

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

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

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

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

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

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

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

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

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

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

(ii) By divestiture of the requisite portion of the incumbent LEC's or incumbent cable company's existing authorized or franchised service area, identified in terms of the name of

the party to whom such interest has been divested, the date such divestiture was executed, the name of any regulatory agency that must approve such divestiture, and the date on which an application was filed for this purpose with the regulatory agency.

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

Note 1 to paragraph (e): Waivers of § 101.1002(e) may be granted upon an affirmative showing:

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

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

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

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

§ 101.1005 Frequencies available.

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

Block A of 1,150 MHz Block B of 150 MHz

27,500-28,350 MHz	31,000-31,075 MHz
29,100-29,250 MHz	31,225-31,300 MHz
31,075-31,225 MHz	

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

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

(2) 29,100-29,250 MHz is shared on a co-primary basis with feeder links for non-geostationary orbit Mobile Satellite Service (NGSO/MSS) systems in the band and is limited to LMDS hub-to-subscriber transmissions, as provided in § 25.257 and § 101.103(h) of this part.

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

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

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

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

§ 101.1007 Geographic service areas and number of licenses.

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

§ 101.1009 System operations.

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

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

(A) international agreements require coordination;

(B) submission of an Environmental Assessment is required under § 1.1307.

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

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

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

§ 101.1011 Construction requirements and criteria for renewal expectancy.

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

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

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

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

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

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

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

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

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

(d) In making its showing of entitlement to a renewal expectancy, a renewal applicant may claim credit for any system modification applications that were pending on the date it

filed its renewal application. Such credit will not be allowed if the modification application is dismissed or denied.

§ 101.1013 Permissible communications services.

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

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

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

§ 101.1015 Application form and contents.

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

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

§ 101.1017 Requesting regulatory status.

(a) *Initial applications.*

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

(b) *Amendment of pending applications.*

(1) Any pending application may be amended to: (i) change the carrier status requested, or (ii) add to the pending request in order to obtain both common carrier and non-common carrier status in a single license.

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

(c) *Modification of license.*

(1) A licensee may modify a license to: (i) change the carrier status authorized, or (ii) add to the status authorized in order to obtain both common carrier and non-common carrier status in a single license.

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

36. A new subpart M consisting of §§ 101.1101 through 101.1112 will be added to Part 101 to read as follows:

Subpart M -- Competitive Bidding Procedures for LMDS

Sec.

101.1101 LMDS service subject to competitive bidding.

101.1102 Competitive bidding design for LMDS.

101.1103 Competitive bidding mechanisms.

101.1104 Bidding application (FCC Forms 175 and 175-S).

101.1105 Submission of payments.

101.1106 Long-form application (FCC Form 600).

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

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

101.1109 Certifications, disclosures, records maintenance and audits.

101.1110 Petitions to deny.

101.1111 Procedures for partitioned licenses.

101.1112 Definitions.

§ 101.1101 LMDS service subject to competitive bidding.

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

§ 101.1102 Competitive bidding design for LMDS.

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

§ 101.1103 Competitive bidding mechanisms.

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

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

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

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

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

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

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

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

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

§ 101.1105 Submission of payments.

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

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

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

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

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

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

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

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

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

(d) *Unjust enrichment.*

(1) A licensee that utilizes a bidding credit, and that during the initial license term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. government for the amount of the bidding credit plus interest at the rate imposed for installment financing at the time the license was awarded, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest at the rate imposed for installment financing at the time the license was awarded, must be paid to the U.S. government as a condition of Commission approval of the assignment or transfer. If, within the initial license term, a licensee that utilizes a bidding credit seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the restructured licensee would qualify), plus interest at the rate imposed for installment financing at the time the license was awarded, must be paid to the U.S. government as a condition of Commission approval of the ownership change.

(2) The amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows: (1) a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of small businesses transferring to businesses having average gross revenues of more than \$40 million but not more than \$75 million, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible); (2) in year three of the license term the payment will be 75 percent; (3) in year four the payment will be 50 percent; and (4) in year five the payment will be 25 percent, after which there will be no required payment.

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

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

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

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

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

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

§ 101.1109 Certifications, disclosures, records maintenance and audits.

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

- (1) The identity of the applicant's affiliates and controlling principals; and
- (2) The applicant's gross revenues, computed in accordance with § 101.1112.

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

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

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

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

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

(d) *Audits.*

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

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

§ 101.1110 Petitions to deny.

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

§ 101.1111 Procedures for partitioned licenses.

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

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

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

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

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

§ 101.1112 Definitions.

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

(b) *Small business; consortium.*

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

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

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

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

(d) *Affiliate.*

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

- (i) Directly or indirectly controls or has the power to control the applicant, or
- (ii) Is directly or indirectly controlled by the applicant, or
- (iii) Is directly or indirectly controlled by a third party or parties who also control or have the power to control the applicant, or
- (iv) Has an "identity of interest" with the applicant.

(2) *Nature of control in determining affiliation.*

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

Example for paragraph (d)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

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

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

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

(3) *Identity of interest between and among persons.*

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

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

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

- (A) The family members are estranged,
- (B) The family ties are remote, or
- (C) The family members are not closely involved with each other in business matters.

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

(4) *Affiliation through stock ownership.*

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

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

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

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

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

Example 2 for paragraph (d)(5). If a large company, BigCo, holds 70 percent (70 of 100 outstanding shares) of the voting stock of company A, who holds a controlling interest in an LMDS license application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an

affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule, which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

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

(6) Affiliation under voting trusts.

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

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

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

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

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

(9) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) Affiliation under joint venture arrangements.

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

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

APPENDIX B

List of Existing Governmental and Private Business 31 GHz Licensees

The Commission has decided to auction two licenses in each BTA simultaneously, one license for 1,150 MHz, consisting of 1,000 megahertz located in the 28 GHz band and 150 megahertz located in the center of the 300 megahertz segment of the 31 GHz band (31,075-31,225 MHz), and a smaller license for 150 megahertz, located entirely in the 31 GHz band. This second 150 megahertz license consists of two 75 megahertz segments located at each end of the 300 megahertz block (31,000-31,075 MHz and 31,225-31,300 MHz). LMDS service providers will be entitled to interference protection from any other presently-authorized primary users in the entire band. Although LMDS operations are permitted in the 31,000-31,075 and 31,225-31,300 MHz bands, incumbent governmental licensees and private business users, and excluding LTTS licensees, operating in these two segments are entitled to protection against harmful interference from any LMDS operation in these blocks. Therefore, bidders should be aware that some BTA's have incumbent operations in the smaller 150 megahertz block that must be protected from harmful interference under the Commission's Rules.

Listed below are BTAs with incumbent licensees and the cities in which operations are authorized. Prospective bidders should not rely solely on this list, but should carefully review the Commission's databases and records before formulating bidding strategies. Records relating to these stations are available for public inspection during regular business hours in the FCC Reference Room at the Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania.

Market No.	Basic Trading Area	Authorizations	Cities with Authorized Operations	Licensees/Call Signs
B262	Los Angeles, CA		La Habra, CA	City of La Habra/WNTV232
			Montclair, CA	City of Montclair/WNTR498, etc.
			Palm Springs, CA	City of Palm Springs/WNTV245, etc.
			San Bernardino, CA	City of San Bernardino/WNTS881 County of San Bernardino/WNTU750
			Upland, CA	City of Upland/WNTT952
B245	Las Vegas, NV		Laughlin, NV	Budget Rental Car of Northern Arizona/WNTZ735
			Bullhead City, AZ	Budget Rental Car of Northern Arizona/WNTZ734

Market No.	Basic Trading Area	Authorizations	Cities with Authorized Operations	Licensees/Call Signs
B402	San Diego, CA		San Diego, CA	City of San Diego/WPJF232
B404	San Francisco, CA		Cupertino, CA	City of Cupertino/WNTR886, etc.
			Daly City, CA	City of Daly City/WNTW384
			Menlo Park, CA	Venture Law Group/WPJF201, etc.
			Petaluma, CA	City of Petaluma/WNTT654, etc.
			Santa Clara, CA	City of Santa Clara/WNTR417
			San Francisco, CA	Academy of Art College/WPJB264, etc.
B389	Sacramento, CA		Sacramento, CA	State of California/WNTY579
B434	Stockton, CA		Tracy, CA	City of Tracy/WNTW798
B074	Charlotte, NC		Charlotte, NC	City of Charlotte/WNTW392
B051	Boston, MA		Framingham, MA	Preseptive Bio Systems, Inc./WPJC807, etc.
			Natick, MA	Natural Microsystems, Inc./WPJC925, etc.
B024	Atlanta, GA		Marietta, GA	County of Cobb/WPJE982
B297	Milwaukee, WI		Milwaukee, WI	Dept. of Transportation State of WI/WPJD491, etc.
B413	Seattle-Tacoma, WA		Burlington, WA	State of Washington/WNTR826
			Seattle, WA	State of Washington/WNTS695, etc.
B347	Phoenix, AZ		Mesa, AZ	Lutheran Healthcare Network/WNTX926
B421	Sioux City, IA		Sioux City, IA	Nutra Flo III/WNTV448, etc.

Market No.	Basic Trading Area	Authorizations	Cities with Authorized Operations	Licensees/Call Signs
B445	Topeka, KS		Topeka, KS	City of Topeka/WNTW208
B202	Idaho Falls, ID		Idaho Falls, ID	City of Idaho Falls/WNTW717
			Gulf of Mexico	Chevron USA, Inc./WNTX932

APPENDIX C

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act,¹ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in the Fifth Notice of Proposed Rulemaking (Fifth NPRM). Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice. The Secretary shall send a copy of the Fifth NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the RFA.²

Need for and Objectives: Our objectives are to afford licensees the flexibility to disaggregate and partition their licenses so as to: (1) promote efficient use of LMDS spectrum by leaving determinations regarding the correct size of licenses to the licensees, who are in the best position to analyze their business plans, assess new technology, and determine customer demand, (2) encourage more rapid deployment of services in the LMDS spectrum, (3) enable licensees to concentrate on core areas or to deliver services to isolated complexes, such as rural towns or university campuses, that do not lie within major market areas, and (4) provide opportunities for small businesses seeking to enter the multichannel video programming distribution and local telephony marketplaces.

Legal Basis for Proposed Rules: The proposed action is authorized under the Administrative Procedure Act, 5 U.S.C. § 553; and §§ 4(i), 257, 303(g), 303(r) 309(j) and 332(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 257, 303(g), 303(r), 309(j), 332(a).

Description and Estimate of Small Entities Subject to the Rules: We incorporate by reference the detailed description and estimate of the number of potential small LMDS licensees identified in the accompanying FRFA for the Second Report and Order, Appendix D, *infra*.

¹ 5 U.S.C. § 603 (RFA).

² 5 U.S.C. § 603(a).

Reporting, Recordkeeping, and Other Compliance Requirements: Under the proposal contained in the Fifth NPRM: (1) acquisitions by partitioning or disaggregation will be treated as assignments of a license and will require the parties to seek prior approval of the Commission ; (2) the parties will be required to identify which of them will be responsible for complying with the construction requirements set forth in the Second Report and Order we have adopted today, and to submit a certification to that effect, signed by both parties; (3) parties failing to meet their construction requirement obligations will be subject to forfeiture of their license; (4) licensees afforded bidding preferences and other benefits available to small entities will be subject to the Commission's unjust enrichment rules should they partition or disaggregate to entities that are not small businesses. If adopted, this proposal would apply to all LMDS licensees and all entities that attempt to acquire an LMDS license by means of partitioning or disaggregation. We request comment on how these requirements can be modified to reduce the burden on small entities and still meet the objectives of the proceeding.

Significant Alternatives Minimizing the Significant Economic Impact on a Substantial Number of Small Entities Consistent with the Stated Objectives: We have not identified any significant alternatives that would minimize the significant economic impact on small entities that are consistent with the stated objectives to allow a flexible approach to partitioning and disaggregation of LMDS. We tentatively conclude that a flexible approach affords providers, including small businesses, the ability to respond to market forces and demands for service relevant to their particular locations and service offerings.

The regulatory burdens we have imposed on LMDS licensees with respect to assignments and buildout certifications, as well as unjust enrichment, are necessary in order to ensure that the public receives the benefits of innovative new services in a prompt and efficient manner. We seek comment on any significant alternatives that are consistent with the objectives in the NPRM.

Federal Rules That Overlap, Duplicate, or Conflict with These Proposed Rules: None.

APPENDIX D

Final Regulatory Flexibility Analysis

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As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *First NPRM*, the *Third NPRM*, and the *Fourth NPRM* in this proceeding.¹ The Commission sought written public comments on the proposals in each of the Notices, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Second Report and Order (hereinafter in this Appendix referred to as the "Order") conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).²

I. Need for and Objectives of Action

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

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

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

We deny petitions for reconsideration of our dismissal in the *First NPRM* of applications for waiver which sought to allow petitioners to provide LMDS in the 28 GHz band under the existing point-to-point rules. We defer consideration of the comments filed in re-

¹ Certain short form references used in the Second Report and Order are also used in this Appendix.

² Title II of the Contract with America Act is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. §§ 601 *et seq.*