

FCC MAIL SECTION

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 92-173  
38378

In the Matter of )  
)  
Amendment of Parts 1, 2, and )  
21 of the Commission's Rules )  
Governing Use of the Frequencies )  
in the 2.1 and 2.5 GHz Bands )

PR Docket No. 92-80 ✓  
RM 7909

**NOTICE OF PROPOSED RULE MAKING**

Adopted: April 9, 1992 Released: May 8, 1992

Comment Date: June 29, 1992  
Reply Comment Date: July 14, 1992

By the Commission: Commissioners Quello and Duggan issuing separate statements.

**I. INTRODUCTION**

1. We are issuing this Notice of Proposed Rule Making to solicit public comment on a range of proposals designed to reduce the delays associated with the processing of applications for stations in the Multipoint Distribution Service (MDS),<sup>1</sup> thereby allowing entities licensed in the MDS, particularly wireless cable operators, to realize their competitive potential. Specifically, under consideration are proposals to (1) reorganize various aspects of the MDS processing and regulatory scheme; (2) streamline the rules and technical standards governing MDS operations; and (3) remedy several difficulties that have arisen with respect to the processing of pending MDS applications by modifying our existing processing procedures.

**II. BACKGROUND**

2. Generally, an MDS station provides an omni-directional, one-way radio transmission of information for simultaneous reception at multiple fixed points within the station's service area.<sup>2</sup> The frequencies originally allocated for MDS use include, in fifty of the largest metropolitan areas, two single-channel, 6 MHz-wide channels designated channel 1 (2150-2156 MHz) and channel 2 (2156-2162 MHz), and in all other regions, one single-channel, 6

<sup>1</sup> Throughout this proceeding, "MDS" will be used to refer collectively to the single channel (MDS) and multichannel (MMDS) MDS authorizations unless otherwise indicated. We propose to amend our rules to reflect this practice.

<sup>2</sup> In re Applications of Midwest Corp. and Two-way Radio of Carolina, Inc., 53 FCC 2d 294, 296 (1975).

MHz-wide MDS channel (channel 1), and one single-channel, 4 MHz-wide Channel 2A (2156-2160 MHz).<sup>3</sup> In addition, in 1983, the Commission reallocated eight channels (the E group and the F group channels)<sup>4</sup> from the Instructional Television Fixed Service (ITFS) to the MDS.<sup>5</sup> Most recently, in October of 1991, the H-channels, formerly a part of the Private Operational-Fixed Microwave Service (OFS), were reallocated to the MDS.<sup>6</sup>

3. Originally, it was anticipated that frequencies in the MDS would be used primarily for the transmission of business data, video teleconferencing, and other forms of high-speed computer information.<sup>7</sup> In response to the growing demand for video entertainment programming, however, MDS frequencies are now predominantly used for the provision of "wireless cable," a multichannel video distribution medium that resembles cable television, but that uses microwave channels rather than coaxial cable or wire to transmit programming to subscribers.<sup>8</sup>

4. On several occasions, we have recognized the strong public interest in removing regulatory obstacles to the development of wireless cable as a

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<sup>3</sup> See generally Report and Order, Docket No. 19493, 45 FCC 2d 616 (1974). Throughout this proceeding, we refer to channels 2 and 2A collectively as channel 2.

<sup>4</sup> The specific frequencies associated with the E channels are: channel E1 (2596-2602 MHz); channel E2 (2608-2614 MHz); channel E3 (2620-2626 MHz); and channel E4 (2638-2644 MHz). The specific frequencies associated with the F channels are: channel F1 (2602-2608 MHz); channel F2 (2614-2626 MHz); channel F3 (2626-2632 MHz); and channel F4 (2638-2644 MHz).

<sup>5</sup> See generally Report and Order, Gen Docket No. 80-112, 94 FCC 2d 1203 (1983).

<sup>6</sup> Second Report and Order, Gen Docket No. 90-54, 6 FCC Rcd 6792, 6795 (1991).

<sup>7</sup> Report and Order, CC Docket No. 86-179, 2 FCC Rcd 4251, 4252 (1987).

<sup>8</sup> See Report and Order, CC Docket No. 86-179, 2 FCC Rcd 4251, 4252 (1987). See also Second Report and Order, Gen Docket No. 90-54, 6 FCC Rcd at 6792-93. The use of the term "wireless cable" in this context does not imply that the service constitutes cable television for any statutory or regulatory purpose. See Report and Order, MM Docket No. 89-35, 5 FCC Rcd 7638, 7639-41 (1990) (the definition of a "cable system" does not include infrared transmissions such as MDS), remanded on other grounds sub nom. Beach Communications, Inc., et al. v. FCC, No. 91-1089 (D.C. Cir. March 6, 1992). Typically, wireless cable operators use some combination of the thirteen MDS channels available on a full-time basis and twenty channels in the ITFS available to them on a leased, part-time basis to transmit video entertainment programming to subscribers.

viable competitor to traditional cable television systems.<sup>9</sup> To promote our ongoing efforts to facilitate wireless cable as a competitive multichannel source of video programming, we recently amended our rules to eliminate numerous impediments to the effective delivery of wireless cable service. For example, in October of 1990, we released a Report and Order that increased the availability of MDS channels for use in wireless cable systems by eliminating MDS ownership restrictions and simplifying certain rules governing the application process, the initiation of service on new channels, and the modification of existing operations.<sup>10</sup> In addition, on September 26, 1991, we adopted a Second Report and Order that, among other things, reallocated the three OFS H-channels to the MDS so that these channels may be used for the distribution of video entertainment material and other MDS-type programming with relaxed administrative and operational burdens.<sup>11</sup>

5. Despite these measures, the competitive potential of wireless cable remains largely unrealized. To a substantial extent, this is because approximately 20,000 MDS applications, some dating back as far as the 1980 and 1983 filing periods, remain pending before the Commission.<sup>12</sup> This large and aging backlog is the result of the interplay between our existing MDS

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<sup>9</sup> See, e.g., Notice of Proposed Rule Making and Notice of Inquiry, Gen Docket Nos. 90-54, 80-113, 5 FCC Rcd 971 (1990). See also Report and Order, PR Docket No. 90-5, 6 FCC Rcd 1270, 1271 (1991) (permitting OFS eligibles to engage in the distribution of video entertainment material in an effort to increase the competitive potential of alternative multichannel operators vis-a-vis cable systems); Report, MM Docket No. 89-600, 5 FCC Rcd 4962, 4972 (1990) (discussing the fact that cable systems possess a disproportionate share of market power).

<sup>10</sup> See Report and Order, Gen Docket Nos. 90-54, 80-113, 5 FCC Rcd 6410 (1990). See also Order on Reconsideration, Gen Docket Nos. 90-54, 80-113, 6 FCC Rcd 6764 (1991).

<sup>11</sup> Second Report and Order, Gen Docket Nos. 90-54, 80-113, 6 FCC Rcd at 6792.

<sup>12</sup> There have been four separate MDS application filing periods: (1) the single channel MDS filing period which started in 1974 and continues to the present; (2) the September 9, 1983 one-day filing period for MMDS applications, see Report and Order, Gen Docket No. 80-112, 94 FCC 2d at 1266; (3) the post-April 20, 1988 through October 31, 1990 filing period, see Public Notice, DA 88-562, 2 FCC Rcd 2661 (1988); and (4) the filing period applicable to applications filed November 1, 1990 through the present, see Report and Order, Gen Docket Nos. 90-54, 80-113, 5 FCC Rcd at 6424. The rules and procedures applicable to each described group of applicants are slightly different. Under existing procedures, single-channel MDS licenses are awarded via comparative hearings, and MMDS licenses are awarded through random selection procedures.

processing rules and policies,<sup>13</sup> the fact we have been unable to allocate sufficient resources to the processing of MDS applications, and a torrent of MDS filings, the majority of which are believed to be speculative.<sup>14</sup> The impact of this backlog on the wireless cable industry has been devastating. Wireless cable operators have been unable to gain access to the number of channels necessary for them to meet subscriber demand and match competitors' offerings.<sup>15</sup> Meanwhile, delays in the processing of MDS applications have allowed traditional cable systems to further strengthen their position in the multichannel video distribution marketplace, making the task of providing meaningful competition more difficult for rival operators. We initiate the instant proceeding with the primary objective of facilitating the licensing of MDS entities and, we hope, reversing these trends. The proposals advanced herein are designed to expedite the provision of wireless cable service by deterring speculative filings and, where possible, streamlining the processing of MDS applications, while at the same time honoring our commitment to safeguard the operations of ITFS licensees.<sup>16</sup>

### III. DISCUSSION

6. **Relocation of MDS processing.** As indicated, we are considering various proposals to reorganize the MDS processing and regulatory scheme.

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<sup>13</sup> Among the rules and procedures that have contributed to the backlog of MDS applications are the following: (1) the fact that comparative hearings, which are extremely time-consuming and resource-intensive, are used to select among the single-channel MDS applications; (2) the existence of rules requiring Commission engineering staff to review analyses submitted by applicants and petitioners in order to assure protection to ITFS licensees, see 47 C.F.R. § 21.901; (3) relatedly, the existence of rules requiring Commission staff to verify antenna patterns and type-acceptance of proposed equipment, see 47 C.F.R. § 21.906, 21.908; and (4) rules allowing the filing of numerous petitions to deny and petitions for reconsideration.

<sup>14</sup> Our records reflect that in Fiscal Year 1990 almost 6,000 MDS applications were filed, and that approximately 12,000 MDS applications were filed in Fiscal Year 1991. Applications are currently being filed at the rate of approximately 1,000 per month. The filing of MDS applications appears to be particularly appealing to application mills in part because our existing rules authorize lotteries and settlement groups. See 47 C.F.R. §§ 21.33(b), 21.901(d)(2), 21.901(f)(1). In this proceeding, we are considering rule changes that would prohibit partial settlements. See infra paras. 17, 21. See also Petition for Rule Making, RM 7909, filed by the Wireless Cable Association (December 12, 1991).

<sup>15</sup> See Report and Order, Gen Docket Nos. 90-54, 80-113, 5 FCC Red at 6411. See also Report and Order, PR Docket No. 90-5, 6 FCC Red at 1272 (eliminating the limitation on the number of frequencies per site available to OFS eligibles seeking to engage in the distribution of video entertainment material).

<sup>16</sup> See infra para. 15.

Specifically, we have developed four options to this effect: (1) to relocate some or all aspects of the processing of MDS applications to the Private Radio Bureau's Licensing Division in Gettysburg, Pennsylvania, and to have either the Common Carrier Bureau or the Mass Media Bureau process the remaining aspects and regulate the service, (2) to relocate both MDS processing and regulation to the Private Radio Bureau, (3) to relocate MDS processing and regulation entirely to the Mass Media Bureau, and (4) to leave both MDS processing and regulation in the Common Carrier Bureau.

7. Our proposals to relocate some or all aspects of MDS processing to the Private Radio Bureau's Licensing Division stem from the fact that the procedures currently used to process Part 94 private radio applications have been used in the context of 900 MHz point-to-multipoint and H-channel applications, both of which are processed similarly to MDS. As such, we view relocating the processing of MDS applications to the Private Radio Bureau as an available method for assisting our goal of eliminating the existing backlog of MDS filings, thereby accelerating the effective delivery of service. We request commenters' views on all aspects of this proposal.

8. Although under our first proposal MDS operators would be regulated by either the Common Carrier Bureau or the Mass Media Bureau, we are also interested in commenters' views as to whether the MDS has evolved in a manner that makes it appropriate for us to reclassify the service as a wholly private radio service to be regulated under Part 94. In posing this broad question, we specifically request commenters to discuss whether (1) a functional distinction between common carrier and non-common carrier MDS offerings continues to exist, and (2) under National Association of Regulatory Utility Commissioners v. FCC,<sup>17</sup> even common carrier MDS licensees appear indistinguishable from traditional private carriers.<sup>18</sup> We also ask commenters to discuss any potential benefits that would inure to wireless cable operators as a result of being reclassified as private radio licensees.

9. Recognizing that there are other methods for eliminating the MDS application backlog, we are also considering the third option delineated above, to relocate MDS processing and regulation to the Mass Media Bureau. We

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<sup>17</sup> 525 F.2d 630, 641-42 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). We expressly recognized that non-common carrier MDS operators are essentially private carriers when we created the status election. See Report and Order CC Docket No. 86-179, 2 FCC Rcd at 4262 n. 11. Application of National Association of Regulatory Utility Commissioners v. FCC to common carrier MDS providers could lead to an identical conclusion because (1) these licensees may not appear to have market power, negating the public interest reasons for requiring them to hold themselves out as providing service to the public indiscriminately, and (2) they may not in fact appear to engage in a nondiscriminatory holding-out of service to the public.

<sup>18</sup> See In re Orth-o-vision, Inc., 69 FCC 2d 657, 666 (1978), recon. denied, 82 FCC 2d 178 (1980) (pre-empting state and local rate and entry regulation of MDS operations), review denied sub nom. New York State Comm'n on Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982).

request commenters to discuss the relative merits of this proposal. In particular, we seek commenters' views as to whether the fact that the Mass Media Bureau is the situs for the processing and regulation of ITFS operations makes it most logical for us to process and regulate the MDS in the Mass Media Bureau as Mass Media service.

10. Finally, we also seek commenters' views as to whether the processing of MDS applications should remain the province of the Common Carrier Bureau. In particular, we request commenters to discuss whether, in their view, the rule changes we are considering in this proceeding would alone be sufficient to expedite MDS processing.

11. **Proposed Rule Changes.** Regardless of which Bureau processes and/or regulates the MDS, we are also considering the adoption of certain new rules and technical standards to be used to govern MDS operations. These new rules are set forth for public comment in Appendix B and need not be reiterated in detail here.<sup>19</sup> We believe, however, that it would be beneficial to highlight several pronounced departures from existing Part 21 rules and practices that are being considered as part of our effort to streamline the MDS regulatory scheme. In developing each of the suggested rule changes, we have attempted to balance in an equitable manner the interests of existing MDS operators as well as those of MDS applicants. Commenters are explicitly asked to discuss the impact on both of these groups of each rule change under consideration.

12. First, it is possible that the processing of MDS applications could be expedited by modifying the interference protection criteria currently contained in 47 C.F.R. § 21.902. Under the existing criteria, MDS applicants are required to submit detailed analyses of the potential for harmful interference to co- and adjacent channel stations. The advantage of the existing criteria is that they afford licensees a high degree of flexibility in designing their systems. On the other hand, the disadvantage of the existing criteria is that their use is believed to slow processing because Commission engineers are required to evaluate each applicant's submissions. One alternative to interference analyses is the use of separation standards. Under this alternative, MDS applicants would no longer be required to engineer their systems to provide 45 dB desired-to-undesired signal (C/I) ratio of co-channel interference protection. Rather, they would be required to certify that their proposed facilities would be located at least 80 km<sup>20</sup> from all

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<sup>19</sup> Although Appendix B reflects the proposed rule changes in the context of Part 21, the proposed rules are equally suitable for inclusion in either Part 74 or Part 94 of our Rules.

<sup>20</sup> In developing the 80 km co-channel separation criterion, we assumed that the height-above-average-terrain (HAAT) of an MDS transmitting antenna would be 180 meters. At that height, assuming "flat-earth," line-of-sight signals extend to a distance of 56 km. Thus, if two co-channel MDS transmitters are located 80 km apart, a signal from the first transmitter would not reach any receiving antennas located within a radius of 24 km of the second system's transmitter. We request commenters to discuss the appropriateness of our assumed value for transmitting antenna HAAT. A higher

existing<sup>21</sup> and previously applied-for co-channel stations.<sup>22</sup> Similarly, MDS applicants would no longer be required to engineer their systems to provide C/I protection of 0 dB to adjacent channel licensees.<sup>23</sup> Applicants would instead be required to certify that their proposed facilities are at least 48 km<sup>24</sup> from all existing and previously applied-for adjacent channel stations.<sup>25</sup>

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transmitting antenna HAAT would result in greater coverage by an interfering signal and would thus require co-channel MDS transmitters to be located farther apart. Similarly, a lower transmitting antenna HAAT would allow co-channel transmitters to be located closer together. In addition, we seek comment as to whether an HAAT limitation should be placed on MDS transmitting antennas to prevent the possibility of interference resulting from MDS transmitting antennas operating at HAATs greater than 180 meters (or whatever HAAT value is used to determine the co-channel separation). We also seek comment as to whether the height of receiving antennas should be taken into consideration in determining the appropriate co-channel separation distance. Under this proposal, we would continue to permit MDS licensees to employ signal boosters and would also continue to require that signal booster signals not extend beyond a licensee's service area. We would not, however, continue to require licensees to license individual signal booster stations.

<sup>21</sup> For purposes of calculating the co- and adjacent channel separation requirements between MDS applicants and existing licensees, the latter would include all conditional licenses and licenses granted under Part 21 as of the effective date of the new MDS rules.

<sup>22</sup> Under these rules, we would employ available remedies, such as possible denial with prejudice of all applications filed by the offending applicant in all markets, or referral to the Department of Justice for possible criminal prosecution pursuant to 18 U.S.C. § 1001, in response to the submission of a false certification.

<sup>23</sup> To provide adequate protection to existing MDS licensees, we would retain the power limitations currently set forth in Part 21. Thus, the maximum allowable EIRP would continue to be 33 dBW, and no limit would be placed on transmitter output power.

<sup>24</sup> The 48 km value is determined to be the distance between two adjacent channel MDS transmitters where the receiving antennas of each system located at the common edge of their 24 km service areas would receive on-channel and adjacent channel signals of equal strength. When this occurs, the protection at such receive sites will be equal to that currently afforded receive sites under our existing 0 dB D/U criterion. In determining this separation criterion, we assumed that the co-channel and adjacent channel base transmitters would be operating with the same equivalent isotropic radiated power (EIRP) in the direction of the receiving antennas and that the receiving antennas are omni-directional. We solicit comment as to whether these assumptions and the corresponding 48 km adjacent channel separation criterion are appropriate.

If the suggested separation standards are adopted, the 48 kilometer separation requirement would not apply to an applicant proposing to co-locate with the transmitter of an existing or previously applied-for adjacent channel station.<sup>26</sup>

13. We solicit comment with respect to all aspects of the separation standards delineated above. In particular, commenters are asked to set forth their views as to the sufficiency and necessity of the suggested criteria, and to discuss the perceived impact thereof on proposed and existing MDS operations in terms of, inter alia, the avoidance of harmful interference and spectrum efficiency.

14. In addition, either in conjunction with the proposed separation standards or as an alternative thereto, we request commenters to discuss whether we should adopt a table to facilitate short-spacing of stations. Such a table is currently used to process short-spaced applications in the Specialized Mobile Radio Service, and we have found that the table promotes

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<sup>25</sup> Following the effective date of the new MDS rules, applicants for MDS channels would be required to certify, by a specified date, satisfaction of the new separation standards with respect to both existing co-channel and adjacent channel licensees as well as all previously filed pending applications. Applications filed or tentative selectees selected prior to the effective date of the new rules would not be summarily dismissed for failure to have demonstrated satisfaction of these new standards. However, after an opportunity to amend has been provided, the new criteria would be applied to such applications, and those specifying sites within 80 km of existing co-channel licensees or within 48 km of existing adjacent channel licensees would be dismissed. Similarly, applications filed prior to the effective date of the new rules would not be summarily dismissed for failure to have demonstrated satisfaction of the separation standards with respect to all previously applied-for co-channel and adjacent channel stations. Rather, all MDS applications for co-channel or adjacent channel stations inside the required separation distances from previously applied-for stations would be considered mutually exclusive if timely filed. Depending on the initial date of filing, they may be subject to lottery pursuant to 47 C.F.R. § 1.972. We would be permitted to apply the new separation standards to previously filed applications under United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). Applicants would be given a limited opportunity to amend their applications to take the new rules into consideration and, if necessary, bring their applications into compliance therewith. See infra para. 20.

<sup>26</sup> In order for an applicant to be considered co-located with an adjacent channel facility, the coordinates of both transmitters must be identical and the later applicant must demonstrate that it will not interfere with the adjacent channel existing facility or previously filed application. Under our proposal, failure to make such a showing would result in dismissal. In addition, it is conceivable that we would be required to restrict the operational parameters of proposed facilities to minimize interference.

spectrum efficiency and operational flexibility.<sup>27</sup> Accordingly, we have devised a proposed short-spacing derating table, which is included in Appendix B, for use by MDS applicants. Commenters are asked to discuss the permissible separations reflected in the table, and to suggest alternatives. In this connection, we emphasize that the flexibility afforded to applicants as the result of procedures such as short-spacing necessarily exacts a toll on the speed of processing. We solicit commenters' impressions as to the desirability of routine short-spacing in view of the impact thereof on both existing operators and our effort to facilitate the processing of MDS applications. Finally, we ask commenters to discuss the relative merits of a proposal to retain our existing co- and adjacent channel interference criteria, and to address the impact that the retention of these standards would have on our goal of expediting the processing of both backlogged and new MDS applications.

15. In a related vein, we are also considering requiring MMDS applicants to satisfy the 80- and 48-kilometer separation standards with respect to all existing co-channel and adjacent channel ITFS licensees.<sup>28</sup> Moreover, as part of our ongoing commitment to the development of ITFS as an effective source of the distribution of educational material, we are considering requiring MDS applicants to provide existing co- and adjacent channel ITFS entities the following additional measures of protection: (1) all existing co-channel ITFS registered receive sites must be protected in accordance with the 45 dB desired to undesired signal (C/I) ratio, and (2) all adjacent channel ITFS registered receive sites must be protected in accordance with the 0 dB (or 10 dB, where applicable) C/I ratio. MDS licenses would be conditioned on meeting these criteria in actual practice.<sup>29</sup> We believe that the use of these

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<sup>27</sup> See Report and Order, PR Docket No. 90-34, 6 FCC Rcd 4929 (1991).

<sup>28</sup> For this purpose, we would treat pending and future MDS applications in a manner identical to that set forth in note 25, *supra*. We also request comment on whether existing adjacent channel MDS licenses, conditional licensees and applicants should receive protection from ITFS applications in this fashion.

<sup>29</sup> In addition, all ITFS registered receive sites in existence at the time the MDS transmitter is licensed would be given actual protection in accordance with 47 C.F.R. § 74.903(a)(2). Furthermore, MDS licensees would be required to contact any ITFS co-channel or adjacent channel licensee within 112 km (70 mi.) or 80 km (50 mi.), respectively, of the MDS transmitter site at least 14 days prior to operating and to notify the ITFS licensee of the exact time that operations will begin. If no interference occurs to the ITFS operator, or if the ITFS operator fails to complain, the MDS license would become unconditional with respect to the need to protect ITFS co- or adjacent channel licensees after 30 days of continuous on-air operation. During this 30-day period, however, the MDS operator would be required to make every effort to ensure that the ITFS operator is aware of the actual hours of operation. If interference were to occur, the Commission could require the MDS operator to cease operating immediately without a hearing. We solicit comment, however, as to whether a method for more immediate relief should be

protection standards could serve the public interest in two discrete respects. First, as discussed in the preceding paragraph, the simplification of the interference criteria could help facilitate the expeditious processing of MDS applications, thereby speeding the provision of service to the public. In addition, the use of stringent ITFS protection standards would likely promote the public interest by enhancing the quality of ITFS transmissions. Commenters are asked to discuss all aspects of the proposed separation standards as they pertain to ITFS entities.

16. We are also considering replacing the requirements currently set forth in 47 C.F.R. §§ 21.15(a) and 21.900, pursuant to which an MDS applicant must demonstrate (1) that the applicant is legally, financially, technically, and otherwise qualified to render the proposed service; (2) that there are frequencies available to enable the applicant to render satisfactory service; and (3) that it has a station site available, with a certification that these things are true. A similar certification requirement is used under Part 94, and has proved as effective as the more onerous requirements contained in the rule parts cited above. We solicit commenters' views on these suggestions, and in addition request commenters to address whether some of these requirements should simply be eliminated altogether.

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considered. An MDS operator that failed to comply with a request that it cease operations would be subject to forfeiture or license revocation in accordance with our rules. Before resuming normal operations, an MDS operator that had ceased operating because of interference to the protected ITFS operations would be required to reduce its signal to the required levels, as measured at the output terminals of the ITFS receive antenna. This may be accomplished by any mutually-acceptable means, such as a reduction of the MDS station power, use of a directional antenna at the MDS transmission site, provision of an improved antenna for the ITFS receive site(s), or any combination thereof. Failure of the MDS operator to take such measures would result in license cancellation for failure to comply with the express condition requiring the avoidance of harmful interference to licensed ITFS stations. The ITFS operator would be required to cooperate in all tests and measurements. Any ITFS operator that failed to cooperate fully would receive protection based on measurements using an equivalent antenna in the immediate area of the ITFS receive antenna and would lose the right to request cessation of the MDS station's operations. Under this scheme, we propose that the ITFS licensee would have the initial burden of going forward to demonstrate interference from an MMDS licensee. Once this initial burden has been met, the burden of disproving such interference would shift to the MMDS licensee. Commenters are requested to discuss whether these proposals suffice to provide adequate protection to ITFS operations as well as whether they are sufficiently flexible to permit MDS operators to function effectively. In addition, we specifically request commenters to discuss whether a greater number of days of continuous on-air MDS operation, such as 60, 90, or 120, should be required during which an ITFS operator may complain about co- or adjacent channel MDS interference. Finally, commenters disagreeing with any of the proposals set forth in this footnote are specifically asked to delineate suggested alternatives.

17. As additional components of our effort to streamline MDS regulations and processing procedures, we also are considering disallowing settlement agreements among MDS applicants, and prohibiting applicants from holding any type of interest, including serving as an officer, director, shareholder, trustee, beneficiary, owner, general or limited partner, or similar position, in more than one application for the same channel or channels at sites within the same service area.<sup>30</sup> Again, if these rule changes are adopted, pending applicants would be given an opportunity to bring their applications into compliance therewith.<sup>31</sup> Our proposals with respect to partial settlements and interests in more than one application are consistent with those advanced in a Petition for Rule Making filed by the Wireless Cable Association, and are designed to deter the filing of speculative applications by restricting lottery entry to entities with a sincere interest in using MDS frequencies for their intended purposes.<sup>32</sup> In turn, with the curtailment of the number of speculative filings, which at present is believed to be prodigious, we anticipate the rate of incoming MDS applications to subside to an extent that will not overstrain our resources. We request commenters to discuss the anticipated effectiveness of the proposed measures set forth in this paragraph, and to suggest any alternative proposals for reducing the quantity of speculative MDS filings.<sup>33</sup>

18. **Interim Measures.** In addition to the proposed regulatory changes set forth above, which under our proposal would apply to all MDS operations, we are entertaining several interim measures to be used solely for the purpose of processing the backlog of pending MDS applications. We believe that these interim procedures are necessary in light of the exigent circumstances

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<sup>30</sup> See 47 C.F.R. § 21.902(d).

<sup>31</sup> See supra note 25.

<sup>32</sup> Our records make evident that speculative filings have delayed the provision of MDS service. First, numerous applicants selected for qualification review in an initial lottery have failed to perfect their applications, necessitating the initiation of new lottery proceedings. Furthermore, to date, more than 350 MDS construction permits or conditional licenses have been cancelled or forfeited for failure to construct. In addition, the sheer volume of speculative filings delays the licensing process and overburdens the Commission's resources.

<sup>33</sup> In addition, we are proposing to revise and strengthen the rules that prohibit the assignment or transfer of conditional MDS licenses prior to completion of construction. See 47 C.F.R. § 21.39(a). This action would also serve to deter speculation. Also, consistent with our existing regulations, a licensee claiming a preference in its application must operate its station for at least one year before it may assign or transfer that station. Similarly, we propose to amend 47 C.F.R. §§ 21.29 and 21.31 to prohibit substantial ownership changes in pending MDS applications. Under this proposal, any ownership change between the date of filing and the date of final action on a pending MDS application that results in more than a pro forma change of ownership would cause the application to be dismissed.

presented by the accumulation of several thousand applications that must be processed swiftly if the underlying objectives of this proceeding are to be realized.

19. Initially, we are imposing a short-term, temporary freeze on the filing of all applications for MDS channels, effective immediately upon adoption of this Notice of Proposed Rule Making. Accordingly, as of April 9, 1992, no initial applications for new stations on these channels will be accepted for filing, at least until we are able to build a complete data base.<sup>34</sup> The imposition of a freeze on new filings is absolutely imperative because it is the only means by which the deluge of incoming applications, which are being filed at the rate of 1000 per month, can be controlled. In addition, unless we freeze the filing of incoming applications, we will not be able to process the backlog of pending applications without seriously impinging upon our processing speeds. Finally, in any case, given the volume of pending MDS applications, we anticipate that very few newly filed applications are grantable.<sup>35</sup>

20. Next, to permit the expeditious processing of the backlog of MDS applications, we are considering the following special procedures to be applied to pending applications, including applications of tentative selectees, that, because they contain settlement agreements or other pre-lottery requests, would ordinarily require individualized review by Commission staff. These new rules and procedures would be prospectively applied to all pending MDS applications. Accordingly, we would permit all applicants to amend their pending applications during the fourteen-day period commencing on the effective date of the new MDS rules so that they may take the new rules into consideration or otherwise put their applications in conformity therewith. Applicants would not, however, be permitted to (1) amend the site location by moving the site in excess of 24 km (approximately 15 mi.) from the site coordinates specified in the pending application as of the day of

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<sup>34</sup> The imposition of this freeze is procedural in nature and therefore is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA). See *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963). Moreover, in any event, good cause exists justifying noncompliance with these APA requirements because adherence to the notice and comment and effective date requirements is impractical, unnecessary and contrary to the public interest as compliance would undercut the purposes of the freeze.

<sup>35</sup> This freeze is equally applicable to the amendment of pending applications except as may be permitted during the proposed fourteen-day amendment period as described in this proceeding. Any other requests for leave to amend will be considered on a case-by-case basis and will be strictly scrutinized. See para. 20, infra. The specific frequencies affected by this freeze on new filings include those identified in 47 C.F.R. § 21.901 and the ITFS frequencies available to MDS entities pursuant to 47 C.F.R. § 74.990. The Commission will continue to accept applications to modify facilities from existing MDS/MMDS conditional licensees and licensees, as well as applications from entities eligible for the ITFS radio service.

adoption of this Notice of Proposed Rule Making,<sup>36</sup> or (2) apply for more channels than applied for in the original application. After expiration of the fourteen-day period, no further amendments to pending applications, except those required by Section 1.65 of our rules, 47 C.F.R. § 1.65, would be accepted until the processing of all backlogged applications is completed.<sup>37</sup> In this vein, we also wish to underscore our intention to review all waiver requests, particularly those seeking waiver of our separation standards, with strict scrutiny in accordance with 47 C.F.R. § 21.19.

21. We are also considering a proposal to bar all settlement agreements and, consequently, cumulative lottery chances, for applicants whose applications have not yet been placed on public notice designating them for random selection.<sup>38</sup> Under this proposal, tentative selectees resulting from settlement groups would not be required to amend their surviving application to dissolve the settlement group. In the event that any such tentative selectee's application is not granted, however, the surviving application would be dismissed. We are also considering a rule change prohibiting cumulative chances from being awarded in the case of tentative selectees who do not receive licenses and a subsequent lottery or lotteries becomes necessary. In addition, as aforementioned, we are proposing not to grant a license to any entity, including tentative selectees, with any interest whatsoever in another application or applications for the same channel in the same service area.<sup>39</sup> All such entities would, however, be permitted to amend their applications to divest themselves of the interest in the other application(s) in the fourteen-day period following the effective date of the new rules. Commenters are invited to discuss these proposals.

22. **Processing of Applications.** Irrespective of where MDS applications will be processed in the internal structure of the Commission, we are considering the following proposed processing procedures which we believe could help to expedite the processing of MDS applications. Under the first processing proposal, our initial step would be to create a consolidated data

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<sup>36</sup> The 24 km limit should be sufficient to permit applicants to comply with any new rules adopted as the result of this proceeding.

<sup>37</sup> Permissible amendments made during the fourteen-day period following the effective date of the new rules would not be treated as substantial amendments under 47 C.F.R. §§ 1.918(b) and 21.23(c). Accordingly, applicants who amend their applications as provided within the fourteen-day period would retain their original filing date for this limited purpose. For administrative convenience, we would require the amending party to include with its amendment a copy of its original application as well as any previous amendments.

<sup>38</sup> This is a departure from existing practices under 47 C.F.R. § 21.33(b), pursuant to which, after filing, mutually exclusive individually filed MDS applicants may enter into settlement agreements giving the joint venture cumulative lottery chances.

<sup>39</sup> See supra para. 17.

base comprised of all pending MDS, ITFS and H-channel applications, as well as all existing MDS, ITFS and H-channel stations, and ITFS registered receive sites, the MDS portion of which would be put out for public comment. Any entity that is either incorrectly reflected on or omitted from this data base would be afforded a limited opportunity to demonstrate that it should have been included.<sup>40</sup> After the data base is updated, we would process and act on all pending applications that are not mutually exclusive. We would at this time also grant licenses to all tentative selectees, selected prior to the effective date of the new rules, found to be qualified under our new standards.<sup>41</sup> Applications of tentative selectees that fail to qualify under the new rules would be dismissed.

23. We would then conduct lotteries to select among pending applications for both channel 1 and channel 2 that are in a condition acceptable for filing.<sup>42</sup> In the case of single channel applications that have

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<sup>40</sup> Such an entity may demonstrate that its license or application should be included in the data base by submitting persuasive evidence that the license was issued or the application was filed, including, for example, a copy of its license, a Commission date stamped copy of the application, a United States Postal Service certified mail receipt or a cancelled check demonstrating payment of an application fee. Mere certification of filing will not be accepted.

<sup>41</sup> As explained in paragraph 20, supra, all applicants will have been afforded an opportunity to amend their applications in order to take the new rules into account. Tentative selectees selected prior to the effective date of the new rules who are the result of settlement groups would not be required to dissolve their settlement group. See para. 21, supra.

<sup>42</sup> Although we initially decided to use comparative hearings to select among this group of MDS applicants, we have carefully weighed the various public interest objectives served by continuing to process Channel 1 and 2 applications through comparative hearings against the interests promoted by the use of random selection procedures, and propose to use the latter. The most important considerations leading to this proposal are (1) the efficiencies generally associated with random selection procedures as opposed to comparative processes, and (2) the necessity of proceeding to expeditious grant of the Channel 1 and 2 MDS authorizations. See generally Second Report and Order, Gen Docket No. 80-112, 50 Fed. Reg. 5983 (Feb. 1, 1985) (the public interest in expedited introduction of service found to require use of random selection procedures rather than comparative hearings for selecting among MMDS applications). See also In re Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, CC Docket No. 83-1096, 98 FCC 2d 175, 186 (1984)(same in cellular context), modified, 101 FCC 2d 577, further modified, 59 RR 2d 407 (1985), aff'd in part and rev'd in part, Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987). We recognize that certain applications that would be included in the lottery may already have been designated for hearing and a hearing fee submitted. We believe, however, that it would be appropriate and

already been placed on public notice, we would conduct lotteries based on the determinations of mutual exclusivity made pursuant to 47 C.F.R. §§ 21.31 and 21.914 prior to the adoption date of this Notice of Proposed Rule Making. These applicants would, prior to lottery, be permitted to amend their applications for the sole purpose of stating the preferences, if any, to which they believe they are entitled. We would treat applicants for channels 1 and 2 whose applications have not been placed on public notice in a manner identical to all other MDS applicants. Any such applicants seeking to claim a preference would be required to do so during the fourteen-day amendment period. After the effective date of the new MDS rules, we would issue public notices designating these applications for random selection.<sup>43</sup> Using a computer-based random number generator, we would then "rank order" the applications.<sup>44</sup> Then, we would process the applications, granting only those that satisfy the co- and adjacent channel separation requirements as to previously granted applications.

24. We would then commence processing pending MMDS applications filed during the 1983 one-day filing window. The applications of those applicants that were not previously chosen as tentative selectees would be included in lotteries to be conducted in a manner similar to that described in the preceding paragraph. We would then process the applications, granting only those that satisfy the co- and adjacent channel separation requirements as to previously granted MMDS applications and ITFS operations.

25. Finally, we would proceed to those applications filed from April 20, 1988, to the date of adoption of this Notice of Proposed Rule Making. The processing of these applications would be conducted in a manner identical to that proposed herein for the processing of the 1983 applications, except for

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within our authority to process these applications via random selection. In those instances where the hearing fee was not paid in a timely manner, the MDS application would be dismissed and would not be eligible for lottery.

<sup>43</sup> We would accept petitions to deny filed within thirty days of the issuance of this public notice. We would also accept petitions to deny filed against MDS applicants that are not mutually exclusive within thirty days of the issuance of a public notice listing such applications. 47 C.F.R. § 1.962(g). We propose that there would no longer be separate ITFS petitions to deny or a separate period of time for ITFS entities to file petitions to deny in all future MDS processing. Cf. 47 C.F.R. § 21.902.

<sup>44</sup> In determining the winners, we would retain the use of diversity and minority preferences. See Second Report and Order, Gen Docket No. 80-112, 50 Fed. Reg. 5983 (February 1, 1985). In addition, we would continue to enforce the equal employment opportunity program as set forth in 47 C.F.R. § 21.307. At this juncture, we also note our intent to treat the falsification of an entitlement to a preference as an abuse of our processes and a reflection on an applicant's basic qualifications for licensing. Also, any such cases of falsification would be submitted to the United States Attorney for prosecution under 18 U.S.C. § 1001.

(1) the treatment of previously-chosen tentative selectees within the group,<sup>45</sup> and (2) inclusion of applications for the H-channels. All future applications would also be processed in accordance with these general procedures.<sup>46</sup>

26. In addition to the above proposals, we seek comment on the following variation for the processing of MDS applications. Specifically, we propose as another alternative that licensees be selected by lotteries held for service areas defined by Metropolitan Statistical Area (MSA) or Rural Service Area (RSA) boundaries, similar to current practices in the Cellular Radio Service.<sup>47</sup> Pursuant to this proposal, each application would be associated with an MSA or an RSA. Any existing tentative selectees would be processed first to determine which MSAs or RSAs are closed and which have frequencies remaining. We propose that these tentative selectees would be awarded their requested frequencies for the entire MSA or RSA in which the selectee's transmitter site is to be located.<sup>48</sup> In the event that more than one tentative selectee for the same frequency or frequencies exists within an MSA or RSA, we request comment on whether the MSA or RSA should in some fashion be divided between the tentative selectees, whether the mutually exclusive tentative selectees should be given an opportunity to negotiate among themselves to build one joint or multiple separate MDS stations within the service areas, or whether the Commission should conduct a second lottery among

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<sup>45</sup> We would include in the lottery of these filings the applications of existing tentative selectees that have not yet been dismissed, denied or issued a conditional license if we determine that their selection was procedurally defective. We find it necessary to preserve the option of rescinding tentative selectee status because we have substantial reason to believe that some of the lotteries resulting in the selection of applicants from this filing group were procedurally defective. Several post-1988 lotteries were conducted while applications filed many years earlier that could have been mutually exclusive remained pending. In these circumstances, we believe that the only available avenue for correcting these procedural defects would be to begin anew with respect to all applicants who have not been awarded a conditional license. Interested parties are invited to comment on this proposal.

<sup>46</sup> If the burden of conducting multiple lotteries is too great to allow service to be provided to the public in a timely manner, we may find it necessary to conduct fewer lotteries and to adopt rules to utilize groups of mutually exclusive applicants that are larger than those contemplated by Section 21.914 of our rules, 47 C.F.R. § 21.914. Commenters are requested to address the desirability of this option.

<sup>47</sup> See generally 47 C.F.R. § 22.903.

<sup>48</sup> The licensee would not, however, be permitted to provide service beyond the boundaries of its MSA or RSA. Prior to grant of its license, the tentative selectee would be afforded an opportunity to amend its application to change its transmitter site to another location within the MSA or RSA if it desired.

the tentative selectees, the winner of which would be awarded a license for the entire MSA or RSA.

27. After existing tentative selectees are processed, all remaining applicants would, as noted, be associated with an MSA or RSA. Lotteries among mutually exclusive applicants would then be held for open MSAs and RSAs based on MSA/RSA numerical ranking, i.e., with MSAs for which the largest number of MDS applications are filed first. Selectees would be granted the frequencies they requested in their applications to the extent that they are not already assigned within the MSA or RSA.<sup>49</sup> We seek comment with respect to whether a selectee should be granted all remaining MDS frequencies in the MSA or RSA without regard to the frequencies originally requested. Selectees would then have an opportunity to amend their transmitter sites to comply with either the mileage separations or desired-to-undesired signal ratios, as appropriate, depending on the outcome of this rule making. Sites with short-spacing agreements with licensees of adjacent MSA/RSA transmitter sites would also be accepted. For administrative convenience, we propose to require the selectees to submit, upon request by the Commission, an additional copy of their application and any amendments thereto.

28. This proposal would allow considerable flexibility for licensees and would help to guarantee the ability of a licensee to serve an entire market. It would also allow "engineering-in" of transmitter sites. We seek comment on whether we should require a specific build-out of an MSA or RSA based on land area or population and whether unserved areas should be subject to new applications at some point in the future.

29. We solicit comment on all aspects of our proposals for the processing of pending and future MDS applications. We also ask commenters to set forth any alternative suggestions and all recommendations that in their view would prove more efficacious in terms of either easing the burden on applicants or the Commission, or in accomplishing the goals of this proceeding in general. In addition, we wish to underscore our cognizance of the fact that several of the proposals advanced in this proceeding represent significant departures from previous rules and practices governing the selection and operation of MDS licensees. As such, we propose to refund the application filing fees paid by any applicant who, in light of the changes proposed herein, requests dismissal of its application prior to the issuance of the public notice designating the application for random selection.<sup>50</sup> In this same vein, we request commenters' views as to whether, in light of the complicated task before us in undertaking to process thousands of applications

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<sup>49</sup> We propose that the tentative selectee would be awarded the frequencies requested in its application throughout the entire MSA or RSA, but that it must protect, in accordance with the rules we adopt as the result of this proceeding, the operations of all previously granted licensees. The service area of these MSA- or RSA-wide licensees could not extend beyond the border of the MSA or RSA.

<sup>50</sup> We interpret 47 C.F.R. § 1.1111(a)(4) to permit us to refund application fees paid by such entities.

and conducting separate lotteries, it would simply be preferable to return all pending applications and establish a new window for acceptance of MDS applications.

#### IV. CONCLUSION

30. In conclusion, as the market for the distribution of video entertainment material becomes increasingly dominated by cable television systems, it is incumbent upon us to create a regulatory environment amenable to the competitive viability of rival operators. We are initiating this proceeding in an attempt to facilitate the emergence of wireless cable as a vital competitor to traditional coaxial cable systems. The various rules and procedures proposed in this proceeding are designed to restructure our regulatory scheme and processing procedures in a manner that will foster the growth and development of wireless cable by making MDS frequencies readily available for use by wireless cable operators. This in turn will benefit the public interest by expediting the provision of wireless cable service, thereby enhancing competition in the video distribution marketplace.

#### V. PROCEDURAL MATTERS

##### Ex parte Rules - Non-Restricted Proceeding

31. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

##### Initial Regulatory Flexibility Analysis

32. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals advanced in this document. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

##### Comment Dates

33. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before June 29, 1992, and reply comments on or before July 14, 1992. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you wish for each Commissioner to receive a personal copy of your comments,

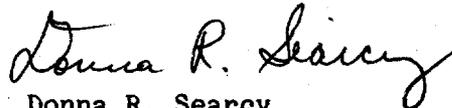
you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

34. For further information concerning this proceeding, contact Karen Kincaid or Rosalind Allen, Private Radio Bureau, Room 5202, Federal Communications Commission, Washington, D.C. 20554, telephone (202) 634-2443.

35. Authority for issuance of this Notice of Proposed Rule Making is contained in Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 303(r).

32. Accordingly, IT IS ORDERED, upon the adoption of this Notice of Proposed Rulemaking, that no new applications for the MDS or MMDS service will be accepted for filing by the Federal Communications Commission until further notice by the Commission.

FEDERAL COMMUNICATIONS COMMISSION



Donna R. Searcy  
Secretary

## APPENDIX A

### INITIAL REGULATORY FLEXIBILITY ANALYSIS

#### Reason for Action

This rule making proceeding is being initiated to obtain comment regarding a proposal to modify the existing rules and policies pertaining to applicants, conditional licensees and licensees in the Multipoint Distribution Service.

#### Objectives

The purpose of this rule making is two-fold: (1) to expedite the provision of the various services offered on MDS frequencies to the public, and (2) to increase administrative efficiency in the processing of MDS applications.

#### Legal Basis

The proposed action is authorized under sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C §§ 154(i), 154(j), and 303(r).

#### Reporting, Recordkeeping and Other Compliance Requirements

Generally, the proposed rule changes reduce the reporting and recordkeeping burden on applicants. The amendment of certain applications may, however, be necessitated in order for applicants to bring their applications into compliance with the new rules.

#### Federal Rules that Overlap, Duplicate or Conflict with these Rules

None.

#### Description, Potential Impact, and Number of Small Entities Involved

The rule changes proposed in this proceeding could affect certain small entities in the wireless cable industry, or small entities that otherwise use MDS spectrum. After evaluating the comments, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

#### Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

None.

## APPENDIX B

Parts 1, 2, and 21 of Title 47 of the U.S. Code of Federal Regulations are amended to read as follows:

1. The Authority Citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. The heading for Section 1.824 is changed to read "Random selection procedures for Multipoint Distribution Service." and Section 1.824 is amended to read as follows:

### **§ 1.824 Random selection procedures for Multipoint Distribution Service.**

(a) If there are mutually exclusive applications for an initial conditional license the Commission may use the random selection process to select the conditional licensee. Each such random selection shall be conducted under the direction of the Office of the Managing Director in conjunction with the Office of the Secretary. Following the random selection, the Commission shall announce the tentative selectees and dismiss all applications that are not tentative selectees. The Commission shall determine whether tentative selectees are qualified to receive the conditional license and if the Commission determines that a tentative selectee is qualified, it shall grant an application. If the Commission determines that a tentative selectee for a particular assignment is not qualified to receive a grant of its application, the station assignment of that tentative selectee will not be awarded from among the pool of applications from that random selection.

(b) Competing applications for conditional licenses shall be designated for random selection in accordance with the procedures set forth in §§ 1.1621, 1.1622(a), (b), (c), and (d), and 1.1623. No preferences pursuant to § 1.1622(b)(2) or (b)(3) shall be granted to any MDS applicant whose owners, when aggregated, have an ownership interest of more than 50 percent in the media of mass communication whose service areas, as set forth in § 1.1622(e)(1) through (7), wholly encompass or are encompassed by the service area, computed in accordance with § 21.902(e), for which the conditional license is sought.

(c) Petitions to Deny filed against an application must be filed within 30 days of the Public Notice announcing that the application is accepted for filing. Any consolidated reply to the Petition to Deny must be filed within 15 days of the due date for filing the Petition to Deny. The Commission shall review and process only Petitions to Deny filed against applicants later deemed to be tentative selectees.

3. The Authority Citation for Part 2 continues to read as follows:

AUTHORITY: Secs 4, 302, 303, 307, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, 307, unless otherwise noted.

4. Section 2.106 is revised by replacing note NG47 to read as follows:

**§ 2.106 Table of frequency Allocations.**

NG47 In Alaska, frequencies within the band 2655-2690 MHz are not available for assignment to terrestrial stations.

5. Section 2.106 is revised by deleting note NG47 from column 5 in frequency band 2500-2655 MHz, and by including "AUXILIARY BROADCASTING (74)" and "DOMESTIC PUBLIC FIXED RADIO (21)" under column 6 in frequency band 2500-2655 MHz.

6. The Authority Citation for Part 21 continues to read as follows:

AUTHORITY: Secs 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102, as amended; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.

7. Section 21.13(a)(2) is amended to read as follows:

**§ 21.13 General application requirements.**

(a) \* \* \*

(2) Demonstrate, or, in the case of MDS applicants, certify, the applicant's legal, financial, technical and other qualifications to be a conditional licensee or licensee;

8. Section 21.15(a) is amended by adding a new sentence at the end of the subsection to read as follows:

**§ 21.15 Technical content of applications.**

\* \* \* \* \*

(a) \* \* \* Provided, MDS applicants proposing a new station location shall certify, rather than demonstrate, availability of the proposed station site.

9. Section 21.20(b)(5) is amended and Section 21.20(b)(11) is added to read as follows:

**§ 21.20 Defective applications.**

\* \* \* \* \*

(b) \* \* \*

(5) The Multipoint Distribution Service application does not certify the availability of the proposed site for the new facility or the application in the Point-to-Point Microwave Radio, Local Television Transmission, or Digital Electronic Message Services does not demonstrate the availability of the proposed site for the new facility;

\* \* \* \* \*

(11) The Multipoint Distribution Service application specifies a transmitter site within 80 km (approximately 50 mi) of an existing or previously applied-for co-channel station or within 48 km (approximately 30 mi) of an existing or previously applied-for adjacent channel station.

10. Sections 21.23(a) and (b) are amended to read as follows:

**§ 21.23 Amendment of 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 § 21.35, provided, however, that the amendments shall comply with the provisions of § 21.29 as appropriate and the Commission has not otherwise forbidden the amendment of pending applications. An MDS application tentatively selected by the random selection process may be amended as a matter of right up to 14 days after the date of the public notice announcing the tentative selection, provided, however, that the amendments shall comply with the provisions of § 21.29 as appropriate and the Commission has not otherwise forbidden the amendment of pending applications. Provided further, that the Commission will not grant applications that seek more than a pro forma change of ownership or control of a pending MDS application and the Commission will dismiss any MDS application seeking such a change of ownership or control.

(b) The Commission or the presiding officer may grant requests to amend an application designated for hearing or for comparative evaluation, or tentatively selected by the random selection process, only if a written petition demonstrating good cause is submitted and properly served upon the parties of record, except that MDS applications tentatively selected in a random selection process may be amended as a matter of right under paragraph (a) of this section. Provided, however, that the Commission will not grant applications that seek more than a pro forma change of ownership or control of a pending MDS application and the Commission will dismiss any MDS application seeking such a change of ownership or control.

11. Section 21.28 is amended by adding the following new subsection (f) at the end of the existing text:

**§ 21.28 Dismissal and return of applications**

\* \* \* \* \*

(f) The Commission will dismiss a Multipoint Distribution Service application if the applicant seeks to change ownership or control, except for

a pro forma change of ownership or control.

12. Section 21.29 is amended by adding the following new subsection (f) at the end of the existing text:

**§ 21.29 Ownership changes and agreements to amend or to dismiss applications or pleadings.**

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(f) Notwithstanding the provisions of Section 21.29(e) of this part, the Commission will not grant applications that seek more than a pro forma change of ownership or control of a pending MDS application and the Commission will dismiss any MDS application seeking such a change of ownership or control.

13. Section 21.30 is amended by revising subsection (a)(4) to read as follows:

**§ 21.30 Opposition to applications.**

\*\*\*\*\*

(a) \*\*\*

(4) Be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto; and

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14. Section 21.33 is amended to read as follows:

**§ 21.33 Grants by random selection.**

(a) If an application for a license in the Digital Electronic Message Service (DEMS) is mutually exclusive with another such application and satisfies the requirements of § 21.31, the applicants may be included in the random selection process set forth in Part 1, §§ 1.821, 1.822, and 1.825.

(b) If an application for a license in the Multipoint Distribution Service (MDS) is mutually exclusive with another such application and satisfies the applicable requirements of §§ 21.31 and 21.914, the applicants may be included in the random selection process set forth in Part 1, §§ 1.821, 1.822, and 1.824.

(c) Renewal applications shall not be included in the random selection process.

(d) If, after filing individual MDS applications, mutually exclusive applicants enter into settlements that result in the formation of a joint venture, the joint venture must be represented by one application only and

will not receive the cumulative number of chances in the random selection process that the individual applicants would have had if no settlement had been reached; the joint venture will be entitled to only one chance in the random selection process.

16. In Section 21.39, subsections (b) and (c) are redesignated subsections (c) and (d), respectively; subsection (a) is modified and relabeled subsection (b), and a new subsection (a) is added to Section 21.39 to read as follows:

**§ 21.39. Considerations involving transfer or assignment applications.**

(a) A conditional license to operate an MDS station authorized under this part may not be assigned or transferred prior to the completion of construction of the facility. However, the Commission may give its consent to the assignment or transfer of control of such a conditional license prior to the completion of construction and placing the facility into operation where:

(1) The assignment or transfer does not involve a substantial change in ownership or control of the authorized radio facilities; or,

(2) The assignment or transfer is involuntary due to the licensee's bankruptcy, death, or legal disability.

(b) The Commission will review proposed transactions under this part to determine if the circumstances indicate "trafficking" in licenses whenever applications (except those involving pro forma assignment or transfer of control) for consent to assignment of a license, or for transfer of control of a license, involve facilities that were:

\* \* \*

17. The table in Section 21.107 of the rules, and footnote 1 to that table, is amended as follows: