahertz of unencumbered spectrum for broadband services and sufficient spectrum to experiment with services and technology that competes with telephone and cable operators. We deny requests from CellularVision and other commenters to consider an alternative allocation to spectrum below 27.5 GHz or the request from ICE–G to consider allocation to the 40 GHz band. We considered these matters in the *First Report and Order* and their availability has not changed since then.

94. Among the alternatives, we decide that co-existence of incumbent 31 GHz licensees with LMDS would not be possible because incumbents would be reduced to a secondary status if LMDS were accorded primary protected status and the interference from LMDS would render such services useless. We agree with CellularVision that incumbents could lease or otherwise arrange to continue to use redesignated spectrum, but find that incumbents cannot rely on these arrangements as a reasonable alternative to minimize the impact. We also decide that movement to another band such as 23 GHz that provides protection for incumbent services is not feasible because of the major costs to incumbents to modify or replace equipment.

95. We decide that the plans submitted by CellularVision and Sierra to share the 31 GHz band establish a framework for us to reach a compromise based on the needs of both LMDS and 31 GHz proponents and adopt an outcome that is more equitable and balanced. We decide to segment the 300 megahertz for establishing protections based on the enumerations used by Sierra. Under this plan, the middle 150 megahertz is designated for LMDS on a primary protected basis and incumbent licensees are not granted protection from harmful interference. At each end of the band, a segment of 75 megahertz each is designated for protection of non-LTTS incumbent licensees from LMDS to enable them to continue existing operations. We decide that the plan of CellularVision to increase the middle segment to 250 megahertz on a primary protected basis and leave incumbents protected in only 25 megahertz at each end would not accommodate traffic signal technology at intersections and would be too costly. We decide that LMDS requires no more than 150 megahertz of unencumbered spectrum in the middle.

96. We do not adopt Sierra's limitations on LMDS use or access of the entire 31 GHz band. We agree with CellularVision and other comments that

the benefits to according LMDS access to the entire band and to allowing the full array of LMDS services can be achieved while according the protections that non-LTTS incumbent licensees need to continue their operations. Thus, we accord LMDS a protected status throughout the band, but require LMDS in return to protect non-LTTS existing services in the outer segments. We do not agree with CellularVision that incumbents should be excluded altogether from the middle segment, inasmuch as LMDS has primary status there and is protected from harmful interference there.

97. To accommodate incumbents, we permit them to relocate to the outer segments and adopt a procedure that requires them to file an application to modify their licenses within 15 days after the rules adopted in the Order take effect, if they choose to relocate. Under our current rules, any 31 GHz licensee filing a modification application in accordance with the Order will be able to implement license changes any time during the 18-month period after the Commission grants the modification. Moreover, because the incumbents are not authorized to provide service on a common carriage basis, their modification applications are not subject to the public notice and petition to deny requirements of section 101.37 of the Commission's Rules. Thus, applications for modification of an incumbent's license under the relocation procedure would be expedited.

98. We find that relocation within the band gives existing 31 GHz licensees a reasonable opportunity to continue their operations with a minimum of expense and disruption. We decide not to include LTTS licensees for protection in the outer segments nor permit them to relocate, but to leave their status unchanged because of the nature of their services. These decisions are discussed more fully at paras. 85–93 of the Order.

99. We decide to limit the band-sharing plan to achieve protections for existing 31 GHz non-LTTS licensees in order to minimize the impact of our objective of implementing LMDS in 31 GHz on existing traffic control systems provided by small municipalities and other governmental entities. Commenters, including Palm Springs, demonstrate that public funds have been expended that would be wasted if incumbents were not protected and that these systems help control traffic and air pollution in furtherance of Federal goals. However, we decide not to allow future licensing under the existing rules and to limit incumbent licensees to their existing operations. We carefully consider the advantages and disadvantages of future growth under such rules, and conclude that it would be inconsistent with our objective to permit the licensing of LMDS on 31 GHz in order to meet the consumer demand for those telecommunications and video services it will provide.

100. We decide to permit incumbent licensees to renew and to modify their licenses to the extent they are not expanding service. As a result, the plans of Palm Springs and other licensees to expand existing operations under current rules cannot be achieved. The impact on small entities would not be extensive, inasmuch as we have shown that all incumbents are few in number and engaged in short-range services, as compared with the potential harm to LMDS development if the entire 31 GHz spectrum were not available and was encumbered by changing, incompatible, localized services.

101. Because we do not permit the licensing of new 31 GHz services, we find the dismissal of all pending applications to be consistent with our objectives. As we noted in para. 100 of the Order, we have concluded that it is in the public interest to dismiss the pending applications. Moreover, a review of our database indicates that all pending applications were filed after the release date of the *Fourth NPRM* and by new applicants not currently licensed. Thus, these applicants were on notice that we were considering a change in our rules for the 31 GHz band. To the extent any of these applicants are small entities, the impact would not be considerable because they have not invested fully in such new systems and alternative spectrum or options to gain access to 31 GHz is available, such as leasing from LMDS licensees.

B. Alternatives To Minimize Impact of LMDS Service Rules

102. To accommodate concerns expressed by Ad Hoc RTG and others about our proposal to license LMDS as a single block of the 28 GHz and 31 GHz spectrum, we decided to auction two licensees of different sizes for each BTA. We considered the band-segmentation plan we adopted for protecting non-LTTS incumbent licensees in 31 GHz and the comments of LMDS proponents that 150 megahertz is viable for certain LMDS services. We decide to issue one license for 1,150 megahertz, consisting of 1,000 megahertz located in the 28 GHz band and 150 megahertz in the middle of the 300 megahertz located in the 31 GHz band. We also will issue a smaller license for 150 megahertz consisting of the two 75 megahertz segments located at each end of the 300 megahertz block in 31 GHz. The small license can be acquired by LMDS to achieve the objectives of the broadest spectrum for its experimentation, or may be used by incumbent licensees to accommodate their needs to continue using the 31 GHz band on a protected basis or by small entities such as rural interests to develop niche markets or provide more economical narrower bandwidth services. We have decided to establish a 1,150 megahertz license because we believe that a large block of unencumbered spectrum will provide LMDS providers with an opportunity to compete with broadband services and develop two-way services.

103. We decide that our proposal to license LMDS based on BTA geographic service areas is the most logical area for LMDS. We decline to use the smaller MSAs and RSAs requested by M3ITC and other commenters because their areas are smaller than existing video programming and telephony service areas and their use might result in unnecessary fragmentation of natural markets. BTAs ensure that the wide array of LMDS services can be provided, afford greater economies of scale, and vary in size to afford building blocks for establishing an LMDS system. We do not restrict the number of BTAs a licensee may acquire at auction, but also point out that the varying sizes provide more opportunities for smaller businesses to enter the market.

104. We decide that our proposal for disaggregating spectrum and allowing the geographic partitioning of an LMDS licensed area would benefit small business and allow some areas, such as rural areas, to be served more readily (para. 145 of the Order).

105. We agree with WebCel and other small entities to adopt our proposal to restrict eligibility of incumbent LECs and cable companies and decide that they may not acquire the larger LMDS license of 1,150 megahertz in their geographic service areas for three years. We find that such firms would not need the small license for unencumbered service and thus would not have the incentive to hobble competition. We do not adopt the request of SkyOptics and CVTT for permanent ineligibility to protect smaller entities, because they can bid for the smaller license and the 3-year period may be sufficient to allow new entrants to become established. We do not agree with commenters from the rural telephone community that argue against any restrictions on LEC ownership of LMDS licenses. We find our restrictions should not hinder LMDS in rural areas, because they do not have the overlap that triggers our restriction and they can acquire

spectrum from an LMDS licensee through contract or partitioning and disaggregation. We modify our proposal to define in-region incumbent LECs or cable companies to reflect the same provisions in the CMRS spectrum cap. This ensures consistency in our rules for wireless services for ease of compliance and efficiency.

106. In adopting application procedures for LMDS, we agree with CellularVision and other small entities to adopt a broad service definition that allows the LMDS provider to provide any fixed microwave service, whether common or non-common carrier. We expand our proposal to allow an applicant or licensee to apply for both common and non-common authorization in the same license, depending on the services it seeks to provide. We clarify the effect of the Telecommunications Act of 1996 on the nature of the video programming and telecommunications services that we originally identified as potential services in LMDS to assist applicants and licensees in determining the regulatory status to govern their operations. We agree with commenters to not apply the presumption we proposed to treat LMDS as common carriage.

107. By authorizing both common and non-common carrier service in a single license, we eliminate the burden in our proposed procedures that would require a licensee to submit an application whenever it sought to change its services between common and non-common carrier services. We decide this achieves economies in the licensing process, ensures the flexibility licensees need to provide the full array of LMDS offerings, and promotes the development of the services that may compete with existing telecommunications and video programming services. To ensure that applicants or licensees are in compliance with the statutory requirements imposed on common carriers and reflected in the Part 101 rules that govern LMDS, we decide to subject all LMDS applications to the 30-day public notice provisions and require all applicants to submit information in response to all the alien ownership eligibility restrictions. Consequently, we can rely on a simplified procedure for licensees to notify us of any change in their regulatory status, either by changing or adding common carrier or non-common carrier status, through notification by application after the change is implemented, unless the change results in the impairment of a common carrier service that requires prior approval under the discontinuance rules. These procedures are adopted to ensure implementation of LMDS under a simplified format.

108. For the technical rules, we agree with commenters to use the prior frequency coordination procedures rather than a service area boundary PFD limit, which could stifle technology and inhibit flexibility in system design. We decide to adopt uniform polarization to achieve greater system efficiency. We disagree with CellularVision and ComTech that adopting a frequency stability standard would be costly, but find that it aids in coordinating usage to assist the rapid development of service.

C. Alternatives To Minimize Impact of LMDS Auction Rules

109. We decline to adopt the use of lotteries in lieu of auctions. We conclude that auctioning LMDS licenses would further the Communications Act's objectives: first, by speeding the development and deployment of this new technology, products and services to the public with minimal administrative or judicial delay, and encouraging efficient use of the spectrum; second, by fostering economic opportunity and the distribution of licenses among a wide variety of applicants, including small businesses; and, third, by enabling the public to recover a portion of the value of the public spectrum. Concerns regarding small businesses having the financial ability to participate in LMDS auctions are addressed by the special provisions adopted for small businesses. We also decline to adopt Public Television's suggestion of a set-aside of spectrum for educational purposes.

110. We adopt a uniform upfront payment for all applicants for LMDS auctions, and decide not to adopt a reduced down payment for small businesses, because we believe that this action is consistent with our reason for requiring upfront payments, i.e., to deter insincere and speculative bidding and to ensure that bidders have the financial capacity to build out their system. We delegate authority to the Wireless Telecommunications Bureau to determine an appropriate calculation for the upfront payment, which the Bureau will announce by Public Notice. The Bureau will take into consideration CellularVision's and ComTech's objection to the proposed formula of $0.02 per MHz-pop for the largest combination of MHz-pops a bidder anticipates being active on in any single round of bidding.

111. Because we believe the record with regard to past discrimination, continuing discrimination, and other significant barriers experienced by minorities and women is insufficient to support race- and gender-based competitive bidding provisions under the standards of judicial review applicable to such provisions, we do not adopt such provisions. Instead, we adopt race- and gender-neutral provisions such as installment payments and bidding credits for small businesses in order to provide small businesses with an opportunity to obtain LMDS licenses. Many minority- and women-owned entities are small businesses and will therefore qualify for these same special provisions.

112. CellularVision recommended a definition of small business with a ceiling of $100 million in annual gross revenues. We choose, for the purposes of LMDS auctions, to define a small business as an entity that, together with affiliates and controlling principals, has average gross revenues not exceeding $40 million for the three preceding years. To address CellularVision's concerns, we also adopt bidding credits and installment payments for LMDS applicants that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of more than $40 million but not more than $75 million, as elaborated in paras. 346–348 of the Order.

113. Emc³ and CellularVision proposed a small business bidding credit of 25 percent or more. The rules adopted in the Order provide a 25 percent bidding credit for small business applicants in the LMDS auctions, and a 15 percent bidding credit for entities with average gross revenues of more than $40 million but not exceeding $75 million. Commenters who advocated higher credits offered no data upon which to base such credits. We also decline to offer a bidding credit to commercial entities that set aside part of their capacity for educational institutions at preferential rates. We do not believe that we have an adequate record regarding the legal and policy implications of such credits.

VI. Report to Congress

114. We will submit a copy of this Final Regulatory Flexibility Analysis, along with the Order, in a report to Congress pursuant to 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the **Federal Register**.

Ordering Clauses

115. It is ordered that the actions of the Commission herein are taken pursuant to sections 4(i), 257, 303(r), and 309(j) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 257, 303(r), 309(j).

116. It is further ordered that the Commission's Rules are amended as set forth in Appendix A, effective June 30, 1997.

117. It is further ordered that the Petitions for Reconsideration of the Memorandum Opinion and Order in Application of Hye Crest Management, Inc., for License Authorization in the Point-to-Point Microwave Radio Service in 27.5–29.5 GHz Band and Request for Waiver of the Rules, File No. 10380–CF–P–88, filed by the University of Texas-Pan American, RioVision of Texas, Inc., the City of Gustine, California, Video/Phone Systems, Inc., Northeast Wireless, High Band Broadcasting Corporation, FM Video Broadcasters, Western Sierra Bancorp, M3 Illinois Telecommunications Corporation, Perry W. Haddon as President of GHz Equipment Company; Connecticut Home Theater Corporation, Alliance Associates, Stevan A. Birnbaum, BMW Associates, Joseph B. Buchwald, Celltel Communications Corporation, Linda Chester, Thomas F. Clark, the Committee to Promote Competition in the Cable Industry, Arnold Cornblatt, CT Communications Corporation, Evanston Transmission Company, Judy Feinberg, Lawrence Fraiberg, Freedom Technologies, Inc., Rosalie Y. Goldberg, Harry A. Hall, Lloyd Hascoe, L.D.H. International, Inc., Paul R. Likins, William Lonergan, Herbert S. Meeker, James L. Melcher, Frederick Myers, Frederick M. Peyser, PMJ Securities, Inc., Robert E. La Blanc Associates, Inc., Jeanne P. Robertson, Sanford Robertson, Robert Rosenkranz, R&R Telecommunications Partners, SCNY Communications, Inc., Seaview Telesystems Partners, Lewis W. Siegel, Michael S. Siegel, Kim Sloan, SMC Associates, Charles D. Snelling, Telecom Investment Corp., Telecommunications/Haddock Investors, Video Communications Corporation, Diane Wechsler, and Ivan Wolff are denied.

118. It is further ordered that Local Multipoint Distribution Service licensees shall attach appropriate labels to every subscriber transceiver antenna and provide notice to users regarding the potential hazard of remaining within the Maximum Permissible Exposure separation distance of these high gain antennas, as indicated herein.

119. It is further ordered that, effective upon adoption of this Order, applications will not be accepted for filing under Part 101 of the Commission's Rules either for new services or for license modifications in the 31 GHz band, except those filed by incumbent city licensees and private business users pursuant to the terms of this Order, and that all such applications for license modifications shall be filed no later than 15 days following the effective date of this Order.

120. It is further ordered that the applications filed for authorization to operate under the existing licensing rules for the 31,000–33,000 MHz band and pending review under the existing rules shall be dismissed, and applicants that submitted filing fees with the applications shall be refunded.

121. It is further ordered that, pursuant to section 1.402(h) of the Commission's Rules, the Chief, Office of Engineering and Technology, shall select a panel of experts to review the specific technologies set forth in the pioneer preference request that was filed by the Suite 12 Group, on September 23, 1991, as amended on November 19, 1991, and that was accepted and placed on Public Notice on December 16, 1991.

122. It is further ordered that, pursuant to Section 5(c) of the Communications Act of 1934, the Chief, Wireless Telecommunications Bureau, is granted delegated authority to implement and modify auction procedures in the Local Multipoint Distribution Service, including the general design and timing of the auction; the number and grouping of authorizations to be offered in a particular auction; the manner of submitting bids; the amount of bid increments; activity and stopping rules; and application and payment requirements, including the amount of upfront payments; and to announce such procedures by Public Notice.

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Environmental impact statements, Radio, Reporting and recordkeeping requirements, Telecommunications.

47 CFR Part 2

Radio.

47 CFR Part 74

Radio.

47 CFR Part 78

Radio.

47 CFR Part 95

Radio.

47 CFR Part 101

Communications common carriers, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission

William F. Caton,

Acting Secretary

Rule Changes

Parts 1, 2, 74, 78, 95, and 101 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. §§ 151, 154, 303 and 309(j), unless otherwise noted.

2. Section 1.1307 is amended by revising the section heading and adding a new entry at the end of Table 1 in paragraph (b)(1) as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(1) * * *

* * * * *

(b) * * *

TABLE 1.—TRANSMITTERS, FACILITIES, AND OPERATIONS SUBJECT TO ROUTINE ENVIRONMENTAL EVALUATION

Service (Title 47 CFR Rule Part)	Evaluation required if:
* *	* * *
Local Multipoint Distribution Service (subpart L of part 101).	*Non-rooftop antennas*: Height above ground level to radiation center <10 m and power >1640 W EIRP. *Rooftop antennas:* Power > 1640 W EIRP. LMDS licensees are required to attach a label to subscriber transceiver antennas that (1) provides adequate notice regarding potential radio frequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC radio frequency emission guidelines contained in FCC OST Bulletin 65, 2d Edition.

3. Section 1.77 is amended by revising paragraph (i) to read as follows:

§ 1.77 Detailed application procedures, cross references.

* * * * *

(i) Rules governing applications for authorizations in the Common Carrier and Private Radio terrestrial microwave services and Local Multipoint

Distribution Services are set out in part 101 of this chapter.

4. Section 1.2102 is amended by adding paragraph (a)(9) as follows:

§ 1.2102 Eligibility of applications for competitive bidding.

(a) * * *

(9) Local Multipoint Distribution Service (LMDS) (see 47 CFR part 101).

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

5. The authority citation for Part 2 continues to read as follows:

Authority: Sec 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303 and 307, unless otherwise noted.

6. Section 2.106 is amended by revising the entries for 27.5–29.5 GHz and 31.0–31.3 GHz to read as follows:

§ 2.106 Table of Frequency Allocations.

International table			United States table		FCC use designators	
Region 1—allocation GHz	Region 2—allocation GHz	Region 3—allocation GHz	Government	Non-Government	Rule part(s)	Special-use frequencies.
			Allocation GHz	Allocation GHz		
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	*
27.5–29.5	27.5–29.5 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE		27.5–29.5	27.5–29.5 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE	SATELLITE COMMUNICATIONS (25) FIXED MICROWAVE (101)	
*	*	*	*		*	*
31.0–31.3	31.0–31.3 FIXED MOBILE Standard Frequency and Time Signal-Satellite (space-to-Earth) Space Research 884 885 886		31.0–31.3 Standard Frequency and Time Signal-Satellite (space-to-Earth) 886 US211	31.0–31.3 FIXED MOBILE Standard Frequency and Time Signal-Satellite (space-to-Earth) 884 886 US211	FIXED MICROWAVE (101)	
*	*	*	*	*	*	*

* * * * *

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

7. The authority citation for Part 74 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. §§ 154, 303, 554.

§ 74.602 [Amended]

8. In § 74.602, paragraph (h) is removed and paragraphs (i) and (j) are redesignated as paragraphs (h) and (i).

PART 78—CABLE TELEVISION RELAY SERVICE

9. The authority citation for Part 78 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309.

§ 78.18 [Amended]

10. In § 78.18, paragraph (a)(5) is removed and paragraphs (a)(6) through (a)(8) are redesignated as paragraphs (a)(5) through (a)(7).

PART 95—PERSONAL RADIO SERVICES

11. The authority citation for Part 95 continues to read as follows:

Authority: Secs. 4 , 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

§ 95.1 [Amended]

12. In § 95.1, paragraph (b) is removed and paragraph (c) is redesignated as (b).

PART 101—FIXED MICROWAVE SERVICE

13. The authority citation for Part 101 continues to read as follows:

Authority: 47 U.S.C. §§ 154, 303, 309(j), unless otherwise noted.

14. Section 101.1 is amended by revising paragraph (a) to read as follows:

§ 101.1 Scope and authority.

(a) The purpose of the rules in this part is to prescribe the manner in which portions of the radio spectrum may be made available for private operational, common carrier, and Local Multipoint Distribution Service fixed, microwave operations that require transmitting facilities on land or in specified offshore coastal areas within the continental shelf.

* * * * *

15. Section 101.3 is amended by revising the two definitions in alphabetical order to read as follows:

* * * * *

Local Multipoint Distribution Service Hub Station. A fixed point-to-point or point-to-multipoint radio station in a Local Multipoint Distribution Service System that provides one-way or two-way communication with Local Multipoint Distribution Service Subscriber Stations.

* * * * *

Local Multipoint Distribution Service System. A fixed point-to-point or point-to-multipoint radio system consisting of Local Multipoint Distribution Service Hub Stations and their associated Local Multipoint Distribution Service Subscriber Stations.

* * * * *

16. Section 101.5 is amended by revising paragraph (d) to read as follows:

§ 101.5 Station authorization required.

* * * * *

(d) For stations authorized under subpart H (Private Operational Fixed Point-to-Point Microwave Service), subpart I (Common Carrier Fixed Point-to-Point Microwave Service), and subpart L of this part (Local Multipoint Distribution Service), construction of new or modified stations may be initiated prior to grant of an authorization. As a condition to commencing construction under this paragraph (d), the Commission may, at any time and without hearing or notice, prohibit such construction for any reason. Any construction conducted under this paragraph is at the applicant's sole risk.

17. Section 101.11 is amended by revising paragraph (a) to read as follows:

§ 101.11 Filing of applications, fees, and number of copies.

(a) Part 1 of this chapter contains information on application filing procedures and requirements for all services authorized under this part. All filings, unless they are filed electronically, must include the original application plus one copy. Instructions for electronic filing will be provided by public notice.

* * * * *

18. Section 101.15 is amended by revising paragraph (a) to read as follows:

§ 101.15 Application forms for common carrier fixed stations.

(a) *New or modified facilities.* Except for Local Multipoint Distribution Service in subpart L of this part, FCC Form 415 must be submitted and a license granted for each station. FCC Form 415 also must be submitted to amend any license application, to modify any license pursuant to §§ 101.57(a) and 101.59, and to notify the Commission of modifications made pursuant to § 101.61. Cancellation of a license may be made by letter.

* * * * *

19. Section 101.19 is amended by revising paragraph (a)(5) to read as follows:

§ 101.19 General application requirements.

(a) * * *

(5) Show compliance with the special requirements applicable to each radio service and make all special showings that may be applicable (e.g., those required by §§ 101.103(d), 101.701, and 101.1001 through 101.1015).

* * * * *

20. Section 101.21 is amended by revising the introductory paragraph and adding a new paragraph (g) as follows:

§ 101.21 Technical content of applications.

Applications, except FCC Form 175, must contain all technical information required by the application form and any additional information necessary to fully describe the proposed facilities and to demonstrate compliance with all technical requirements of the rules governing the radio service involved (see subparts C, F, G, I, J, and L of this part, as appropriate). The following paragraphs describe a number of technical requirements.

* * * * *

(g) Each application in the Local Multipoint Distribution Service must contain all technical information required by FCC Form 600 and any other applicable form or associated Public Notices and by any applicable rules in this part.

21. Section 101.29 is amended by revising paragraph (a) to read as follows:

§ 101.29 Amendment of pending applications.

(a) Any pending application may be amended as a matter of right if the application has not been designated for hearing, or for comparative evaluation pursuant to § 101.51, or for the random selection process, or is not subject to the competitive bidding process, provided, however, that the amendments must comply with the provisions of § 101.41 as appropriate.

* * * * *

22. Section 101.35 is amended by adding new paragraph (e) as follows:

§ 101.35 Preliminary processing of applications.

* * * * *

(e) Competitive bidding applications will be processed pursuant to part 1, subpart Q, of this chapter and subpart M of this part.

23. Section 101.37 is amended by revising paragraphs (a)(1), (a)(3), and (a)(5) and adding new paragraph (e) to read as follows:

§ 101.37 Public notice period.

(a) * * *

(1) The acceptance for filing of common carrier applications, Local Multipoint Distribution Service applications, and major amendments thereto;

* * * * *

(3) The receipt of common carrier applications and Local Multipoint Distribution Service applications for minor modifications made pursuant to § 101.59;

* * * * *

(5) Special environmental considerations as required by part 1 of this chapter.

* * * * *

(e) Paragraphs (a) through (c) of this section shall not apply to FCC Form 175.

24. Section 101.45 is amended by revising introductory paragraph (b) as follows:

§ 101.45 Mutually exclusive applications.

* * * * *

(b) A common carrier application, except in the Local Multipoint Distribution Service, will be entitled to be included in a random selection process or to comparative consideration with one or more conflicting applications only if:

* * * * *

25. Section 101.47 is amended by revising introductory paragraph (f) to read as follows:

§ 101.47 Consideration of applications.

* * * * *

(f) Except with respect to applications subject to subpart L of this part, whenever the public interest would be served thereby, the Commission may grant one or more mutually exclusive applications expressly conditioned upon final action on the applications, and then either conduct a random selection process (in specified services under this part), designate all of the mutually exclusive applications for a formal evidentiary hearing or (whenever so requested) follow the comparative evaluation procedures of § 101.51, as appropriate, if it appears:

* * * * *

26. Section 101.57 is amended by revising paragraph (a) to read as follows:

§ 101.57 Modification of station license.

(a)(1) Except as provided in § 101.59, and except in the case of licenses authorized for operation in the 31,000–31,300 MHz band prior to March 11, 1997, and except in the Local Multipoint Distribution Service as provided in § 101.61(c)(10), no modification of a license issued pursuant to this part (or the facilities described thereunder) may be made except upon application to the Commission.

(2) Notwithstanding the provisions of subparagraph (1) of this paragraph, licensees (other than licensees in the Local Television Transmission Service) authorized to operate in the 31,000–31,300 MHz band prior to March 11,

1997, may submit applications to the Commission for modification of such licenses not later than the end of the 15-day period following June 30, 1997.

* * * * *

27. Section 101.59 is amended by revising paragraphs (a) and (b)(1) to read as follows:

§ 101.59 Processing of applications for facility minor modifications.

(a) Except in the Local Multipoint Distribution Service as provided in § 101.61(c)(10), unless an applicant is notified to the contrary by the Commission, as of the twenty-first day following the date of public notice, any application that meets the requirements of paragraph (b) of this section and proposes only the change specified in paragraph (c) of this section will be deemed to have been authorized by the Commission.

(b) * * *

(1) It is in the Private Operational Fixed Point-to-Point Microwave, Common Carrier Fixed Point-to-Point Microwave, Local Television Transmission, Digital Electronic Message Services, and Local Multipoint Distribution Services;

* * * * *

28. Section 101.61 is amended by revising introductory paragraph (b), and paragraph (b)(3), adding new paragraphs (c)(9) and (c)(10), and revising paragraph (d) to read as follows:

§ 101.61 Certain modifications not requiring prior authorization.

* * * * *

(b) Licensees of fixed stations in the Private Operational Fixed Point-to-Point Microwave, Common Carrier Fixed Point-to-Point Microwave, Local Television Transmission, Digital Electronic Message Services, and Local Multipoint Distribution Services may make the facility changes listed in paragraph (c) of this section without obtaining prior Commission authorization, if:

* * * * *

(3) The Commission is notified of changes made to facilities by the submission of a completed FCC Form 415 within 30 days after the changes are made, except that licensees in the Local Multipoint Distribution Service must notify the Commission by the submission of a completed FCC Form 600 within 30 days or, if the change is subject to § 101.305(b) or 101.305(c), within the time periods required in those sections.

* * * * *

(c) * * *

(9) In the Local Multipoint Distribution Service, changes in regulatory status from common carrier to non-common carrier status or non-common carrier to common carrier status, or from the addition of common carrier or non-common carrier status to an existing license in order to be authorized to provide both common carrier and non-common carrier services; except that changes that result in the discontinuance, reduction, or impairment of the existing service are subject to the requirements of § 101.305 (b) and (c).

(10) In the Local Multipoint Distribution Service, the addition, removal, or relocation of facilities within the area authorized by the license, except as provided in § 101.1009.

(d) Licensees may notify the Commission of permissible changes or correct erroneous information on a license not involving a major change (i.e., a change that would be classified as a major amendment as defined by § 101.29) without obtaining prior commission approval by filing FCC Form 415, except in Local Multipoint Distribution Service by filing FCC Form 600.

29. Section 101.63 is amended by revising paragraph (a) to read as follows:

§ 101.63 Period of construction; certification of completion of construction.

(a) Each station, except in the Local Multipoint Distribution Services, authorized under this part must be in operation within 18 months from the initial date of grant. Modification of an operational station must be completed within 18 months of the date of grant of the applicable modification request.

* * * * *

30. Section 101.101 is amended by removing the entry for ''27,500–29,500'' MHz and adding entries for ''27,500–28,350,'' and ''29,100–29,250'' and revising the entry for ''31,000–31,300'' MHz and adding LMDS in alphabetical order following the table to read as follows:

§ 101.101 Frequency availability.

Frequency band (MHz)	Radio service				
	Common carrier (Part 101)	Private radio (Part 101)	Broadcast auxiliary (Part 74)	Other (Parts 15, 21, 24, 25, 74, 78 & 100)	Notes
* * *	*	*		*	*
27,500–28,350	LMDS				
29,100–29,250	LMDS			SAT	
31,000–31,300	CC–LMDS LTTS	OFS			F/M/TF
* * *	*	*		*	*

* * * * * * *

LMDS: Local Multipoint Distribution Service (including non-common carrier and common carrier services)—(Part 101, Subpart L).

* * * * *

31. Section 101.103 is amended by revising paragraph (b) and adding new paragraphs (g) and (h) to read as follows:

§ 101.103 Frequency coordination procedures.

* * * * *

(b)(1) Operations in the bands 31,000–31,075 MHz and 31,225–31,300 MHz licensed prior to March 11, 1997, were licensed on an unprotected basis and are subject to harmful interference from similarly licensed operations in that band.

(i) Operations licensed in the Local Mulitpoint Distribution Service and those operations licensed prior to March 11, 1997, except in the Local Television Transmission Service, operating in these bands are equally protected against harmful interference from each other.

(ii) In the case of operations licensed prior to March 11, 1997, except in the Local Television Transmission Service, that are licensed on a point-to-radius basis, LMDS licensees shall be subject to the protection requirement established in this section in the case of existing links operated by such licensees, and in the case of links added by such licensees in the future in accordance with the terms of their point-to-radius licenses.

(iii) An LMDS licensee may not initiate operations within the point-to-radius area licensed to an operator (other than an operator in the Local Television Transmission Service) prior to March 11, 1997, even if such operator has not initiated operations to the fullest extent of the license. An LMDS licensee, however, may initiate operations at the border of such operator's license area without prior coordination if the LMDS licensee's operations would not cause harmful interference to the other operator's existing operations.

(iv) An operator (other than an operator in the Local Television Transmission Service) licensed on a point-to-radius basis prior to March 11, 1997, may add additional stations within its license area. Such operator shall coordinate with any affected LMDS licensee if its new operations might cause harmful interference to the existing operations of such LMDS licensee.

(v) Operations licensed prior to March 11, 1997, on a point-to-point basis may not be extended or otherwise modified through the addition of point-to-point links. Such operations shall be limited to the use of frequency pairs licensed as of March 11, 1997. Operations licensed in the Local Television Transmission Service as of March 11, 1997, may continue to operate, but such operators may not expand existing operations nor initiate new operations.

(2) Operations in the 31,075–31,225 MHz band licensed prior to March 11, 1997, shall receive no protection against harmful interference from authorized operations in the Local Multipoint Distribution Service in that band.

* * * * *

(g) *Licensees operating in Basic Trading Areas authorized in the Local Multipoint Distribution Service.* (1) When the transmitting facilities in a Basic Trading Area (BTA) are to be operated in the bands 27,500–28,350 MHz; 29,100–29,250 MHz; and 31,000–31,300 MHz and the facilities are located within 20 kilometers of the boundaries of a BTA, each licensee must complete the frequency coordination process of paragraph (d)(2) of this section with respect to neighboring BTA licensees that may be affected by its operations prior to initiating service. In addition, all licensed transmitting facilities operating in the bands 31,000–31,075 MHz and 31,225–31,300 MHz and located within 20 kilometers of neighboring facilities must complete the frequency coordination process of paragraph (d)(2) of this section with respect to such authorized operations before initiating service.

(2) Response to notification should be made as quickly as possible, even if no technical problems are anticipated. Any response to notification indicating potential interference must specify the technical details and must be provided to the applicant, either electronically or in writing, within the 30-day notification period. Every reasonable effort should be made by all licensees to eliminate all problems and conflicts. If no response to notification is received within 30 days, the licensee will be deemed to have made reasonable efforts to coordinate and commence operation without a response. The beginning of the 30-day period is determined pursuant to paragraph (d)(2)(v) of this section.

(h) *Special requirements for operations in the band 29,100–29,250 MHz.* (1)(i) Local Multipoint Distribution Service (LMDS) receive stations operating on frequencies in the 29,100–29,250 MHz band within a radius of 75 nautical miles of the geographic coordinates provided by a non-GSO–MSS licensee pursuant to § 101.113(c)(2) or (c)(3)(i) (the ''feeder link earth station complex protection zone'') shall accept any interference caused to them by such earth station complexes and shall not claim protection from such earth station complexes.

(ii) LMDS licensees operating on frequencies in the 29,100–29,250 MHz band outside a feeder link earth station complex protection zone shall cooperate fully and make reasonable efforts to resolve technical problems with the non-GSO MSS licensee to the extent that transmissions from the non-GSO MSS operator's feeder link earth station complex interfere with an LMDS receive station.

(2) No more than 15 days after the release of a public notice announcing the commencement of LMDS auctions, feeder link earth station complexes to be licensed pursuant to § 25.257 of this chapter shall be specified by a set of geographic coordinates in accordance with the following requirements: no feeder link earth station complex may be located in the top eight (8) metropolitan statistical areas (MSAs), ranked by population, as defined by the Office of Management and Budget as of June 1993, using estimated populations as of December 1992; two (2) complexes may be located in MSAs 9 through 25, one of which must be Phoenix, AZ (for a complex at Chandler, AZ); two (2) complexes may be located in MSAs 26 to 50; three (3) complexes may be located in MSAs 51 to 100, one of which must be Honolulu, Hawaii (for a complex at Waimea); and the three (3) remaining complexes must be located at least 75 nautical miles from the borders of the 100 largest MSAs or in any MSA not included in the 100 largest MSAs. Any location allotted for one range of MSAs may be taken from an MSA below that range.

(3)(i) Any non-GSO MSS licensee may at any time specify sets of geographic coordinates for feeder link earth station complexes with each earth station contained therein to be located at least 75 nautical miles from the border of the 100 largest MSAs.

(ii) For purposes of paragraph (h)(3)(i) of this section, non-GSO MSS feeder link earth station complexes shall be entitled to accommodation only if the affected non-GSO MSS licensee preapplies to the Commission for a feeder link earth station complex or certifies to the Commission within sixty days of receiving a copy of an LMDS application that it intends to file an application for a feeder link earth station complex within six months of the date of receipt of the LMDS application.

(iii) If said non-GSO MSS licensee application is filed later than six months after certification of the Commission, the LMDS and non-GSO MSS entities shall still cooperate fully and make reasonable efforts to resolve technical problems, but the LMDS licensee shall not be obligated to re-engineer its proposal or make changes to its system.

(4) LMDS licensees or applicants proposing to operate hub stations on frequencies in the 29,100–29,250 MHz band at locations outside of the 100 largest MSAs or within a distance of 150 nautical miles from a set of geographic coordinates specified under paragraphs (h)(2) or (h)(3)(i) of this section shall serve copies of their applications on all non-GSO MSS applicants, permittees or licensees meeting the criteria specified in § 25.257(a). Non-GSO MSS licensees or applicants shall serve copies of their feeder link earth station applications, after the LMDS auction, on any LMDS applicant or licensee within a distance of 150 nautical miles from the geographic coordinates that it specified under § 101.113(c)(2) or (c)(3)(i). Any necessary coordination shall commence

upon notification by the party receiving an application to the party who filed the application. The results of any such coordination shall be reported to the Commission within sixty days. The non-GSO MSS earth station licensee shall also provide all such LMDS licensees with a copy of its channel plan.

32. Section 101.107 is amended by removing the entry ''19,700 to 40,000'' MHz, adding the entries for ''19,700 to 27,500, 27,500 to 28,350, 29,100 to 29,250, 31,000 to 31,075, 31,075 to 31,225, 31,225 to 31,300 and 31,300 to 40,000'' and adding a footnote 8 to read as follows:

§ 101.107 Frequency tolerance.

* * * * *

Frequency (MHz)	Frequency tolerance (percent)		
	All fixed and Base stations	Mobile stations over 3 Watts	Mobile stations 3 Watts or less
*	*	*	*
19,700 to 27,500 [6]	0.03		
27,500 to 28,350	0.001		
29,100 to 29,250	0.001		
31,000 to 31,075 [8]	0.001		
31,075 to 31,225 [8]	0.001		
31,225 to 31,300 [8]	0.001		
31,300 to 40,000 [6]	0.03		

* * * * * * *

[8] For stations authorized prior to March 11, 1997, transmitter frequency tolerance shall not exceed 0.03 percent.

33. Section 101.109(c) is amended by removing the entry ''31,000 to 31,300'' and adding the entries for ''31,000 to 31,075, 31,075 to 31,225, and 31,225 to 31,300'' in numerical order to read as follows:

§ 101.109 Bandwidth.

* * * * * * *

(c) * * *

Frequency band (MHz)	Maximum authorized bandwidth
*	*
31,000 to 31,075	75 MHz
31,075 to 31,225	150 MHz
31,225 to 31,300	75 MHz
*	*

34. Section 101.113(a) is amended by removing the entry ''31,000 to 31,300'' MHz and adding entries for ''31,000 to 31,075, 31,075–31,225, and 31,225 to 31,300,'' removing the first footnote 7, revising the second footnote 7, revising footnote 8 and adding footnote 9 to read as follows:

§ 101.113 Transmitter power limitations.

(a) * * *

Frequency band (MHz)	Maximum allowable EIRP [1, 2]	
	Fixed (dBW)	Mobile (dBW)
*	*	*
27,500 to 28,350 [9]	+30 dBW/MHz	
29,100 to 29,250	([7])	
31,000 to 31,075 [8, 9]	30 dBW/MHz	30 dBW/MHz
31,075 to 31,225 [8, 9]	30 dBW/MHz	30 dBW/MHz
31,225 to 31,300 [8, 9]	30 dBW/MHz	30 dBW/MHz
*	*	*

* * * * * * *

[7] See § 101.113(c).
[8] For stations authorized prior to March 11, 1997, transmitter output power shall not exceed 0.05 watt.
[9] For subscriber transceivers authorized in these bands, the EIRP shall not exceed 55dBW or 42 dBW/MHz.

* * * * *

35. Section 101.147 is amended by revising paragraph (a), removing the entries for ''27,500–29,500 MHz''and adding entries for 27,500–28,350 MHz (16) and 29,100–29,250 MHz (16), revising the entry for ''31,000–31,300 MHz'' (16), revising note 16 in paragraph (a), removing paragraph (x), redesignating paragraphs (t) through (w) as paragraphs (u) through (x), adding a new paragraph (t), and revising newly designated paragraph (u), to read as follows:

§ 101.147 Frequency assignments

(a) Frequencies in the following bands are available for assignment for fixed microwave services.

* * * * *

27,500–28,350 MHz (16)
29,100–29,250 MHz (5), (16)
31,000–31,300 MHz (16)

* * * * *

(5) Frequencies in this band are shared with stations in the fixed-satellite service.

* * * * *

(16) As of June 30, 1997, frequencies in these bands are available for assignment only to LMDS radio stations. Stations initially authorized prior to that date may continue to operate within the existing terms of the outstanding licenses.

* * * * *

(t) *27,500–28,350; 29,100–29,250; 31,000–31,300 MHz*. These frequencies are available for LMDS systems. Each assignment will be made on a BTA service area basis, and the assigned spectrum may be subdivided as desired by the licensee.

(u) *31,000–31,300 MHz*. Stations licensed in this band prior to March 11, 1997, may continue their authorized operations, subject to license renewal, on the condition that harmful interference will not be caused to LMDS operations licensed in this band after June 30, 1997. In the sub-bands 31,000–31,075 and 31,225–31,300 MHz, stations initially licensed prior to March 11, 1997, except in LTTS, and LMDS operations authorized after June 30, 1997, are equally protected against harmful interference from each other in accordance with the provisions of § 101.103(b). For stations, except in LTTS, permitted to relocate to these sub-bands, the following paired frequencies are available:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
(1) 25 MHz Authorized Bandwidth Channels	
31,012.5	31,237.5
31,037.5	31,262.5
31,062.5	31,287.5
(2) 75 MHz Authorized Bandwidth Channel	
31,037.5	31,275.0

* * * * *

36. Section 101.305 is amended by revising paragraphs (a) through (c) to read as follows:

§ 101.305 Discontinuance, reduction, or impairment of service.

(a) If the public communication service provided by a station in the Common Carrier Radio Services and the Local Multipoint Distribution Service is involuntarily discontinued, reduced or impaired for a period exceeding 48 hours, the station licensee must promptly notify the Commission, in writing, at Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325. In every such case, the licensee must furnish full particulars as to the reasons for such discontinuance, reduction or impairment of service, including a statement as to when normal service is expected to be resumed. When normal service is resumed, prompt notification thereof must be given in writing to the Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania, 17325.

(b) No station licensee subject to title II of the Communications Act of 1934, as amended, may voluntarily discontinue, reduce or impair public communication service to a community or part of a community without obtaining prior authorization from the Commission pursuant to the procedures set forth in part 63 of this chapter. In the event that permanent discontinuance of service is authorized by the Commission, the station licensee must promptly send the station license to the Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 for cancellation; except that station licensees in the Local Multipoint Distribution Service need not surrender the license for cancellation if the discontinuance is a result of a change of status by the licensee from common carrier to non-common carrier pursuant to § 101.61.

(c) Any licensee not subject to title II of the Communications Act of 1934, as amended, who voluntarily discontinues, reduces or impairs public communication service to a community or a part of a community must give written notification to the Commission within 7 days thereof. In the event of permanent discontinuance of service, the station licensee must promptly send the station license to the Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 for cancellation; except that station licensees in the Local Multipoint Distribution Service need not surrender the license for cancellation if the discontinuance is a result of a change of status by the licensee from non-common carrier to common carrier pursuant to § 101.61.

* * * * *

37. Section 101.311 is revised to read as follows:

§ 101.311 Equal employment opportunities.

Equal opportunities in employment must be afforded by all common carrier licensees and all Local Multipoint Distribution Service licensees in accordance with the provisions of § 21.307.

38. Section 101.803 is amended by revising note (7) of paragraph (a), revising note (9) of paragraph (d), removing paragraph (e), and redesignating paragraphs (f), (g), and (h) as (e), (f), and (g), to read as follows:

§ 101.803 Frequencies.

(a) * * *

(7) As of June 30, 1997, frequencies in these band only are available for assignment to LMDS radio stations. Stations authorized prior to that date may continue to operate within the existing terms of the outstanding licenses, subject to renewal.

* * * * *

(d) * * *

(9) As of June 30, 1997, frequencies in these band only are available for assignment to LMDS radio stations. Stations authorized prior to that date may continue to operate within the existing terms of the outstanding licenses, subject to renewal.

* * * * *

39. Subpart K is added and reserved in part 101 and Subpart L is added, reading as follows:

Subpart L—Local Multipoint Distribution Service

Sec.
101.1001 Eligibility.
101.1003 LMDS eligibility restrictions for incumbent LECs and cable companies.
101.1005 Frequencies available.
101.1007 Geographic service areas and number of licenses.
101.1009 System operations.
101.1011 Construction requirements and criteria for renewal expectancy.

101.1013 Permissible communications services.
101.1015 Application form and contents.
101.1017 Requesting regulatory status.

§ 101.1001 Eligibility.

Any entity, other than one precluded by § 101.7 and by § 101.1003, is eligible for authorization to provide Local Multipoint Distribution Service (LMDS) under this subpart. Authorization will be granted upon proper application filed under the rules in this part.

§ 101.1003 LMDS eligibility restrictions for incumbent LECs and cable companies.

(a) *Eligibility for LMDS license.* Except as provided in paragraph (b) of this section, no incumbent LEC or incumbent cable company, as defined in paragraph (c) of this section, nor any entity owning an attributable interest in an incumbent LEC or incumbent cable company, shall have an attributable interest in an LMDS license whose geographic service area significantly overlaps such incumbent's authorized or franchised service area.

(1) *Termination of restriction.* This restriction shall terminate three years following June 30, 1997 unless the Commission extends its applicability based on a determination that incumbent LECs or incumbent cable companies continue to have substantial market power in the provision of local telephony or cable television services.

(2) *Waiver of restriction.* Upon completion of the initial award of LMDS licenses, an incumbent LEC or incumbent cable company may petition for a waiver of the restriction on eligibility based upon a showing that the petitioner no longer has market power in its authorized or franchised service area as the result of the entry of new competitors, other than an LMDS licensee, into such service area.

(b) *Exception to eligibility restriction.* The restriction set forth in paragraph (a) of this section shall not apply to any license for the 31,000–31,075 megahertz and 31,225–31,300 megahertz bands of LMDS spectrum.

(c) *Incumbent LECs and cable companies defined.* The terms incumbent LEC and incumbent cable company shall be defined as follows:

(1) *Incumbent LEC.* The term incumbent local exchange carrier or incumbent LEC shall be defined, in accordance with section 251(h) of the Communications Act, to mean, with respect to an area, that:

(i) On February 8, 1996, the LEC provided telephone exchange service in such area and was deemed to be a member of the exchange carrier association pursuant to § 69.601(b) of this chapter; or

(ii) Is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in paragraph (c)(1)(i) of this section; or

(iii) Is an entity, or a member of a class or category of entities, that the Commission has determined under section 251(h)(2) of the Communications Act to treat as a local exchange carrier.

(2) *Incumbent cable company.* The term incumbent cable company means a company that is franchised to provide cable service and is not subject to effective competition under the following definition of effective competition in section 623(l) of the Communications Act:

(i) Fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; or

(ii) The franchise area is:

(A) Served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(B) The number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or

(iii) A multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households of that franchise area; or

(iv) A local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

(d) *Significant overlap with authorized or franchised service area.* For purposes of paragraph (a) of this section, a significant overlap of an incumbent LEC's or incumbent cable company's authorized or franchised service area occurs when at least 10 percent of the population of the LMDS licensed service area, as determined by the 1990 census figures for the counties contained in such service area, is within the authorized or franchised service area.

(e) *Definition of attributable interest.* For purposes of paragraph (a) of this section, an entity shall be considered to have an attributable interest in an incumbent LEC, incumbent cable company, or LMDS licensee pursuant to the following criteria:

(1) A controlling interest shall constitute an attributable interest. Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the entity, in whatever manner exercised.

(2) Partnership and similar ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock or outstanding voting stock of an entity.

(3) Stock interests held in trust that exceed the limit set forth in paragraph (e)(2) of this section shall constitute an attributable interest of any person who holds or shares the power to vote such stock, of any person who has the sole power to sell such stock, and, in the case of stock held in trust, of any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust shall constitute an attributable interest of such grantor or beneficiary, as appropriate.

(4) Non-voting stock shall constitute an attributable interest in the issuing entity if it exceeds the limit set forth in paragraph (e)(2) of this section.

(5) Debt and interests such as warrants and convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not constitute attributable interests unless and until conversion is effected.

(6) Limited partnership interests amounting to 20 percent or more, calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses, shall constitute an attributable interest of each such limited partner.

(7) Officers and directors of an incumbent LEC or incumbent cable company, an LMDS licensee, or an entity that controls such incumbent LEC, incumbent cable company, or LMDS licensee, shall be considered to have an attributable interest in such incumbent LEC, incumbent cable company, or LMDS licensee.

(8) Ownership interests that are held indirectly by any party through one or

more intervening corporations or other entities shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that, if the ownership for any interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(9) Any person who manages the operations of an incumbent LEC or incumbent cable company or an LMDS licensee pursuant to a management agreement shall be considered to have an attributable interest in such incumbent LEC, incumbent cable company or LMDS licensee, if such person or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(i) The nature or types of services offered by such entity;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(10) Any person or its affiliate who enters into a joint marketing arrangement with an incumbent LEC, an incumbent cable company, an LMDS licensee, or an affiliate of such entity, shall be considered to have an attributable interest in such incumbent LEC, incumbent cable company, LMDS licensee, or affiliate, if such person or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine:

(i) The nature or types of services offered by such entity;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(f) *Divestiture.* Any incumbent LEC or incumbent cable company, or any entity owning an attributable interest in an incumbent LEC or incumbent cable company, that would otherwise be barred from participating in an LMDS auction by the eligibility restriction in paragraph (a) of this section, may be a party to an LMDS application (i.e., have an attributable interest in the applicant), and such applicant will be eligible for an LMDS license, pursuant to the divestiture procedures set forth in paragraphs (f)(1) through (f)(6) of this section.

(1) Divestiture shall be limited to the following prescribed means:

(i) An LMDS applicant holding an attributable interest in an incumbent LEC or incumbent cable company may divest such interest in the incumbent LEC or cable company.

(ii) Other LMDS applicants disqualified under paragraph (a) of this section, will be permitted to:

(A) Partition and divest that portion of the existing authorized or franchised service area that causes it to exceed the overlap restriction in paragraph (d) of this section, subject to applicable regulations of state and local governments; or

(B) Partition and divest that portion of the LMDS geographic service area that exceeds the overlap restriction in paragraph (d) of this section.

(iii) Divestiture may be to an interim trustee if a buyer has not been secured in the required period of time, as long as the LMDS applicant has no interest in or control of the trustee and the trustee may dispose of the license as it sees fit.

(2) The LMDS applicant shall certify as an exhibit to its short form application that it and all parties to the application will come into compliance with paragraph (a) of this section.

(3) If such LMDS applicant is a successful bidder in an auction, it must submit with its long-form application a signed statement describing its efforts to date and future plans to come into compliance with the eligibility restrictions in paragraph (a) of this section.

(4) If such an LMDS applicant is otherwise qualified, its application will be granted subject to a condition that the applicant shall come into compliance with the eligibility restrictions in paragraph (a) of this section, within ninety (90) days of final grant of such LMDS license.

(5) An LMDS applicant will be considered to have come into compliance with paragraph (a) of this section if:

(i) In the case of the divestiture of a portion of an LMDS license, it has submitted to the Commission an application for license assignment or transfer of control of the requisite portion of the LMDS geographic service area.

(ii) In all other cases, it has submitted to the Commission a signed certification that it has come into compliance with paragraph (a) of this section by the following means, identified in such certification:

(A) By divestiture of a disqualifying interest in an incumbent LEC or incumbent cable company, identified in terms of the interest owned, the owner of such interest (and, if such owner is not the applicant itself, the relationship of the owner to the applicant), the name of the party to whom such interest has been divested, and the date such divestiture was executed; or

(B) By divestiture of the requisite portion of the incumbent LEC's or incumbent cable company's existing authorized or franchised service area, identified in terms of the name of the party to whom such interest has been divested, the date such divestiture was executed, the name of any regulatory agency that must approve such divestiture, and the date on which an application was filed for this purpose with the regulatory agency.

(6) If no such certification or application is tendered to the Commission within ninety (90) days of final grant of the initial license, the Commission may consider the short form certification and the long form divestiture statement to be material, bad faith misrepresentations and shall invoke the condition on the initial license, cancelling or rescinding it automatically, shall retain all monies paid to the Commission, and, based on the facts presented, shall take any other action it may deem appropriate.

Note to § 101.1003: Waivers of § 101.1003(e) may be granted upon an affirmative showing:

1. That the interest holder has less than a 50 percent voting interest in the licensee and there is an unaffiliated single holder of a 50 percent or greater voting interest;

2. That the interest holder is not likely to affect the local market in an anticompetitive manner;

3. That the interest holder is not involved in the operations of the licensee and does not have the ability to influence the licensee on a regular basis; and

4. That grant of a waiver is in the public interest because the benefits to the public of common ownership outweigh any potential anticompetitive harm to the market.

§ 101.1005 Frequencies available.

(a) The following frequencies are available for assignment to LMDS in two license blocks:

Block A of 1,150 MHz

27,500–28,350 MHz
29,100–29,250 MHz
31,075–31,225 MHz

Block B of 150 MHz

31,000–31,075 MHz
31,225–31,300 MHz

(b) In Block A licenses, the frequencies are authorized as follows:

(1) 27,500–28,350 MHz is authorized on a primary protected basis and is shared with Fixed Satellite Service (FSS) systems.

(2) 29,100–29,250 MHz is shared on a co-primary basis with feeder links for non-geostationary orbit Mobile Satellite Service (NGSO/MSS) systems in the band and is limited to LMDS hub-to-

subscriber transmissions, as provided in § 25.257 and § 101.103(h).

(3) 31,075–31,225 MHz is authorized on a primary protected basis and is shared with private microwave point-to-point systems licensed prior to March 11, 1997, as provided in § 101.103(b).

(c) In Block B licenses, the frequencies are authorized as follows:

(1) On a primary protected basis if LMDS shares the frequencies with systems licensed as Local Television Transmission Service (LTTS) licensed prior to March 11, 1997, as provided in § 101.103(b).

(2) On a co-equal basis with systems not licensed as LTTS prior to March 11, 1997, as provided in § 101.103(g).

§ 101.1007 Geographic service areas and number of licenses.

LMDS service areas are Basic Trading Areas (BTAs) as defined in the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38–39, that identifies 487 BTAs based on the 50 States and as defined to include the BTA-like areas of the United States Virgin Islands, American Samoa, Guam, Mayaguez/Aguadilla-Ponce, Puerto Rico, San Juan, Puerto Rico, and the Commonwealth of Northern Marinas, for a total of 493 BTAs.

§ 101.1009 System operations.

(a) The licensee may construct and operate any number of fixed stations anywhere within the area authorized by the license without prior authorization, except as follows:

(1) A station would be required to be individually licensed if:

(i) International agreements require coordination;

(ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter.

(iii) The station would affect the radio quiet zones under § 101.123.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 17.4 of this chapter.

(b) Whenever a licensee constructs or makes system changes as described in paragraph (a) of this section, the licensee is required to notify the Commission within 30 days of the change under § 101.61 and include a statement of the technical parameters of the changed station.

§ 101.1011 Construction requirements and criteria for renewal expectancy.

(a) LMDS licensees must make a showing of ''substantial service'' in their license area within ten years of being licensed. ''Substantial'' service is defined as service which is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal. Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.

(b) A renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, that is the most important comparative factor to be considered in the proceeding as long as the applicant's past record for the relevant license period demonstrates that:

(1) The renewal applicant has provided ''substantial'' service during its past license term; and

(2) The renewal applicant has substantially complied with applicable FCC rules, policies, and the Communications Act of 1934, as amended.

(c) In order to establish its right to a renewal expectancy, an LMDS renewal applicant involved in a comparative renewal proceeding must submit a showing explaining why it should receive a renewal expectancy. At a minimum, this showing must include:

(1) A description of its current service in terms of geographic coverage and population served:

(2) An explanation of its record of expansion, including a timetable of new construction to meet changes in demand for service:

(3) A description of its investments in its LMDS system; and

(4) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and a list of any pending proceedings that relate to any matter described in this paragraph.

(d) In making its showing of entitlement to a renewal expectancy, a renewal applicant may claim credit for any system modification applications that were pending on the date it filed its renewal application. Such credit will not be allowed if the modification application is dismissed or denied.

§ 101.1013 Permissible communications services.

(a) Authorizations for stations in the Local Multipoint Distribution Service will be granted to provide services on a common carrier basis or a non-common carrier basis or on both a common carrier and non-common carrier basis in a single authorization.

(b) Stations may render any kind of communications service consistent with the Commission's rules and the regulatory status of the station to provide services on a common carrier or non-common carrier basis.

(c) An applicant or licensee may submit a petition at any time requesting clarification of the regulatory status required to provide a specific communications service.

§ 101.1015 Application form and contents.

(a) Applications for initial authorization are filed on FCC Form 175 in accordance with Subpart M of this part, and part 1 of this chapter, subpart Q. FCC Form 600 is submitted subsequently either by the winning bidder, if an auction is held to decide among two or more mutually exclusive applications, or, in cases of no mutual exclusivity, by the sole applicant. Applications to amend pending applications and to modify licenses are filed on FCC Form 600.

(b) *Foreign ownership information.* All LMDS applicants will provide the information requested on FCC Form 600 to address all of the eligibility requirements in § 101.7. All licensees will keep the information updated.

§ 101.1017 Requesting regulatory status.

(a) *Initial applications.* An applicant will specify on FCC Form 600 if it is requesting authorization to provide services on a common carrier basis, a non-common carrier basis, or on both a common carrier and non-common carrier basis.

(b) *Amendment of pending applications.* (1) Any pending application may be amended to:

(i) Change the carrier status requested, or

(ii) Add to the pending request in order to obtain both common carrier and non-common carrier status in a single license.

(2) Amendments to change, or add to, the carrier status in a pending application are minor amendments filed under § 101.29.

(c) *Modification of license.* (1) A licensee may modify a license to:

(i) Change the carrier status authorized, or

(ii) Add to the status authorized in order to obtain both common carrier and non-common carrier status in a single license.

(2) Applications to change, or add to, the carrier status in a license are modifications not requiring prior Commission authorization filed under § 101.61. If the change results in the discontinuance, reduction, or impairment of an existing service, the licensee is also governed by § 101.305(b) or (c) and submits the application under § 101.61 in conformance with the time

frames and requirements of § 101.305(b) or (c).

40. Subpart M consisting of §§ 101.1101 through 101.1112 is added to part 101 to read as follows:

Subpart M—Competitive Bidding Procedures for LMDS

Sec.

101.1101 LMDS service subject to competitive bidding.
101.1102 Competitive bidding design for LMDS.
101.1103 Competitive bidding mechanisms.
101.1104 Bidding application (FCC Forms 175 and 175–S).
101.1105 Submission of payments.
101.1106 Long-form application (FCC Form 600).
101.1107 Bidding credits for small businesses and entities with average gross revenues of not more than $75 million.
101.1108 Installment payments for licenses won by small businesses and entities with average gross revenues of not more than $75 million.
101.1109 Certifications, disclosures, records maintenance and audits.
101.1110 Petitions to deny.
101.1111 Procedures for partitioned licenses.
101.1112 Definitions.

§ 101.1101 LMDS service subject to competitive bidding.

Mutually exclusive initial applications for LMDS licenses are subject to competitive bidding procedures. The procedures set forth in part 1, subpart Q, of this chapter will apply unless otherwise provided in this part.

§ 101.1102 Competitive bidding design for LMDS.

The Commission will employ a simultaneous multiple round auction design when choosing from among mutually exclusive initial applications to provide LMDS, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

§ 101.1103 Competitive bidding mechanisms.

(a) *Sequencing.* The Commission will establish and may vary the sequence in which LMDS licenses are auctioned.

(b) *Grouping.* The Commission will determine which licenses will be auctioned simultaneously or in combination based on interdependency and administrative circumstances.

(c) *Minimum bid increments.* The Commission may, by public announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(d) *Stopping rules.* The Commission may establish stopping rules before or during an auction in order to terminate the auction within a reasonable time.

(e) *Activity rules.* The Commission may establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder may request waivers of such rule during the auction. The Commission may, by public announcement either before or during the auction, specify or vary the number of waivers available to each bidder.

(f) *Bid withdrawal, default and disqualification payments.* The Commission will impose payments on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction terminates, or who are disqualified. Payments will be calculated as set forth in §§ 1.2104(g) and 1.2109 of this chapter. When the amount of such a payment cannot be determined, a deposit of up to 20 percent of the amount bid on the license will be required.

(g) *Tie bids.* Where a tie bid occurs, the high bidder will be determined by the order in which the bids were received by the Commission.

§ 101.1104 Bidding application (FCC Forms 175 and 175–S).

Each applicant to participate in competitive bidding for LMDS licenses must submit an application (FCC Forms 175 and 175–S) pursuant to the provisions of § 1.2105 of this chapter.

§ 101.1105 Submission of payments.

(a) Each applicant to participate in an LMDS auction will be required to submit an upfront payment in accordance with § 1.2106 of this chapter as announced by the Wireless Telecommunications Bureau by Public Notice.

(b) Winning bidders in LMDS auctions, except those businesses meeting the definition of small business or qualifying as a business with average gross revenues for the preceding three years of not more than $75 million under § 101.1112, must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 20 percent of their winning bids within ten business days following the release of a Public Notice announcing the close of the auction. Winning bidders, except those qualifying for installment payments, must pay the full balance of their winning bids within ten business days following the release of a Public Notice that the Commission is prepared to award the licenses.

(c) Winning bidders in LMDS auctions that meet the definition of small business or businesses with average gross revenues for the preceding three years of not more than $75 million under § 101.1112 must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 10 percent of their winning bids within ten business days following the release of a Public Notice announcing the close of the auction, and up to 20 percent of their winning bids within ten business days of the release of a Public Notice that the Commission is prepared to award the licenses. The remaining 80 percent of the purchase price will then be subject to the installment financing provisions of § 101.1108.

§ 101.1106 Long-form application (FCC Form 600).

Each successful bidder for an LMDS license must submit a long-form application (FCC Form 600) within ten business days after being notified by Public Notice that it is the winning bidder. Applications for LMDS on FCC Form 600 must be submitted in accordance with § 1.2107 of this chapter, all applicable procedures set forth in the rules in this part, and any applicable Public Notices that the Commission may issue in connection with an auction. After an auction, the Commission will not accept long-form applications for LMDS licenses from anyone other than the auction winners and parties seeking partitioned licenses pursuant to agreements with auction winners under § 101.1111 of this chapter.

§ 101.1107 Bidding credits for small businesses and entities with average gross revenues of not more than $75 million.

(a) A winning bidder that qualifies as a small business pursuant to § 101.1112 may use a bidding credit of 25 percent to lower the cost of its winning bid.

(b) A winning bidder that has average gross revenues for the preceding three years of more than $40 million but not more than $75 million pursuant to § 101.1112 may use a bidding credit of 15 percent to lower the cost of its winning bid.

(c) The bidding credits referenced in paragraphs (a) and (b) of this section are not cumulative.

(d) *Unjust enrichment.* (1) A licensee that utilizes a bidding credit, and that during the initial license term seeks to assign or transfer control of a license to an entity that does not meet the

eligibility criteria for a bidding credit, will be required to reimburse the U.S government for the amount of the bidding credit plus interest at the rate imposed for installment financing at the time the license was awarded, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest at the rate imposed for installment financing at the time the license was awarded, must be paid to the U.S. government as a condition of Commission approval of the assignment or transfer. If, within the initial license term, a licensee that utilizes a bidding credit seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the restructured licensee would qualify), plus interest at the rate imposed for installment financing at the time the license was awarded, must be paid to the U.S. government as a condition of Commission approval of the ownership change.

(2) The amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

(i) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of small businesses transferring to businesses having average gross revenues of more than $40 million but not more than $75 million, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(ii) In year three of the license term the payment will be 75 percent;

(iii) In year four the payment will be 50 percent; and

(iv) In year five the payment will be 25 percent, after which there will be no required payment.

§ 101.1108 Installment payments for licenses won by small businesses and entities with average gross revenues of not more than $75 million.

(a) A winning bidder that qualifies as a small business pursuant to § 101.1112 must submit to the Commission a down payment of 20 percent of the net auction price for the license pursuant to § 101.1105(c) and may pay the remaining 80 percent of the net auction price for the license in installment payments over the term of the license. Interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent. Payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term.

(b) A winning bidder that has average gross revenues for the three preceding years of more than $40 million but not more than $75 million pursuant to § 101.1112 must submit to the Commission a down payment of 20 percent of the net auction price for the license pursuant to § 101.1105(c) and may pay the remaining 80 percent of the net auction price for the license in installment payments. Interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent. Payment of interest and principal shall be amortized over the ten years of the license term.

(c) *Unjust enrichment.* A licensee that utilizes installment financing and that seeks to assign or transfer control of a license to an entity not meeting the eligibility standards for installment payments must pay not only unpaid principal but also any unpaid interest accrued through the date of assignment or transfer as a condition of Commission approval. If a licensee that utilizes installment financing seeks to assign or transfer control of a license to an entity qualifying for a less favorable installment plan, its payment plan will be adjusted to reflect the assignee's or transferee's eligibility status as a condition of Commission approval of the assignment or transfer. If a licensee that utilizes installment financing seeks to change its ownership structure in such a way that would result in a loss of eligibility for installment payments, it must pay the unpaid principal and accrued interest as a condition of Commission approval of the change. If such a change in ownership would result in the licensee qualifying for a less favorable installment plan, it must adjust its payment plan to reflect its new eligibility status as a condition of Commission approval. A licensee may not change its payment plan to a more favorable plan.

(d) *Late installment payment.* Any licensee that submits a scheduled installment payment more than fifteen days late will be charged a late payment fee equal to five percent of the amount of the past due payment.

(e) Payments will be applied in the following order: late charges, interest charges, principal payments.

§ 101.1109 Certifications, disclosures, records maintenance and audits.

(a) *Short-form applications: certifications and disclosure.* In addition to certifications and disclosures required in part 1, subpart Q, of this chapter, each applicant for an LMDS license which qualifies as a small business or a business with average gross revenues for the three preceding years of more than $40 million but not more than $75 million shall append the following information as an exhibit to its FCC Form 175:

(1) The identity of the applicant's affiliates and controlling principals; and

(2) The applicant's gross revenues, computed in accordance with § 101.1112.

(b) *Long-form applications: certifications and disclosure.* In addition to the requirements in § 1.2107 of this chapter, each applicant submitting a long-form application for an LMDS license and qualifying as a small business or a business with average gross revenues for the three preceding years of more than $40 million but not more than $75 million shall, in an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 101.1112, for each of the following: the applicant, the applicant's affiliates, the applicant's controlling principals, and, if a consortium of small businesses or businesses with average gross revenues for the three preceding years of more than $40 million but not more than $75 million, the members of the joint venture;

(2) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business or a business with average gross revenues for the three preceding years of more than $40 million but not more than $75 million, including the establishment of *de facto* and *de jure* control; such agreements and instruments include, but are not limited to, articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements including letters of intent, oral or written; and

(3) List and summarize any investor protection agreements, including rights

of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(c) *Records maintenance.* All winning bidders qualifying as small businesses or businesses with average gross revenues for the three preceding years of more than $40 million but not more than $75 million shall maintain at their principal place of business an updated file of ownership, revenue, and asset information, including any document necessary to establish eligibility as a small business or business with average gross revenues for the three preceding years of more than $40 million but not more than $75 million. Licensees (and their successors-in-interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application (FCC Form 175), whichever is earlier.

(d) *Audits.* (1) Applicants and licensees claiming eligibility as a small business or business with average gross revenues for the three preceding years of more than $40 million but not more than $75 million shall be subject to audits by the Commission. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed LMDS service, and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

§ 101.1110 Petitions to deny.

Procedures regarding petitions to deny long-form applications in the LMDS service will be governed by § 1.2108 (b) through (d) of this chapter.

§ 101.1111 Procedures for partitioned licenses.

(a) LMDS licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum.

(b) If partitioned licenses or disaggregated licenses are being applied for in conjunction with a license(s) to be awarded through competitive bidding procedures—

(1) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this chapter shall be followed by the applicant, which must disclose as part of its short-form application all parties to agreement(s) with or among entities to partition or disaggregate the license pursuant to this section, if won at auction. See § 1.2105(a)(2)(viii).

(2) Each entity that is a party to an agreement to partition the license shall file a long-form application for its respective, mutually agreed-upon geographic area or spectrum together with the application for the remainder of the BTA or spectrum filed by the auction winner.

(c) If the partitioned or disaggregated license is being applied for as a partial assignment of the license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to § 101.115(f).

§ 101.1112 Definitions.

(a) *Scope.* The definitions in this section apply to §§ 101.1101 through 101.1112, unless otherwise specified in those sections.

(b) *Small business; consortium.* (1) A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $40 million.

(2) For purposes of determining whether an entity meets the definition of small business or qualifies as a business with average gross revenues for the three preceding years of more than $40 million but not more than $75 million, the gross revenues of the applicant, its affiliates and controlling principals shall be considered on a cumulative basis and aggregated.

(3) *Consortium.* A consortium of small businesses, or a consortium of businesses with average gross revenues for the three preceding years of more than $40 million but not more than $75 million, is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a small business or business with average gross revenues for the three preceding years of more than $40 million but not more than $75 million. Each individual member must establish its eligibility as a small business or business with average gross revenues for the three preceding years of more than $40 million but not more than $75 million. Where an applicant (or licensee) is a consortium of small businesses or a consortium of businesses with average gross revenues for the three preceding years of more than $40 million but not more than $75 million, the gross revenues of each business shall not be aggregated.

(c) *Gross revenues.* Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years, or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form application (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

(d) *Affiliate*—(1) *Basis for affiliation.* An individual or entity is an affiliate of an applicant if such individual or entity:

(i) Directly or indirectly controls or has the power to control the applicant, or

(ii) Is directly or indirectly controlled by the applicant, or

(iii) Is directly or indirectly controlled by a third party or parties who also control or have the power to control the applicant, or

(iv) Has an ''identity of interest'' with the applicant.

(2) *Nature of control in determining affiliation.* (i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example for paragraph (d)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to

block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer, or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions if the voting stock is so widely distributed that no effective control can be established.

Example for paragraph (d)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are controlling principals of the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

(i) *Spousal affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context ''immediate family member'' means father, mother, husband, wife, son, daughter, brother, sister, father-or mother-in-law, son-or daughter-in-law, brother-or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half-brother or -sister. This presumption may be rebutted by showing that:

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

Example for paragraph (d)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has a controlling interest in an LMDS license application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.* (i) An applicant is presumed to control or have the power to control a concern if she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he owns, controls, or has the power to control less than 50 percent of the concern's voting stock, if the block of stock she owns, controls, or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (d)(5). If company B holds an option to purchase a controlling interest in company A, who holds a controlling interest in an LMDS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2 for paragraph (d)(5). If a large company, BigCo, holds 70 percent (70 of 100 outstanding shares) of the voting stock of company A, who holds a controlling interest in an LMDS license application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule, which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (d)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.* (i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors or the management (or both) of another entity.

(8) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space, employees, or other facilities (or any combination of the foregoing) with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one

concern has control, or potential control, of the other concern.

(10) *Affiliation under joint venture arrangements.* (i) A joint venture for size determination purposes is an association of concerns or individuals (or both), with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 87–267; FCC 97–68]

Implementation of the AM Expanded Band Allotment Plan

AGENCY: Federal Communications Commission.

ACTION: Final rule; petitions for reconsideration.

SUMMARY: In Implementation of the AM Expanded Band Allotment Plan, FCC 97–68, the Federal Communications Commission granted in part and denied in part petitions for reconsideration of Comments in Response to Reconsideration of Implementation of the AM Expanded Band and Allotment Plan, FCC 96–113, April 18, 1996 (61 FR 16878), and Public Notice, Mass Media Bureau Announces Revised Expanded AM Broadcast Band Improvement Factors and Allotment Plan, DA 96–408 (released March 22, 1996). By this action the Commission rescinds the second allotment plan for the AM expanded band, i.e., 1605–1705 kHz, modifies the frequency preclusion program, and eliminates software and coding errors in the frequency preclusion and allotment computer programs. This action was taken to ensure that the stations assigned expanded band frequencies would protect existing stations, conform to international agreements, and provide interference-free reception within their service areas.

EFFECTIVE DATE: March 17, 1997.

FOR FURTHER INFORMATION CONTACT: Peter H. Doyle, Audio Services Division, Mass Media Bureau, (202) 418–2625.

SUPPLEMENTARY INFORMATION: Concurrent with the release of Implementation of the AM Expanded Band Allotment Plan, the Commission's Mass Media Bureau released a Public Notice announcing a revised eighty-eight station Expanded Band Allotment Plan in the frequency band between 1605 and 1705 kHz. The Revised Expanded Band Allotment Plan identifies stations eligible for specific allotments. See Public Notice DA 97–537, released March 17, 1997. Such licensees will also be notified individually by letter. Identified stations are afforded until June 16, 1997 to file an application for construction permit on the allotted channel. Applications will be subject to petitions to deny but not to competing applications. Each Expanded Band permittee, following grant of construction permit applications and construction of authorized facilities, will be required to file an application for covering license on FCC Form 302. Expanded Band licensees will receive authorizations permitting dual frequency operations for a period not to exceed five years. The full text of the Implementation of the AM Expanded Band Allotment Plan, FCC 97–68, adopted February 27, 1997 and released March 17, 1997 is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW, Washington, D.C. (See MM Docket 87–267). The complete text of this order may also be purchased from the Commission's copy contractor, International Transcription Service (ITS), 2100 M Street, NW, Suite 140, Washington, D.C. 20037.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–10844 Filed 4–28–97; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 970226037–7094–02; I.D. 022197F]

RIN 0648–AJ39

Fisheries of the Exclusive Economic Zone Off Alaska; Management Measures to Reduce Seabird Bycatch in the Hook-and-Line Groundfish Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues regulations to require operators of hook-and-line vessels fishing for groundfish in the Bering Sea and Aleutian Islands management area (BSAI) and the Gulf of Alaska (GOA), and operators of hook-and-line vessels that are required to obtain a Federal permit and are fishing for groundfish in Alaskan waters adjacent to the BSAI and to the GOA, to conduct fishing operations in a specified manner, and to employ specified bird avoidance techniques to reduce seabird bycatch and incidental seabird mortality. This measure is necessary to mitigate hook-and-line fishery interactions with the short-tailed albatross, an endangered species protected under the Endangered Species Act (ESA), and other seabird species. This measure is intended to accomplish the objectives of the ESA and of the Fishery Management Plan for Groundfish of the Gulf of Alaska and the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (Groundfish FMPs) with respect to the management of the GOA groundfish fishery and the BSAI groundfish fishery and the marine environment.

EFFECTIVE DATE: May 29, 1997.

ADDRESSES: Copies of the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for the final rule may be obtained from the North Pacific Fishery Management Council, Suite 306, 605 West 4th Avenue, Anchorage, AK 99501–2252; telephone: 907–271–2809.

FOR FURTHER INFORMATION CONTACT: Kim S. Rivera, 907–586–7228.

SUPPLEMENTARY INFORMATION: The U.S. groundfish fisheries of the GOA and the BSAI in the Exclusive Economic Zone