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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Rulemaking to Amend Parts 1, 2, 21, and 25	)	CC Docket No. 92-297
Of the Commission's Rules to Redesignate	)	
The 27.5-29.5 GHz Frequency Band, To	)	
Reallocate the 29.5-30.0 GHz Frequency	)	
Band, To Establish Rules and Policies for	)	
Local Multipoint Distribution Service	)	
And for Fixed Satellite Services	)	
	)	
Petitions for Reconsideration of	)	
the Commission's Competitive Bidding Rules	)	

SECOND ORDER ON RECONSIDERATION

Adopted: September 9, 1997 Released: September 12, 1997

By the Commission: Commissioner Chong issuing a statement in which Commissioner Quello joins.

I. Introduction and Executive Summary

1. The Commission has before it several petitions for reconsideration of the *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking* in this proceeding.[1] This *Second Order on Reconsideration* addresses those portions of the

[1] Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules To Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio

aforementioned petitions -- those of CellularVision, WebCel, and Cook Inlet -- that deal with the participation of small businesses in the upcoming auction of Local Multipoint Distribution Service ("LMDS") licenses.[2] For the reasons set forth below, we reconsider and modify certain rules affecting small business participation in the LMDS license auction. Specifically, we:

- Eliminate installment payments for LMDS licensees in favor of revised, tiered bidding credits for very small, small, and entrepreneurial businesses participating in this auction;
- Deny a request to adopt an "asset test" for evaluating business size; and
- Decline to further address the qualifications of licensees that are delinquent or in default on FCC licenses in other services for obtaining favorable provisions for this auction.

Those portions of the aforementioned petitions that do not deal with the small business participation rules will be addressed in a separate Commission ruling.

Service Rules, CC Docket No. 92-297, Suite 12 Group Petition for Pioneer Preference, PP-22, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, FCC 97-82, 62 Fed. Reg. 16514 and 23148 (rel. March 13, 1997) ("*LMDS Second Report and Order*") ("*Fifth Notice of Proposed Rulemaking*") ("*Order on Reconsideration*"), adopting Subpart L of Part 101 of the Commission's Rules, 47 C.F.R. §§ 101.1001-1112; *appeal pending sub nom. Melcher v. FCC*, Case Nos. 93-1110, et al. (D.C. Cir., filed Feb. 8, 1993) (eligibility restrictions); Errata (rel. April 7 and May 1, 1997); *Order on Reconsideration*, FCC 97-166 (rel. May 16, 1997). We defer the comments and all matters raised for comment in the *Fifth Notice of Proposed Rulemaking* to a separate Report and Order to be issued in the near future.

Petitions for reconsideration of the *LMDS Second Report and Order* have been filed by CellularVision USA, Inc. ("CellularVision"), WebCel Communications, Inc. ("WebCel"), Cook Inlet Region, Inc. ("Cook Inlet"), LBC Communications, Inc. ("LBC"), the Rural Telecommunications Group ("RTG"), the Independent Alliance, and Sierra Digital Communications, Inc. A petition for reconsideration of the *Order on Reconsideration* has been filed jointly by LDH International, Inc., Celltel Communications Corporation, and CT Communications Corporation, and a petition for review of the above-referenced *Order on Reconsideration* has been filed by M3 Illinois Telecommunications Corporation.

[2] In authorizing the Commission to use competitive bidding, Congress mandated that we "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." Section 309(j)(4)(D) of the Communications Act of 1934, as amended ("Communications Act"), 47 U.S.C. § 309(j)(4)(D). These categories are collectively known as "designated entities." *See LMDS Second Report and Order* at ¶ 340 and n.514. Noting the lack of a record to support special provisions for businesses owned by members of minority groups and women, we adopted provisions for small businesses in the belief that they would also assist minority- and women-owned entities, many of which are small businesses. *Id.* at ¶ 343.

II. Background

2. In the *LMDS Second Report and Order*, we adopted service and competitive bidding rules for LMDS which included, *inter alia*, provisions designed to assist two distinct sizes of small businesses and entities. Entities with average gross revenues for the preceding three years of more than $40 million but not more than $75 million hereinafter are referred to as "entrepreneurs."[3] A small business is defined as "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."[4] For entrepreneurs, we made available 15 percent bidding credits and installment payments at the same interest rate as for small businesses. Installment payments for entrepreneurs consist of both interest and principal amortized over the ten years of the license term.[5] Small businesses are eligible for 25 percent bidding credits and installment payments, the interest rate for which is based on the rate for ten-year U.S. Treasury obligations, fixed at the time of licensing, plus 2.5 percent.[6] Installment payments for small businesses consist of interest-only payments for the first two years, and interest and principal amortized over the remaining eight years of the license term.[7]

3. CellularVision, WebCel, and Cook Inlet request that the Commission reconsider certain aspects of the small business provisions established in the *LMDS Second Report and Order*.[8] Zip Communications Corporation ("Zip"), RTG, and CellularVision filed

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[3] *See LMDS Second Report and Order* at ¶¶ 340-363. We note that this is the first time in the LMDS proceeding in which the term "entrepreneurs" has been used to refer to entities with average gross revenues for the preceding three years of more than $40 million but not more than $75 million.

[4] 47 C.F.R. § 101.1112(b).

[5] *See* 47 C.F.R. §§ 101.1107(b), 101.1108(b), and 101.1112 (b)(2).

[6] *See* 47 C.F.R. §§ 101.1107(a) and 101.1108(a).

[7] *See* 47 C.F.R. § 101.1108(a).

[8] *See* CellularVision Petition for Partial Reconsideration (filed May 29, 1997) ("CellularVision Petition") (requesting adoption of a second installment payment plan for small businesses); WebCel Petition for Partial Reconsideration (filed May 29, 1997) ("WebCel Petition") (requesting adoption of a "very small business" category and an "asset test" for determinations of business size); and Cook Inlet Petition for Reconsideration (filed May 29, 1997) ("Cook Inlet Petition") (requesting elimination of installment payments, adoption of a very small business category, and that licensees that are delinquent or in default on their installment payment obligations in connection with other FCC licenses be ineligible for special bidding preferences). These petitioners also variously seek reconsideration of other aspects of our LMDS rules, but this proceeding addresses only their designated entity proposals.

oppositions to various portions of these petitions.[9] WebCel and CellularVision also replied to some of the oppositions.[10] Finally, the Commission received *ex parte* communications from the National Venture Capital Association ("NVCA"), U.S. WaveLink Telecommunications Group, L.P. ("U.S. WaveLink"), WebCel, CellularVision, and LBC.[11] Petitions for judicial stay of the *LMDS Second Report and Order* have also been filed.[12]

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[9] *See* Opposition and Comments of Zip Communications Corporation on Petitions for Reconsideration (filed July 2, 1997) ("Zip Opposition") (opposing all requests of CellularVision, WebCel, and Cook Inlet, except for WebCel's request for an asset test); RTG Partial Opposition to Petition for Reconsideration (filed July 2, 1997) ("RTG Opposition") (supporting institution of a very small business category); and Consolidated Opposition of CellularVision USA, Inc. to Petitions for Reconsideration (filed July 2, 1997) ("CellularVision Opposition") (opposing elimination of installment payments and implementation of a very small business category if it would reduce current benefits for small businesses and entrepreneurs). Bell Atlantic Corporation also opposes the WebCel Petition, which it characterizes as an "effort to suppress bidding competition," but does not specifically address WebCel's arguments regarding designated entity provisions. *See* Bell Atlantic Opposition to WebCel Petition for Reconsideration (filed July 2, 1997).

[10] *See* Reply of WebCel Communications, Inc. (filed July 14, 1997) ("WebCel Reply") (reiterating request for a very small business category); and Reply of CellularVision USA, Inc. to Opposition of Zip Communications Corporation to CVUS Petition for Partial Reconsideration (filed July 16, 1997) ("CellularVision Reply") (further supporting revised installment payment option).

[11] *See* Letter from Daniel T. Kingsley, Executive Director, National Venture Capital Association, to Reed E. Hundt, Chairman, Federal Communications Commission (July 7, 1997), regarding "Need for LMDS Very Small Business Category & Asset Test" ("NVCA Letter") (supporting a very small business category and an asset test); Letter from Jason S. Priest, President, U.S. WaveLink Telecommunications Group, L.P., to Reed E. Hundt, Chairman, Federal Communications Commission (July 11, 1997), regarding "*Ex Parte* Presentation, Local Multipoint Distribution Service, CC Docket No. 92-297" ("U.S. WaveLink Letter") (urging no further delay in the LMDS auction); WebCel Notices of *Ex Parte* Presentations, June 27 and July 1, 17, 23, 25, and 31, 1997, and Letter from Martin L. Stern, Counsel for WebCel Communications, Inc., to Rosalind Allen, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission (July 21, 1997), regarding "CC Docket No. 92-297, et al. -- Cook Inlet Proposal to Eliminate Installment Payments" ("WebCel Letter") (collectively advocating a very small business category, requesting a second additional very small business category, and opposing elimination of installment payments); CellularVision Notice of *Ex Parte* Presentation, July 23, 1997 (proposing that, if installment payment plans for LMDS licensees are eliminated, small businesses receive a 50 percent bidding credit); and Letter from Daniel S. Goldberg, Counsel for LBC Communications, Inc., to Rosalind Allen, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission (August 1, 1997), regarding "CC Docket No. 97-297 et al.," ("LBC Letter") (opposing elimination of installment payments).

[12] Those cases have since been consolidated in the U.S. Court of Appeals for the District of Columbia in *Melcher v. FCC*, *cited* at n.1, *supra*.

III. Discussion

1. Commencement of the Auction

4. Petitions. U.S. WaveLink urges the Commission to announce that the LMDS auction will begin no later than November, 1997, believing expedition imperative to ensure sound business planning.[13] U.S. WaveLink asserts that the LMDS auction is already long overdue, that capital markets have been poised to invest, and that further delay will dampen investors' interest, slow the delivery of innovative video programming and telecommunications services to the public, and irreparably harm competition in LMDS and in the video programming and telecommunications markets in which LMDS licensees seek to compete.[14] Zip also urges the Commission to commence the LMDS auction as expeditiously as possible.[15]

5. Discussion. We agree with U.S. WaveLink and Zip regarding the need to move expeditiously to auction the LMDS licenses. We believe that the public will significantly benefit from the availability of new services via LMDS and from the benefits of competition between LMDS and established services. We are concerned that further delay may slow the delivery of new services to the public and harm the growth of competition. We also want to give sufficient time from the date of the release of this *Second Order on Reconsideration* for potential bidders to arrange financing. Therefore, we have recently announced that the LMDS auction will begin on December 10, 1997.[16] This issue is therefore moot.

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[13] U.S. WaveLink Letter at 1.

[14] *Id.* U.S. WaveLink notes that it has already been several months since the Commission last directed the Wireless Telecommunications Bureau to implement procedures for auctioning LMDS licenses pursuant to the *LMDS Second Report and Order*, and that it has been more than four years since the Commission first proposed to authorize LMDS operation and almost a year since the Commission designated spectrum for LMDS use. *Id.*, *citing* Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, RM-7872, RM-7722, Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, Suite 12 Group Petition for Pioneer's Preference, University of Texas - Pan American Petition for Reconsideration of Pioneer's Preference Request Denial, PP-22, *Notice of Proposed Rulemaking, Order, Tentative Decision, and Order on Reconsideration*, 8 FCC Rcd 557 (1993).

[15] Zip Opposition at 1.

[16] *See* "FCC Announces Upcoming Spectrum Auction Schedule: Two Auctions to Commence Before End of Year," *Public Notice*, DA 97-1627 (rel. July 30, 1997).

2. Installment Payments

6. Petitions. Cook Inlet urges us to eliminate the installment payment plans for LMDS licensees. Cook Inlet asserts that installment payment plans fueled speculation in the broadband Personal Communications Services ("PCS") auctions, encouraged expectations of Commission relief from payment obligations, and saddled the Commission with difficult credit-related tasks for which it has no experience.[17] Cook Inlet further argues that installment payment programs force the Commission to balance its duty to regulate the provision of wireless services with its sometimes conflicting obligation to manage the federal debt responsibly.[18] To ensure that small businesses have the opportunity to compete for LMDS licenses, Cook Inlet urges the Commission to offer increased bidding credits in place of installment payment plans, which it asserts will allow responsible small bidders with appropriately tailored business plans to secure private financing, without sacrificing market driven bidding discipline.[19]

7. CellularVision, WebCel, Zip and LBC oppose Cook Inlet's proposal to eliminate installment payment plans for LMDS licensees. CellularVision and WebCel argue that Section 309(j)(4) of the Communications Act requires the Commission to consider the use of installment payments as a means of ensuring that licenses are held by a wide variety of applicants, including small businesses.[20] WebCel further argues that installment payments were successful in past auctions, and that in this proceeding the Commission lacks the requisite degree of justification to eliminate them.[21] CellularVision, WebCel and LBC also

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[17] Cook Inlet Petition at 6-9. Cook Inlet Petition also notes our statement in the current proceeding to modify our general competitive bidding rules:

> We note that substituting a system of larger bidding credits might eliminate the administrative and market concerns associated with installment payments, while nonetheless ensuring opportunities for small businesses to participate in auctions.

Id. at 10, *quoting* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, FCC 97-60, 62 Fed. Reg. 13540 (rel. February 29, 1997), at ¶ 34 ("*Part 1 Order and NPRM*").

[18] Cook Inlet Petition at 9-10.

[19] *Id.* at 9-11.

[20] CellularVision Opposition at 2-5; WebCel Letter at 2.

[21] WebCel Letter at 2-4, *citing* 47 U.S.C. § 309(j)(4)(A) and (D), the Administrative Procedures Act, generally, and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29 (1983) ("*Motor Vehicle Manufacturers*").

express doubts that private financing will be available or sufficient for participation in the LMDS auction and subsequent build-out, marketing and operations.[22] Zip agrees with Cook Inlet that its proposal would curb speculative bidding, but also believes that it would eliminate any meaningful opportunity for small businesses to participate in the LMDS auction.[23] If the Commission does eliminate installment payments for LMDS licensees, CellularVision proposes that small businesses, as currently defined, receive a 50 percent bidding credit in order to attract the necessary private financing to compete in the LMDS auction.[24]

8. Contrary to Cook Inlet's proposal, CellularVision asserts that an additional, "deferred incremental repayment" installment payment option, that takes into account the special resource-intensive characteristics of LMDS, is necessary to ensure maximum small business participation in the LMDS auction.[25] WebCel, for its part, suggests the creation of two additional "very small" business categories (*see* ¶ 14, *infra*) which would include proportionally favorable installment payment plans.[26] Zip opposes CellularVision's proposal, asserting that the elimination of any immediate financial obligation would give bidders an incentive to engage in speculation, and that it may encourage bidders to drive prices beyond the range of small businesses, with the expectation that the Commission will forgive the winners' debt obligations if they later find that they have overreached.[27] CellularVision asserts in reply that the auction process itself virtually eliminates the possibility of speculation.[28]

9. Discussion. We grant Cook Inlet's petition and eliminate installment payment plans for LMDS licensees. Notwithstanding the arguments of CellularVision and WebCel,

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[22] CellularVision Opposition at 5-6; WebCel Letter at 3; LBC Letter at 1.

[23] Zip Opposition at 4.

[24] CellularVision Notice of *Ex Parte* Presentation, July 23, 1997.

[25] CellularVision Petition at 3-5. Under CellularVision's proposal, payments of interest, at a rate equal to a 10-year U.S. Treasury note, would commence in year six, while payments of principal would commence in year seven under an incremental structure of five percent in year seven, 10 percent in years eight and nine, and the remaining 75 percent in the final year.

[26] WebCel Petition at 11 and Notice of *Ex Parte* Presentation, July 31, 1997.

[27] Zip Opposition at 3, *citing* Installment Payments for PCS Licenses, *Order*, DA 97-649 (rel. March 31, 1997).

[28] *See* CellularVision Reply at 3.

Congress did not require the use of installment payments in all auctions, but rather recognized them as one means of promoting the objectives of Section 309(j)(3) of the Communications Act.[29] The Commission continues to experiment with different means for achieving its obligations under the statute, and has offered installment payments to licensees in several auctioned wireless services.[30] By no means, however, has Congress dictated that installment payments are the only tool in assisting small business. Indeed, we have conducted several auctions without installment payments.[31] Moreover, in recent legislation,

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[29] Specifically, Section 309(j)(4) of the Communications Act states that the Commission shall, in prescribing regulations pursuant to these objectives and others, "*consider* alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B) . . . ." *See* 47 U.S.C. § 309(j)(4)(A) (emphasis added). *See also* Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255:

> While it is clear that, in many instances, the objectives of section 309(j) will be best served by a traditional, "cash-on-the-barrelhead" auction, it is important that the Commission employ different methodologies as appropriate. Under this subsection, the Commission has the flexibility to utilize any combination of techniques that would serve the public interest.

[30] *See, e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994) (Interactive Video Data Services); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941 (1994) ("*Narrowband PCS Third Report and Order*") (regional narrowband PCS); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) (broadband PCS); Implementation of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589 (1995) (Multipoint Distribution Service); and Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Implementation of Sections 3(n) and 322 of the Communications Act, GN Docket No. 93-252, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639 (1995) (900 MHz Specialized Mobile Radio ("SMR")).

[31] We specifically note the auctions of licenses for the Wireless Communications Service ("WCS"), nationwide narrowband PCS, and cellular unserved areas. *See, respectively*, Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, *Report and Order*, FCC 97-50, 62 Fed. Reg. 9636 (rel. February 19, 1997) ("*WCS Report and Order*"); *Narrowband PCS Third Report and Order*; and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket No. 90-6, *Ninth Report and Order*, 11 FCC Rcd 14769 (1996).

Congress dictated that certain future auctions effectively be conducted without installment payments.[32] We have carefully considered the use of installment payment plans for LMDS licensees. We conclude that we can meet our statutory obligations absent these provisions.[33]

10. The Commission must balance competing objectives in Section 309(j) that require, *inter alia*, that it promote the development and rapid deployment of new spectrum-based services and ensure that designated entities are given the opportunity to participate in the provision of such services.[34] In assessing the public interest, we must try to ensure that all the objectives of Section 309(j) are considered. While we disagree with Cook Inlet's contention that installment payments necessarily encourage speculation, our experience with the installment payment program leads us to conclude that installment payments may not always serve the public interest. The Commission has found, for example, that obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants.[35] We are presently examining issues relating to our administration of installment payments, including those raised by Cook Inlet, in several other

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[32] *See* Section 3001 of the Omnibus Consolidated Appropriations Act for 1997, P.L. 104-208, 110 Stat. 3009 (1996) ("Omnibus Consolidated Appropriations Act"). *See also* the Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997). Section 3007 of the Balanced Budget Act of 1997, which significantly amends Section 309(j) of the Communications Act, requires that:

> The Commission shall conduct the competitive bidding required under this title or the amendments made by this title in a manner that ensures that all proceeds of such bidding are deposited in accordance with section 309(j)(8) of the Communications Act of 1934 not later than September 30, 2002.

The Conference Report on the Balanced Budget Act of 1997 indicates that the deadline set forth in Section 3007 "applies to all competitive bidding provisions in this title of the conference agreement and any amendments to other law made in this title." Conference Report on H.R. 2015, Balanced Budget Act of 1997, Congressional Record -- House, Vol. 143, No. 109 -- Part II, at H6176.

[33] *See LMDS Second Report and Order* at ¶¶ 344-349.

[34] *See* 47 U.S.C. § 309(j)(3) and (4).

[35] *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, Implementation of Section 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order*, FCC 97-224, 62 Fed. Reg. 41225 (rel. July 10, 1997) ("*800 MHz MO&O*") at ¶ 130.

proceedings.[36] Because of the importance of these issues, we plan to incorporate our decisions regarding installment payments for the broadband PCS C and F Blocks and other financial issues into our Part 1 rulemaking.[37] Nevertheless, we agree with U.S. WaveLink and Zip about the need to move expeditiously to auction the LMDS licenses. We believe that the public interest is best served by going forward with the LMDS auction without extending installment payments to LMDS licensees. In place of installment payments, we establish other changes that will provide for the interests of new entrants (*see* ¶¶ 16-17 and 19-20, *infra*).

11. We disagree with the contentions of WebCel, LBC, and Zip that installment payments are necessary to ensure a meaningful opportunity for small businesses to participate in LMDS. In other auctions in which installment payments were not available, small businesses were the high bidders on a significant number of licenses. In the WCS auction, which had bidding credits of 25 percent for small businesses and 35 percent for very small businesses and no installment payments, 25 percent of the licenses went to small or very small businesses. In the cellular auction of licenses for unserved areas, which had no special bidding provisions, 36 percent of the licenses went to small or very small businesses. CellularVision, although expressing some doubts regarding the ability of small businesses to attract private financing, suggests that a large enough bidding credit would enable small businesses to do so, while Cook Inlet contends that increased bidding credits will allow responsible small bidders with appropriately tailored business plans to secure private financing. WebCel, Cook Inlet, and NVCA also point out, as discussed below, that LMDS may be built out incrementally, which may allow for lower levels of front-end system financing than other services. Further, as we have already noted, Section 309(j) requires the Commission to consider alternative methods to allow for dissemination of licenses among

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[36] *See Part 1 Order and NPRM* at ¶¶ 34-35, proposing changes to the competitive bidding process in Part 1 of the Commission's Rules. *See also* "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," *Public Notice*, WT Docket 97-82, DA 97-679 (rel. June 2, 1997). Several parties also filed petitions for reconsideration in the Commission's paging proceeding, in which they requested that the Commission reconsider its adoption of installment payment plans for small businesses. *See* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Petitions for Reconsideration*, filed by Paging Network, Inc. and Personal Communications Industry Association, April 11, 1997. Responding to other requests, we eliminated installment payments in the auction of the upper 200 channels of 800 MHz SMR. *See 800 MHz MO&O*. We also deferred a decision on installment payments for the lower 230 channels to our Part 1 rulemaking. *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, Implementation of Sections 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, FCC 97-223, 62 Fed. Reg. 41190 (rel. July 10, 1997), at § 279; *Part 1 Order and NPRM* at ¶¶ 34-35.

[37] *Part 1 Order and NPRM*.

designated entities, including small businesses. We believe that the methods discussed below will both fulfill the mandate of Section 309(j) to provide small business with the opportunity to participate in auctions and ensure that new services are offered to the public without delay.

12. Since we have decided not to offer installment payments, we reject as moot both CellularVision's proposed deferred incremental repayment and WebCel's suggestion of a favorable interest rate for very small businesses. We further disagree with WebCel that the Commission lacks adequate justification to eliminate installment payment plans for LMDS licensees under the Administrative Procedures Act and *Motor Vehicle Manufacturers*. Section 706(2)(A) of the Administrative Procedures Act states that agency actions, findings, and conclusions shall be held unlawful and set aside if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."[38] *Motor Vehicle Manufacturers* held that this standard is applicable to rescission or modification of rules.[39] Under *Motor Vehicle Manufacturers* and other cases, an agency acts arbitrarily or capriciously if it fails to examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choices made."[40] We have fully considered the issue based on our experience with installment payment plans and the record before us in this proceeding.

3. Very Small Business Category

13. Petitions. In place of the current installment payment plan, Cook Inlet requests the institution of a "very small business" category, featuring a 35 percent bidding credit, for entities that, together with affiliates and controlling principals, have average gross revenues for the preceding three years of not more than $15 million.[41] Cook Inlet opines that while substantial capital will be necessary to acquire and construct LMDS systems, LMDS may provide better opportunities for smaller entities than did broadband PCS because LMDS operators will be able to build out systems incrementally without compromising their provision of service to end users. Cook Inlet notes the examples of wireless local loop or

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[38] 5 U.S.C. § 706(2)(A).

[39] *Motor Vehicle Manufacturers*, 463 U.S. at 41-42.

[40] *Id.* at 43, *citing Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). *Motor Vehicle Manufacturers* also acknowledged that "'regulatory agencies do not establish rules of conduct to last forever,' . . . and that an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *Motor Vehicle Manufacturers*, 463 U.S. at 42 (citations omitted).

[41] Cook Inlet Petition at 5.

video offerings, in which "a smaller system may stand on its own on a more localized basis without the need for immediate 'total area' coverage or even national systems support."[42]

14. NVCA and WebCel also advocate very small business categories, although not in place of installment payments, arguing that the fixed nature of LMDS service allows cell sites and network infrastructure to be deployed incrementally to match revenue generation. Therefore, the initial capital-raising requirements for one or a few markets are not as formidable as services that require extensive buildout before they are put into service.[43] NVCA also asserts that because the fixed nature of LMDS obviates the need for nationwide roaming and national branding, very small businesses can be successful with only one or a few licenses.[44] Both NVCA and WebCel express concern that without a very small business category, entrepreneurial entities with differentiated business plans and adequate venture financing, who would otherwise succeed in building local LMDS businesses, will be outbid by much larger entities that currently qualify for the same provisions.[45] WebCel consequently requests the adoption of a very small business category for entities with average gross revenues for the three preceding years of not more than $15 million, and an additional very small business category for entities with average gross revenues for the three preceding years of not more than $3 million, and seeks advantageous installment payment rates and bidding credits for these categories.[46] RTG concurs with parties advocating inclusion of a very small business category in the LMDS auction, asserting that LMDS is capital-intensive and that small businesses will not be able to afford licenses or effectively deploy their systems without additional incentives.[47]

15. CellularVision opposes implementation of WebCel's plan if it would reduce current incentives for small businesses or entrepreneurs, believing that any incentives granted for very small businesses must be in addition to the current bidding credits and installment

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[42] *Id.* at 4.

[43] NVCA Letter at 1; WebCel Petition at 9-10 and Reply at 3-4.

[44] NVCA Letter at 1. NVCA characterizes LMDS as potentially "one of the best new venture opportunities for locally-owned small businesses and entrepreneurial start-ups to enter the telecommunications industry." *Id.*

[45] NVCA Letter at 2; WebCel Petition at 5-11.

[46] WebCel Petition at 9-12 and Reply at 3-4, and Notice of *Ex Parte* Presentation, July 31, 1997, respectively.

[47] RTG Opposition at 7.

payment plans for those entities.[48] Zip also opposes WebCel's proposal for a very small business category, without elaboration.[49]

16. Discussion. We will create an additional category to benefit "very small" businesses bidding for LMDS licenses, along the lines suggested by Cook Inlet, NVCA, WebCel, and RTG. We agree that a unique category for very small businesses will serve as an effective method of leveling the competitive imbalance between very small businesses and other entrepreneurial entities. We will define "very small" businesses as entities that, together with controlling principals and affiliates, have average gross revenues for the three preceding years of not more than $15 million. We will also re-define "small" businesses as entities that, together with controlling principals and affiliates, have average gross revenues for the three preceding years of more than $15 million but not more than $40 million. These categories are identical to those adopted for the broadband PCS F Block auction, as petitioners argue. We will apply to the very small business category the same attribution, control, consortia, upfront payment, and unjust enrichment rules that we adopted for our small business and entrepreneur categories.[50]

17. We decline to adopt WebCel's suggestion of another category for entities that, together with controlling principals and affiliates, have average gross revenues for the three preceding years of not more than $3 million. Under the revised "tiered" approach, we will have three categories of bidders: "entrepreneurs," "small businesses," and "very small businesses." Creating an additional category (*i.e.*, "very, very small" businesses) adds another layer of complexity with little countervailing benefit to bidders. We believe that the three categories will adequately serve to diversify opportunity in our LMDS auction.

4. Bidding Credits

18. Petitions. As previously described, Cook Inlet supports heightened bidding credits in lieu of installment payment plans for LMDS licenses. Specifically, Cook Inlet suggests the establishment of the aforementioned very small business category with a 35 percent bidding credit, and the retention of a 25 percent bidding credit for small businesses and a 15 percent bidding credit for entrepreneurs.[51] Cook Inlet asserts that "increased

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[48] CellularVision Opposition at 9-10.

[49] Zip Opposition at 4.

[50] *See LMDS Second Report and Order* at ¶¶ 352-361 and 47 C.F.R. §§ 101.1105, 101.1107(c) and (d), and 101.1112.

[51] Cook Inlet Petition at 11.

bidding credits such as these" are appropriate in the absence of installment payment plans.[52] To the extent that installment payments are no longer available for LMDS licensees, CellularVision proposes a 50 percent bidding credit for small businesses, as currently defined, in order to attract the necessary private financing to compete in the LMDS auction.[53] WebCel requests that the Commission offer either a bidding credit of 35 percent for its two very small business categories, or adopt the tiered scheme employed for the broadband PCS F Block auction -- a 25 percent bidding credit for very small businesses, a 15 percent bidding credit for small businesses, and no bidding credit for entrepreneurs.[54]

19. Discussion. We will offer higher bidding credits than those adopted in the *LMDS Second Report and Order* for small businesses and entrepreneurs. We agree with Cook Inlet and CellularVision that heightened bidding credits are appropriate in the absence of installment payment plans. Also, contrary to WebCel's assertions, we believe that heightened bidding credits will fulfill the mandate of Section 309(j)(4)(D) of the Communications Act to provide small businesses with the opportunity to participate in spectrum-based services.[55] As noted above, this approach was successful in enabling small businesses to participate in the WCS auction, in which we were unable to employ installment payments because of the statutory deadline for depositing auction revenues in the U.S. Treasury.[56] We also recently used this approach in establishing rules for the auction of licenses for 800 MHz SMR.[57] However, we do not agree with the bidding credit levels suggested by the petitioners. Except for entities that would qualify as very small businesses, Cook Inlet's proposed levels would not account for the loss of installment payment plans. WebCel's alternative suggestion of conforming the LMDS bidding credit levels to those employed in the broadband PCS F Block auction would entail reducing the bidding credits available to small businesses and entrepreneurs at the same time that we are eliminating installment payments. CellularVision has not provided any support for its assertion that small businesses will require a 50 percent bidding credit to attract private financing.

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[52] *Id.*

[53] CellularVision Notice of *Ex Parte* Presentation, July 23, 1997.

[54] WebCel Petition at 11-12. *See also* 47 C.F.R. §§ 24.717(a) and (b) and 24.720(b).

[55] 47 U.S.C. § 309(j)(4)(D).

[56] *See* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, *Notice of Proposed Rulemaking*, FCC 96-441, 61 Fed. Reg. 59048 (rel. November 12, 1996), at ¶ 63; and *WCS Report and Order* at ¶ 182. *See also* Section 3001 of the Omnibus Consolidated Appropriations Act.

[57] *See 800 MHz MO&O.*

20. We will raise the bidding credit available to small businesses (entities with average gross revenues for the three preceding years of more than $15 million but not more than $40 million) to 35 percent and the bidding credit available to entrepreneurs (entities with average gross revenues for the preceding three years of more than $40 million but not more than $75 million) to 25 percent. These levels reflect the thresholds adopted in the *LMDS Second Report and Order*, with a reasonable adjustment of ten percent for the unavailability of installment payment plans for LMDS licensees. In addition, we will adopt a 45 percent bidding credit for very small businesses (entities with average gross revenues for the three preceding years of not more than $15 million) in the LMDS auction. This level reflects the 35 percent threshold requested by WebCel, plus a reasonable adjustment for the lack of bidding credits. We note that it is difficult to accurately calculate the net present value of an installment payment plan (which value would depend on several variables, including future commercial interest rates), and we do not in any event commit to an exact accommodation or reimbursement of the value of installment payments. Nor do we intend to exactly match our small business provisions for LMDS to those employed in other services such as WCS or 800 MHz SMR. Our small business provisions for LMDS have historically deviated from those adopted for other services, and we believe that an effort to conform them to the provisions adopted for other types of wireless services would be pointless.

5. Asset Test

21. Petitions. WebCel, Zip, and NVCA suggest the institution of an asset test in our small business size standards to differentiate start-ups from larger entities.[58] WebCel's suggested asset test would consist of a "financial eligibility threshold" excluding firms with total assets in excess of $500 million, the measure of which would include the value of other licenses held.[59] Zip suggests financial eligibility thresholds of $250 million for small businesses, and $500 million for entrepreneurs.[60] NVCA would have us apply the $500 million threshold employed in other auctions.[61]

22. Discussion. We will not adopt an asset test for the LMDS auction. Although we have adopted an asset test for eligibility for particular blocks of licenses in broadband PCS

[58] WebCel Petition at 2-3 and 5-12; Zip Opposition at 4-6; NVCA Letter at 2.

[59] WebCel Petition at 2-3 and 5-12.

[60] Zip Opposition at 4-6. Zip theorizes that the lack of discussion in the *LMDS Second Report and Order* of our decision not to adopt an asset threshold test, as well as the requirement in Section 101.1109(c) of the Commission's Rules that winning bidders' records include asset information, indicates that the absence of an asset test may have been an oversight. *Id.* at 5-6. *See also* 47 C.F.R. § 101.1109(c).

[61] NVCA Letter at 2.

auctions, we have never before employed an asset test for eligibility for small business size standards. We also note that the Small Business Administration, the rules of which have formed the basis for much of our own consideration of small business provisions, presently does not employ asset tests in its business size standards except in the context of national and commercial banks, savings institutions, and credit unions.[62] Assets, being potentially fluid and subject to inconsistent valuation (*e.g.*, intangibles) are generally much less ascertainable than gross revenues or numbers of employees. We further note that we have never counted licenses won in other auctions as assets for purposes of calculating total assets, as requested by WebCel, and there would appear to be significant questions of proper valuation (*e.g.*, amortization schedules) in doing so. Given the complexity and significance of the issues associated with asset tests and the importance of proceeding with the LMDS auction without further delay (*see* ¶ 10, *supra*), we do not feel that we have enough data at this time to do adopt an asset test for LMDS. However, we will consider adopting an asset test in future auctions in our Part 1 rulemaking.

6. Exclusion of Delinquent and Defaulted Debtors

23. Petitions. Cook Inlet suggests that licensees that are delinquent or in default on their installment payment obligations in other services should be ineligible for special bidding provisions in LMDS.[63] Cook Inlet considers this particularly appropriate if installment payment plans are not offered, believing that a bidder that is prepared to pay in full should be required to dedicate those funds to the satisfaction of an existing Commission obligation before acquiring new licenses.[64] Cook Inlet asserts that "bidders should not expect that delinquency or default exists as a money management system in one auction without consequence in another."[65] Cook Inlet accordingly suggests that the Commission require entities that are seeking favorable provisions in the LMDS auction to certify on their short-form applications (FCC Form 175) that neither they nor their affiliates or attributable investors are delinquent or in default on any Commission competitive bidding installment payment obligation.[66]

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[62] *See* 13 C.F.R. § 121.201, Standard Industrial Classifications 6021-6082 and n.7.

[63] Cook Inlet Petition at 11-13. Cook Inlet's limitation would also apply to the delinquent and/or defaulting licensees' affiliates and attributable investors. *Id.* at 11.

[64] Cook Inlet Petition at 12.

[65] *Id.* at 13.

[66] *Id.* at 12.

24. Discussion. We decline to further address the qualifications of licensees that are delinquent or in default on other FCC licenses for obtaining favorable provisions for the LMDS auction. We agree with Cook Inlet that, as a matter of policy, it may be desirable to exclude licensees that have defaulted on existing obligations from further favorable small business provisions. However, we have already amended Section 1.2105(a) of our Part 1 Rules to indicate that "an applicant's signature on FCC Form 175 or its electronic submission of this form will serve to certify that the applicant is not in default on any payment for Commission licenses (including down payments) and that it is not delinquent on any non-tax debt owed to any federal agency."[67] Moreover, Section 1.2105(a)(2)(v) of our Part 1 Rules requires a certification that the applicant is legally, technically, financially and otherwise qualified to bid. We therefore believe that our existing rules address this issue.

IV. Ordering Clauses

25. ACCORDINGLY, IT IS ORDERED that the Petition for Partial Reconsideration filed by WebCel Communications, Inc., is granted in part and denied in part; the Petition for Reconsideration filed by Cook Inlet Region, Inc., is granted in part and denied in part; and the Petition for Partial Reconsideration filed by CellularVision USA, Inc., is granted in part and denied in part.

26. IT IS FURTHER ORDERED that Part 101 of the Commission's Rules is amended as set forth in the attached Appendix A.

27. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 60 days after their publication in the Federal Register. This action is taken pursuant to Section 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

28. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Second Order on Reconsideration*, including the Supplemental Final Regulatory Flexibility Analysis set forth in the attached Appendix B, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

[67] *See Part 1 Order and NPRM* at ¶ 8 and 47 C.F.R. § 1.2105(a)(2)(x).

APPENDIX A

Final Rules

Part 101 of title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation continues to read as follows:

AUTHORITY: 47 U.S.C. Sections 154, 303.

2. Section 101.1105 is revised to read as follows:

§ 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 Sec. 1.2106 of this chapter as announced by the Wireless Telecommunications Bureau by Public Notice.

(b) Winning bidders in LMDS auctions 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 must pay the full balance of their winning bids within ten business days following the release of a Public Notice that the Commission is prepared to award the licenses.

3. Section 101.1107 is revised to read as follows:

§ 101.1107 Bidding credits for very small businesses, small businesses and entrepreneurs; unjust enrichment.

(a) A winning bidder that qualifies as a very small business or a consortium of very small businesses pursuant to Sec. 101.1112 may use a bidding credit of 45 percent to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a small business or a consortium of small businesses pursuant to Sec. 101.1112 may use a bidding credit of 35 percent to lower the cost of its winning bid.

(c) A winning bidder that qualifies as an entrepreneur or a consortium of entrepreneurs pursuant to Sec. 101.1112 may use a bidding credit of 25 percent to lower the cost of its winning bid.

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

(e) 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 based on the rate for ten year U.S. Treasury obligations applicable on the date the license is granted, 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 based on the rate for ten year U.S. Treasury obligations applicable on the date the license is granted, 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 based on the rate for ten year U.S. Treasury obligations applicable on the date the license is granted, 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 (e)(1) of this section will be reduced over time as follows:

(i) 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 the difference between the bidding credit obtained by the original licensee and the bidding credit for which the post-transfer licensee is eligible);

(ii) In year three of the license term the payment will be 75 percent;

(iii) In year four of the license term the payment will be 50 percent; and

(iv) In year five of the license term the payment will be 25 percent, after which there will be no required payment.

4. Section 101.1108 is removed and reserved.

5. Section 101.1109 is revised to read as follows:

§ 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 very small business, small business or entrepreneurs pursuant to

Sec. 101.1112 shall append the following information as an exhibit to its short-form applications (FCC Form 175):

(1) The identities of the applicant's affiliates and controlling principals; and

(2) The applicant's gross revenues, computed in accordance with Sec. 101.1112.

(b) Long-form applications: certifications and disclosure. In addition to the requirements in Sec. 1.2107 of this chapter, each applicant submitting a long-form application for an LMDS license and qualifying as a very small business, small business or entrepreneur pursuant to Sec. 101.1112 shall, in an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with Sec. 101.1112, for each of the following: the applicant, the applicant's affiliates, the applicant's controlling principals, and, if a consortium of very small businesses, small businesses or entrepreneurs, the members of the consortium;

(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 very small business, small business or entrepreneur, 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 very small businesses, small businesses or entrepreneurs 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 very small business, small business or entrepreneur. 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 very small business, small business or entrepreneur pursuant to Sec. 101.1112 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.

6. Section 101.1112 is revised to read as follows:

§ 101.1112 Definitions.

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

(b) Very small business. A very 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 $15 million.

(c) Small business. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of more than $15 million but not more than $40 million.

(d) Entrepreneur. An entrepreneur is an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of more than $40 million but not more than $75 million.

(e) For purposes of determining whether an entity meets the definition of very small business, small business or entrepreneur, the gross revenues of the applicant, its affiliates and controlling principals shall be considered on a cumulative basis and aggregated.

(f) Consortium. A consortium of very small businesses, small businesses or entrepreneurs 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 very small business, small business or entrepreneur. Each individual member must establish its eligibility as a very small business, small business or entrepreneur. Where an applicant (or licensee) is a consortium of very small businesses, small businesses or entrepreneurs, the gross revenues of each business shall not be aggregated.

(g) 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.

(h) 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;

(ii) Is directly or indirectly controlled by the applicant;

(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 (h)(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 (h)(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, and 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 (h)(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 (h)(5). If company B holds an option to purchase a controlling interest in company A, which holds a controlling interest in an LMDS applicant, 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 (h)(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 applicant, 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 (h)(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,

(10) Affiliation under joint venture arrangements. 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.

(11) Exclusion from affiliation coverage. For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliated entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.