

## APPENDIX B

## Supplemental Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 ("RFA"), a Final Regulatory Flexibility Analysis ("FRFA") was incorporated in Appendix D of the *LMDS Second Report and Order* in this proceeding.<sup>1</sup> The Commission's Supplemental Final Regulatory Flexibility Analysis ("SFRFA") in this *Second Order on Reconsideration* reflects revised or additional information to that contained in the FRFA, and incorporates the FRFA by reference. The SFRFA is thus limited to matters raised in petitions for reconsideration of the *LMDS Second Report and Order* and addressed in the *Second Order on Reconsideration*. This SFRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 ("CWAAA"), P.L. 104-121, 110 Stat. 846 (1996).<sup>2</sup>

**I. Need For, and Objectives of, the *Second Order on Reconsideration***

This *Second Order on Reconsideration* is issued in response to certain petitions for reconsideration of the *LMDS Second Report and Order*. The revisions in our rules made in the *Second Order on Reconsideration* are intended to address concerns raised in the record concerning the competitive bidding rules for LMDS, while otherwise reaffirming the Commission's commitment to the rapid implementation of LMDS throughout the United States.

**II. Summary of Significant Issues Raised by the Public Comments in Response to the Final Regulatory Flexibility Statement**

No comments were received in direct response to the FRFA, but the *Second Order on Reconsideration* addresses three petitions for reconsideration of the *LMDS Second Report and Order* that raise issues affecting small businesses. One petitioner asks that the Commission reconsider its rules making installment payments available to small business

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<sup>1</sup>See FRFA at 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 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), Appendix D.

<sup>2</sup> Title II of the CWAAA is the "Small Business Regulatory Enforcement Fairness Act of 1996," codified at 5 U.S.C. §§ 601 *et seq.*

LMDS licensees and replace the installment payment plans with heightened bidding credits. Contrary to that request, another petitioner requests that the Commission augment its LMDS installment payment plan with an additional "deferred incremental repayment" installment payment option delaying payment of principal until late in the license term. One petitioner supporting retention of installment payments alternatively suggests that the Commission adopt higher bidding credits if installment payments are eliminated. Two petitioners ask that the Commission reconsider its rules defining small business size categories and that it consider establishing a additional categories for very small businesses, with heightened bidding credits and/or more favorable installment payment terms. One of those petitioners also requests that the Commission adopt an asset test to distinguish between the various existing and proposed small business size categories. Finally, one petitioner asks that the Commission hold licensees that are delinquent or in default on their installment payment obligations in other services ineligible for special bidding preferences in LMDS. Oppositions, replies to oppositions, and *ex parte* comments were filed in response to the petitions and were considered before a decision was reached.

### III. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

As in the FRFA, the service regulations we adopt to implement LMDS would apply to all entities seeking an LMDS license. As discussed in the FRFA, using the Small Business Administration ("SBA") definitions applicable to radiotelephone companies and to cable and pay television services, the majority of LMDS entities to provide video distribution and telecommunications services may be small businesses.<sup>3</sup>

The Commission had not developed a more refined definition of small entities applicable to LMDS prior to the *LMDS Second Report and Order* because LMDS is a new service. The RFA amendments were not in effect until shortly before the *Fourth NPRM* in this proceeding<sup>4</sup> was released, and no data has been received establishing the number of small businesses associated with LMDS. However, in the *Third NPRM* in this proceeding<sup>5</sup>

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<sup>3</sup> See FRFA at 8-10.

<sup>4</sup> 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, CC Docket No. 92-297, *First Report and Order and Fourth Notice of Proposed Rulemaking*, FCC 96-311 (rel. July 22, 1996), 61 Fed. Reg. 39425.

<sup>5</sup> 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

we proposed to auction the spectrum for assignment and requested information regarding the potential number of small businesses interested in obtaining LMDS spectrum, in order to determine their eligibility for special provisions such as bidding credits and installment payments to facilitate participation of small entities in the auction process. In the *LMDS Second Report and Order* we adopted criteria for defining small businesses for purposes of determining such eligibility. We will use this definition for estimating the potential number of entities applying for auctionable spectrum that are small businesses.

In Section II.D.2.e. of the *LMDS Second Report and Order* we adopted criteria for defining small businesses and other eligible entities for purposes of defining eligibility for bidding credits and installment payments. We defined a small business as an entity that, together with affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the three preceding years.<sup>6</sup> Additionally, bidding credits and installment payments were made available to applicants that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of more than \$40 million but not more than \$75 million ("entrepreneurs").<sup>7</sup> In the *Second Order on Reconsideration* we adopt a "very small business" category. A very small business is defined as an entity that, together with controlling principals and affiliates, has average annual gross revenues for the three preceding years of not more than \$15 million. These entities were previously included within the small business definition.<sup>8</sup>

No parties submitting or commenting on the petitions giving rise to the *Second Order on Reconsideration* commented on the potential number of entities that would be very small businesses, and we are unable to predict accurately the number of applicants for LMDS that would fit the definition of a small business or very small business for competitive bidding purposes. However, in the FRFA, we estimated the number of applicants that are small businesses based on the rules for the Multipoint Distribution Service ("MDS"), which use the

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Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, and Suite 12 Petition for Pioneer's Preference, PP-22, *Third Notice of Proposed Rulemaking and Supplemental Tentative Decision*, 11 FCC Rcd 53 (1995) ("*Third NPRM*").

<sup>6</sup> See paragraphs 345 and 348 of the *LMDS Second Report and Order*.

<sup>7</sup> See paragraphs 349 and 358 of the *LMDS Second Report and Order*.

<sup>8</sup> The SBA has not yet approved these definitions in the context of LMDS. The definitions have received SBA approval in the context of broadband Personal Communications Services ("PCS").

same size standard as was adopted for LMDS.<sup>9</sup> A total of 154 applications were received in the MDS auction, of which 141, or 92 percent, qualified as small businesses. MDS rules did not provide a very small business definition. We note, however, that in the broadband PCS F Block rules, we adopted a very small business definition like the one adopted for LMDS.<sup>10</sup> In the broadband PCS F Block auction, 53.9 percent of the applicants were very small businesses.<sup>11</sup>

We plan to issue two licenses for each of the 492 BTAs, excluding New York, that are the geographic basis for licensing LMDS. Thus, 984 licenses will be made available for authorization in the LMDS auction. Inasmuch as 92 percent of the applications received in the MDS auction were from entities qualifying as small businesses, we anticipate receiving at least the same proportion of applications from small business entities seeking LMDS licenses. Further, as many as 53.9 percent of these entities could be very small businesses.

#### **IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

These descriptions will remain unchanged, for purposes of this *Second Order on Reconsideration*, from those in the FRFA.

#### **V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

While installment payment plans for small entities in LMDS are eliminated in the *Second Order on Reconsideration*, the Commission found that better alternatives to assist

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<sup>9</sup> In MDS, a small business is "an entity that together with its affiliates has average annual gross revenues that are not more than \$40 million for the preceding three years." See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Fixed Television Service, MM Docket No. 94-131, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589 (1995), adopting 47 C.F.R. § 21.961(b)(1).

<sup>10</sup> See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket No. 90-314, *Report and Order*, 11 FCC Rcd 7824, 7852 (1996), adopting 47 C.F.R. § 24.720(b)(2).

<sup>11</sup> 82 of 152 applicants in the broadband PCS F Block auction, and 70 of the 125 winners (56 percent), were very small businesses.

small businesses, as well as ensure provision of new services to the public, are to raise bidding credits for existing categories of small entities and adopt an additional category for very small businesses. The Commission agrees with the suggestions of two petitioners that bidding credits of sufficient size will enable small businesses to secure private financing. This suggestion is consistent with the Commission's experience in other auctions in which installment payments were not offered and small entities nevertheless have been successful (e.g., the auction of Wireless Communications Service licenses, for which bidding credits were heightened to accommodate the lack of installment payments).<sup>12</sup> Prior to the *Second Order on Reconsideration*, bidding credits of 15 percent were offered to entrepreneurs, and 25 percent to small businesses. The Commission now offers bidding credits of 25 percent for entrepreneurs, 35 percent for small businesses, and 45 percent for very small businesses.<sup>13</sup> Additionally, the adoption of a category for very small businesses, featuring a bidding credit higher than those offered to small businesses and entrepreneurs, will serve as an effective method of leveling the competitive imbalance between those entities, as well as allowing very small businesses to compete more effectively with large entities. Since the Commission decided not to offer installment payments in LMDS, it rejected as moot both the suggestion of a deferred incremental repayment option and the suggestion of a favorable interest rate for very small businesses.

The Commission disagreed with the assertion that small businesses would require a 50 percent bidding credit to attract private financing in the absence of installment payments. This assertion is unsupported and is at odds with the levels suggested by another petitioner as being sufficient to attract private financing without installment payments. The levels of bidding credits adopted offer a reasonable accommodation for the elimination of installment payments and constitute a reasonable compromise between the levels suggested in lieu thereof. Also, although adopting the suggestion of an additional category for very small businesses, the Commission rejected the suggestion of a second additional category for entities that, together with controlling principals and affiliates, have average annual gross revenues for the three preceding years of not more than \$3 million. This suggestion, which was part of an *ex parte* comment and not significantly elucidated, would create, in essence, a "very, very small business" category that would add another layer of complexity with little apparent countervailing benefit to bidders.

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<sup>12</sup> See 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).

<sup>13</sup> As noted in the *Second Order on Reconsideration*, it is difficult to calculate accurately the net present value of an installment payment plan (which value would depend on several variables, including future commercial interest rates), and the Commission does not in any event commit to an exact accommodation or reimbursement of the value of installment payments.

The Commission also declined to adopt an asset test to distinguish between the small business size categories. Assets, being potentially fluid and subject to inconsistent valuation, are generally less ascertainable than gross revenues or numbers of employees. Although the Commission has adopted an asset test for eligibility for particular blocks of licenses in broadband PCS auctions, it has never employed an asset test in its small business size standards. Nor does the SBA employ an asset test in its business size standards, except in the context of national and commercial banks, savings institutions, and credit unions (for which asset reporting obligations exist for other regulatory purposes).<sup>14</sup>

Finally, the Commission declined to further address the qualifications of licensees that are delinquent or in default on FCC licenses in other services for obtaining favorable provisions for the LMDS auction. While the Commission agrees that, as a matter of policy, it may be desirable to exclude licensees that have defaulted on existing obligations from further small business provisions, its existing rules already address this issue. An applicant's signature on FCC Form 175 or its electronic submission of that form serves to certify that the applicant is not in default on any payment for Commission licenses (including down payments), that it is not delinquent on any non-tax debt owed to any federal agency, and that it legally, technically, financially and otherwise qualified to bid.<sup>15</sup>

## VI. Report to Congress

The Commission will enclose a copy of the *Second Order on Reconsideration*, including this SFRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>16</sup> A copy of the *Second Order on Reconsideration* and this SFRFA (or summary thereof) will also be published in the Federal Register<sup>17</sup> and will be sent to the Chief Counsel for Advocacy of the SBA.

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<sup>14</sup> See 13 C.F.R. § 121.201, Standard Industrial Classifications 6021-6082 and n.7.

<sup>15</sup> See 47 C.F.R. § 1.2105(a)(2)(x) and (v).

<sup>16</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>17</sup> See 5 U.S.C. § 604(b).

**Separate Statement  
of Commissioner Rachelle B. Chong,  
in which Commissioner James H. Quello Joins**

*Re: 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 Establish Rules and Policies for Local Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, Second Order on Reconsideration*

It is with some concern that I cast my vote to eliminate installment payments for the LMDS auction. I supported this decision because I share my colleagues' concerns about the difficulties associated with the Commission's administration of the installment payment program, and I strongly felt that we should not delay the LMDS auctions while we worked through these larger issues. I am concerned, however, that the timing of our decision may have a regrettable negative impact on the ability of small businesses and woman and minority-owned businesses to participate in the LMDS auction.

The decision we issue today comes just ninety days before the start of the LMDS auction. By now, the potential bidders in the LMDS auction have prepared their business plans and have secured their financial support to participate in the auction. The bidders who are small businesses and who relied on the availability of installment payments will now be forced to make last minute significant adjustments to their plans.

That being said, given the Commission's recent experiences with the installment payment program, I agree with my colleagues that we could not go forward with another auction that included installment payments without careful consideration of all of the ramifications of that decision. Unfortunately, there was no way to do that without delaying the LMDS auction -- something I simply was not willing to do given the long and arduous road we have travelled to get to this auction. I am anxious to get LMDS up and running to provide new and vigorous competition to incumbent multichannel video providers and data providers.

In the last three-and-a-half years, many small businesses have emphasized to me how important installment payments are to them, due to the "access to capital" problem small businesses face in the real world. They argue that bidding credits are not a perfect substitute for installment payments. I recognize the validity of this argument, but I must balance this against the Commission's deep concern about our installment payment programs. I am hopeful that our significant increases in the LMDS bidding credits, together with the establishment of a new "very small" business category, will help small businesses participate in the upcoming auction.