

our previously-adopted small business definition.¹⁹

67. Overall, we believe that the \$40 million gross revenue standard is, based on the record before us, the most appropriate standard for defining small business for the MDS auction. Contrary to the assertions of PacTel, this standard will fulfill the directive of Section 309(j) of the Communications Act to "ensure that small businesses . . . are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). See September 13, 1995 Ex Parte Letter from PacTel (contending that "unduly high" small business benchmark would frustrate purpose of designated entity policy); Reply of PacTel at 4 (\$40 million standard will frustrate intent of Section 309(j)). By providing special incentives to enterprises, including existing wireless cable licensees and operators, in need of such incentives to compete successfully in the wireless cable industry against larger telecommunications enterprises with well-established revenue streams and easier access to capital, the small business definition adopted in the *MDS Report and Order* fulfills the statutory mandate of Section 309(j) and the Commission's frequently expressed goal of encouraging wireless cable as a viable competitor in the multichannel video distribution market. Accordingly, we decline to alter the definition of small business set forth in the *MDS Report and Order*.

15. Prevention of Unjust Enrichment by Small Businesses

68. *Background.* In the *MDS Report and Order*, we adopted specific rules to prevent small businesses from taking advantage of the special provisions for such entities by transferring or assigning their BTA authorizations immediately following the MDS auction. Specifically, if a small business winning bidder making installment payments seeks to assign or transfer its BTA authorization to a non-small business entity, the Commission will require payment of any remaining unpaid principal balance, and of any unpaid interest accrued, as a condition of the assignment or transfer. Similarly, we require small businesses that acquired BTA authorizations through the use of bidding credits to reimburse the government the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the authorizations were awarded, if the authorizations are transferred or assigned within specified time periods to such entities. See *MDS Report and Order* at ¶¶ 183; 189. Although the Commission imposed the above-described unjust enrichment requirements when a small business winning bidder transfers or assigns its BTA authorization to a non-small

¹⁹ PacTel has also asserted that "the value (and, concomitantly, the capital requirements) of the MDS BTAs will be quite modest." Petition of PacTel at 9. The Commission cannot agree with this assertion. Not only are the capital requirements of MDS, as discussed above, considerable, these capital requirements are not attendant upon the value of the BTAs at auction. In fact, in the *MDS Report and Order*, we expressly noted that "even though the cost of acquiring BTA authorizations at auction are estimated to be relatively modest in comparison to other services, considerable capital is nonetheless required to construct a competitive wireless cable system." *Id.* at ¶ 191.

business entity, we did not specifically impose any such unjust enrichment provisions if a small business winning bidder were to partition a substantial portion -- or even virtually all -- of its BTA service area to a non-small business entity immediately upon receipt of its authorization. Because, unlike other auctionable services, MDS allows all types of entities the option of partitioning their service areas, we believe that this omission in our unjust enrichment requirements could lead to abuse of our partitioning provisions. Consequently, the Commission now, on its own motion, clarifies its unjust enrichment requirements.

69. **Resolution.** After consideration, we believe that unjust enrichment requirements should also apply in the partitioning context. Specifically, a small business winning bidder who partitions to a non-small business entity a portion of its BTA containing one-third or more of the population of the area within its control in the licensed BTA will: (1) if making installment payments, be required to pay any remaining unpaid principal balance, and any unpaid interest accrued, as a condition of the partition; and (2) be required to reimburse the government the amount of any bidding credit, plus interest at the rate imposed for installment financing at the time the authorization was awarded, before the partition will be permitted. The amount of the required reimbursement of the bidding credit will be reduced over time. A partition in the first two years after issuance of the authorization will result in a reimbursement of one hundred percent of the value of the bidding credit; during year three, seventy-five percent of the bidding credit; in year four, fifty percent; in year five, twenty-five percent; and thereafter, no reimbursement. No unjust enrichment reimbursement requirements will apply if a small business winning bidder partitions any portion of its BTA service area to another entity qualifying as a small business under the Commission's rules.

70. We believe that the above-described provisions are consistent with our existing unjust enrichment requirements, and will prevent abuse of the liberal partitioning measure set forth in Section 21.931 of our rules. See 47 C.F.R. § 21.931.²⁰ The unjust enrichment provisions adopted herein still permit small business winning bidders to partition relatively substantial portions of their BTA service areas to entities not qualifying as small businesses without being subject to reimbursement requirements. Thus, these provisions should not unduly inhibit the partitioning of BTA service areas, which, as discussed in the *MDS Report and Order*, will promote efficient use of the spectrum and facilitate the provision of service to small markets. See *MDS Report and Order* at ¶ 47.

²⁰ The decision to impose unjust enrichment provisions only on small businesses that partition to non-small businesses portions of their BTAs containing one-third or more of the population of the areas within their control in the licensed BTAs is also consistent with the Commission's five year build-out period, which requires BTA authorization holders to provide a signal level sufficient to furnish adequate service to two-thirds of the population of the areas within their control in the licensed BTAs. See *MDS Report and Order* at ¶ 43.

16. Statutory Authority for Competitive Bidding on MDS

71. **Background.** Section 301 of the Communications Act, as amended, gives the Commission authority to provide for the use of radio transmission channels, for limited periods of time, under license granted by federal authority. Section 307 requires fair, efficient and equitable distribution of radio services. Section 309(j) gives the Commission authority to use competitive bidding to choose among mutually exclusive applications for certain initial licenses or construction permits which will involve a use of the electromagnetic spectrum. *See* 47 U.S.C. §§ 301, 307, 309(j).

72. **Pleadings.** A/B Financial contends that the MDS auction rules, as adopted, exceed the Commission's statutory authority under Sections 301, 307 and 309(j) of the Communications Act. Principally, A/B Financial argues that the *MDS Report and Order* creates and provides for the auction of a BTA authorization which is not a license in violation of Sections 301 and 309(j) of the Act. *See* Petition of A/B Financial at 3-4; 8. A/B Financial also complains that the Commission intends to auction authorizations for BTAs in which no MDS channels may be available for licensing and that the issuance of such authorizations is not permitted by Section 301 and/or Section 309(j). *See id.* at 4-5; 8. The petitioner adds that this BTA authorization is not limited in time, and Section 301 only permits the creation of licenses allowing use of channels for limited periods of time. *See id.* at 5.

73. A/B Financial additionally argues that the BTA authorization is an illegal restraint of trade forbidden under Section 307, which requires fair, efficient and equitable distribution of radio services. *See id.* at 5-7. Specifically, A/B Financial contends that the BTA authorization approach adopted by the Commission will facilitate the creation of anti-competitive monopolies, and lead to undue concentration in the wireless cable industry, by granting the BTA authorization holder exclusive access to the channels available within the BTA.²¹ *See id.* Similarly, A/B Financial asserts that the regulatory objectives of competitive bidding, set forth in Section 309(j)(3), are not met by the Commission's MDS rules because MDS is a pre-existing service, rather than a "new" technology, product or service, and the rules do not promote competition in the service. *See id.* at 8-9. Finally, this petitioner argues that the BTA approach adopted in the MDS rulemaking violates Section 309(j)(6)(D), 47 U.S.C. § 309(j)(6)(D), which states that nothing in the use of competitive bidding "shall be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection." *See id.* at 9.

²¹ This petitioner also contends that the creation of a right of first refusal for the BTA authorization holder over ITFS excess capacity leases inhibits competition. *See* Petition of A/B Financial at 6-7. Since we agree with the petitioners who request elimination of the right of first refusal, we need not address this issue. *See supra* ¶ 16.

74. The Association and NYNEX oppose that part of A/B Financial's petition challenging the Commission's statutory authority to implement competitive bidding for MDS as set forth in the *MDS Report and Order*. The Association argues that the use of auctions to award MDS BTA authorizations is well within the Commission's statutory authority under Section 309(j) and will not result in an undue concentration of control within the wireless cable industry. See Partial Opposition of the Association at 12-15. NYNEX similarly asserts that the Commission is authorized to use auctions to award MDS authorizations on a BTA basis, and emphasizes the Commission's "broad discretion" and "great flexibility" in developing auction methodologies. See Opposition of NYNEX at 11-13.

75. **Resolution.** We will deny A/B Financial's petition on these issues. For the reasons set forth in detail below, we find that the approach adopted in the *MDS Report and Order* to auction the remaining usable MDS channels is well within the Commission's statutory authority.

76. A/B Financial's principal contention that the Commission violated its statutory authority under Sections 301 and 309(j) by providing for the auction of BTA "authorizations" rather than BTA "licenses" constitutes a mere exercise in semantics. See Petition of A/B Financial at 3-4; 8. As we clearly stated in the MDS rulemaking, "the *initial license* for the BTA service area will be referred to as a 'BTA authorization.'" *MDS Report and Order* at ¶ 39 (emphasis added). Because BTA authorizations are initial licenses, the Commission clearly has authority to auction these authorizations under Section 309(j), which provides for the auctioning of mutually exclusive initial licenses or construction permits involving a use of the electromagnetic spectrum. See 47 U.S.C. § 309(j)(1). We also believe that the Commission has authority under Sections 301 and 309(j) to refer to these initial licenses for the BTA service areas as "BTA authorizations." The term "authorization" is quite broad and is used by the Commission to include a variety of licenses and permits. For example, the actual permit received by MDS licensees to operate an MDS facility has for years been captioned as a "Radio Station Authorization."

77. Petitioner's vague objections to the BTA authorizations as "blanket" authorizations that still require the holders to secure individual authorizations for particular MDS facilities are also without merit. See Petition of A/B Financial at 4. As explained in the *MDS Report and Order*, the Commission adopted a licensing approach based on BTAs because it would promote the development of MDS, while effectively protecting the rights of incumbents. In the MDS rulemaking, we concluded that, based on the record, licensing by geographic areas was most appropriate for MDS and would afford wireless cable operators the flexibility to improve existing systems, introduce new systems and implement digital technologies. See *MDS Report and Order* at ¶¶ 24-33. We also determined that requiring BTA authorization holders to file applications to secure individual authorizations for particular MDS facilities within their BTA service areas would help protect previously authorized and proposed MDS facilities from harmful interference by, *inter alia*, giving incumbents the opportunity to file petitions to deny such applications. See *id.* at ¶¶ 38-39; 48; 150-151. Indeed, other parties opposed and we have rejected Bell Atlantic's proposal to

implement a blanket licensing approach under which BTA authorization holders would *not* be required to file applications for specific MDS facilities in part because of the risk of harmful interference to existing MDS operations. See Partial Opposition of the Association at 8-10; ¶¶ 10-13, *supra*. The Association and NYNEX correctly point out in their oppositions that the Commission is not barred from establishing such a licensing system. Indeed, Section 309(j) specifically gives the Commission authority to identify the "classes of licenses and permits to be issued by competitive bidding" and to "prescribe area designations and bandwidth assignments." 47 U.S.C. § 309(j)(3) and 4(C). Given this broad statutory authority and the discretion generally afforded the Commission to implement congressional directives, the Commission believes that its prescription of BTAs as the appropriate geographic service areas and its identification of BTA authorizations as the class of initial licenses to be auctioned are clearly within its statutory authority. *Accord* Partial Opposition of the Association at 13; Opposition of NYNEX at 11-12. We also note that the "blanket" BTA authorizations challenged by A/B Financial are similar to the licensing schemes in other spectrum-based services that involved incumbents with site-specific licenses. These new licenses based on geographic areas in broadband PCS, 900 MHz specialized mobile radio ("SMR") and 800 SMR, like the MDS BTA authorizations, grant the holder the exclusive right to use specified spectrum within a defined geographic area, subject to certain interference protection or relocation requirements for incumbent licensees.²²

78. We also reject petitioner's claim that auctioning BTAs where no MDS channels may be available is not permitted under Section 301 or Section 309(j). See Petition of A/B Financial at 4-5; 8. This argument evidences a misunderstanding of what is meant by an "available" or "usable" MDS channel. As clearly explained in the MDS rulemaking, a "channel is usable if the proposed station design is in compliance with the Commission's interference standards." *MDS Report and Order* at ¶ 2. The Commission is therefore unable to determine definitively the number of usable channels in an encumbered BTA until we can examine the engineering design and technical parameters of a station proposing to utilize a specified channel(s) within the BTA.²³ The improvement in and the expanding number of interference abatement techniques has also enhanced the ability of prospective operators to construct new facilities to operate on MDS channels within an already encumbered area. Thus, the mere fact that we are auctioning BTAs that are encumbered and that we have not delineated the exact amount of spectrum that remains available in each BTA does not mean,

²² See *Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order*, GEN Docket No. 90-314, 8 FCC Rcd 7700 (1993); *Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, Third Report and Order*, GEN Docket No. 93-252, PR Docket No. 93-144, PR Docket No. 89-553, 9 FCC Rcd 7988 (1994).

²³ Whether a proposed station will cause harmful interference to the incumbents within a BTA will also depend upon the size, shape and terrain of that particular BTA.

as the petitioner implies, that we are auctioning entirely speculative rights.²⁴ Because auctioning all BTAs in the United States, even those with a very limited amount of spectrum remaining, will result in the most efficient utilization of the MDS spectrum, we do not believe that the Commission has exceeded its statutory authority by adopting the auction approach set forth in the *MDS Report and Order*.

79. We find that we need not address petitioner's complaint that the Commission has exceeded its authority under Section 301 by creating a BTA authorization that is not limited in time. See Petition of A/B Financial at 5. As clarified in this memorandum and order at ¶ 7, the BTA authorization in fact has a ten-year term.²⁵

80. Given that both BTA authorizations and MDS station licenses granted within BTA service areas have set ten-year terms, we also reject A/B Financial's contention that our MDS auction rules violate Section 309(j)(6)(D) by conveying rights, including an expectation of renewal of licenses, that differ from the rights that apply to existing MDS licensees. See Petition of A/B Financial at 9. To the contrary, the *MDS Report and Order* represents a careful balance between the rights of existing licensees and the rights afforded to auction winners, and does not curtail the rights of the former by unnecessarily expanding the rights of the latter.²⁶ Even a cursory examination of the *MDS Report and Order* illustrates this balancing. See, e.g., *MDS Report and Order* at ¶ 39 (noting that licenses for MDS stations within the BTA service areas of auction winners will have the same ten year term as MDS stations previously licensed); ¶ 54 (auction rules did not change interference protection standards applied at points along the service contours of protected incumbent MDS facilities); ¶ 150 (in accordance with existing rules, each auction winner must, just as all previous MDS licensees, file a separate long-form application for each channel group and location for which

²⁴ We also note that, if a BTA authorization holder is (as we expect many BTA authorization holders to be) an incumbent, the holder will be able to use more spectrum within the BTA because its protected service area will expand beyond the 35-mile protected service areas granted to incumbents to the borders of the BTA. See *MDS Report and Order* at ¶¶ 48-54. Thus, auctioning BTAs that are encumbered will result, as Congress has directed, in a more intensive use of the MDS spectrum within BTAs because BTA authorization holders will be able to expand their service to cover additional areas. See 47 U.S.C. § 309(j)(3)(D) (Commission shall seek to promote "efficient and intensive use" of electromagnetic spectrum).

²⁵ We note that all individual MDS station licenses within the BTA service areas winners also have ten-year terms. See *MDS Report and Order* at ¶¶ 155-157.

²⁶ See Opposition of NYNEX at 12 (existence of large number of MDS licensees and grandfathered ITFS facilities required Commission to adopt auction approach that established a defined authorization on which bids could be accepted, but which protected existing interests).

the winner wants to obtain a station license).²⁷ Given the Commission's express authority to adopt a geographic based licensing approach for MDS and the Commission's careful balancing of the rights conveyed to auction winners with the protections afforded to incumbents, we reject A/B Financial's argument that the approach set forth in the *MDS Report and Order* violates Section 309(j)(6)(D).

81. This petitioner's concerns that the BTA authorization constitutes an illegal restraint of trade prohibited by Section 307 and will lead to anti-competitive monopolies and undue concentration in the wireless cable industry are unfounded. See *Petition of A/B Financial* at 5-7. A/B Financial's objection to the BTA authorization holder's "exclusive" right to utilize the remaining usable MDS channels within a BTA is misplaced because, as we have continually noted, it is necessary for a single operator to obtain as many MDS channels as possible within a geographic area to be competitive with cable television system offerings. See *Notice*, 9 FCC Rcd 7665, 7667 (1994); *MDS Report and Order* at ¶ 173. Thus, the "exclusivity" that A/B Financial objects to as anti-competitive will, in fact, promote competition in the multichannel video distribution market by encouraging the aggregation of MDS channels by the BTA authorization holders and making the holders more competitive with cable operators. We additionally disagree with petitioner's claim that only a "handful" of wireless cable companies will be able to bid successfully for the majority of BTA authorizations at auction. See *Petition of A/B Financial* at 7. Even the largest wireless cable companies are relatively small enterprises, and, given the publicly expressed interest of several telephone companies and large telecommunications firms in wireless cable, there is no basis to assume that only a "handful" of wireless cable companies will win BTA authorizations at auction. *Accord* *Partial Opposition of the Association* at 14.²⁸ Given the

²⁷ Admittedly, each auction winner will receive certain rights to apply for the available MDS channels within a BTA that previous licensees for particular MDS facilities have not possessed. However, this fact does not mean that the Commission violated Section 309(j)(6)(D) in adopting this geographic-based licensing approach. As explained previously, this geographic approach was necessary, given the need to define clearly the rights granted to auction winners and to protect incumbents. See *Opposition of NYNEX* at 12, *cited in* footnote 28 above. Moreover, Congress in Section 309(j) explicitly acknowledged the Commission's authority to adopt licensing approaches based on differing geographic areas. See 47 U.S.C. § 309(j)(6)(F) (nothing in this subsection shall be construed to prohibit Commission from issuing nationwide, regional or local licenses or permits).

²⁸ Furthermore, it is erroneous to assume, as the petitioner has, that concentration within the wireless cable industry would be harmful to consumers. Indeed, we believe it is important for wireless cable companies to increase in size and strength so they are able to expand service into new areas and to serve new subscribers. The growth of wireless cable, and other technologies such as direct broadcast satellite, can only be beneficial to consumers, as it will result in viable competition to cable television, which remains a monopoly in many areas. Considering the small niche that wireless cable currently occupies in the multichannel

congressional indication that antitrust considerations should not dominate the Commission's determination of competitive bidding issues,²⁹ these remote concerns about concentration in the wireless cable industry do not persuade us to alter our previously adopted MDS auction rules.

82. Finally, we reject A/B Financial's assertion that the MDS auction rules do not fulfill the objectives of competitive bidding as set forth in Section 309(j)(3).³⁰ See Petition of A/B Financial at 8-9. To the contrary, we feel that the auction rules adopted in the MDS rulemaking clearly fulfill these objectives. First, the BTA-based licensing approach will promote the development and rapid deployment of wireless cable service for the benefit of the public, including those residing in rural areas, in many ways, such as by eliminating processing delays and by providing both new and incumbent operators with maximum flexibility to improve and expand service and implement digital technologies. See *MDS Report and Order* at ¶¶ 27-29; 48. We also note that the broad partitioning option set forth in the *MDS Report and Order* will facilitate the provision of service to small markets and

video programming distribution market, concerns over an increase in concentration within the wireless cable industry are clearly misplaced.

²⁹ The Report of the House Budget Committee on the Omnibus Budget Reconciliation Act of 1993, which gave the Commission competitive bidding authority, stated:

The Committee does not intend that the Commission should apply any particular antitrust or other test in order to avoid concentration of licenses, but rather should apply a common sense approach. If a single licensee dominates any particular service, or if it dominates a significant group of services, then the Commission should take that into account. The Committee does not intend that this objective dominate the Commission's decision-making when it adopts regulations to implement the competitive bidding process.

H.R. Rep. No. 111, 103rd Cong., 2d Sess. 254, *reprinted in* 1993 U.S. Code Cong. & Ad. News 581.

³⁰ Section 309(j)(3) provides that, in identifying classes of licenses to be auctioned, in specifying the characteristics of such licenses, and in designing auction methodologies, the Commission shall seek to promote: (i) the development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas; (ii) economic opportunity and competition by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants; (iii) the recovery for the public of a portion of the value of the public spectrum resource and the avoidance of unjust enrichment through the methods employed to award uses of that resource; and (iv) the efficient and intensive use of the electromagnetic spectrum. 47 U.S.C. § 309(j)(3).

rural areas. *See id.* at ¶¶ 46-47.³¹ Second, contrary to petitioner's assertion, the MDS auction rules will, as described in detail above (*see* ¶ 81), promote economic opportunity and competition by encouraging the development of wireless cable as a viable alternative to cable television.³² Third, by adopting a geographic-based licensing approach and by clearly defining the rights of auction winners vis-a-vis incumbents in those geographic areas, we believe that the auction of the remaining usable MDS spectrum will recover for the public a portion of the value of the public spectrum resource.³³ Fourth, as explained above (*see* ¶ 78), by auctioning the remaining usable MDS spectrum, including the spectrum available in even highly encumbered BTAs, the MDS auction rules will promote the efficient and intensive use of the electromagnetic spectrum.³⁴ Thus, the auction rules adopted in the *MDS Report and Order* clearly meet the congressional objectives expressed in Section 309(j), and we accordingly deny A/B Financial's petition on this issue.

D. Other Issues

83. We would like to clarify that the coordinates of the center reference point for incumbent MDS protected service areas became fixed on September 15, 1995, and the protected service area expansion was effective as of September 18, 1995. *See e.g.*, Petition of the Association at 15-18. However, since several petitions indicate that there was some confusion on the effective dates of these rules, we will fix the center reference point for any modifications of incumbent MDS stations filed on September 18, 1995, as of that date, if the modifications are otherwise grantable.

³¹ The fact that MDS is a "pre-existing service," rather than a brand new technology, is not relevant, despite the petitioner's claim to the contrary. *See* Petition of A/B Financial at 9. To consumers who have not previously benefitted from wireless cable service, such service is "new," and the goal of further developing and deploying such a "pre-existing service" for the benefit of the public is, in our opinion, fulfilled by the MDS auction rules.

³² We also note that the MDS rules include several special measures, such as reduced upfront payments, installment financing and bidding credits, for small businesses, including those owned by women and minorities. These measures should help fulfill the statutory objective of disseminating licenses among a wide variety of applicants.

³³ We additionally note that our auction rules, as directed by Congress, include provisions designed to avoid unjust enrichment of entities that obtain BTA authorizations through the use of special measures, such as bidding credits and installment financing. *See MDS Report and Order* at ¶¶ 158-160; 183; 189. As discussed above, we now have also set forth an unjust enrichment measure to prevent auction winners from abusing our partitioning provisions. *See* ¶¶ 68-70.

³⁴ Other provisions of our rules are also designed to promote the most efficient and intensive use of the spectrum possible. *See e.g.*, *MDS Report and Order* at ¶¶ 46-47 (partitioning will lead to most efficient use of spectrum).

84. U.S. Wireless asks that we review letter rulings on ITFS leases, which it contends undermine the viability of the wireless cable industry. Petition of U.S. Wireless at 4. Review of these rulings is beyond the scope of this proceeding.

85. The Association states that paragraph (c)(2) of Section 21.904 was inadvertently omitted. We have restored it herein. American Telecasting asks the Commission to eliminate Section 21.904 in its entirety to prevent involuntary modifications that might impede low power cellular MDS systems. The *MDS Report and Order* did not reach the issue of the application of cellular communications to MDS systems. Multiple transmitting antenna sites in incumbent wireless cable systems present difficult issues that were not addressed in the *Notice* in this proceeding. For example, which desired signal strength from the multiple sites would be protected against interference at particular points within the protected service area. Therefore, review of this issue is beyond the scope of this proceeding.

86. The Association points out that several typographical errors were made in the version of the revised rules published in the Federal Register. See Petition of the Association at 39. We have corrected them herein.

III. ORDERING CLAUSES

87. Accordingly, IT IS ORDERED, that the above-referenced reconsideration petitions ARE GRANTED IN PART AND DENIED IN PART.

88. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), and 403, this *Order on Reconsideration* is adopted, and Part 21 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix C.

89. IT IS FURTHER ORDERED that the rule changes set forth in Appendix C will become effective immediately upon their publication in the Federal Register. Pursuant to 5 U.S.C. §553(d)(3) we find good cause exists to have the rule amendments take effect immediately upon publication in the Federal Register. The MDS auction is scheduled to commence on November 13, 1995. Our revised rules need to be effective in less than 30 days so that the auction may take place as scheduled and bidders are fully informed of the rules prior to the auction.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

PLEADINGS WERE FILED BY THE FOLLOWING PARTIES:

1. A/B Financial, Inc., *et al.* and Betty Brown, *et al.* ("A/B Financial")
2. American Telecasting, Inc.
3. Bell Atlantic Corporation ("Bell Atlantic")
4. Greenville Technical College, University of Wisconsin, California State University, Dallas County Community College District, INTELCOM Intelligent Telecommunications, Ohio State University, Oregon State System of Higher Education, Portland Community College, Public Television 19, Inc., University of Minnesota, South Carolina Educational Television Commission, St. Louis Regional Educational and Public Television Commission, State of Wisconsin-Educational Communications Board, Troy State University, University of Maine System, University System of the Ana G. Mendez Educational Foundation and Washington State University ("ITFS Parties")
5. Hispanic Information and Telecommunications Network, Inc.
6. Instructional Telecommunications Foundation, Inc. ("Instructional Telecommunications")
7. The National ITFS Association
8. Network for Instructional TV, Inc.
9. NYNEX Corporation ("NYNEX")
10. Omni Microwave Associates
11. Pacific Telesis Enterprise Group and Cross Country Wireless Inc. ("PacTel")
12. Schwartz, Woods and Miller, on behalf of its ITFS clients, Arizona State University, Board of Trustees of Community Technical Colleges, Boston Catholic Television Center, California State University - Fullerton, Catholic Diocese of Youngstown, Connecticut Public Broadcasting, Daytona Beach Community College, Detroit Educational Television Foundation, Fifteen Telecommunications, Inc., Mid-South Public Communications Foundation, Mississippi Authority for Educational Television, Mississippi EdNet Institute, Inc., Monterey County Office of Education, New Jersey Public Broadcasting Authority, North Carolina Agricultural and Technical State University, North Carolina State University, Northern California Educational Television Association, Oregon Public Broadcasting, San Jose State University, Santa Clara County Office of Education, University of North Carolina at Charlotte, University of North Carolina Center for Public Television, University of North Carolina General Administration, WHYY, Inc., Winston-Salem State University, WJCT, Inc. ("Schwartz, Woods and Miller")
13. SR Telecom Inc. ("SR Telecom")
14. Trans Video Communications, Inc. ("Trans Video")
15. United States Wireless Cable, Inc. ("U.S. Wireless")
16. The Wireless Cable Association International, Inc. ("the Association")

APPENDIX B -- FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis is as follows:

I. Need For, and Purpose of, This Action

The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, within the *Notice of Proposed Rulemaking* in MM Docket No. 94-131. As noted in that initial analysis, this proceeding will streamline the procedures for filing applications in MDS, and thereby expedite the provision of services to the public.

Under the terms of the 1993 Budget Act, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis within the *Notice of Proposed Rulemaking* in PP Docket No. 93-253, and published a Final Regulatory Flexibility Analysis within the *Second Report and Order* in that docket. As noted in that previous final analysis, this proceeding will establish a system of competitive bidding for choosing among mutually exclusive initial MDS applications, and will carry out congressional mandates that certain designated entities be afforded an opportunity to participate in the competitive bidding process and the provision of spectrum-based services.

II. Legal Basis for This Action

Authority for the action taken in this proceeding may be found in Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), and 403.

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

No comments were submitted in response to our Initial Regulatory Flexibility Analysis for either MM Docket No. 94-131 or PP Docket No. 93-253.

IV. Significant Alternatives Considered

Although, as described in (III) above, no comments were received pertaining to our Initial Regulatory Flexibility Analysis for MM Docket No. 94-131 and PP Docket No. 93-253, the *Second Report and Order* addressed at length the general policy considerations raised as a result of the new competitive bidding legislation. This *Memorandum and Order on Reconsideration* considered in detail various alternatives for revising MDS application

procedures and implementing competitive bidding for MDS, and the comments submitted on such alternatives.

This *Memorandum and Order on Reconsideration* also specifically considered the impact of the provision adopted on small entities. Overall, the Commission believes that the provisions adopted herein would benefit small entities by retaining certain special incentives to small entities in the competitive bidding process.

APPENDIX C

I. Part 21 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 21- DOMESTIC PUBLIC FIXED RADIO SERVICES

1. 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, 602; 47 U.S.C. 552, 554.

2. In § 21.2, the following definitions are revised to read as follows:

§ 21.2 Definitions.

* * * * *

BTA service area. The area within the boundaries of a BTA to which a BTA authorization holder may provide Multipoint Distribution Service. This area excludes the protected service areas of incumbent MDS stations and previously proposed and authorized ITFS facilities, including registered receive sites.

* * * * *

Partitioned service area (PSA). The area within the coterminous boundaries of one of more counties or other geopolitical subdivisions, drawn from a BTA, to which an authorization holder may provide Multipoint Distribution Service or the area remaining in a BTA upon partitioning any portion of that BTA. This area excludes the protected service areas of incumbent MDS stations and previously proposed and authorized ITFS stations, including registered receive sites.

3. Section 21.15(g) is corrected to read as follows:

§ 21.15 Technical content of applications.

* * * * *

(g) Except for applications in the Multipoint Distribution Service filed on or after September 15, 1995, each application in the Point-to-Point Radio, Local Television Transmission and Digital Electronic Message Service (excluding user stations) proposing a new or replacement

antenna (excluding omni-directional antennas) shall include an antenna radiation pattern showing the antenna power gain distribution in the horizontal plane expressed in decibels, unless such pattern is known to be on file with the Commission in which case the applicant may reference in its application the FCC-ID number that indicates that the pattern is on file with the Commission. Multipoint Distribution Service applicants who filed applications on after September 15, 1995 must provide related information in completing an MDS long-form application.

* * * * *

4. Section 21.42(d) is corrected to read as follows:

§ 21.42 Certain modifications not requiring prior authorization.

* * * * *

(d) Licensees may correct erroneous information on a license which does not involve a major change (i.e., a change that would be classified as a major amendment as defined by § 21.23) without obtaining prior Commission approval by filing a completed FCC Form 494, or for the Multipoint Distribution Service licensees, by filing the MDS long-form application.

5. Section 21.902 is amended by revising paragraph (g)(1) to read as follows:

§ 21.902 Frequency interference.

* * * * *

(g)(1) All interference studies prepared pursuant to paragraph (c) of this section must be served on all licensees, conditional licensees, and applicants for the stations required to be studied by this section. This service must include a copy of the FCC application and occur on or before the date the application is filed with the Commission.

* * * * *

6. Section 21.904(c) is amended to redesignate paragraph (2) as (3), and to add a new paragraph (2) to read as follows:

§ 21.904 Transmitter power.

* * * * *

(c) An increase in station transmitter power, above currently-authorized or previously

proposed values, to the maximum values provided in subsections (a) and (b) of this section, may be authorized, if the requested power increase would not cause harmful interference to any authorized or previously proposed co-channel or adjacent-channel station with a transmitter site within 80.5 kilometers (50 miles) of the applicant's transmitter site, or if an applicant demonstrates that:

(1) A station, that must be protected from interference, potentially could suffer interference that would be eliminated by increasing the power of the interfered-with station; and

(2) The interfered-with stations may increase its own power consistent with the rules; and

(3) The applicant requesting authorization of a power increase agrees to pay all expenses associated with the increase in power to the interfered-with station.

* * * * *

7. Section 21.924 is amended by revising paragraph (c) to read as follows:

§ 21.924 Service areas.

* * * * *

(c) The area within the boundaries of a BTA to which a BTA authorization holder may provide Multipoint Distribution Service excludes the protected service areas of any incumbent MDS stations and previously proposed and authorized ITFS facilities, including registered receive sites.

8. Section 21.925(a)(2) is corrected to read as follows:

§ 21.925 Applications for BTA authorizations and MDS station licenses.

(a) * * *

(2) For purposes of conducting competitive bidding procedures, short-form applications are considered to be mutually exclusive with each other if they were filed for, and specified, the same BTA service area.

* * * * *

9. Section 21.929 is amended by redesignating paragraph (a) as (b) and by adding paragraphs (a)(1) and (2) to read as follows:

§ 21.929 Authorization period for station licenses.

(a)(1) A BTA authorization will be granted for a term of ten years, terminating ten years from the date the Commission declared bidding closed in the MDS auction.

(2) A BTA authorization shall automatically terminate without further notice to the licensee upon expiration of the ten-year license term unless prior thereto an application for renewal of such license has been filed with the Commission.

* * * * *

10. Section 21.933 is amended by revising paragraphs (a) and (b) to read as follows:

§ 21.933 Protected service areas.

(a) The stations licensed to the holder of a BTA authorization shall have a protected service area that is coterminous with the boundaries of that BTA, subject to the exclusion of the 56.33 km (35 mile) protected service area of incumbent MDS stations and of previously proposed and authorized ITFS facilities within that BTA, even if these protected service areas extend into adjacent BTAs. The protected service area also includes registered receive sites.

(b) The stations licensed to the holder of a PSA authorization shall have a protected service area that is coterminous with the boundaries of the counties or other geopolitical subdivisions comprising the PSA, subject to the exclusion of the 56.33 km (35 mile) protected service area of incumbent MDS stations and of previously proposed and authorized ITFS facilities within that PSA, even if these protected service areas extend into adjacent BTAs. The protected service area also includes registered receive sites.

11. Section 21.938 is amended by revising paragraphs (c) and (e), by redesignating paragraphs (c) through (g) as (d) through (h) respectively, and by adding new paragraphs (c)(1), (2), and (3) to read as follows:

§ 21.938 BTA and PSA technical and interference provisions.

* * * * *

(c)(1) ITFS applicants may locate a new station in an unused portion of a BTA or PSA where interference to a previously-proposed or authorized MDS station of a BTA or PSA authorization holder would not be predicted.

(2) With respect to ITFS applications only and for purposes of determining the existence of harmful electromagnetic interference as caused to MDS stations licensed to BTA or PSA authorization holders by subsequently proposed ITFS stations within that BTA, MDS stations licensed to BTA and PSA authorization holders and will have a protected service area of 56.33 km (35 miles), centered on the antenna site of the MDS stations.

(3) The 56.33 km (35 mile) protected service area afforded to a previously-proposed or authorized MDS station of a BTA or PSA authorization holder with respect to a subsequently proposed ITFS station is entitled to the interference protection standards of § 21.902 of this subpart.

(4) An ITFS station authorized before September 15, 1995 may be modified, provided the power flux density of that station does not exceed - 73 dBw/m² at locations along the 56.33

km (35 mile) circle centered on the then-existing transmitting antenna site or service area of collocated incumbent MDS station, as applicable.

(d) Unless the affected parties have executed a written interference agreement in accordance with § 21.937, it shall be the responsibility of a BTA or PSA authorization holder to correct at its expense any condition of harmful electromagnetic interference caused to authorized MDS service at locations within other BTAs or PSAs or within the 56.33 km (35 mile) protected service areas of authorized or previously proposed ITFS and MDS stations (incumbents), or at authorized or previously proposed ITFS receive sites.

* * * * *

(f) The calculated free space power flux density from an MDS station, other than an incumbent MDS station, may not exceed - 73 dBW/m² at locations on BTA or PSA boundaries for which there is an unobstructed signal path from the transmitting antenna to the boundary, unless the applicant has obtained the written consent of the authorization holder for the adjoining BTA or PSA.

* * * * *

12. Section 21.960 is amended by revising paragraphs (b)(5)(i) and (d)(1)(i) to read as follows:

§21.960 Designated entity provisions for MDS.

* * * * *

(b) * * *

(5) * * *

(i) If an eligible BTA authorization holder that utilizes installment financing under this subsection seeks to assign or transfer control of its BTA authorization to an entity not meeting the eligibility standards for installment payments, the holder must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval. If an eligible BTA authorization holder that utilizes installment financing under this subsection seeks to partition, pursuant to Section 21.931, a portion of its BTA containing one-third or more of the population of the area within its control in the licensed BTA to an entity not meeting the eligibility standards for installment payments, the holder must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of partition as a condition of approval.

* * * * *

(d) * * *

(1) * * *

(i) If a BTA authorization holder that utilizes a bidding credit under this subsection seeks to assign or transfer control of its BTA authorization to an entity not meeting the eligibility standards for bidding credits, the authorization holder must reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the authorization was awarded, before assignment or transfer will be permitted. If an eligible BTA authorization holder that utilizes a bidding credit under this subsection seeks to partition, pursuant to Section 21.931, a portion of its BTA containing one-third or more of the population of the area within its control in the licensed BTA to an entity not meeting the eligibility standards for bidding credits, the authorization holder must reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the authorization was awarded, before the partitioning will be permitted. The amount of the required reimbursement will be reduced over time. An assignment, transfer or partition in the first two years after issuance of the BTA authorization will result in a reimbursement of one hundred (100) percent of the value of the bidding credit; during year three, of seventy-five (75) percent of the bidding credit; in year four, of fifty (50) percent; in year five, twenty-five (25) percent; and thereafter, no reimbursement.

13. Section 21.961 is amended by revising paragraph (b)(2) to read as follows:

§ 21.961 Definitions applicable to designated entity provisions.

* * * * *

(b) * * *

(1) * * *

(2) *Aggregation of gross revenues*

* * * * *

II. Part 74 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

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

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

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

2. Section 74.903 is amended by revising paragraph (b)(5) and by adding and sentence to (d) between the first and second sentence to read as follows:

§ 74.903 Interference

* * * * *

(b) * * *

(5) An analysis of the potential for harmful interference within the protected service area, as defined at paragraph (d) of this section, of any authorized or previously proposed station(s) described at paragraph (d) of this section.

* * * * *

(d) * * * Alternatively, an applicant, permittee, or licensee may select a 56.33 km (35 mile) circular protected area centered at the geographic latitude and longitude of the transmitting antenna site. * * *