

EX PARTE OR LATE FILED

DOCKET FILE COPY ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

222



OFFICE OF
THE CHAIRMAN

9302026

92-277

RECEIVED

JUN - 9 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Honorable John Bryant
House of Representatives
208 Cannon House Office Bldg.
Washington, D.C. 20515-4305

Dear Congressman Bryant:

Thank you for your letter on behalf of your constituent, Mr. A. Scott Sudduth, Assistant Vice Chancellor for Federal Regulations, The University of Texas System. Mr. Sudduth indicates that the System is asking the Commission to consider a non-commercial designation for a portion of the 28 GHz band (27.5 GHz - 29.5 GHz) for priority use by institutions of higher education.

The Commission issued a Notice of Proposed Rulemaking proposing rules to permit video distribution or other telecommunications services in the 28 GHz band on January 8, 1993. Comments were due on March 16, 1993; reply comments were due on April 15, 1993. Enclosed is a copy of the Notice of Proposed Rulemaking for your reference.

One of the issues raised for comment in our Notice is whether a portion of the 28 GHz spectrum should be set aside for priority use by educational institutions. Inasmuch as Mr. Sudduth's comments address this issue, your letter, along with Mr. Sudduth's comments, will be included in the record of the proceeding. We will give your views full consideration as this pending matter is reviewed.

Sincerely,

James H. Quello
Chairman

Enclosures

No. of Copies rec'd 1 copy
List ABCDE

RECEIVED
 JUN - 9 1993
 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

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

FCC 92-538

In the Matters of)
)
 Rulemaking to Amend Part 1 and Part 21) CC Docket No. 92-297
 of the Commission's Rules to Redesignate)
 the 27.5 - 29.5 GHz Frequency Band and) RM-7872; RM-7722
 to Establish Rules and Policies for)
 Local Multipoint Distribution Service;)
)
 Applications for Waiver of the)
 Commission's Common Carrier Point-to-)
 Point Microwave Radio Service Rules;¹)
)
 Suite 12 Group Petition for Pioneer's) PP-22
 Preference;)
)
 University of Texas - Pan)
 American Petition for Reconsideration)
 of Pioneer's Preference Request Denial)

**NOTICE OF PROPOSED RULEMAKING, ORDER,
 TENTATIVE DECISION AND ORDER ON RECONSIDERATION**

Adopted: December 10, 1992 Released: January 8, 1993

Comment Date: March 16, 1993
 Reply Comment Date: April 15, 1993

By the Commission:

TABLE OF CONTENTS

<u>Subject</u>	<u>Paragraphs</u>
I. Introduction	1-4
II. Background	5-13
III. Discussion	

¹ A list of applications identified to date is provided in Appendix C. Should any further waiver applications be identified in the future, we hereby delegate authority to the Common Carrier Bureau to dismiss them in accordance with the holding in this Order.

LMDS Demand	14-19
Structure of the 28 GHz Band for Licensing	20-22
Technical Issues	23-24
Regulatory/Licensing Issues	
Status of Licensees	25-26
Regulation of Common Carriers	27
Preemption	28-29
Service Areas	30-31
Service of minimum areas and/or populations	32
Cross-ownership	33-34
Selection from among mutually exclusive applicants	35-36
Preferences	37
Settlements	38
License term and transfer of control/assignment	39-41
Application requirements	42-44
One-to-a-market	45
Financial showing	46-47
Construction requirement	48
Filing date	49
Fees	50
IV. Pending Applications	51-53
V. Pioneer's Preference	54-68
VI. Conclusion	69
VII. Procedural Matters	
Ex Parte Rules - Non-Restricted Proceeding	70
Initial Regulatory Flexibility Analysis	71-77
Comment Dates	78-79
Ordering Clauses	80-84

I. INTRODUCTION

1. This Notice of Proposed Rulemaking and Tentative Decision (NPRM) proposes a redesignation of use of the 28 GHz band from point-to-point microwave common carrier service to a local multipoint distribution service. In separate sections of this document, we address pending waiver applications in the Common Carrier Point-to-Point Microwave Radio Service filed in anticipation of our action on the instant petitions for rulemaking, (Section IV). In addition, we address two petitions for pioneer's preference, one of which is before us on a petition for reconsideration of the staff's action dismissing the request, (Section V).

2. We initiate this NPRM in response to a petition filed by Suite 12 Group ("Suite 12"), a group of inventors who have engineered a millimeter wave component technology which can be used to offer video and other communications services in the 27.5 - 29.5 GHz frequency range ("28 GHz band"). We have received two other petitions for rulemaking which affect the 28 GHz band. In response to Suite 12's petition for rulemaking, Video/Phone Systems, Inc. (Video/Phone) proposes a Local Wireless Broadband Service (LWBS) for the 28 GHz band in a separate rulemaking petition. In addition, Harris Corporation (Farinon Division) (hereinafter "Harris") filed a petition for rulemaking (RM 7722) suggesting that the Commission implement a uniform channelization plan

for the 28 GHz band so that equipment manufacturers would have a standard to apply for the development of new technology.

3. In this proceeding we propose to accommodate the Suite 12 and Video/Phone requests. The 28 GHz band is virtually unused, and the proposals before us, if developed to their apparent potential, will provide consumers with additional options by which to satisfy video and other telecommunications requirements. Among the primary regulatory objectives of this proceeding are providing applicants in this band sufficient flexibility to satisfy consumer demand, expediting service to the public, making more efficient use of essentially fallow spectrum, and streamlining the licensing process while deterring speculative applications. We propose licensing and regulatory policies that, in our experience, should serve these objectives. We seek comment on proposals to license two licensees in each area; adopt minimal technical rules to accommodate multipoint video programming distribution, wideband video, data, and other telecommunications services; require that service be available to 90% of the residents within a service area within 3 years; adopt one-day-filing; use lotteries or auctions to select licensees; and employ minority and diversity of ownership preferences. We also deny 971 pending waiver applications that seek to establish point-to-multipoint video distribution services without benefit of the instant rulemaking to amend the current Common Carrier Point-to-Point Microwave Service rules.

4. Suite 12's and Video/Phone's proposed redesignation of the 28 GHz band is for a service which meets the generic standards of a multipoint distribution service. However, due to the novel technology which uses a cellular distribution format and a greatly expanded range of services which can be offered, we find that this service is separate and distinct from other types of multipoint distribution services. Accordingly, we propose to title the new service Local Multipoint Distribution Service (LMDS) and propose new rules suited to the technology and distribution format to be used.

II. BACKGROUND

5. The 28 GHz band has been available for point-to-point microwave radio common carrier use since 1959. Nevertheless, until 1991, the only licensees for the 28 GHz band were for a few temporary fixed licenses authorized under Part 21. Very little, if any, common carrier point-to-point use of the frequency band has been made since 1959.²

² We have received an application from Motorola Satellite Communications, Inc. to use 100 MHz within the 27.5 - 30 GHz band for gateway/control satellite uplinks in the fixed satellite service (FSS) to support its proposed "Iridium" low earth orbit mobile satellite service. (File Nos. 9-DSS-P-91(87) and CSS-91-010, Public Notice date April 1, 1991, Report No. DS-1068). In addition, the NASA Advanced Communications Technology Satellite (ACTS) is scheduled to be launched in June or July 1993. This satellite will operate from 100° W.L. with 29-30 GHz uplinks and 19.2 - 20.1 GHz downlinks. This program intends to provide several services including T-1 VSAT networks within 100 mile radius of several major metropolitan areas on frequencies 29.242 GHz +/- 20.5 MHz, 29.263 GHz +/- 20.5 MHz and 29.298 GHz +/- 20.5 MHz. See

6. In 1991, the Commission authorized a wholly-owned affiliate of Suite 12 to construct a system in the New York Primary Metropolitan Statistical Area (PMSA) using millimeter wave technology to provide video service. Hye Crest Management, Inc., 6 FCC Rod 332 (1991). The application proposed a new fixed station in the 28 GHz band to provide 24 channel television service in New York City. The licensee, Hye Crest, was granted waivers of Sections 21.108 (directionalization and bandwidth requirements) and 21.700 (status eligibility). Hye Crest also received a designated service area, the New York PMSA. Hye Crest subsequently requested and received authorization for a major modification of its license to change the transmitter type to offer 49 television channels within 1000 MHz of spectrum. Hye Crest filed its Certification of Completion of Construction for its first facility located at Brighton Beach, New York (FCC Form 494A) on July 1, 1992. Hye Crest's authorization is for a five year period. Since granting Hye Crest's initial authorization, we have received 971 applications accompanied by petitions for waiver of the Commission's rules from entities seeking to provide service similar to that of Hye Crest around the nation. On October 29, 1992, the Common Carrier Bureau released an Order (In the Matter of Rulemaking to Amend Part 2 and 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band, and to Establish Rules and Policies for Multichannel Local Distribution Service, DA 92-1488) announcing that applications in the 28 GHz band would no longer be accepted for filing pending the outcome of the instant rulemaking proceeding.

7. As discussed above, three petitions for rulemaking were filed proposing

spectrum with the same polarization. Two-way communication channels are inserted between the video channels and are transmitted with opposite polarity. The system uses an omni-directional antenna to transmit from the node, or center of the cell. The subscriber's receiver antenna uses a narrow beamwidth to eliminate multipath reception and to obtain sufficient link margin for service. Each cell is designed to be between 6 to 12 miles in diameter, and shadowed areas are served with a repeater or reflector. The system avoids interference between adjacent cells by cross-polarizing the signals and by taking advantage of the discrimination provided by the subscriber receiving antenna. Suite 12 states that its system makes exceptionally efficient use of the frequency spectrum.

10. Video/Phone Petition. Video/Phone is supportive of Suite 12's technology but criticizes it for confining its suggested rules only to video programming service, with secondary communications services. Video/Phone proposes that a Local Wireless Broadband Service would respond to the growing demand for video telecommunications services such as videoconferencing, telecommuting, telemedicine, and education. Video/Phone argues that the lack of economic transmission capability at the local loop has heretofore hindered the growth of these services, which it argues, would have been substantial. Accordingly, Video/Phone proposes rules intended to permit flexible use of the 28 GHz spectrum and Suite 12's technology to provide a wide variety of communication services to the public.

11. Harris Petition. Harris proposes that the Commission amend Parts 2, 21, and 94 of the Rules to adopt a channelization plan with multiple bandwidth options for the 28 GHz band and to make the band available for assignment to private carriers under Part 94. Harris argues that manufacturers find it difficult to design and market equipment due to uncertainty regarding channel pairings, bandwidths, channel spacings, etc. Harris also argues that the Commission has adopted frequency sharing between private carriers and common carriers. Furthermore, Harris argues that broad eligibility rules will result in greater and more efficient use of the 28 GHz band. Harris argues that the band could be used to facilitate the implementation of personal communications services through the interconnection of microcells. Finally, Harris argues that private radio use should be permitted for the band because, it contends, the Operational Fixed Microwave Radio Service (OFS) bands below the 28 GHz band are heavily used.

12. Harris opposes Suite 12's proposal, arguing that there is an imminent need for point-to-point spectrum. If redesignation is undertaken, Harris suggests that LMDS assignments be limited to one half of the band and the International Radio Consultative Committee (CCIR) channelization plan be implemented so that multiple uses of the spectrum can be made, including point-to-point services. Harris provides no evidence of either manufacturer or subscriber interest in the 28 GHz band for conventional private or common carrier point-to-point use, however.

13. The Wireless Cable Association (WCA) believes that a redesignation is premature. It argues that wireless cable licensees in the Multichannel Multipoint Distribution Service (MMDS) are at a competitive disadvantage because of their limited channel capacity. WCA also argues that the wireless

cable operators are at a competitive disadvantage due to expansion of telephone companies into video dialtone, and the entrance of franchised cable operators into two-way voice and data services. It contends lack of available spectrum for wireless cable operators has been a brake to their expansion into both video and two-way communications services. Accordingly, WCA is interested in the use of the 28 GHz band for wireless cable operators. Nevertheless, WCA argues that Suite 12 has failed to produce test results into the record that would establish the viability of its system. Finally, WCA argues that if the 28 GHz band is redesignated for Suite 12's technology, that the public interest may be best served by setting aside spectrum for local wireless cable operators to expand.

III. DISCUSSION

IMDS Demand

14. We believe that the record compiled thus far establishes that 1) the 28 GHz band is not being utilized; 2) Suite 12 and others have demonstrated an interest and ability to use it; 3) the most likely use will be to provide video programming, and that such use will serve the public interest, and 4) we should not limit the use of the band only to video service.

15. Technological advances in the use of radio technology are making possible wider use of spectrum in lower bands and opening use of the higher frequency bands not heretofore possible. One of these advances has been made by Suite 12, which has developed and patented the equipment it hopes to place in subscribers' homes. Suite 12's representations that the proposed redesignation will serve the public interest are supported by its bringing IMDS service to Brighton Beach. In addition, the number of applications received seeking to provide similar service indicates a significant interest in both the technology and the service. Coupled with the volume of public inquiry regarding the service, we find that there is strong public interest in the proposed redesignation.

16. The interest in spectrum for video services, as evidenced by Suite 12's developmental work and the growth of conventional cable subscribership.⁴

polarization planes of the assigned frequency, which the public may require in a particular location.

17. We intend that the rules we promulgate in this proceeding reflect the maximum flexibility for licensees to construct communications systems in which the public is interested. Suite 12's technology offers the promise for a wide variety of applications that could be tailored to local interests. In this sense, it responds to Video/Phone's concerns, because the uses for the 28 GHz band it proposes could be incorporated into service capabilities of the multicell technology if local demand warrants. We therefore seek to establish rules that provide adequate spectrum for multipoint video programming distribution services and to provide sufficient flexibility to accommodate different types of point-to-point and point-to-multipoint communications services.

18. WCA's concern that licensees in the Multichannel Multipoint Distribution Service will face undesirable competition during its start-up period is unsupported. The existing industry has had a de facto head start which moots WCA's concern. We have granted more than 900 applications for wireless cable licenses to date, while potential LMDS licensing awaits this rulemaking proceeding, and video dialtone applications are only now being filed. Thus, MMDS wireless cable systems have had, and will continue to have, a significant opportunity to develop and refine their services and to establish market position.

19. WCA proposed that we set aside a portion of the 28 GHz band for MMDS operators because one of the obstacles facing the MMDS industry is acquiring enough spectrum to provide a service competitive with the franchised cable systems. We do not perceive a compelling public interest justification for setting aside 28 GHz spectrum for MMDS system operators.⁵ We have recently allocated additional spectrum for wireless cable operators. Second Report and Order, Gen. Docket No. 90-54, 6 FCC Rcd 6792 (1991). We also have proposed rule changes to expedite processing. Notice of Proposed Rulemaking in PR Docket No. 92-80, 7 FCC Rcd 3266 (1992). Accordingly, we do not propose to set aside any portion of the 28 GHz band for MMDS licensees, but we invite comments to address this tentative conclusion, focussing particularly on whether the public interest would be served by a set-aside.⁶

⁵ In the Domestic Public Cellular Radio Telecommunications Service (DPCRTS), the Commission set aside one-half the available spectrum for assignment to Local Exchange Carriers (LECs or wireline carriers) upon a finding of compelling public need for a wireline set-aside. Cellular Lottery Order, 98 FCC 2d 175 (1984).

⁶ The University of Texas has requested that we consider reserving one-half the available 28 GHz band for educational use. Accordingly, we also seek comment on the probable relative demand of commercial video entertainment

Structure of 28 GHz Band

20. We propose, in accordance with Suite 12's and Video/Phone's suggestion, that the 28 GHz band initially be licensed in two blocks of 1000 megahertz each to two different carriers. Each assignment will be optimized on a cell by cell basis, for video services on the one (horizontal/vertical) polarization, and for other services on the other (vertical/horizontal) polarization. Suite 12's patented technology, the only equipment which appears to be capable of providing direct customer services in the 28 GHz band at this time, uses channels of 20 MHz to provide video service. Since it appears that video service will be, at least initially, the primary service offered in IMDS, we propose to divide each 1000 megahertz band into channels of 20 MHz each; licensees of the respective blocks will then have flexibility to use or lease portions of one or both polarization directions in each cell and to provide a wide variety of services. Thus, each licensee will be able to provide a minimum of 49 video programming channels to the public using the full 1000 megahertz assignment on one polarization direction in each cell. Licensees will also have the opportunity to supplement their video programming with telecommunications services (such as point to multipoint video, data or telephony services) on the full 1000 megahertz assignment by using the opposite polarization from the video service, and by using frequency offsets and the multicell point-to-multipoint distribution structure. This channelization plan provides licensees the flexibility to offer different telecommunications services in every cell in the designated authorized area to meet the demands of the marketplace for these services. The 27.5 - 28.5 GHz band will be designated the "A-Band," and the 28.5 -29.5 GHz band will be designated the "B-Band." We seek comment on this assignment scheme.

21. We also seek comment on whether other assignment schemes might better meet our objectives. For example, four blocks of spectrum could be assigned to different licensees instead of two blocks. In this scheme, two larger blocks of spectrum, enough to offer about 34 video channels, could each be assigned to new licensees for IMDS video programming services, and the two smaller blocks of spectrum could each be assigned to other users, possibly to applicants proposing only telecommunications services or a smaller video system. Other assignment schemes may also offer the possibility of providing either

Technical issues

23. The Commission's technical regulations have in the past provided guidance to manufacturers as to the minimum specifications necessary for equipment type acceptance or certification for service. In addition, technical regulations are designed to ensure minimum service performance and facilitate spectrum management, interference control and coordination among individually licensed stations nationwide. Each licensee would have control over its own facilities within its designated service area and would therefore be responsible for minimum service performance and interference levels within its system. The licensee, however, may need to coordinate its operations with other entities licensed to provide service in adjacent designated areas to avoid mutual interference situations. Hence, we must establish regulations to facilitate interference control, spectrum management and coordination at the designated service area interfaces. In addition, coordination requirements and sharing criteria may need to be developed to reflect satellite use. Overall, however, we have an opportunity to be less restrictive in developing technical standards and to promote flexibility for the licensee to meet market demands of the consumer in the designated service area. Although we propose 20 MHz channels for licensing purposes, once licensed, the licensee would not be restricted to specific bandwidth, emission characteristics, etc. and could change the traffic mix within the frequency assignment to meet the requirements of the individual community served by a cell or multiple cells.

24. The three petitions propose a wide range of technical regulations, from a very detailed channelization plan with multiple bandwidth options to a more flexible approach which envisions no restrictions on bandwidth, channelization plan, emission or modulation characteristics. Since the petitions propose to provide licenses for stations over a limited geographical area corresponding to metropolitan statistical areas, they propose some restrictive technical standards and regulations. Given the propagation characteristics of the band, we believe only limited technical regulations may be needed to insure adequate interference control and coordination of services at the interfaces of the designated service areas within each 1000 MHz spectrum block.⁷ We seek comment on the need for technical standards, if any, and specific proposals for power, modulation requirements, channelization, bandwidth, emission characteristics, frequency stability, antenna characteristics, gain, beamwidth, height and polarization and spectrum utilization, as appropriate. We recognize the need to protect stations operating outside the frequency band. The emissions limitations in Part 21 appear to be sufficient to meet this concern. Spectrum utilization would address any questions of spectrum efficiency including minimum standards that should be enforced and how these standards should be determined. Parties should also consider whether technical rules should be adopted to accommodate existing and proposed satellite use of the band.

⁷ Coordination is required within the border areas with Canada and Mexico. We believe that in these circumstances regulations would be required to coordinate with our neighbors individual stations within 56 km of the border to insure interference protection to and from stations across the border.

Regulatory/Licensing Issues

25. Status of Licensees. Suite 12 suggested that the Commission authorize video service distributors in the 28 GHz band as non-common carriers, while Video/Phone proposed that parties be allowed to elect either common carrier or non-common carrier status. In National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C.Cir. 1976), the United States Court of Appeals for the District of Columbia Circuit defined a non-common carrier as one whose practice is to make individualized decisions, in particular cases, whether and on what terms to deal, and who is under no compulsion to offer its services indifferently. A common carrier is one which holds itself out indifferently to serve those who seek to avail themselves of the carrier's particular services, or is under a legal compulsion to do so.

26. We have allowed service providers to elect common carrier or non-common carrier status in a number of radio services licensed by the Commission. For example, we have allowed licensees of satellite transponders to provide service as a non-common carrier entity. We also have allowed Multichannel Multipoint Distribution Service licensees to choose their own status. We have found that doing so furthers the Commission's goals of ensuring that the communications needs of the public are met by allowing marketplace forces to shape the development of service providers. See, e.g., Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984); Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982); Revision to Part 21, Report and Order, 2 FCC Rcd 4251, 4253 (1987). As we have done with MMDS, we propose that LMDS licensees choose whether they will operate as a common or non-common carrier on a channel-by-channel and/or cell-by-cell basis. We request comments on this issue, with particular emphasis on the effects status election would have on consumers.⁸ We also invite comment on the basis on which the selection should be made. In addition, we seek comment on whether the non-video services provided by LMDS licensees should be regulated as common carrier services,⁹ and on the jurisdictional implications of allowing election by a local exchange carrier of non-common carrier status in the proposed service.¹⁰

⁸ With regard to notification of status election, parties should note the process currently used by MMDS licensees (47 C.F.R. § 21.900, ff.). We request interested parties to comment on the usefulness of these procedures for LMDS licensees.

⁹ See In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rulemaking (Gen. Docket No. 90-314, ET Docket No. 92-100) 7 FCC Rcd. 5676 (1992). We also seek comment on the application of our video dial tone policies to common carriers providing video services over LMDS.

¹⁰ To the extent that LMDS could be used as a resold telephone service, the Commission has determined that, under Section 332 of the Communications Act, a private land mobile radio licensee may not resell interconnected telephone service for profit. Amendment of Part 90 of the Commission's Rules to Prescribe Policies and Regulations to Govern the Interconnection of Private Land Mobile Radio Systems, 93 FCC 2d 1111, 1115 (1983), on recon., 49 Fed. Reg.

27. Regulation of Common Carriers. We tentatively propose that LMDS operators electing common-carrier status for part or all of their systems should be classified as "non-dominant" carriers, and subject to streamlined tariff regulation as with MDS.¹¹ A non-dominant carrier is one which has insufficient market power to practice anti-competitive pricing. Id. Although we propose to reallocate a large quantity of spectrum to LMDS, and to assign each operator one gigahertz of spectrum, we tentatively conclude that both video and telecommunications services are so well represented in the marketplace that no LMDS operator will have a monopoly or near-monopoly position. For example, in the video distribution market, LMDS faces competition from MDS, cable television, low-power television, domestic fixed satellites and broadcast television stations. Revisions to Part 21, supra. The telecommunications market includes long-distance telephone service, local exchange service, fixed cellular services, fixed satellite communications, private carriers, and Personal Communications Systems (PCS). Accordingly, it appears that LMDS, while it may find a market niche in particular areas, is unlikely to develop into a monopoly service. Should it do so, we could reassess its regulation.

28. Preemption. For LMDS licensees choosing non-common carrier status, "[p]reemption is primarily a function of the extent of the conflict between federal and state and local regulation." In the Matter of Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 101 FCC2d 952, 959 (1985). To the extent such systems provide video entertainment programming, we tentatively conclude that state entry and rate regulation should be preempted. Beyond that, at this stage, the record in this proceeding does not contain any information regarding the extent to which state and local regulations might conflict with provision of LMDS. State law which conflicts with the federal provisions must be preempted, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); however, we require a factual record on this subject prior to making any final preemption determination. Based on the rules proposed herein, and any additional rules, especially of a technical nature

26066 (1984), aff'd by judgement sub nom. Telocator v. FCC, 764 F.2d 926 (D.C. Cir. 1985) (Table); In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, - FCC Rcd - (1992), Gen. Docket No. 90-314, (Notice of Proposed Rulemaking and Tentative Decision) paras. 97-98, note 64. Accordingly, we ask for comment on this issue, in particular, whether LMDS could be classified as a resold telephone exchange service, whether LMDS licensees may operate as private land mobile radio licensees, and what implications operation of such resold telephone service by local exchange carriers (or others) operating as LMDS licensees would have.

¹¹ History and prior citations noted in Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities (Sixth Report and Order), 99 FCC2d 1020 (1985), rev'd and remanded sub. nom. MCI Telecommunications Corporation v. FCC, 765 F.2d 1186 (D.C. Cir. 1985); vacated in part, AT&T v. FCC, No. 92-1053 (D.C. Cir., November 13, 1992). Commenters should discuss the implications of our competitive carrier policies for participation in LMDS by telephone companies.

suggested by commenting parties, we request comment on the extent to which the Commission may be required to preempt state entry and/or rate regulation of IMDS licensees choosing non-common carrier status.

29. For IMDS licensees choosing to maintain common carrier status, this Commission can preempt state regulation of video service since it is inherently interstate in nature. United States v. Southwestern Cable Co., 392 U.S. 157, 168-169 (1968); New York State Commission on Cable Television v. F.C.C., 669 F.2d 1001 (2d Cir. 1981). Request for IMDS licensees providing common

possible. We noted in Personal Communications Services that the cellular industry might have benefitted from larger initial licensing areas, since many licensees have expended large sums to combine metropolitan area and rural area licenses in consolidated systems. On the other hand, the costs associated with marketing and providing a new collection of LMDS services to the public may be prohibitive in larger population or geographic areas. We seek to find an appropriately-sized service area for LMDS in order to take advantage of economies of scale necessary to support a successful enterprise. Finally, we hope to facilitate applications processing. BTAs provide an easily identifiable and manageable number of discrete filing areas covering all areas of the country. Parties may also consider as alternatives to BTAs the 47 "Major Trading Areas" identified in the Rand McNally guide, supra, or smaller, cellular-type metropolitan and rural service areas, or Areas of Dominant Influence (ADI).

31. We request comment on the alternative proposals. Commenters should focus on the economies likely to be encountered with LMDS, both video and telecommunications services; the comparative costs of building LMDS systems in smaller and larger service areas; which type of licensing would be most likely to best serve expeditiously the needs of rural areas; and which approach would enhance speed of service to the public. Parties are invited to comment on the competitive implications of each alternative.

32. Service of minimum areas and/or populations. In order to ensure that licensees fulfill their responsibility to use the radio spectrum efficiently

similarities, including the method of product distribution. Accordingly, it appears that the intent of Congress to facilitate competition in the video distribution services would include a ban on cable ownership of IMDS licenses if used to distribute video programming.¹² We solicit parties' comments on the interpretation of the cross-ownership prohibition on MDS in the Cable Act as it applies to IMDS, and our tentative policy conclusion not to impose cross-ownership restrictions.¹³

35. Selection from among mutually exclusive applicants. The two traditional choices available for choosing from among mutually exclusive applicants are comparative hearing and random selection. A third option, competitive bidding, may be available if Congress enacts enabling legislation. Comparative hearings may be either full administrative hearings or expedited hearings conducted primarily through a written record. Full administrative hearings are extremely costly and time-consuming. Expedited "paper" hearings, while not as costly in time and resources as full administrative hearings, are nevertheless cumbersome. For example, proceedings to license the top-30 cellular markets through expedited hearing procedures took approximately two years.

36. Because of our interest in making as many innovative, competitive services available to the public as quickly as possible, we propose to use random selection, or competitive bidding, if authority is provided by Congress, to choose among any mutually exclusive IMDS applications. We request comments on which method would be best suited to this service. We also ask for comment on the specific form any lotteries should take. In our recent Notice of Proposed Rulemaking for the PCS service, we discussed ways in which the lottery system could be improved. We also asked questions on how to implement competitive bidding. PCS NPRM, supra, paras. 84 - 91. We ask for comment on these options in the context of this service.

licensee." 47 U.S.C. §309(i)(3)(C)(i). Accordingly, since IMDS appears to be a medium of mass communications, we tentatively conclude that preferences for diversity and minority interests are appropriate for IMDS. We request comment on this issue.

38. Settlements. Settlement between mutually exclusive applicants may avoid the need for comparative hearing or random selection procedures and reduce administrative burdens, delay and expense. See, e.g., Second Report and Order, Gen. Docket No. 80-112, 50 Fed. Reg. 5983-01, para. 41 (February 13, 1985) (MMDS Lottery Order). However, our experience with cellular and MMDS licensing has shown that this purpose has not always been served by permitting settlements. To the contrary, the opportunity to settle is often perceived as making an application a "sure thing" in a game of chance, thus drawing thousands of insincere applicants hoping to profit from merely filing. Accordingly, the settlement rules have not promoted the public interest in licensing entities prepared to serve the public with needed communications services.¹⁴ Thus, we propose to forbid any settlements among applicants for IMDS, and any alienation of interest in an application for IMDS. The rule we propose herein is based on the Part 22 Domestic Public Cellular Radio Telecommunications Service rule barring any alienation of interest in an application, and requires that each applicant file an independent, individual application. We welcome comment on our proposal.

39. License Term and Transfer of Control/Assignment. To further ensure

42. Application requirements. We propose to adopt rules for application requirements similar to those used for cellular applications. Although these requirements demand vigilance and careful preparation on the part of applicants, the public interest is served because fewer processing delays contribute to licenses being made available as quickly as possible.

43. We propose that the standard to be met for LMDS applications be the "letter perfect" standard, rather than the present Part 21 standard of substantial compliance and opportunity to amend. The latter standard has proved to be administratively burdensome and may have contributed to delays in licensing MMDS stations. Accordingly, LMDS applicants not meeting the proposed rule's requirements would be dismissed rather than, under the current Part 21 practice, being allowed to perfect their applications. We propose that detailed review occur after a lottery is held. Parties are invited to comment on this proposal, with particular emphasis on expeditious licensing of qualified applicants.

44. As an alternative, we request comment on whether a "post-card" application, requiring minimal information about the applicant, would be appropriate for LMDS. No technical or financial information would be required to enter the random selection procedure; however, the applicant would be required to certify that it complies with all eligibility rules. Applicants chosen as tentative selectee would have 30 days to file a complete, letter-perfect application for the Commission's consideration.

45. One-to-a-Market. As with cellular licensing, we propose that only one application per market area could be filed by each applicant. We propose that no interest, direct or indirect, would be permitted in another application for the same market, including pre-existing settlement agreements or understandings, which in any event we propose to prohibit. Interests in bona fide publicly-held corporations of less than one percent would not be cognizable interests for the purpose of this proposed rule. Parties are invited to comment.

46. Financial showing. Due to the large amount of bandwidth which each licensee would receive, and the responsibility each licensee would have to serve a large area, we believe that applicants should give an indication of their financial qualifications to construct and operate their proposed system. We propose to require applicants to meet the "firm financial commitment" standard which has been required of cellular applicants below the top 120 markets.

47. We propose that applicants be required to provide a proposal of service for 90% of the population within the service area within 3 years, a detailed business plan for meeting their plan of system construction and operation, and a showing of a firm financial commitment to construct the three year plan and to operate for one year after complete construction without additional revenue. Parties are invited to comment on this proposal.

48. Construction Requirement. To ensure that the public is served expeditiously, we propose to establish construction completion benchmarks. We

propose to require that licenses be conditioned on constructing the system within three years of the date of license grant. Whenever any portion of the system is ready to begin operation, the conditional licensee must file a Form 494A, Notification of Completion of Construction. Thereafter, the licensee need not file any additional notifications until the entire system is

Telephone, 2 FCC Rcd 2413 (1986), the Commission found the waiver standard had been satisfied because "(3) the proposed use of the frequencies will not be detrimental to their assigned users;" 6 FCC Rcd at 334, para. 20.

53. Granting the several hundred waivers before us would amount to a de facto reallocation of the 28 GHz band, would be inconsistent with the Commission's suggestion that it would not grant a flood of such requests, and would be detrimental to the assigned users (potential common carrier point-to-point applicants) because spectrum awarded to waiver applicants would not be available to those assigned users. Large scale waivers also would run afoul of the guidance provided by the courts to the Commission in considering waivers, e.g., that they not undermine the purpose of the rule being waived. WATT Radio, 418 F.2d 1153 (D.C. Cir. 1969). We also see no basis for distinguishing among any of the individual requests in an equitable fashion.

V. PIONEER'S PREFERENCE

54. Background. The Commission's pioneer's preference rules are a means of recognizing, in the Commission's licensing process, parties that develop new communications services or technologies. The underlying rationale for such rules is to foster the development of new services and improvements to existing services by reducing for innovators the delays and risks associated with the Commission's licensing processes. Innovators of substantial new communications services and technologies have an opportunity to participate either in the new services that they took a lead in developing or in existing services with regard to which they took a lead in promoting application of new technologies.¹⁵

55. For each request before us, we have evaluated (1) whether the requester has demonstrated that its proposal constitutes a significant communications innovation; (2) whether it has made a significant contribution in developing that innovation; and (3) whether the innovation reasonably will lead to establishment of a service not currently provided or substantially enhance an existing service. In applying these criteria, we employ the pioneer's preference standards set out in our rules and applied in our previous tentative decisions that consider award of pioneer's preferences.¹⁶ We consider whether a proposal is "to provide either a service not currently provided or a substantial enhancement to an existing service"¹⁷ by evaluating factors that include, but are not limited to, (1) added functionality; (2) new use of

¹⁵ The pioneer's preference regulations are codified at 47 C.F.R. §§ 1.402, 1.403, and 5.207. See Establishment of Procedures to Provide a Preference, Report and Order, 6 FCC Rcd 3488 (1991), recon. granted in part, 7 FCC Rcd 1808 (1992), further recon. pending.

¹⁶ See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services, supra, paras. 143-195.

¹⁷ 6 FCC Rcd 3488 at para. 49.

spectrum; (3) changed operating or technical characteristics; (4) increased spectrum efficiency; (5) increased speed or quality of information transfer; (6) technical feasibility; and (7) reduced cost to the public. In addition, to be eligible for a tentative award, at the time of the tentative decision a requester must have either received an experimental license and reported at least preliminary results, or submitted a written showing that demonstrates the technical feasibility of its proposal.¹⁸

56. Two pioneer's preference requests were filed in this proceeding. The first, filed by Suite 12, was accepted and placed on public notice on December 16, 1991. Comments and reply comments were received in January 1992. The second, filed by the University of Texas - Pan American (UTPA), was submitted on May 1, 1992 and dismissed on June 18, 1992 for failure to include the information required by the pioneer's preference rules and which is necessary

60. WCA opposes Suite 12's request for a pioneer's preference. WCA questions the feasibility of Suite 12's proposal, contending that substantial doubts exist as to the viability of Suite 12's system in the marketplace. In WCA's view, until those doubts are resolved, the Commission would be premature to award Suite 12 a pioneer's preference. WCA also argues that Suite 12 received what is tantamount to a pioneer's preference when the Commission granted Suite 12's wholly-owned affiliate, Hye Crest Management, a license (by waiver) to construct a one-way video transmission system using the 28 GHz band in the New York Primary Metropolitan Statistical Area (PMSA).

61. In replying to WCA's opposition, Suite 12 argues that a report prepared for Suite 12 by the David Sarnoff Laboratories provides a comprehensive technical description of the viability of Suite 12's technology based on tests that the Sarnoff Laboratories performed. According to Suite 12, more than 50 companies and individuals have witnessed demonstrations of Suite 12's LMDS technology, and virtually all have felt sufficiently confident in its technical and market viability to seek licenses from Suite 12 to use it.

62. Suite 12 also maintains that Hye Crest's license is not tantamount to a pioneer's preference grant to Suite 12 because the waiver permits only a one-way video service. Because LMDS technology is capable of two-way voice and data applications in addition to one-way video, Suite 12 argues that it is seeking a pioneer's preference for a different and more sophisticated service than is the subject of the Hye Crest waiver. Suite 12 maintains that regardless of whether LMDS is viewed as a substantial enhancement of the service offered by Hye Crest or as a new service in its own right, it warrants a pioneer's preference.

63. Decision. The record demonstrates that Suite 12 is the innovator of LMDS technology and that other companies are seeking licenses to provide LMDS based on Suite 12's pioneering work. No party has challenged Suite 12's claims regarding its developmental efforts. Further, the rules proposed herein are based substantially on Suite 12's proposals in its petition for rule making. While WCA correctly observes that LMDS remains to be tested in the marketplace, the same is necessarily true of most technologies or services for which a pioneer's preference is considered. Therefore, we tentatively conclude that Suite 12 should be awarded a pioneer's preference.

64. Regarding WCA's concerns about Suite 12 already having received the equivalent of a pioneer's preference in the New York PMSA, we disagree with Suite 12 and believe that the service provided by Hye Crest in the New York City area is not substantially different from the service requested by Suite 12 for a pioneer's preference. While Suite 12 is eligible for a pioneer's preference for its proposal in this proceeding, we emphasize that a pioneer's preference for LMDS will not be awarded in more than one service area. Consequently, if a tentative preference to Suite 12 is confirmed, we will modify the authorization to Hye Crest to meet the service area, frequency, and other technical rules developed in this proceeding for the area encompassing Hye Crest's New York PMSA authorization. Alternatively, if Suite 12 informs

the Commission that it prefers a preference in the Los Angeles area,²⁰ and that Hye Crest will surrender its New York FMSA authorization at the time of issuance to Suite 12 of any LMDS license for the service area encompassing Los Angeles, we will grant it a preference for Los Angeles.

65. For the above reasons, we tentatively conclude that Suite 12 should be awarded a pioneer's preference in either the New York or Los Angeles area. If the tentative preference is confirmed and Suite 12 is otherwise qualified, it would be the only eligible applicant for one of the frequency blocks for its preferred service area.

66. UTPA Petition for Reconsideration. In its pioneer's preference request UTPA stated that it plans to employ LMDS technology "to ameliorate a critical lack of educational opportunities for the residents of the Rio Grande Valley of Texas."²¹ Specifically, UTPA proposes to employ LMDS in the Rio Grande Valley to provide two-way point-to-multipoint video distribution of various educational material. UTPA's petition was dismissed for failure to describe or otherwise document its role in having developed a specific distinctive innovation or new technology. The dismissal states that proposing a series of applications for a new technology developed by another party, in and of itself.

work must be developmental in nature. In contrast to Suite 12, which has performed substantial developmental work and experimental testing of its LMS technology, ~~ITD has provided no substantive information about any work that it~~

73. Legal basis. The authority for this action is the Administrative Procedure Act, 5 U.S.C. §553; and sections 4(i), 4(j), 301, 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. §§ 145, 301, and 303(r).

74. Reporting, recordkeeping and other compliance requirements. Reporting requirements are proposed to ensure that the spectrum, if redesignated for these new uses, is used to serve the public's need for communications services.

Ordering Clauses

80. Accordingly, IT IS ORDERED That the Notice of Proposed Rulemaking is hereby adopted with proposed rules in Appendix B;

81. IT IS FURTHER ORDERED That the petition for reconsideration filed by University of Texas - Pan American IS DENIED;

82. IT IS FURTHER ORDERED That the 971 pending applications in the Point-to-Point Microwave Radio Service involving waiver requests listed in Appendix C ARE DENIED;

83. IT IS FURTHER ORDERED That Suite 12 Group is tentatively granted a pioneer's preference in accordance with the discussion in paragraphs 63-65 of this document;

84. IT IS FURTHER ORDERED That the Secretary shall mail a copy of this document to the Chief Counsel for Advocacy, Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary