121. We adopt our original proposal to locate telemetry beacons for satellite DARS in the satellite DARS band, with minor modification. No parties supported the proposal made by DSBC. Further, DSBC provided no supporting information in its comments to assess the impact of satellite DARS telemetry beacons in the 3697-3699 MHz band on the Radiolocation and Aeronautical Radionavigation users of the band. DSBC indicates that Intelsat and Inmarsat and numerous other non-U.S. satellite systems make use of all or large portions of this band. These satellite systems, however, are not located in the geostationary orbit between 80° and 110° W.L., where the satellite DARS applicants propose to locate their satellites. CD Radio, on the other hand, supports the operation of satellite DARS telemetry beacons within the satellite DARS service link spectrum. CD Radio's proposal is more flexible than the proposal in our Notice because it does not mandate an amount of spectrum by which each satellite DARS licensee must reduce its bandwidth to accommodate telemetry beacons (i.e., 0.1 MHz). We therefore modify our original proposal to require satellite DARS licensees to accommodate telemetry beacons for their systems within their exclusively licensed bandwidth but allow each licensee the flexibility to determine the appropriate amount of spectrum necessary for its telemetry beacons.

Cross Polarization

122. Cross polarized signals are orthogonal signals as seen by the receiver.[223] This technique is used extensively in the fixed-satellite service because it facilitates reuse of frequencies to accommodate multiple signals, thereby promoting efficient use of the spectrum. In the Notice we indicated that the record was insufficient for us to analyze the benefits of potential capacity increases, if any, that may result from use of cross-polarized transmissions for satellite DARS.[224] We proposed, however, that satellite DARS licensees be permitted to reach agreement with other satellite DARS licensees to transmit on cross polarized frequencies in frequency assignments of other licensees.[225] The parties who reach such agreements would be required to apply to the Commission for approval of the agreement. Commission approval would be conditioned on the outcome of coordination with other administrations.[226]

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223 Two signals which are orthogonal can occupy the same frequency. The cross polarization isolation achievable between two signals determines the practicality of two signals occupying the same bandwidth.

224 Notice, ¶ 59. We noted that it was not clear whether optimum cross-polarization isolation would be available to allow use of this technique for multiple entry in a mobile environment. Id. Indeed, CD Radio continues to test the feasibility of cross polarization and it asserts that it will not use this reuse technique if it proves unworkable. See CD Radio Reply Comments at 49.

225 See proposed section 25.214, Notice, Appendix I.

226 Notice, ¶ 59.

123. The satellite DARS applicants generally support this proposal.[227] CD Radio asserts that a licensee should at least be permitted to transmit cross-polarized signals within its own frequency assignment.[228] AMRC contends that the use of cross polarization techniques is still untested in the S-band and the availability of such techniques for DARS licensees should not be assumed. However, to the extent that cross polarization techniques become feasible, the Commission should allow its use to expand program offerings.[229] We believe that our proposed rule for cross polarization leaves open the possibility for satellite DARS operators to use this technique, when proven feasible, to meet future market demands for their service. We received no comment in opposition to our proposal for use of cross-polarized frequencies and we adopt our original proposal, without modification.

D. Modification of Part 87

124. In our Notice we indicated that modification to Part 87 of our rules (Aviation Services) would be consequential to the licensing of satellite DARS systems in the 2310-2360 MHz band. We recognized that the mobile and radiolocation services are currently allocated on a primary basis in the 2310-2360 MHz band until January 1, 1997 or until the first broadcasting-satellite (sound) system is operating and affecting or be affected by the mobile and radiolocation services in those service areas, whichever date is later.[230] Further, our Allocation Order warned that the BSS(sound) and complementary terrestrial broadcasting service, during their implementation, should take cognizance of the expendable and reusable launch vehicle frequencies 2312.5, 2332.5 and 2352.5 MHz to minimize the impact on this mobile service use to the extent possible.

125. We proposed modification of Section 87.303, in Appendix II of our Notice, to align Part 87 with Parts 2 and 25 of our Rules. We recommended authorization of new primary assignments for mobile telemetry and telecommand operations, pursuant to Section 87.303, above 2360 MHz. Our Notice indicated that there was support from the aeronautical community to reaccommodate existing aeronautical telemetry users of the 2310-2390 MHz band to the 2360-2390 MHz band.[231] We proposed modification to Section 87.303 to assign telemetry and associated telecommand operations in fully operational or expendable and re-usable launch vehicles above 2360 MHz. Moreover, we suggested that any other telemetry use of the band 2310-2390 MHz would be secondary to launch vehicle use.

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227 See DSBC Comments at 50, CD Radio Comments at 96, and Primosphere Comments at 42.

228 CD Radio Comments at 96.

229 AMRC Reply at 16, n.15.

230 Notice, ¶ 61. See Commissions Rules, Part 2, Section 2.106, fn. US328.

231 Notice, ¶ 61.

126. As discussed, supra, co-frequency, co-coverage operation of satellite DARS and MAT is not possible and it would not be practical to license MAT systems in the satellite DARS band on a co-primary basis. There was no opposition to our proposal to modify Section 87.303. Only DSBC and AFTRCC commented with modifications to our proposal to clarify the status of telemetry use of the 2310-2390 MHz band.[232] Consistent with our original proposal, footnote US328 to Part 2 of our Rules, and the developments in the remainder of the 2310-2360 MHz band,[233] we modify Section 87.303 as it pertains to the 2320-2345 MHz band.[234] We therefore adopt the modified Section 87.303 contained in the Appendix.

E. Satellite DARS Feeder Link Networks

127. In addition to satellite DARS space stations providing service downlinks in the 2320-2345 MHz band, feeder link earth stations for each satellite DARS system will be required to uplink programming information to the space station(s). We recognized in the Notice that feeder link networks are essential to deliver service to the end user and that ample contiguous spectrum is necessary to implement a viable satellite DARS system.[235] We also recognized that satellite DARS feeder link earth stations will be few in number (i.e. one, or possibly two for redundancy, per licensee) and will operate at fixed locations. Therefore, we will authorize satellite DARS feeder link networks in fixed-satellite service (FSS) frequency allocations.

128. We indicated, however, that we would not authorize satellite DARS feeder link networks in the conventional FSS 4/6 GHz (C-band) and 12/14 GHz (Ku-band) frequency bands which are already congested with U.S. fixed-satellite service networks. We tentatively concluded that this would not be an efficient use of the FSS spectrum or the geostationary orbit.[236] Additionally, we recognized in the Notice that the pending satellite DARS applicants propose feeder link operations in FSS bands other than the conventional 4/6 and 12/14 GHz bands. This is consistent with our tentative conclusion. Moreover, we understand that feeder link requirements for each satellite DARS system may increase or decrease depending on the amount of satellite DARS service link spectrum that is exclusively licensed to each applicant,

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232 DSBC Comments at 54. See also AFTRCC Ex Parte statement dated December 16, 1996.

233 We note that the WCS Notice proposes a new footnote USYYY to Part 2, Section 2.106 to assign MAT operations in the 2310-2320 MHz and 2345-2360 MHz bands on a secondary basis to WCS.

234 See discussion of domestic re-allocation of spectrum in our WCS Notice, supra.

235 Notice, ¶ 70.

236 See Notice, ¶ 71.

and on the final configuration of the satellite DARS systems. For these reasons we sought comment on possible alternative non-congested FSS frequency bands that would be suitable for satellite DARS feeder link operations in the event that the frequency bands originally proposed by the applicants are not available.[237]

129. Licensing service link spectrum in the 2320-2345 MHz band without designating spectrum for feeder link networks would result in the Commission licensing an incomplete satellite DARS system. The satellite DARS systems cannot operate without sufficient feeder link spectrum. We therefore will permit satellite DARS feeder link networks in the FSS frequency bands 7025-7075 MHz and 6725-7025 MHz (101° W.L. orbital location only), consistent with the requirements identified in the current applications. We will license satellite DARS feeder link Earth stations according to existing regulations for FSS Earth stations.

130. According to the proposals in the pending applications, the feeder link spectrum requirements for three of the four applicants can be accommodated in the 7025-7075 MHz band. Since satellite DARS systems will be operating space stations in the geostationary orbit, this 50 MHz of spectrum can be reused by satellite DARS licensees in the uplink direction, given sufficient orbital separation between the space stations. We believe that an orbital separation of at least two degrees between satellite DARS space stations is obtainable.[238] Primosphere and CD Radio propose in their applications to use the 7025-7075 MHz band.[239] Though AMRC proposes to use the 6530-6545 MHz band for its feeder links, it proposed no alternative bands. We believe that AMRC's feeder link spectrum requirements, too, can be accommodated in the 7025-7075 MHz band.

131. The fourth applicant, DSBC, proposes in its application to use the 6500-6855 MHz band for its feeder links. DSBC has a greater spectrum requirement than the other applicants because it proposes a system which uses multiple spot beams. Spot beams allow for greater frequency reuse of the service link spectrum but the amount of feeder link

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237 Notice, ¶ 74.

238 According to its application, Primosphere proposes to use the 80° and 110°° W.L. orbital locations which are the same locations proposed by CD Radio. Primosphere recognizes, however, that slight variations from its proposed orbital locations may be necessary to provide sufficient orbital separation in the feeder link band. See Primosphere Application at Appendix 1, pg 5.

239 Following its application for satellite DARS, CD Radio submitted a request to use center frequencies 6715 MHz and 6725 MHz for its feeder link transmissions. Its request was dismissed without prejudice, however, by the Commission on August 3, 1993, as being prematurely filed since its space station application had not yet been granted.

spectrum required is proportionately greater. We note also that DSBC has requested the 101° W.L. orbital position which is allocated to the U.S. in accordance with the international FSS allotment plan.[240] The spectrum in the 6725-7025 MHz allotment band is contiguous with the 7025-7075 MHz band. By combining the 300 MHz of spectrum from the allotment plan with the 50 MHz between 7025-7075 MHz, 350 MHz of spectrum could be available to implement a satellite DARS system at 101° W.L. which uses a multiple spot beam configuration. Moreover, this proposal would be a more efficient use of the FSS allotment plan by using it to its fullest.

132. The 6725-7025 MHz allotment and 7025-7075 MHz bands are currently lightly used in the U.S. by the fixed-satellite service, in contrast to the conventional 4/6 GHz and 12/14 GHz bands. Indeed, the WRC-95 designated these frequency bands for NGSO MSS feeder link use because, globally, they are currently lightly used by the FSS. Though NGSO MSS feeder link networks are planned to operate in these frequency bands and these bands are used in the U.S. for broadcast auxiliary and Electronic News Gathering (ENG), we believe, for the reasons stated herein, that satellite DARS feeder links can share the 6725-7025 MHz allotment and 7025-7075 MHz bands with existing and planned co-primary users.

133. Regarding the sharing situation in the U.S. with broadcast auxiliary and ENG use of the bands, we identified in the Notice the sharing issues that satellite DARS operators would have to address. Initially, commenters maintained that bands allocated for broadcast auxiliary are heavily used for ENG, inter-city relays and studio-to-transmitter links, and that use of the 7 GHz band for satellite DARS feeder link operations would not be feasible.[241] Joint Comments from broadcasters assert, however, that satellite DARS feeder links could share the 7 GHz band with broadcast operations under certain conditions.[242] The National Association of Broadcasters (NAB) maintains that satellite DARS feeder link use of the 7 GHz band would be possible only in small markets, noting that ENG may move from the 2 GHz band to the 7 GHz band thereby crowding the 7 GHz band.[243] CD Radio contends that, even in light of the mobile nature of ENG operations in the 7 GHz band, a carefully engineered and coordinated satellite DARS uplink may well be able to co-exist with these broadcast facilities.[244]

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240 See International Radio Regulation RR No. 792A.

241 See Notice, ¶ 72.

242 See Joint Comments of SBE, Capital Cities, Association of Maximum Service Television, and NBC at 3.

243 See NAB Comments at 61-62.

244 See CD Radio Comments at 98. See also CD Radio Comments, Appendix F, for an example satellite DARS feeder link Earth station coordination.

134. Most of the conditions for sharing the 7 GHz band identified by the broadcasters in their Joint Comments are typically negotiated during the domestic licensing process between satellite licensees and broadcasters. The results of this domestic coordination would be reflected in the satellite DARS earth station application to demonstrate that Earth station operations would not affect other co-primary users of the band.[245] Satellite DARS feeder link networks will be authorized as a fixed-satellite service in the 6725-7025 MHz allotment and 7025-7075 MHz bands on a co-primary basis, but Earth station operations are expected to be coordinated with pre-existing users of the spectrum before they will be licensed to operate. The Commission will authorize satellite DARS feeder link Earth stations only after the applicant demonstrates that coordination with potentially affected users in the band, including co-primary broadcast users, has been successfully completed.[246]

135. Certain of the conditions proposed by the broadcasters would not be imposed on satellite DARS operators after the earth station licensing process is completed. For instance, satellite DARS feeder links would not be required to accept interference received from existing and planned TV broadcast auxiliary stations once the earth stations are licensed.[247] Moreover it would be premature for the Commission to identify and adopt "keep out zones" for satellite DARS earth stations, for example in areas near major sporting arenas and around existing 7 GHz television broadcast auxiliary receive sites, as proposed by broadcasters in their comments. This detailed frequency coordination exercise will be conducted between the satellite DARS licensees and broadcasters during the domestic licensing process and in parallel with the construction and deployment of the satellite DARS systems. Nevertheless, the fact that the Joint Commenters identified conditions that would facilitate sharing in the 7 GHz band is an indication that a workable solution can be realized for satellite DARS feeder link networks to operate in the bands shared with broadcast facilities.

136. We also identified the sharing issues regarding satellite DARS feeder links and planned feeder link networks for NGSO MSS systems in the Notice.[248] NGSO MSS feeder link networks will be transmitting in the downlink direction in the 7 GHz band while satellite DARS feeder links will be transmitting in the uplink direction in the same band (i.e. NGSO MSS feeder links will be operating "reverse band"). Coordination between the transmitting satellite DARS earth stations and receiving NGSO MSS feeder link earth stations, and between receiving DARS space stations and transmitting NGSO MSS space stations is

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245 See Part 25, Section 25.130(b). See also Section 25.151 for procedures to process satellite Earth station applications.

246 See Part 74, Sections 74.604(b) - (d) for procedures to avoid and resolve interference that may be caused to existing broadcast auxiliary users.

247 See Primosphere Reply at 30-31.

248 Notice, ¶ 75.

therefore required. Primosphere asserts that because satellite DARS feeder link earth stations do not have significant geographic limitations on where they can be located, it is not expected that coordinated use of the 7 GHz band with NGSO MSS feeder link earth stations will be difficult.[249] DSBC adds that there are no apparent problems with satellite DARS feeder link band proposals even in light of WRC-95 proposals for NGSO MSS feeder links.[250]

137. Loral Qualcomm Partnership (LQP) asserts that any satellite DARS feeder link assignment in the 7 GHz band should be required to operate within the sharing criteria adopted at WRC-95 for sharing between GSO FSS and NGSO MSS feeder link networks. We expect satellite DARS feeder link networks, and NGSO MSS feeder link networks, to operate according to WRC-95 decisions. We believe that, based on WRC-95 decisions, geostationary satellite DARS feeder links and NGSO MSS feeder links can co-exist in the 7 GHz band. There will be relatively few feeder link earth stations for both services and sufficient distance can be maintained between the transmitting feeder link earth stations for satellite DARS and the receiving earth stations of NGSO MSS feeder links networks. Additionally, according to WRC-95 decisions, transmitting NGSO MSS feeder link space stations must meet power flux density limits at the geostationary orbit to protect receiving space stations in the 7 GHz band. The domestic coordination process, in accordance with Section 25.130 of our Rules, will facilitate feeder link Earth station licensing of both satellite DARS and NGSO MSS systems.

F. Further Notice of Proposed Rulemaking on Terrestrial Repeaters

138. As discussed above, we are not mandating a specific service link margin that satellite DARS operators must provide in a given geographic area, such as urban areas. It is important, however, for the satellite DARS systems to maintain sufficient service link margin to reproduce the original information transmitted by the satellite. In the Notice, we noted that some satellite DARS applicants intend to implement, as necessary, terrestrial repeaters, or "gap-fillers", in urban canyons and other areas where it may be difficult to receive DARS signals transmitted by a satellite. These terrestrial gap-fillers would re-transmit the information from the satellite to overcome the effects of signal blockage and multipath interference. Since we had no information in the record on the specifics of operation of these terrestrial gap-fillers, we sought comment on their operation to determine what rules should govern their use.[251]

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249 See Primosphere Reply at 30, n. 47. In particular, Primosphere sees no impediment to coordinating with LQP reverse band feeder link networks.

250 DSBC Comments at 51.

251 See Notice, ¶¶ 55-56.

139. Some commenters expressed concern about use of terrestrial repeaters to complement satellite DARS. Tichenor Media Systems, for example, contends that satellite DARS should not be permitted to originate local programming through the use of terrestrial repeaters.[252] Similarly, NAB and WFAN express concern that the use of terrestrial gap fillers would transform satellite DARS into a terrestrial based service.[253] Indeed, in the Notice we proposed to prohibit the operation of terrestrial gap-fillers except in conjunction with an operating satellite DARS system to ensure its complementary nature and so that there would be no transformation of satellite DARS into an independent terrestrial DARS network.[254]

140. Satellite DARS applicants provided additional information on how terrestrial gap-fillers will be used with their satellite DARS systems. The commenters agree that terrestrial repeaters would be used to improve satellite DARS service in the authorized satellite coverage areas only and on the same frequencies, and that they would not be used to extend the satellite coverage area or be used to originate programming. CD Radio and DSBC maintain that terrestrial gap-fillers will only be complementary to the satellite DARS systems because they will operate on the same frequency as the satellite transmission and only re-transmit the signals of operating satellite DARS space stations to improve service link margin in difficult propagation environments, especially in urban areas.[255] Additional spectrum is therefore unnecessary for satellite DARS gap-fillers. Primosphere asserts further that no commercial inserts or local programming would be permitted over terrestrial gap-fillers.[256] Furthermore, terrestrial gap-fillers will not extend satellite DARS coverage outside of the systems' already authorized service area. AMRC asserts that they will be used only to fill in coverage gaps within the authorized service area caused by various signal obstructions.[257] Terrestrial gap-fillers will also be transparent to the end users because the receiver will automatically select the stronger of the satellite or repeater signal.

141. Several commenters suggest that regulation of terrestrial gap-fillers be as unrestrictive as possible. CD Radio favors rules to permit flexible deployment of terrestrial gap fillers without prior Commission approval or notification.[258] Primosphere contends that it

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252 See Tichenor Media Systems Reply Comments.

253 See NAB Comments at 61 and WFAN Comments at 1.

254 See Notice, ¶ 56.

255 CD Radio Reply at 54-56 and DSBC Comments at 48-49 and 51.

256 See Primosphere Comments at 42.

257 See AMRC Reply at 21.

258 See CD Radio Comments at 94-96 and CD Radio Comments, Appendix E.

will be important for the Commission to provide a flexible scheme to implement terrestrial gap-fillers without the necessity to seek separate licenses.[259] DSBC notes that the use of terrestrial gap-fillers for satellite DARS comports with the Commission's authorization of "boosters" as defined in Part 22 of the Commission's rules.[260] The comments of all applicants appear to be reflected in a proposal by CD Radio, seen for the first time in its Comments to our Notice.

142. We did not set forth a specific proposal for authorizing terrestrial repeaters in the Notice. We now seek comment on our proposal to permit deployment of satellite DARS gap-fillers, on an as-needed basis by satellite DARS licensees to meet their service requirements. To accomplish the following important objectives, we seek comment on whether to adopt rules for terrestrial repeaters based on CD Radio's proposals, as set forth in Appendix C. We agree that it would be burdensome for both the Commission and the licensees if licensees were to seek separate authorization for each terrestrial repeater. To this end, we seek comment on whether to adopt a regulatory structure for satellite DARS terrestrial repeaters similar to the blanket authorizations used for mobile earth stations of other services. At the same time, the Commission must consider and address any potential impact that the operation of these repeaters would have on services of adjacent countries, any potential effects of radio frequency emissions to the public, and must determine how to ensure any use of terrestrial repeaters is complementary to the DARS service and is only for retransmission of signals received from the satellite. We also seek comment on our tentative conclusion to prohibit the use of terrestrial repeaters to transmit locally originated programming which would be inconsistent with the allocation of this spectrum.

G. Rules for Auctioning DARS Licenses

143. Two 12.5 MHz DARS licenses will be granted for use of the spectrum at 2320-2332.5 MHz, and 2332.5-2345 MHz, respectively. As discussed above, since we are not opening the filing cut-off, the four applicants are the only eligible parties for these licenses.[261] Accordingly, as all four applicants' proposals cannot be accommodated,[262] we adopt rules to assign the licenses to two of these applicants through use of competitive bidding.

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259 See Primosphere Comments at 41-42.

260 See DSBC Comments at 48-49 noting Commission's Amendment of Parts 22, 90 and 94 of the Commission's rules to permit Routine Use of Signal Boosters, Notice of Proposed Rulemaking (released June 22, 1995), FCC 95-204, 60 FR 33782. "Boosters" as proposed by the Commission, would be a stationary device that automatically re-radiates signals from base transmitters without channel translation for the purpose of providing service in weak signal areas.

261 See, infra, ¶ 67.

262 See, infra, ¶¶ 69-70.

1. Authority to Conduct Auctions

144. *Background.* The Commission has authority under Section 309(j) of the Communications Act of 1934, as amended ("Communications Act"), to employ auctions to choose among mutually exclusive applications for initial licenses where the principal use of the spectrum is likely to involve the licensee receiving compensation from subscribers.[263] Specifically, the Communications Act permits auctions where: (1) mutually exclusive applications for initial license or construction permits are accepted for filing by the Commission; (2) the principal use of the spectrum will involve, or is reasonably likely to involve, the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communication signals utilizing the licensed frequencies; and (3) the public interest objectives of Section 309(j) would be served by subjecting mutually exclusive applications in the service to competitive bidding.[264]

145. In the Notice, we recognized that mutual exclusivity could arise if we decided not to make the entire 50 MHz of allocated spectrum available for satellite DARS licensing.[265] We also tentatively concluded that the principal use of the spectrum will be to provide subscription-based services.[266] We further concluded that using competitive bidding to assign DARS licenses would fulfill the public interest obligations mandated by statute.[267]

146. *Discussion.* Some commenters contend that the Commission is not authorized to auction DARS licenses because they believe the applications on file are not mutually exclusive.[268] The pending applicants argue that the Commission has a statutory obligation to avoid mutual exclusivity, citing Section 309(j)(6)(E) of the Communications Act.[269] CD Radio and American Mobile Radio Corporation (AMRC) also allege that the use of auctions to resolve applications filed before the Commission was granted competitive bidding authority is not warranted.[270]

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263 47 U.S.C. § 309(j).

264 Id.

265 Notice, ¶¶ 31, 36, 40, 95.

266 Notice, ¶ 93.

267 Id., ¶ 97.

268 See, e.g., AMRC Comments at 16; DSBC Comments at 38-42.

269 See, e.g., AMRC Comments at 3; CD Radio Comments at 34-45; DSBC Comments at 38-42.

270 CD Radio Comments at 36-42; AMRC Comments at 15-17.

147. Based upon a review of the record in this proceeding, we disagree with these commenters. As we stated in the Notice, with respect to the "principal use" requirement of Section 309(j), auctions are authorized if at least a majority of the use of the spectrum is likely to be for subscription-based services. In making this determination, we look to classes of licenses and permits rather than individual licenses.[271] Given that three of the four current applicants propose to provide subscription-based service,[272] we conclude that the principal use of the satellite DARS spectrum is likely to involve the licensee receiving compensation from subscribers. We note, however, that our "principal use" determination does not in any way preclude satellite DARS licensees from providing any amount of non-subscription service, and they are not precluded from recovering auction costs, as well as the costs of construction, launch, and operation from sources other than subscribers, such as advertising.

148. We also expect that the amended applications to be filed for the satellite DARS licenses will raise mutual exclusivity. While eligibility for this license is limited to the four existing applicants, we expect that each of these applicants will file amended applications to participate in the auction for the two licenses in view of their continued interest, as expressed in this proceeding, in providing satellite DARS. In the event the Commission receives only one acceptable amended application for each of the licenses, the Wireless Telecommunications Bureau will issue a public notice cancelling the auction and establishing a date for the filing of an amended long-form application that complies with the service and technical rules adopted herein.[273]

149. We turn now to the issue of whether using competitive bidding to assign the satellite DARS licenses will promote the public interest objectives set forth in Section 309(j)(3) of the Communications Act.[274] These objectives are:

> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses

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271 Notice, ¶ 96 (citing Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, 2354 (1994) (Competitive Bidding Second Report and Order)).

272 See Notice, ¶¶ 24-25.

273 See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2360.

274 47 U.S.C. § 309(j)(3).

among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and

(D) efficient and intensive use of the electromagnetic spectrum.

We conclude that using competitive bidding procedures to award the DARS licenses will further these objectives. Using competitive bidding for satellite DARS, a new national satellite service, does not present the same complexities and difficulties inherent in any consideration of using auctions for transnational systems. The complex and difficult issues involved in using competitive bidding to award licenses for global systems are described in the Commission's recent Little LEO NPRM.[275] Satellite DARS is a domestic service. In fact, other countries will use different frequency bands for satellite DARS service. This unique situation offers us the opportunity to provide the public with the advantages of competitive bidding without the significant disadvantages involved in using auctions to license transnational services.

150. In general, paying for spectrum provides incentives for the licensee to construct quickly in order to obtain a return on its investment. We therefore conclude that, in this particular set of circumstances, an auction for the satellite DARS licenses is likely to promote the rapid deployment of service because the party that is in the best position to deploy satellite DARS technologies and services is also likely to be the highest bidder. We further believe that adopting competitive bidding procedures to award satellite DARS licenses is the most efficient mechanism for ensuring that satellite DARS is offered to the public in the most expeditious manner possible. Use of competitive bidding, as compared to other licensing methods, will speed the development and deployment of satellite DARS service to the public with minimal administrative or judicial delays, and encourage efficient use of the spectrum as required by Section 309(j)(3)(A) and (D) of the Communications Act.[276] Based on our experience with DBS, for example, we believe that the satellite DARS auction could be concluded in a matter of days and the Commission could move forward expeditiously with licensing. Additionally, competitive bidding will recover a portion of the value of the spectrum, as envisioned in Section 309(j)(3)(C).

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275 Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-voice, Non-geostationary Mobile Satellite Service, NPRM, IB Docket No. 96-220 (released Oct. 29, 1996).

276 See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2358.

151. As discussed infra, we have not adopted special provisions for small businesses and other designated entities because of the extremely high implementation costs associated with satellite-based services and the lack of sufficient evidence in the current record to support the adoption of designated entity provisions. However, this does not mean either that we have ignored Congress' mandate to offer designated entities the opportunity to participate in competitive bidding, that designated entities will be unable to participate in the DARS industry or that auctions of DARS spectrum will not promote many of the objectives of Section 309(j).[277] Based upon our experience with respect to other satellite-based services, it is likely that a wide variety of businesses, including designated entities, will be involved in various sectors of this industry as non-licensed operators, programmers, and equipment suppliers.

152. Moreover, we disagree with commenters' arguments that it is inappropriate to use competitive bidding procedures to select from mutually exclusive applications that were filed before the Commission was granted competitive bidding authority. We observe that Section 6002 of the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act") specifically grants the Commission the discretion to decide whether to employ either lotteries or auctions to choose between mutually exclusive applications filed before July 26, 1993. In this regard, we believe that, in balancing the advantages and disadvantages of using a lottery or an auction to award the DARS licenses, the public interest is best served by our use of competitive bidding. As discussed supra, we believe that an auction will ensure that the licenses are awarded to the party that values it most highly, thereby maximizing efficient use of the spectrum and facilitating the expeditious delivery of service to the public. This is especially true with regard to nationwide licenses because the winning bidders at the auction will likely be the parties that have made the greatest commitment to satellite DARS and are best prepared to begin construction of a nationwide system. Finally, use of auctions to assign the DARS licenses will advance the goals of Section 309(j)(3)(C) of the Communications Act by enabling us to recover for the public a portion of the value of the spectrum and avoid unjust enrichment to license winners.

153. In sum, we conclude that the Commission has the authority to award DARS licenses by means of competitive bidding. We further conclude that the use of competitive bidding to assign DARS spectrum will promote the rapid deployment of DARS and the efficient use of DARS spectrum most effectively. We will therefore award two 12.5 MHz DARS licenses by means of competitive bidding.

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[277] In our recent DBS auction, we also declined to adopt special provisions for designated entities due to the capital requirements necessary to build-out a nationwide satellite-based service. Revision of Rules and Policies for the Direct Broadcast Satellite Service, Report and Order, FCC 95-507, IB Docket No. 95-168, PP Docket No. 93-253 (released Dec. 15, 1995) (DBS Report and Order) at ¶ 217.

2. Competitive Bidding Design and Bidding Procedures

154. *Background.* In the Notice, we proposed that a simultaneous multiple round auction be used to award DARS licenses if the Commission determined that competitive bidding procedures should be implemented.[278] In a simultaneous multiple round auction, in every round, a bidder may bid on any of the licenses for which it is eligible. The auction does not close until bidding has ceased on all licenses. In the Competitive Bidding Second Report and Order, the Commission concluded that this method ensures that interdependent licenses will be awarded to the bidders who value them most highly by generating the most information about license values and providing bidders with the greatest degree of flexibility to pursue back-up strategies.[279] In the Notice, we said that if we employ competitive bidding for DARS licensing, we would conduct it "pursuant to the general framework adopted in the Second Report and Order, the Commission's rules, and consistent with other Commission proceedings where auctions have been employed."[280] There were no comments on our proposed auction design or bidding procedures for DARS.

155. *Discussion.* In view of the fact that the two DARS licenses are substitutable and these licenses will be significantly interdependent, we conclude that a simultaneous multiple round auction design is the appropriate auction methodology. This auction methodology will generate valuable information about the licenses during the course of the auction. In addition, as noted below, consistent with our rules for other auctionable services, we adopt bidding procedures to ensure that the auction proceeds at a rapid pace.

156. *Multiple Round Electronic Auction Design.* We observe that a multiple round electronic auction generally will provide bidders useful information about other bidders' valuations. Bidders will be able to observe who is willing to bid on a license at each announced price. Providing this information may enable bidders to refine their estimates of the license value, thereby reducing the tendency of bidders for licenses with uncertain value to shade down their bids to avoid the "winner's curse." Because of the Commission's discretion to adjust the length of bidding rounds in an electronic auction and the other auction design features described below, we expect the auction to proceed rapidly. We will provide for on-site electronic bidding because of the limited number of eligible participants and the anticipated rapid auction pace. We reserve the option, however, to offer remote bidding where bidders can place their bids by computer from any location.

157. *Bid Increments and Tie Bids.* Consistent with the rules we have adopted in other services, we conclude that the Wireless Telecommunications Bureau should have

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278 Notice, ¶ 103.

279 Competitive Bidding Second Report and Order, 9 FCC Rcd at 2366.

280 Notice, ¶ 100.

discretion to establish, raise and lower minimum bid increments during the course of the DARS auction.[281] We believe that this discretion over minimum bid increments is necessary to ensure that the Commission can efficiently control the pace of the auction. We anticipate using larger percentage minimum bid increments early in the auction and reducing the minimum increment percentage as bidding activity falls. We also believe that the efficiency of the auction may be enhanced by limiting jump bidding, i.e., bidding above the minimum accepted bids. Therefore, the Wireless Telecommunications Bureau will announce by Public Notice prior to auction the specific bid increment that generally will be used, and will also retain the discretion to establish and change maximum bid increments during the course of the auction. Where a tie bid occurs, the high bidder will be determined by the order in which the bids were received by the Commission.

158. *Activity Rules.* To maximize the amount of information generated during the course of an auction and to ensure that the auction closes in a reasonable amount of time, we will require a bidder to be active on one license in each round of the auction or use an activity rule waiver, as defined below. To be active in the current round, a bidder must submit an acceptable bid in the current round or have the high bid from the previous round. A bidder who is not active in a round and has no remaining activity rule waivers will no longer be eligible to bid on the license being auctioned. Bidders will not be permitted to be active on more than one license in a single round. We see no efficiency-enhancing reason to permit such bidding because the service rules allow only one license to be acquired per bidder. Moreover, experience in previous auctions has raised concerns that such bidding could be used to signal or engage in other forms of anticompetitive strategic bidding. The Commission delegates to the Wireless Telecommunications Bureau the authority to determine and announce by Public Notice bid withdrawal procedures for the DARS auction.

159. *Minimum Opening Bid.* We conclude that a minimum opening bid would help ensure that the auction proceeds quickly and would increase the likelihood that the public receives fair market value for the spectrum. We will therefore establish a minimum opening bid for this spectrum, the amount of which will be announced by the Wireless Telecommunications Bureau by Public Notice. We observe that this approach is consistent with our approach in the DBS context.[282] The Wireless Telecommunications Bureau will determine the amount of the minimum opening bid using all available information and taking into consideration the uncertainty as to the value of the spectrum.

160. *Activity Rule Waivers.* To make allowance for unusual circumstances that might delay a bidder's bid preparation or submission in a particular round, we will provide bidders with a limited number of waivers of the above-described activity rule. We believe

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281 See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2369.

282 DBS Report and Order at ¶ 186.

that some waiver procedure is needed because the Commission does not wish to end a bidder's participation due to an accidental act or circumstances not under the bidder's control.[283] We will provide bidders with three activity rule waivers that may be used in any round during the course of the auction.[284] A waiver will preserve eligibility in the next round.[285] Waivers may be applied automatically by the Commission or invoked proactively by bidders. If a bidder is not active in a round, a waiver will be applied automatically. An automatic waiver applied in a round in which there are no new valid bids will not keep the auction open. A proactive activity rule waiver is a waiver invoked by a bidder during the bid submission period.[286] If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

161. The Commission will retain the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control or in the event of a bid withdrawal, as discussed below. We will also retain the flexibility to adjust, by Public Notice prior to an auction, the number of waivers permitted.

162. *Stopping Rules.* A stopping rule specifies when an auction is over. The auction will close after one round passes in which no new valid bids or proactive activity rule waivers are submitted. The Commission retains the discretion, however, to keep the auction open even if no new valid bids and no proactive waivers are submitted. In the event that the Commission exercises this discretion, the effect will be the same as if a bidder had submitted a proactive waiver. This will help ensure that the auction is completed within a reasonable period of time, because it will enable the Commission to utilize larger bid increments, which speed the pace of the auction, without risking premature closing of the auction.[287]

3. Procedural and Payment Issues

163. *Background.* In the Notice, we proposed to adopt the short-form application procedures, upfront payment requirements, public notice procedures, and default and disqualification provisions set forth in Subpart Q of Part 1 of the Commission's rules.[288]

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283 See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2372.

284 See id. at 2373.

285 An activity rule waiver cannot be used to correct an error in the amount bid.

286 Thus, a "proactive" waiver, as distinguished from the automatic waiver described above, is one requested by the bidder.

287 See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Memorandum Opinion and Order, 9 FCC Rcd 7684, 7685 (1994).

288 Notice, ¶ 104 (citing 47 C.F.R. Part 1, Subpart Q).

164. *Discussion.* We received no comments addressing these proposals.[289] Because there only are four applicants eligible in this auction, all of whom previously filed applications for DARS licenses, we will not use our short-form application requirement (FCC Form 175) and adopt a new rule for the DARS auction. Specifically, we will require these applicants to supplement their previously-filed applications within five days of the publicatin of this Report & Order in the Federal Register. The supplemental information must be certified and include the following: 1. Applicant's name; 2. Mailing Address (no Post Office boxes); 3. City; 4. State; 5. ZIP Code; 6. Auction Number 15; 7. FCC Account Number; 8. Person(s) authorized to make or withdraw a bid (list up to three individuals); 9. Certifications and name and title of person certifying the information provided; 10. Applicant's contact person and such person's telephone number, E-mail address and FAX number.; 11. Signature and date. In keeping with our previous practice, we also retain discretion to implement or modify certain other procedures prior to the DARS auction, including rules governing the payment requirements.[290]

165. As discussed below, we will require applicants to submit to the Commission an upfront payment prior to commencement of the DARS auction. In addition, each auction winner will be required to submit an amount sufficient to bring its total deposit up to 20 percent of its winning bid within ten (10) business days of the announcement of the winning bidder. The winning bidder also will be required to supplement its application in accordance with Part 25 of the Commission's Rules. This procedure will constitute the "long-form application" process referred to in our general auction rules. The winning bidder will be required to file such information by a date specified by Public Notice, generally within 30 business days after the close of bidding. After receiving the winning bidder's long-form application and verifying receipt of the bidder's 20 percent down payment, the Commission will announce the application's acceptance for filing, thus triggering the filing window for petitions to deny. If, pursuant to Section 309(d) of the Communications Act, the Commission dismisses or denies any and all petitions to deny, the Commission will issue an announcement to this effect, and the winning bidder will then have ten (10) business days to submit the balance of its winning bid. If the bidder fails to submit the balance of the winning bid or the license is otherwise denied, we will assess a default payment as set forth below and re-auction the license among the other existing applicants. If no petitions to deny are filed, we will issue a public notice conditionally granting the licenses pending final payment.

166. *Upfront Payment Background.* In the Notice we proposed an upfront payment requirement of $0.02 per MHz-pop to ensure that only serious, qualified bidders participate at

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289 See, supra, ¶ 156.

290 DBS Report and Order, ¶ 191.

auction.[291] Initially, the commenters did not address our proposed upfront payment provisions. In various recent *ex parte* filings, however, the eligible applicants claim that an upfront payment based on $0.02 per MHz-pop is too high and is not needed to ensure that only serious, qualified bidders participate at auction.[292] We conclude that our proposed up-front payment of $0.02 per MHz-pop may be too high here. We observe that the eligible applicants in this auction have demonstrated a continued interest in providing DARS and have already expended significant resources towards this end. Accordingly, we believe a more modest upfront payment for the auction of the DARS licenses is appropriate. We believe that a payment that takes into consideration the valuation of similarly auctioned satellite spectrum (such as DBS) would be appropriate[293]. We therefore delegate authority to the Wireless Telecommunications Bureau and the International Bureau to determine an appropriate calculation for the upfront payment and announce it by Public Notice.[294]

167. *Bid Withdrawal, Default and Disqualification.* In the Competitive Bidding Second Report and Order, the Commission determined that bid withdrawal, default and disqualification provisions were needed to discourage insincere bidding.[295] The Commission observed that insincere bidding, whether frivolous or strategic, distorts the price information generated by the auction process and reduces its efficiency.[296] Accordingly, we adopt the bid withdrawal, default and disqualification provisions as set forth in Sections 1.2104(g) and 1.2109 of the Commission's rules. Pursuant to these rules, any bidder who withdraws a high bid during an auction before we declare bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent

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291 Id.

292 For example, CD Radio contends that the upfront payment should be between $1 million and $5 million. Letter to William Caton, Acting Secretary from Carl R. Frank, Esq. and Eric W. DeSilva, Esq., Wiley, Rein & Fielding dated December 13, 1996 ("CD Radio Letter"); Letter to William Caton, Acting Secretary from Douglas J. Minster, Vice President, Corporate Development Digital Satellite Broadcasting Corporation, (no more than $10 million) dated December 20, 1996 ("DSBC Letter").

293 We note that the upfront payment in the DBS auction was $10 million.

294 See, e.g., Competitive Bidding MDS Report and Order, 10 FCC Rcd. at 9650.

295 See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2373.

296 Id.

winning bid is lower than the withdrawn bid.[297] If a license is reoffered by auction, the "winning bid" refers to the high bid in the auction in which the license is reoffered. If a license is reoffered in the same auction, the winning bid refers to the high bid amount in that auction, made subsequent to the withdrawal. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay an amount equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license which is the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, i.e., they may decline without additional payment. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore we will not hold them to their losing bids on license for which another bidder has withdrawn a bid or on which another bidder has defaulted.

168. After bidding closes, a defaulting auction winner (i.e., a winner who fails to remit the required down payment within the prescribed time, fails to pay for a license, or is otherwise disqualified) will be assessed the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the high bid, plus an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, if the defaulting bid was less.[298] The additional three percent payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We believe that these additional payments will adequately discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements.

169. In addition, if withdrawal, default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, we retain the option to declare the applicant and its principals ineligible to bid in future auctions, or to take any other action we deem

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297 Recently, in Atlanta Trunking Associates, Inc. and Map Wireless, L.L.C., Requests to Waive Bid Withdrawal Provisions, FCC 96-203 (rel. May 3, 1996), we decided to partially waive these provisions with respect to individual requests for waiver of withdrawal payments as a result of mistaken bids. We fashioned guidelines to address these situations based upon the premise that the appropriate bid withdrawal payment is one that takes into consideration the round and stage in which the mistaken bid is withdrawn. In general, this approach is designed to eliminate the strategic benefit of purposely submitting mistaken bids. Petitions for reconsideration of this Order are pending.

298 See 47 C.F.R. §§ 1.2104(g) and 1.2109.

necessary, including institution of proceedings to revoke any existing licenses held by the applicant.[299]

4. Safeguards

170. *Transfers.* We note that DARS licensees, like other satellite licensees, will be subject to rule 25.118, which prohibits transfers or assignments of licenses except upon application to the Commission and upon a finding by the Commission that the public interest would be served thereby.[300] Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.

171. *Rules Prohibiting Collusion.* As we stated in the Notice, we believe that it is necessary to adopt a rule prohibiting collusive conduct in connection with the satellite DARS auction. However, we believe that a modified rule is warranted because there are a limited number of identified eligible participants for the satellite DARS action and thus the additional safeguards associated with an auction with many more bidders are absent here. Specifically, we will not adopt any exceptions to the general anti-collusion rule. As noted above, in lieu of short-form applications, the eligible DARS applicants will be required to supplement their pending applications with certain information within five days of the publication date of this Order. At that time, all applicants will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements with other bidders.

172. Due to the fact that this is a closed auction with a fixed number of eligible applicants, we have determined that none of the three exceptions to our general collusion rules prohibiting discussions with other applicants will apply. Therefore, the applicants will not be permitted to enter into consortia or any type of joint bidding arrangement at any time since cooperation and collaboration are prohibited under the anti-collusion rule. Nor will they be able to enter into settlement arrangements following the filing of their supplemental information. Given the limited number of applicants (four) and available licenses (two), this is not the type of situation we contemplated when we expressed our desire to preserve "efficiency enhancing bidding consortia" so as to possibly reduce entry barriers for smaller firms. The universe of bidders here is already established and very small. In this situation,

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299 See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2383.

300 By adopting this rule, we do not intend to preclude licensees from proposing widely dispersed equity offerings to raise capital. See, e.g., Satellite CD Radio Inc., 9 FCC Rcd 2569 (Common Carrier Bureau 1994).

we believe that allowing any joint bidding arrangements among this limited group will merely serve to undercut the competitiveness of the auction process and limit the number of bidders for each license. In this vein, we also conclude that the other exceptions to the collusion rule designed to allow bidders to combine or obtain additional capital from one another during an auction are inapplicable or unnecessary here. These applicants have been preparing and developing this service for years, and this will be a very short auction. Thus, any additional capitalization requirements are likely to already have been met. or should be after the auction. We believe that the five-day window is sufficient to enable the applicants to conclude any settlement discussions, given the fact that the parties have had significant time prior to the adoption of this Order to reach a settlement. After this five-day period, all negotiations (if any) must cease. This rule is both fair to the four applicants, who had time to negotiate settlements and raise capital, while helping to ensure the competitiveness of the auction and the post-auction market. All applicants will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders five days after publication of this report and order in the Federal Register.

173. Finally, in adopting these rules for the DARS auction, we also remind the eligible bidders that allegations of collusion may be investigated by the Commission or referred to the U.S. Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's Rules while participating in an auction may be subject to forfeiture of their down payment or their full bid amount, as well as revocation of their license, and may be prohibited from participating in future auctions.[301]

5. Designated Entity Provisions

174. *Background.* In the Notice, we asked commenters to discuss whether special provisions should be adopted to enable small businesses, businesses owned by minorities and women, and rural telephone companies (rural telcos) (collectively referred to as "designated entities") to participate at auction and in the provision of DARS.[302]

175. *Discussion.* We received no comments addressing this issue. In an ex parte filing, CD Radio proposes that entrepreneurs and small businesses (as defined in the rules for broadband PCS C and F blocks) be afforded an installment payment plan. CD Radio claims, among other things, that failure to adopt such financing incentives would put pressure on the small business applicants to sell their "place in line" to large companies and encourage

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301 See Fourth Memorandum Opinion and Order, 9 FCC Rcd at 6869, n.134; 47 C.F.R. § 1.2109(d).

302 Notice, ¶ 105-106.

transfers and possible unjust enrichment of speculative applicants.[303] We first note that the legislative history of the designated entity provisions shows that Congress did not necessarily intend for special measures in services such as DARS, as demonstrated by the following reference: "[t]he characteristics of some services are inherently national in scope, and are therefore ill-suited for small businesses."[304] Moreover, we previously concluded that, because of the extremely high implementation costs associated with satellite-based services, no special provisions for designated entities would be made.[305] In part, this conclusion was reached because it was unclear whether small businesses could attract the capital necessary to implement and provide satellite-based services.[306] Second, pursuant to Section 309(j), the purpose of such provisions is to attract the participation of a wide variety of small business applicants. In view of the fact that this is a closed auction with a fixed number of eligible applicants, this purpose of attracting a wide-array of applicants will not be served here. Third, the record is lacking in support for what the appropriate small business threshold is in the DARS context and whether any of the four applicants, including CD Radio, would qualify as a small business. In the DBS context, we did not provide for designated entity provisions, primarily due to the high implementation costs and the lack of interest expressed by the potential beneficiaries, i.e., small businesses, businesses owned by minorities and women, and rural telecos. In this connection, we note that CD Radio's proposal is not supported by the ex parte filings of other potential applicants who arguably would fall within the definitions of entrepreneur and small business proposed by CD Radio. In contrast to CD Radio's proposal, in its ex parte filing, DSBC states that, "[s]o long as the auction is limited to the four pending applicants, the Commission need not employ bidding credits or installment payments, or identify designated entities, to level the playing field among this group of potential licensees."[307] Likewise, in its ex parte filing, Primosphere similarly states that "[t]here should be no bidding preferences" and "[a]ll four applicants should be treated equally."[308]

176. We are, therefore, not convinced that in order to promote the objectives of Section 309(j)(3)(B) ensuring that new and innovative technologies are readily accessible to the American people and the dissemination of licenses among a wide variety of applicants,

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303 CD Radio Letter at 2.

304 H.R. Rep. No. 103-111, 103rd Cong., 1st Sess., at 254.

305 DBS Report and Order, ¶ 211.

306 DBS Report and Order, ¶ 216.

307 DBSC Letter at 2, n.2.

308 Letter to William Caton, Acting Secretary from Howard M. Liberman, Esq. dated December 19, 1996 on behalf of Primosphere Limited Partnership.

including small businesses, we need to provide designated entity provisions, such as the financial incentives requested by CD Radio. Moreover, we conclude that the present record is insufficient to support either race-based rules under the strict scrutiny standard, or to support gender-based rules under the intermediate scrutiny standard that currently applies to those rules.[309] Accordingly, we are not adopting designated entity provisions for DARS.

309 See Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995); United States v. Commonwealth of Virginia, 44 F.3d 1229 (4th Cir. 1995), cert. granted, 116 S.Ct 281 (1995).

IV. CONCLUSION

177. We believe that the foregoing decision and licensing plan best serves the public interest in assuring that the spectrum in question is most efficiently utilized while allowing the implementation of new, innovative services.

V. ORDERING CLAUSES

178. Accordingly, IT IS ORDERED that Part 25 of the Commissions rules are hereby amended as set out in Appendix A.

179. Accordingly, IT IS ORDERED that Parts 25 and 87 of the Commissions rules are hereby AMENDED as set out in Appendix A and SHALL BECOME EFFECTIVE thirty (30) days after publication in the Federal Register, except that the rules in new Subpart F of Part 25 SHALL BECOME EFFECTIVE upon publication in the Federal Register. We find good cause to make the auction rules for satellite DARS (Subpart F of Part 25) effective immediately upon publication in the Federal Register.[310] These rules will allow the four pending applicants to amend their applications, which have been pending for more than four years, and to participate in the auction for this new service, for which spectrum was allocated two years ago. Immediate application of the rules governing the auction procedures will therefore expedite the DARS auction and the introduction of service to the public, including those residing in rural areas, in accordance with Section 309(j)(3)(A) of the Communications Act.[311] In addition, we note that the pending applicants have made substantial financial investment in anticipation of the licensing of DARS.[312] Finally, it is important that the DARS auction take place prior to the Wireless Communications Service ("WCS") auction, which Congress had mandated begin no later than April 15, 1997. According to the applicants, their several years of planning and financial investment would be undermined if a WCS auction

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310 5 U.S.C. § 553(d)(3).

311 47 U.S.C. § 309(j)(3)(A) (Commission's competitive bidding rules shall promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative . . . delays"); see also 47 U.S.C. § 157.

312 See Omnipoint Corporation v. FCC, 78 F.3d 620 (D.C. 1996) (upholding Commission decision to make rules effective immediately upon publication, finding "good cause" existed because of the precarious nature of bidders' investments, the Congressional deadline placed on the Commission to take quick action, and the fact that a delayed auction would undermine the public interest by delaying service).

winner were to enter the DARS market first.[313] The DARS applicants also contend that they may need WCS spectrum for auxiliary support of DARS operations, that they need time to assess these auxiliary needs, but that their efforts will be frustrated if WCS is auctioned first. Accordingly, we find that further deferral of the DARS auction and licensing procedures by a delay in the effective date, for purposes of providing adequate notice to the affected parties, would be impracticable, unnecessary and contrary to the public interest.

180. The analysis required pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix B attached.

181. The Paperwork Reduction Act does not apply to the rules adopted herein as such rules apply to less than ten persons.[314]

182. IT IT FURTHER ORDERED that pursuant to the Communications Act of 1934, 47 U.S.C. §§ 151, 154, 303(r), 309(j), 403, and 405, NOTICE IS HEREBY GIVEN and COMMENT IS SOUGHT regarding the proposals, discussion, and statement of issues in the Further Notice of Proposed Rulemaking.

183. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitte, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.202, 1.203, and 1.1206(a).

184. We certify that the proposed rules relating to the authorization of terrestrial repeaters will not have a significant economic impact on a substantial number of small entities.[315] These rules, if adopted, would permit but not require the use of such repeaters to assist in providing higher quality service and should not significantly increase the cost of the systems.

185. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before May 2, 1997 and reply comments on or before May 23, 1997. To file formally in

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313 See In the Matter of Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, Reply Comments of Satellite CD Radio at 2-3; Reply Comments of Digital Satellite Broadcasting Corporation at 5-6; DSBC Ex Parte Letter at 2, n.1; Comments of Primosphere Limited Partnership at 2-3; Reply Comments of Primosphere at 14.

314 See 44 U.S.C. § 3502(3)(a)(i).

315 See 5 U.S.C. § 605(B).