

circumstances. The 14 dBm limit provides MVDDS with higher operating power to address their coverage concerns, but eliminates the proposed higher power exceptions to ameliorate the concerns of DBS and NGSO FSS entities that higher power would increase the size of the interference zone.⁴⁷⁸ Furthermore, placing a limit on MVDDS EIRP will ensure that DBS entities are not unduly hindered in their ability to acquire customers in areas in close proximity to MVDDS transmit facilities. Thus, we are not permitting higher powers over areas containing mountain ridges or over presently unpopulated regions because the higher power may cause too great of an exclusion zone for future DBS and NGSO FSS subscribers. We recognize that a higher power benefit for MVDDS providers would not offset the potential constraints placed on other service subscribers in the 12 GHz band.

b. RF Safety

199. In the *Further Notice*, the Commission proposed to limit power in the terrestrial use of the 12 GHz band in urban areas, but did not propose to set limits for the excepted areas on tall manmade structures and natural formations adjacent to bodies of water or unpopulated areas.⁴⁷⁹ The Commission proposed that those stations with output powers that equal or exceed 1640 watts EIRP would be subject to the environmental evaluation rules for radiation hazards, as set forth in Section 1.1307 of our rules.⁴⁸⁰ However, in this proceeding we have limited the EIRP for MVDDS transmitting systems to 14 dBm per 24 megahertz, which is far below 1640 watts, and thus MVDDS transmitting stations will not be subject to routine environmental evaluation under Section 1.1307 of our rules.⁴⁸¹

c. Quiet Zone Protection

200. The Commission tentatively concluded in the *Further Notice* to require MVDDS operators to comply with the radio quiet zone criteria set forth in Section 1.924 of our rules.⁴⁸² As such, the Commission proposed that stations authorized by competitive bidding must receive approvals from the relevant quiet zone before commencing operations.⁴⁸³ The requirement to comply with radio quiet zone clearances is a long-standing practice at the Commission and the incumbent POFS operators were also required to meet this standard. The record supports the Commission's proposal for quiet zone protection.⁴⁸⁴ Thus, we will adopt the quiet zone criteria set forth in Section 1.924 of our rules for MVDDS.⁴⁸⁵

d. Antennas

201. **Background.** In the *Further Notice*, the Commission proposed to require antennas deployed to receive MVDDS services to be technically similar to home DBS receive antennas and to have a minimum unidirectional gain of 34 dBi.⁴⁸⁶ Additionally, the Commission proposed to require MVDDS

⁴⁷⁸ See, e.g., EchoStar Comments to MITRE Report at Technical Appendix, Page 1.

⁴⁷⁹ *Further Notice*, 16 FCC Rcd at 4214 ¶ 313.

⁴⁸⁰ *Id.*; see 47 C.F.R. § 1.1307.

⁴⁸¹ *Id.*

⁴⁸² *Further Notice*, 16 FCC Rcd at 4214 ¶ 314; See 47 C.F.R. § 1.924.

⁴⁸³ *Id.*

⁴⁸⁴ SRL Comments at 5.

⁴⁸⁵ 47 C.F.R. § 1.924. We note, however, that the Commission is currently considering changes to this rule in a separate proceeding. In the Matter of Review of Quiet Zones Application Procedures, WT Docket No. 01-319, FCC 01-333, *Notice of Proposed Rulemaking* (Rel. Nov. 21, 2001).

⁴⁸⁶ *Further Notice*, 16 FCC Rcd at 4214 ¶ 315.

transmitting antennas to (1) meet the marking and lighting requirements under Part 17 of our rules⁴⁸⁷ and (2) generally point southward.⁴⁸⁸ The Commission also proposed that the terrestrial licensee of each service area must take into consideration that the DBS satellite receive antennas in the United States generally point southward. In that discussion, the Commission explained that in order to minimize interference to DBS receive antennas, MVDDS licensees must determine for each area of the country the “look angles” of all DBS receive antennas to determine appropriate angles for its transmit antennas that do not place high concentrations of interfering power into DBS receive antennas.⁴⁸⁹ The Commission also proposed to require MVDDS licensees to mitigate any interference caused by its transmitters into the DBS receive antennas, beyond that which the Commission deems to be permissible.⁴⁹⁰

202. Discussion. We find that it is better to allow the MVDDS provider to design its own system, than to promulgate rules limiting design options. The MITRE Report concludes that MVDDS antennas do not need to point south.⁴⁹¹ MITRE confirms the observations about backlobe characteristics of DBS receive antennas and cautions against transmitting past the edges of the antenna into the feed horn.⁴⁹² MITRE suggests that larger receive antennas could alleviate this problem.⁴⁹³ MITRE also reports that look angles for MVDDS other than south, including north, create no more interference, but that care must be taken not to place the antenna too close to the line of sight between a satellite and a DBS receiver.⁴⁹⁴ In fact, based upon the findings of the MITRE Report, we believe that the direction of MVDDS antennas is not important. Interference protection is what is important, and we do not see any reason to limit the general pointing direction of MVDDS antennas. Thus, we agree with MDSA that we should shift our focus from proposals that transmit antennas “generally point southward” and that receive antennas have a “minimum unidirectional gain of 34 dBi,” to the objective of protecting DBS so as not to limit technical innovation and competition in technical rules generally, and antenna configurations specifically.⁴⁹⁵

203. We also believe that the requirement to keep the EIRP low obviates the need to specify a minimum receive antenna gain.⁴⁹⁶ As such, we are placing the emphasis on allowing MVDDS operators to meet certain EPPD limits to protect existing DBS subscribers, instead of trying to define and limit their systems. Thus, we are not requiring pointing angles for MVDDS, nor are we requiring receive antenna standards as originally proposed.

e. Over-the-Air Reception Devices (OTARD) Rule

204. Background. The Over-the-Air Reception Devices rule preempts governmental and nongovernmental rules that impair installation, maintenance or use of certain antennas that receive, for example, broadcast television, DBS, and other video programming services.⁴⁹⁷ The Commission

⁴⁸⁷ *Id.* citing 47 C.F.R. Part 17, Subpart C.

⁴⁸⁸ *Id.* at 4214 ¶ 315.

⁴⁸⁹ A “look angle” is the elevation angle and azimuth of the antenna pointing at the satellite.

⁴⁹⁰ *See Further Notice*, 16 FCC Rcd at 4199 ¶ 273.

⁴⁹¹ MITRE Report at 6-2.

⁴⁹² *Id.* at 6-3.

⁴⁹³ *Id.* at 6-4.

⁴⁹⁴ *Id.* at 6-2 to 6-4.

⁴⁹⁵ MDSA Comments at 11-12; MDSA Reply Comments at 13-14.

⁴⁹⁶ *See* MDSA Comments at 12; Northpoint Comments, Technical Index at 25.

⁴⁹⁷ *See* 47 C.F.R. § 1.4000. *See also* Promotion of Competitive Networks in Local Telecommunications Markets, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and* (continued....)

previously opined that the OTARD rule would probably apply to MVDDS antennas at subscribers' homes or offices because MVDDS proposed to provide wireless services.⁴⁹⁸ The Commission received no comments on this issue.

205. Discussion. The OTARD rule applies to LMDS, MDS and MMDS.⁴⁹⁹ The OTARD rule was recently expanded to apply to antennas that transmit or receive non-video fixed wireless services when the antenna is otherwise within the scope of OTARD.⁵⁰⁰ We clarify that our OTARD rule under Section 1.4000⁵⁰¹ includes MVDDS customer-end antennas measuring one meter or less in diameter or diagonally that will receive radio signals. It is not necessary to amend the OTARD rule to include MVDDS antennas as they already fit within the definition in the rule.⁵⁰²

f. Transmitting Equipment

206. Background. In the *Further Notice*, the Commission made a number of proposals with regards to MVDDS transmitting equipment. Specifically, the Commission proposed to amend either Section 101.139⁵⁰³ or Section 21.120⁵⁰⁴ of our rules to require verification of all MVDDS transmitters in the 12 GHz band.⁵⁰⁵ The Commission also proposed to require MVDDS transmitters to use digital modulation, operate with a bandwidth of 500 megahertz, and provide as many video and data channels as possible.⁵⁰⁶ In addition, the Commission proposed to require all MVDDS stations to meet the digital emissions mask set forth in Section 101.111(a)(2) of our rules.⁵⁰⁷ Further, the Commission proposed to retain the frequency tolerance standard of 0.005% in Section 101.107 of our rules,⁵⁰⁸ and to change the maximum bandwidth in Section 101.109 of our Rules to reflect a value of 500 megahertz for MVDDS systems.⁵⁰⁹ The Commission also indicated that MVDDS transmitters should not be required to meet the efficiency standards in Section 101.141 of our rules.⁵¹⁰

207. Discussion. SkyBridge supports requiring all MVDDS transmitters to meet the emissions mask set forth in Section 101.111(a)(2), but opposes expanding the maximum authorized bandwidth of

(...continued from previous page)

Order and Further Notice of Proposed Rule Making, WT Docket No. 99-217, *Fifth Report and Order and Memorandum Opinion and Order*, CC Docket No. 96-98, and *Fourth Report and Order and Memorandum Opinion and Order*, CC Docket No. 88-57, 15 FCC Rcd 22983 (2000) (*Competitive Networks R&O*).

⁴⁹⁸ *Further Notice*, 16 FCC Rcd at 4214 ¶ 316.

⁴⁹⁹ See Implementation of Section 207 of the Telecommunications Act of 1996, *Report and Order*, 11 FCC Rcd 19276 (1996).

⁵⁰⁰ See *Competitive Networks R&O*, 15 FCC Rcd at 23,027-28, and 23,031 ¶¶ 97-100, 106.

⁵⁰¹ 47 C.F.R. § 1.4000.

⁵⁰² See 47 C.F.R. § 1.4000(a).

⁵⁰³ 47 C.F.R. § 101.139.

⁵⁰⁴ 47 C.F.R. § 21.120.

⁵⁰⁵ *Further Notice*, 16 FCC Rcd at 4215 ¶ 317.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

fixed microwave service carriers from 20 megahertz to 500 megahertz.⁵¹¹ SkyBridge believes that employing this value in the equation will significantly relax the emissions mask, resulting in no limitation on interference levels as far as 250 megahertz below 12.2 GHz (*i.e.* 11.95 GHz). SkyBridge believes that this situation can be remedied by expanding the maximum authorized bandwidth to no more than 24 megahertz, the bandwidth cited by Northpoint for its system.⁵¹² SkyBridge proposes an out-of-band requirement for MVDDS systems in accordance with the emissions mask applicable to CARS systems in the Ku-Band,⁵¹³ but believes that the Commission's proposal to apply the tighter emissions mask contained in Section 101.111 of our rules⁵¹⁴ will serve the same purpose, so long as the maximum authorized bandwidth is expanded to no more than 24 megahertz.⁵¹⁵ SkyBridge contends that if the Commission adopts its proposal, an EPFD limit on MVDDS out-of-band emissions would not be necessary.⁵¹⁶

208. We believe terrestrial licensees will, by necessity, utilize the most efficient technology available in conjunction with their business plans. We also agree with SkyBridge that the emissions mask for MVDDS will be more suitable with 24 megahertz for the value for B in the equation in Section 101.111 of our Rules.⁵¹⁷ Accordingly, we will change the value of B to 24 megahertz in the equation for determining the emissions mask as set forth in Section 101.111(a)(2) of our rules.⁵¹⁸ We believe that optimum efficiency will be achieved in the use of spectrum by MVDDS licensees. Thus, we do not believe we should require MVDDS transmitters to meet the efficiency standards in Section 101.141 of our rules.⁵¹⁹ This action is consistent with the Commission's approach in other Part 101 services.⁵²⁰

209. We received no other comments on technical parameters including the limit on digital emissions. Therefore, where we have not adopted specific rules herein, we will require MVDDS licensees to conform to existing standards in Part 101. MVDDS licensees will also be required to adhere to any additional requirements specified in this *Second Report and Order*, including the requirement to operate with digital emissions and to meet the digital emission mask.

4. Pending Applications

210. **Background.** As previously discussed, on January 8, 1999, April 18, 2000 and August 25, 2000, Northpoint, Pegasus and SRL, respectively, filed applications and waiver requests for terrestrial use of the 12 GHz band with the Commission.⁵²¹ In the *Further Notice*, the Commission sought comment on the disposition of Northpoint's waiver request and application.⁵²² Specifically, the Commission asked

⁵¹¹ SkyBridge Comments at 38-39.

⁵¹² *Id.* at 39.

⁵¹³ 47 C.F.R. § 78.103.

⁵¹⁴ 47 C.F.R. § 101.111.

⁵¹⁵ SkyBridge Comments at 39.

⁵¹⁶ *Id.* at 40.

⁵¹⁷ See 47.C.F.R. § 101.111.

⁵¹⁸ See 47.C.F.R. § 101.111(a)(2).

⁵¹⁹ See 47 C.F.R. § 101.141.

⁵²⁰ See, e.g., *LMDS Second Report and Order*, 12 FCC Rcd at 12672 ¶ 301; *24 GHz Report and Order*, 15 FCC Rcd at 16962 ¶ 62.

⁵²¹ See paras. 7, 9, *supra*.

⁵²² *Further Notice*, 16 FCC Rcd at 4217 ¶ 325.

(a) whether the *Ku-Band Cut-Off Notice*⁵²³ and the November 24, 1998 *NPRM*⁵²⁴ gave adequate notice to all parties interested in filing applications for terrestrial use of the 12 GHz band, (b) whether Northpoint's applications should be accepted for filing, and (c) whether Northpoint's applications are mutually exclusive with the applications submitted by Pegasus and SRL.⁵²⁵ Subsequent to the release of the *First R&O and Further Notice*, Congress passed a law on December 21, 2000, requiring the Commission to provide for independent testing of "any terrestrial service technology proposed by any entity that has filed an application to provide terrestrial service" in the 12 GHz band.⁵²⁶

211. Application Analysis. The standard for determining adequate notice is whether the *Ku-Band Cut-Off Notice* was "reasonably comprehensible to people of good faith."⁵²⁷ That is, would a fair reading of the subject *Notice* have put the reader on notice that the Commission had in fact established dates certain for filing terrestrial applications for use of the 12 GHz band? Northpoint and others argue that the *Notice* provided adequate notice.⁵²⁸ First, according to these commenters, the *Ku-Band Cut-Off Notice* provided notice to all interested 12 GHz applicants, by establishing a licensing window for the 10.7-12.7 GHz band.⁵²⁹ Second, these commenters argue that the *November 24, 1998 NPRM* established that the rulemaking would address Northpoint's Petition for Rulemaking for terrestrial service sharing.⁵³⁰ Thus, these commenters, along with NITI and Paxson contend that the Commission should dismiss all other pending applications as late-filed and complete the processing of Northpoint's application in accordance with the Commission's satellite licensing procedures.⁵³¹

212. EchoStar, SkyTower, AT&T, DirectTV, SBCA, MDS America and Boeing argue that the *Ku-Band Cut-Off Notice* did not provide adequate notice to terrestrial applicants interested in the proceeding. These commenters explain that the subject *Notice* merely established the cut-off date for additional NGSO FSS systems and was silent with regard to terrestrial use of the Ku-band.⁵³² Accordingly, these commenters argue that notice to terrestrial services was not "reasonably comprehensible to people of good faith" and may not be made by implication, as court cases have pointed out.⁵³³

⁵²³ See *Ku-Band Cut-Off Notice*.

⁵²⁴ See *November 24, 1998 NPRM*, 14 FCC Rcd at 1138 ¶¶ 8-9.

⁵²⁵ *Further Notice*, 16 FCC Rcd at 4219 ¶¶ 328-329.

⁵²⁶ See para. 13, *supra*; see also *Prevention of Interference to Direct Broadcast Satellite Services*, Pub. L. No. 106-553, App. B, Tit. X, § 1012(a), 114 Stat. 2762, 2762A-128, 2762A-141 (codified at 47 U.S.C. § 1110) (2000), discussed in detail at para. 229, *infra*.

⁵²⁷ *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968).

⁵²⁸ Northpoint Comments at 17-18, 22-25; Northpoint Reply Comments at 4-6; Joint Broadcasters Comments at 4-6; Consumers Union, Consumer Federation of America, Leadership Conference on Civil Rights, Center for Media Education, League of United Latin American Citizens, the Media Access Project (CU *et al.*) at 2.

⁵²⁹ Northpoint Comments at 17; Northpoint Reply Comments at 5; Joint Broadcasters Comments at 5.

⁵³⁰ See *November 24, 1998 NPRM*, 14 FCC Rcd at 1138 ¶¶ 8-9.

⁵³¹ Northpoint Comments at 31; Joint Broadcasters at 2; NITI Comments at 3; Paxson Comments at 1-2; Northpoint Reply Comments at 3; CU *et al.* Reply Comments at 6.

⁵³² AT&T Comments at 4-10; Boeing Comments at 38-40; DirectTV Comments at 33-34; EchoStar Comments at 22-24, 29; MDS America *Ex Parte* Presentation (filed Oct. 26, 2000); MDS America *Ex Parte* submission at 1-2 (filed March 18, 2002); SBCA Comments at 9-12; SkyTower Comments at 3-4.

⁵³³ AT&T Comments at 4 citing *McElroy Electronics Corp. v. FCC*, 86 F.3d 248, 257 (D.C. Cir. 1996); DirectTV Comments at 33 citing *Ridge Radio Corp. v. FCC*, 292 F.2d 770, 773 (D.C. Cir. 1961); EchoStar Comments at 23-24 citing *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987).

213. We agree and find that the *Ku-Band Cut-Off Notice* did not provide adequate notice for all interested terrestrial entities to file applications for licenses in the subject band. The *Notice* was completely silent with regard to terrestrial use of the Ku-band. The *Notice* specifically “establishes the cut-off date for additional NGSO FSS systems seeking to operate” in those frequencies. Moreover, the *Notice* twice specifically invites entities wishing to implement NGSO FSS systems and those wishing to file competing NGSO FSS applications to do so before rules for NGSO FSS systems were set in place in these bands.⁵³⁴ To receive consideration concurrently with SkyBridge’s applications, requests were to take one of three forms (with accompanying fees): (a) application for a space station license; (b) application for an earth station license that will communicate with a non-licensed satellite; or (c) letter of intent to use a non-United States licensed satellite to provide service in the United States.⁵³⁵ Clearly, the International Bureau did not request applications from entities seeking to provide terrestrial service irrespective of the notice on allocation in the band. Simply because Northpoint participated in a rulemaking that was generally considering the allocation of spectrum involving the 12 GHz band, does not provide a reasonable basis to believe the Commission was inviting applications for terrestrial service in the 12 GHz band through a satellite cut-off public notice.

214. We find that notice to file applications for terrestrial services was not “reasonably comprehensible” to interested parties and may not be made by implication.⁵³⁶ Moreover, if the Commission imposes cut-off dates by implication, then every service interested in spectrum subject to a cut-off notice would be required to file by the deadline (notwithstanding the service that is the subject of the cut-off notice) or risk exclusion from an application processing round. Such a result would unnecessarily result in expanding the scope of cut-off notices, delays, and additional burdens on applicants and the Commission. Thus, Northpoint’s application for terrestrial service in the band was not properly filed and is dismissed without prejudice to refile in a subsequent window for terrestrial applications. In that we find that the *Ku-Band Cut-Off Notice* did not provide adequate notice to all interested terrestrial entities interested in filing applications for licenses in the 12 GHz band, we also dismiss without prejudice the applications filed by Pegasus and SRL for terrestrial use of the 12 GHz band as prematurely filed. We establish this new service and will provide adequate notice to allow MVDDS applicants to apply to provide this service. In light of our finding that adequate notice did not exist, these entities may reapply under the new licensing rules established in this proceeding. We believe this action will maximize the public interest by promoting fair and efficient licensing practices.

215. Waivers. For the reasons provided below, granting of the waivers filed to date for terrestrial service in the 12.2-12.7 GHz band is not warranted here. Northpoint seeks a waiver of Sections 101.105, 101.107, 101.109, 101.111, 101.115, 101.139, 101.603 and any other Commission rules that otherwise would preclude processing of its applications.⁵³⁷ Northpoint may obtain a waiver of our rules by demonstrating that (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s)

⁵³⁴ See *Ku-Band Cut-Off Notice*.

⁵³⁵ *Id.*

⁵³⁶ *McElroy Electronics Corp. v. FCC*, 86 F.3d at 257; *Ridge Radio Corp. v. FCC*, 292 F.2d at 773; *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d at 1551.

⁵³⁷ See Broadwave Network, LLC Application for License to Provide a New Terrestrial Transport Service in the 12.2-12.7 GHz Band (filed Jan. 8, 1999), Exhibit 3 (Broadwave application); 47 C.F.R. §§ 101.105, 101.107, 101.109, 101.111, 101.115, 101.139, 101.603. We note that the waiver requests of Pegasus and SRL raise similar issues and are resolved herein as well.

would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁵³⁸

216. Northpoint asserts that the technical rules⁵³⁹ of which it seeks a waiver are designed to govern typical two-way, private or common carrier point-to-point microwave systems.⁵⁴⁰ Further, Northpoint asserts that the underlying purpose of these rules is to "prevent harmful interference from occurring among the services operating under Part 101."⁵⁴¹ Northpoint argues that its proposed service can reuse the 12 GHz band to deliver local television programming, without causing harmful interference to the other services in the band.⁵⁴² We find that the information submitted in Northpoint's initial waiver request is insufficient to support such relief. We agree that, under certain parameters, terrestrial entities can reuse the 12 GHz band to deliver local television programming, without causing harmful interference to other services in the band. However, those parameters are not readily apparent without detailed analysis. Northpoint's sweeping request for waiver of our technical rules assumes that insertion of its system into the 12.2-12.7 GHz band will be without technical concerns. We disagree because we do not believe that a waiver of our rules would resolve all of the sharing issues involved in introducing such a new service into the band.

217. Based upon engineering data⁵⁴³ assembled through independent testing, comments in the record, and our independent analysis, we believe that without licensing and service rules establishing explicit parameters for the operation of this new service, harmful interference could result to the primary users and public safety spectrum operations. We have no Part 101 technical rules for the 12 GHz band that are designed to ensure that systems deploying such a service operate efficiently and without interference to other 12.2-12.7 GHz band systems. Additionally, we believe Northpoint's request to use the 12 GHz band for point-to-multipoint unidirectional operations is a request for re-licensing of the spectrum. In similar situations,⁵⁴⁴ when our rules did not permit the type of use of the frequencies that the requester sought, the Commission resolved the policy concerns in a rulemaking. We believe that authorizing point-to-multipoint omnidirectional operations is a complex undertaking best accomplished as a result of a rulemaking whereby there is ample opportunity to develop the record, and not an ad hoc waiver proceeding.⁵⁴⁵

⁵³⁸ See 47 C.F.R. § 1.925(b)(1).

⁵³⁹ 47 C.F.R. §§ 101.105, 101.107, 101.109, 101.111, 101.115.

⁵⁴⁰ Broadwave Application Exhibit 3, page 3.

⁵⁴¹ Northpoint Reply Comments to Northpoint Waiver at 5.

⁵⁴² *Id.*

⁵⁴³ See, e.g. MITRE Report.

⁵⁴⁴ For example, in the 35 MHz MO&O, the Commission determined that a change of policy with respect to the use of certain frequencies should take place within the context of a rule making rather than a series of waivers. Amendment of Section 22.501(a) of the Rules to Allow the 35 MHz Frequency Band to be used for One-way Signaling on an Exclusive Basis in the Domestic Public Land Mobile Radio Service, *Memorandum Opinion and Order and Notice of Proposed Rule Making*, 78 FCC2d 438 (1980) (35 MHz MO&O). In addition, the Commission declined to grant waivers that raised policy questions involving the best use of the spectrum, and opted for a rulemaking proceeding to address additional rules that would be needed to govern new uses of the band. 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, *Report and Order*, 12 FCC Rcd 12,545 (1997). The Commission's decision to allow all interested parties the opportunity to comment and provide an opportunity to proceed in a thorough manner in that proceeding was affirmed in *Melcher v. FCC*, 134 F.3d 1143 (D.C.Cir. 1998).

⁵⁴⁵ See *Stockholders of Renaissance Communications Corp. and Tribune Co.*, 12 FCC Rcd 11866, 11887-88 ¶ 50 (1997) citing *Community Television of Southern California v. Gottfried*, 459 U.S. at 511 (1983).

218. Moreover, we believe that a rulemaking proceeding is generally, a better, fairer and more effective method of implementing a new industry-wide policy than is the ad hoc and potentially uneven application of conditions in isolated, proceedings affecting or favoring a single party.⁵⁴⁶ We find that establishing service rules by waiver may lead to varying and arbitrary differences among like licenses and may place an excessive administrative burden on the agency. We further believe that supplementing a rulemaking or other open proceeding would be a "better, fairer, and more effective method" of implementing a new policy than would the granting of individual waivers.⁵⁴⁷ We believe issues such as these have far-reaching implications and should be addressed in a rulemaking proceeding in the first instance instead of in an adjudication or waiver proceeding. The Commission has broad discretion in deciding to proceed by rulemaking or adjudication.⁵⁴⁸ The rulemaking approach is accorded judicial preference when an agency develops new policies.⁵⁴⁹ This preference is based on the principle that a rulemaking under the Administrative Procedure Act's provisions for notice and broad public participation assures fairness, the opportunity to develop the record and mature consideration.⁵⁵⁰

219. We note that Northpoint originally believed that a rulemaking proceeding was the best procedure to authorize the 12 GHz band for the provision of multichannel distribution of local television programs and broadband digital data.⁵⁵¹ In addition to seeking comment on the Petition for Rulemaking via a public notice, the Commission incorporated the petition into the *November 24, 1998 NPRM* for resolution. Accordingly, the Commission exercised its broad discretion and instituted a rulemaking proceeding to resolve these complex issues. Moreover, by resolving the waiver in this proceeding we ensured the development of a full record upon which to address the interference issues and address the sharing concerns of the relevant services.

220. Northpoint asserts that its proposal is unique because it serves "compelling public interests."⁵⁵² Additionally, Northpoint maintains that its proposal creates competition to cable and promotes spectrum efficiency.⁵⁵³ We do not believe that Northpoint's proposal to reuse spectrum shared with satellite services to transmit signals using terrestrial systems is a unique or unusual circumstance such that application of the broadly defined rules through a rulemaking proceeding would be inequitable, unduly burdensome or contrary to the public interest or leave Northpoint with no reasonable alternative. We note that private cable operators may reuse spectrum shared with satellite services in the 18 GHz band

⁵⁴⁶ See *Stockholders of Renaissance Communications Corp. and Tribune Co.*, 12 FCC Rcd at 11887-88 ¶ 50 citing *Community Television of Southern California v. Gottfried*, 459 U.S. at 511.

⁵⁴⁷ See *id.*

⁵⁴⁸ *FCC v. National Citizens Com. For Broadcasting*, 98 S.Ct. 2096, 2119 n.29 (1978); *SEC v. Chernery Corp.* 332 U.S. 194, 202-203 (1947).

⁵⁴⁹ See *Fresno Mobile Radio, Inc. et. al., Order on Reconsideration*, (rel. May 13, 1986) (*Fresno Mobile*) citing *National Petroleum Refiners Assoc. v. FTC*, 482 F.2d 672, 681-683 (D.C. Cir. 1973), *cert. Denied*, 415 U.S. 951 (1974).

⁵⁵⁰ *NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 764 (1969).

⁵⁵¹ See para. 6; We also note that Northpoint's Petition sought to modify our Rules to authorize DBS licensees and their affiliates to provide this new service. Northpoint Petition. Although the Petition is different from the waiver in that Northpoint sought the authorizations for itself, we do not believe this change in the ultimate licensee negates the global interference concerns or the far-reaching impact of permitting this new service in the 12.2-12.7 GHz band. The Northpoint Petition was filed on March 6, 1998. The Commission invited comment on the petition on March 23, 1998.

⁵⁵² Northpoint Reply Comments to the Northpoint Waiver at 12.

⁵⁵³ *Id.*

to transmit signals using their terrestrial systems.⁵⁵⁴ Additionally, several parties have indicated that they have the ability to reuse spectrum in the 12.2-12.7 GHz band and seek the opportunity to do so as well.⁵⁵⁵

221. By adopting a family of technical, licensing and service rules, we are establishing rules for all parties who seek to provide MVDDS. Consequently, we believe we are providing an opportunity for further competition in the MVPD market, and promoting spectrum efficiency by establishing rules to permit this new service that will apply to all parties without the risk of harmful interference to the existing users of the 12.2-12.7 GHz band.

222. Northpoint, however, seeks to operate a separate service that has no existing technical, operational or service rules through an extensive waiver of a variety of rules. In the MVDDS proceeding, we have addressed not only the operation of the Northpoint technology, but the interference impact and potential with regards to the other users of the 12 GHz band—specifically, DBS, NGSO FSS and incumbent public safety licensees. Northpoint seeks to be a licensee of 500 MHz of spectrum, which would make it a competitor to DBS and cable.

223. Finally, we do not believe that Northpoint satisfies the final prong of our waiver standard. Specifically, we do not believe that the underlying purpose of the technical and licensing rules of which Northpoint seeks a waiver could be served, if one were granted. Specifically, these technical and licensing rules are designed to protect Part 101 licensees, including public safety incumbents, from harmful interference. Moreover, DBS licensees must be protected from harmful interference caused by any facility licensed or authorized to deliver local broadcast television signals. As discussed above, there are significant interference concerns associated with the decision to permit terrestrial entities to reuse the 12 GHz band as proposed by Northpoint. We believe that a rulemaking proceeding is a better tool than a waiver grant to resolve such concerns and to set technical parameters allowing MVDDS to share the spectrum on a co-primary basis.

224. This approach is also consistent with the *Boeing Two-Way Order* and *Boeing Receive-Only Order*, which found that Boeing's requests for authority to operate mobile earth stations aboard aircraft could be granted by rule waiver, and that a rulemaking proceeding was unnecessary because the proposed secondary use of the spectrum did not involve any significant technical concerns.⁵⁵⁶ In these two orders, the International Bureau and Office of Engineering and Technology (OET), acting on delegated authority, waived Section 2.106 of the Commission's rules, which contains the U.S. Table of Frequency Allocations, to allow Boeing to use the 11.7-12.2 GHz and 14.0-14.5 GHz bands for aeronautical mobile satellite service (AMSS) downlinks and uplinks.

225. In these bands, the Table includes a primary allocation for FSS, as well as other primary and secondary allocations, but no allocation for AMSS.⁵⁵⁷ It is notable that Boeing's request for waiver of Section 2.106 was granted as a non-conforming use and subject to certain significant restrictions.

⁵⁵⁴ Redesignation of the 17.9-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, *Report and Order*, 15 FCC Rcd. 13,430, 13,443-13,462 (2000).

⁵⁵⁵ See, e.g., SRL Application Exhibit 1 page 3; Pegasus Application Exhibit 1 page 1; MDS America Comments at 10-11.

⁵⁵⁶ See The Boeing Company Application for Blanket Authority to Operate Up to Eight Hundred Technically Identical Transmit and Receive Mobile Earth Stations Aboard Aircraft in the 14.0-14.5 GHz and 11.7-12.2 GHz Frequency Bands, *Order and Authorization*, 16 FCC Rcd 22,645, at 22652, 22653 ¶¶ 16, 18 (2001) (*Boeing Two-Way Order*); The Boeing Company, *Order and Authorization*, 16 FCC Rcd 5864 ¶ 9 (Int'l Bur./OET 2001) (*Boeing Receive-Only Order*).

⁵⁵⁷ 47 C.F.R. § 2.106.

Thus, Boeing is required to accept interference from all authorized primary and secondary services in the affected bands and is not permitted to cause harmful interference to any such services.⁵⁵⁸ In addition, the *Boeing Two-Way Order*, which addressed Boeing's request for the authorization of uplinks in the 14.0-14.5 GHz band, granted a joint request filed by Lockheed Martin Corporation, Intelsat, and PanAmSat to condition Boeing's license on the latter's compliance with the ITU Radiocommunication Sector Working Party 4A's draft new recommendation regarding AMSS operations in that band.⁵⁵⁹ The *Boeing Two-Way Order* also took into account Boeing's various measures to protect other services (e.g., a coordination agreement with the National Science Foundation to ensure the protection of radio astronomy stations).⁵⁶⁰

226. Given these measures, the fact that all parties to the proceeding had reached consensus on the appropriate measures to protect primary FSS operations, and the fact that other operators had been authorized to provide secondary or non-conforming services in the frequencies at issue without any adverse effects or complaints, the International Bureau and OET appropriately concluded in the *Boeing Two-Way Order* that there were no outstanding technical issues and that a rulemaking proceeding was unnecessary.⁵⁶¹ As the International Bureau and OET noted, the Commission has granted waivers in the past "when there is little potential for interference into any service authorized under the Table of Frequency Allocations and when the non-conforming operator accepts any interference from authorized users."⁵⁶² We note also that in the *Boeing Receive-Only Order* the Bureau and OET found that a waiver of 47 C.F.R. § 25.134 was unnecessary to authorize Boeing's downlink operations because these operations would be consistent with the policies underlying the rule.⁵⁶³

227. The circumstances presented in the Boeing case and the situation presented here are very different. Boeing was licensed to use leased transponder capacity on existing satellites operating within applicable coordination agreements,⁵⁶⁴ whereas Northpoint seeks to establish a new service for which there are no applicable rules. In the Boeing case there was agreement among all interested parties as to the conditions under which Boeing must operate and thus there were no unresolved interference issues at the time the waiver was granted; here, however, neither DBS operators nor NGSO FSS providers have reached an agreement with Northpoint as to the technical parameters of its proposed operation. Finally, Boeing must accept interference from all authorized users in the bands in which it will operate, a condition which will not pertain to MVDDS. In light of these important considerations, we reject Northpoint's assertion that the *Boeing Two-Way Order* demonstrates that the Commission's licensing procedures have been biased against Northpoint and in favor of satellite operators.⁵⁶⁵

228. As noted above, the Commission must ensure that public safety incumbents and DBS operators do not receive harmful interference from this new service. Thus, the Commission must ensure that its decision is supported by information and data in the record. Such record support was best attained

⁵⁵⁸ *Boeing Two-Way Order*, 16 FCC Rcd at 22652 ¶ 16; *Boeing Receive-Only Order*, 16 FCC Rcd at 5866-7 ¶ 9.

⁵⁵⁹ *Boeing Two-Way Order*, 16 FCC Rcd at 22,653 ¶ 18.

⁵⁶⁰ *Boeing Two-Way Order*, 16 FCC Rcd at 22,647-9 ¶¶ 5-8.

⁵⁶¹ *Boeing Two-Way Order*, 16 FCC Rcd at 22,653 ¶ 18. For example, we note that the Commission already permitted mobile communications with satellite on a waiver basis in this band for Omnitrac. Therefore, the feasibility of these operations had been demonstrated and was not highly contested.

⁵⁶² *Boeing Receive-Only Order*, 16 FCC Rcd at 5866-7 ¶ 9; *Boeing Two-Way Order*, 16 FCC Rcd at 22650-1 ¶ 12.

⁵⁶³ *Boeing Receive-Only Order*, 16 FCC Rcd at 5867 ¶ 10.

⁵⁶⁴ See *Boeing Two-Way Order*, 16 FCC Rcd at 22652 ¶ 16; *Boeing Receive-Only Order*, 16 FCC Rcd at 5866-7 ¶ 9).

⁵⁶⁵ See Ex Parte Letter to Mr. William Caton, Acting Secretary, FCC, from J.C. Rozendaal, Counsel for Northpoint Technology, Ltd., dated Feb. 22, 2002.

through the rulemaking process. Accordingly, we believe that exercising our discretion to implement this new service through a rulemaking proceeding was appropriate and in the public interest. The filing of waiver requests by Northpoint, Pegasus and SRL did not obviate the consideration of the issues in our rulemaking proceeding. In light of our determination that a waiver is not justified in this situation, we will deny the waiver requests as moot. In conjunction with this denial, we will dismiss the pending applications of Northpoint, Pegasus and SRL.

229. **Independent Testing.** As set forth previously,⁵⁶⁶ Congress passed a law on December 21, 2000, requiring the Commission to provide for independent testing of "any terrestrial service technology proposed by any entity that has filed an application to provide terrestrial service" in the 12 GHz band.⁵⁶⁷ Northpoint contends that it is the only entity that satisfied the provisions of the subject legislation by providing equipment and technology to MITRE for testing.⁵⁶⁸

230. Given its focus on interference, the purpose of Section 1012 is to require a determination of whether any proposed terrestrial service would cause harmful interference to any DBS service. We find that Section 1012(a)'s requirement that the Commission provide for independent testing of any technology proposed by "any entity that has filed an application" covers points in time (present or future) when the Commission has before it entities that seek to provide terrestrial service in the DBS band. In contrast, Section 1012(b), which lays out certain parameters for the testing of technology proposed by "any pending application," is limited to applications pending as of the enactment of the LOCAL TV Act.

231. Our interpretation is grounded in the internal structure of Section 1012. Section 1012(a) covers "any entity that has filed an application," while Section 1012(b) provides instruction for satisfying "the requirement of subsection (a) for any pending application" and sets a timeframe tied to the date of enactment within which the testing was to occur. Had Congress intended Section 1012(a) to apply only to applications on file with the Commission at the time of enactment, it would have used terms such as "pending" and "date of enactment," which it did in Section 1012(b).⁵⁶⁹ Moreover, if the entities covered

⁵⁶⁶ See paras. 13, 210, *supra*.

⁵⁶⁷ Prevention of Interference to Direct Broadcast Satellite Services, Pub. L. No. 106-553, App. B, Tit. X, § 1012(a), 114 Stat. 2762, 2762A-128, 2762A-141 (2000) (LOCAL TV Act). This legislation reads as follows:

(a) **Testing for Harmful Interference.**-The Federal Communications Commission shall provide for an independent technical demonstration of any terrestrial service technology proposed by any entity that has filed an application to provide terrestrial service in the direct broadcast satellite frequency band to determine whether the terrestrial service technology proposed to be provided by that entity will cause harmful interference to any direct broadcast satellite service.

(b) **Technical Demonstration.**-In order to satisfy the requirement of subsection (a) for any pending application, the Commission shall select an engineering firm or other qualified entity independent of any interested party based on a recommendation made by the Institute of Electrical and Electronics Engineers (IEEE), or a similar independent professional organization, to perform the technical demonstration or analysis. The demonstration shall be concluded within 60 days after the date of enactment of this Act and shall be subject to public notice and comment for not more than 30 days thereafter.

(c) **Definitions.**-As used in this section:

(1) **Direct broadcast satellite frequency band.**-The term "direct broadcast satellite frequency band" means the band of frequencies at 12.2 to 12.7 gigahertz.

(2) **Direct broadcast satellite service.**-The term "direct broadcast satellite service" means any direct broadcast satellite system operating in the direct broadcast satellite frequency band.

⁵⁶⁸ Northpoint Reply Comments at 9.

⁵⁶⁹ As a general matter, the use of different words within the same statutory context strongly suggests that different meanings were intended. "Where Congress has chosen different language in proximate subsections of the same

(continued....)

by Section 1012(a) were limited to applications pending at the time of enactment, then the inclusion in Section 1012(b) of the phrase "pending application" would be superfluous.⁵⁷⁰ As a result, we conclude that future applications are subject to Section 1012(a).⁵⁷¹ We also conclude that the specific requirements imposed in Section 1012(b) do not necessarily apply to the requirement of Section 1012(a).

232. We note that pursuant to Section 1012(b), the MITRE Corporation issued a report embodying the results of a technical demonstration and analysis of technology proposed to be used in the DBS band. The report concluded, *inter alia*, that while MVDDS "poses a significant interference threat to DBS operations in many realistic operational situations," it also concludes that "MVDDS/DBS band sharing appears feasible if and only if suitable mitigation measures are applied."⁵⁷² The Commission subsequently sought comment on the MITRE Report and incorporated the report and the comments into this rulemaking proceeding.

233. The Commission today creates technical rules based on the valuable input provided by the MITRE Report to effectuate the underlying purpose of the statute – to provide assurance that terrestrial operations in the DBS band will not disrupt DBS service. MVDDS providers thus will be subject to technical rules aimed at preventing harmful interference to DBS services.⁵⁷³

234. Prospective application of Section 1012(a) requires an "independent technical demonstration" of any "terrestrial service technology" proposed by any MVDDS applicant.⁵⁷⁴ Such statutory language requires the Commission to determine, as an initial step, when new "terrestrial service technology" is proposed. The statute, however, does not define the term "technology." The word "technology" could refer to an individual company's operations or more generally to a set of technical specifications.⁵⁷⁵ In this case, after weighing the statutory objectives at issue and the ability of the Commission's rules to vindicate Congress' goals here, we conclude that the operating parameters for MVDDS licensees, developed through the MITRE testing and codified by this Order, define the

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statute, courts are obligated to give that choice effect." See *Cable Huntington Hospital, Inc. v. Shalala*, 101 F.3d 984, 988 (4th Cir. 1996) (quotation omitted); see also 2A N. Singer, Sutherland on Statutory Construction § 46.07 (5th ed.1992 and Supp.1996) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

⁵⁷⁰ As a matter of statutory interpretation, we are obligated to interpret statutory language in a manner that gives meaning to each word -- if at all possible -- over an interpretation that renders certain words superfluous. See, e.g., *Hoffman v. Connecticut Dept. of Income Maintenance*, 429 U.S. 96, 103 (1989) (statute should be construed to "give effect, if possible, to every clause and word"); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 833-34 (9th Cir. 1996) ("statute must be interpreted to give significance to all of its parts ... statutes should not be construed to make surplusage of any provision."). See also *Office of Consumer's Counsel v. FERC*, 783 F.2d 206, 220 (D.C. Cir. 1986) (same).

⁵⁷¹ MDS America *Ex Parte* submission at 2-3 (filed March 18, 2002), concurring.

⁵⁷² See MITRE Report at Executive Summary xvi, xvii.

⁵⁷³ Any request for waiver of these rules would likewise have to show that the waiver would not cause harmful interference to DBS services. See para. 235, *supra*.

⁵⁷⁴ LOCAL TV Act § 1012(a).

⁵⁷⁵ For example, the American Heritage Dictionary of the English Language contains a definition of technology as "the scientific method and material used to achieve a commercial or industry objective." See <http://www.bartleby.com/61/91/T0079100.html>. The Merriam-Webster's Collegiate Dictionary includes a definition of technology that is "the specialized aspects of a particular field of endeavor." See <http://www.m-w.com>.

“terrestrial service technology” already tested and deemed capable of sharing with direct broadcast satellite service without causing harmful interference.⁵⁷⁶

235. The congressional policy set out in Section 1012 was to ensure that terrestrial services operated in the DBS band would not cause harmful interference. Our technical rules, adopted in accordance with the findings of the MITRE Report, are intended to ensure that harmful interference would not occur as a result of MVDDS operation. We have adopted EPFD limits and other requirements to prevent harmful interference to DBS. These rules ensure that terrestrial services would operate below the level at which harmful interference as defined by our Part 2 rules would result. As a result, we find that the MITRE Report satisfies the independent technical demonstration requirement for applicants that seek to provide terrestrial service in this band subject to the technical rules adopted here. Alternatively, if the Commission were to construe Section 1012(a) to require separate testing for each individual application whose proposed operations will operate within the technical rules adopted here, such a requirement would be superfluous given these technical rules. We do not believe Congress intended such a result.

236. We clarify that MVDDS applicants are not limited to using technology that complies with the operating parameters adopted here. However, any entity seeking to employ a terrestrial service technology that does not comply with our technical rules must file a waiver petition, on which public comment will be sought. As part of the waiver process, the entity must submit an independent technical demonstration of its equipment and technology. We find that this process is in furtherance of the Communications Act and consistent with the requirements of the LOCAL TV Act’s Section 1012(a), as discussed above. While we are mindful of the need to protect current and future entities from harmful interference within the band, we seek to allow flexible use of the spectrum and, as such, do not wish to limit current and future technological innovations. We find that the independent testing requirement will balance these competing interests for terrestrial wireless technologies that do not comply with the technical rules.

5. Competitive Bidding Procedures

a. Statutory Requirements

237. Background. The Balanced Budget Act of 1997 amended Section 309(j) of the Act to require the Commission to award mutually exclusive applications for initial licenses or permits using competitive bidding procedures, with very limited exceptions.⁵⁷⁷ In the *Further Notice*, we stated that if

⁵⁷⁶ To illustrate this relationship, we note that MITRE recommended that power levels above 14 dBm could be problematic due to rain scatter, and the rules we adopt here limit maximum MVDDS power to 14 dBm. MITRE provided measurements and test results which form the basis of the antenna pattern used here to evaluate the EPFD contours. Although MITRE recommended that the interference-mitigation region be based on an increase in DBS baseline unavailability of ten percent and used a receiver threshold of video quality 6 or VQ6 (equivalent to less than 1 uncorrected error per 15 seconds, but more than 1 per minute), we adopt the ten percent baseline but use a more conservative threshold for acceptable interference to a consumer, QEF (equivalent to 1 uncorrected error per hour). For purposes of clarification, we note further that although MITRE recommends defining an interference-mitigation region based on a carrier-to-interference ratio (C/I), our rules use equivalent power flux density (EPFD), which is a logical outgrowth of C/I that is related by a straightforward conversion. C/I is a comparison measurement in clear air of the undesired MVDDS transmitter signal and desired satellite signal received at any given point, while EPFD is a measurement taken after the DBS receiver and considers many other factors such as obstructions and the receive antenna characteristics.

⁵⁷⁷ See 47 U.S.C. § 309(j)(1), (2). Section 309(j)(2) exempts from auctions licenses and construction permits for public safety radio services, digital television service licenses and permits given to existing terrestrial broadcast licensees to replace their analog television service licenses, and licenses and construction permits for noncommercial educational broadcast stations and public broadcast stations under 47 U.S.C. § 397(6).

we find that it would serve the public interest to implement a geographic area licensing scheme, under which mutual exclusivity is possible, mutually exclusive applications for initial MVDDS licenses must be resolved through competitive bidding.⁵⁷⁸ In so doing, the Commission also found that the Open-Market Reorganization for the Betterment of International Telecommunications Act (ORBIT Act) does not bar the use of competitive bidding to award licenses to provide terrestrial services merely because those terrestrial services operate on the same frequencies as satellite services.⁵⁷⁹

238. Discussion. In light of our decision to adopt a geographic area licensing scheme that permits the filing of mutually exclusive applications⁵⁸⁰ and consistent with our statutory mandate to resolve such applications through the use of auctions, any mutually exclusive initial applications for the MVDDS service will be resolved by competitive bidding.

239. Northpoint argues that licensing MVDDS through competitive bidding would be inappropriate because the Commission may conduct an auction only if it accepts “mutually exclusive applications” for any “initial license or construction permit.”⁵⁸¹ Northpoint argues that the Commission’s threshold decision to accept applications must be exercised in a manner consistent with 47 U.S.C. § 309(j)(6)(E), which imposes an obligation to use various means in order to avoid mutual exclusivity.⁵⁸² Northpoint states that the Commission recently has interpreted its obligation in Section 309(j)(6)(E) as an obligation to further the public interest goals of Section 309(j)(3).⁵⁸³ Northpoint questions whether such interpretation is consistent with the plain meaning of the statute but maintains that even if the Commission’s interpretation is correct, under Section 309(j)(3)(A)-(E) of the statute the Commission must avoid accepting applications that would be mutually exclusive with Northpoint’s because the use of Northpoint’s technology in this band promotes the public interest objectives of Section 309(j)(3).⁵⁸⁴ Certain commenters oppose Northpoint’s contention, arguing that neither the Communications Act nor the public interest requires the Commission to avoid accepting mutually exclusive applications as suggested by Northpoint. Moreover, these commenters argue that awarding Northpoint a single, nationwide license without the use of competitive bidding would be tantamount to reestablishing the Pioneer’s Preference program that Congress expressly abolished.⁵⁸⁵

240. The Commission has previously established a framework for the exercise of its auction authority, as amended by the Balanced Budget Act of 1997.⁵⁸⁶ In the *BBA Report and Order*, the Commission affirmed that it was required to pursue the public interest objectives set forth in Section

⁵⁷⁸ *Further Notice*, 16 FCC Rcd at 4221 ¶ 334.

⁵⁷⁹ *Id.* at 4218 ¶ 326. See also ORBIT Act, Pub. L. 106-180, 114 Stat. 48 § 647 (codified at 47 U.S.C. § 647).

⁵⁸⁰ See para.130, *supra*.

⁵⁸¹ Northpoint Comments at 22 citing 47 U.S.C. § 309(j)(1).

⁵⁸² Northpoint Comments at 23.

⁵⁸³ *Id.*

⁵⁸⁴ *Id.* at 23-31. CU *et al.* and NABOB also support Northpoint’s contention that the grant of Northpoint’s application would promote the public interest objectives of Section 309(j)(3). See CU *et al.* Reply Comments at 9-10, 17-18; NABOB Reply Comments at 3-7. See also NAB Reply Comments at 3 (urging the Commission to grant Northpoint’s waiver request).

⁵⁸⁵ AT&T Comments at 3, 6, 8; AT&T Reply Comment at 3-4; NRTC Comments at 13; Boeing Comments at 39-40; Boeing Reply Comments at 13-14; EchoStar Comments at 29; EchoStar Reply Comments at 7; SBCA Reply Comments at 6; SkyBridge Reply Comments at 18. See also 47 U.S.C. § 309(j)(13)(F).

⁵⁸⁶ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 22709 (2000) (*BBA Report and Order*).

309(j)(3) of the Act in identifying which classes of licenses would be subject to competitive bidding.⁵⁸⁷ The *BBA Report and Order* also affirmed that, as part of this public interest analysis, the Commission must continue to consider alternative procedures that avoid or reduce the likelihood of mutual exclusivity.⁵⁸⁸ The Commission concluded, however, that its obligation to avoid mutual exclusivity does not preclude it from adopting licensing processes that result in the filing of mutually exclusive applications where it determines that such an approach would serve the public interest.⁵⁸⁹

241. Northpoint nonetheless contends that it is not in the public interest to permit the filing of applications for MVDDS that would be mutually exclusive with an application filed by Northpoint. We disagree. As we discuss above, we believe that a geographic area licensing scheme, which permits the filing of mutually exclusive applications, promotes the public interest objectives of Section 309(j)(3) by creating economic opportunities for a number of potential service providers and by disseminating licenses among a wide variety of applicants. While a geographic area licensing scheme promotes efficient licensing and administrative ease, it also facilitates the ubiquitous use of services and provides licensees with flexibility to quickly adjust and coordinate spectrum usage, within their license areas, based on changing market conditions.⁵⁹⁰ Assigning MVDDS licenses through competitive bidding also promotes efficient and intensive use of the spectrum and recovery for the public of a portion of the value of this scarce resource. As a general matter, we conclude that awarding licenses to the entities that value them most highly fosters Congress's policy objectives because those bidders are more likely to rapidly introduce new and valuable services and deploy those services quickly.⁵⁹¹ Moreover, because we are providing MVDDS licensees with flexibility to use any technology that complies with our rules, accepting mutually exclusive applications to provide MVDDS service and assigning licenses through competitive bidding will result in the most competitive provider being licensed and facilitate entry of a viable competitor into the MVPD marketplace. Further, we agree with those commenters who argue that we do not have statutory authority to award an entity a license for a non-auction-exempt service without the use of competitive bidding solely based on its innovative technology, and such action would be inconsistent with Congress's intent in abolishing the Pioneer's Preference program.⁵⁹² Rather, consistent with our statutory mandate, we will resolve any mutually exclusive initial applications for licenses for MVDDS through competitive bidding.

242. We also reject Northpoint's argument that the ORBIT Act bars the assignment of licenses for MVDDS in the 12.2-12.7 GHz band by competitive bidding because the terrestrial licenses will be operating on the same frequencies as a satellite service.⁵⁹³ The ORBIT Act restricts the Commission from

⁵⁸⁷ *Id.* at 22718-23 ¶¶ 20-27.

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.* Consistent with this conclusion, the U.S. Court of Appeals for the D.C. Circuit has concluded that the Section 309(j)(6)(E) obligation does not foreclose new licensing schemes that are likely to result in mutual exclusivity. The court stated that if the Commission finds such schemes to be in the public interest, it may implement them "without regard to [S]ection 309(j)(6)(E) which imposes an obligation only to minimize mutual exclusivity 'in the public interest,' ... and 'within the framework of existing policies' ..." See *Benkelman Telephone Co., et al. v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000) (*petition for rehearing on other grounds pending*).

⁵⁹⁰ Site-based licensing does not provide licensees with the same flexibility and, as discussed above, it is also resource intensive for applicants and licensees. See paras. 130-132, *supra*, where we also decline to adopt a nationwide license area. The auction of a single nationwide license would disadvantage small businesses seeking to participate in MVDDS.

⁵⁹¹ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2352 ¶¶ 3-7 (1994).

⁵⁹² See 47 U.S.C. § 309(j)(13)(F).

⁵⁹³ Northpoint Comments at 16.

using competitive bidding procedures to award licenses for “spectrum used for the provision of international or global satellite communications services.”⁵⁹⁴ Northpoint contends that the ORBIT Act’s ban on competitive bidding should attach here because MVDDS will ubiquitously share the exact frequencies in the 12.2-12.7 GHz band with NGSO FSS, an international or global satellite service.⁵⁹⁵ Northpoint further contends that the recent decision of the U.S. Court of Appeals for the D.C. Circuit in *National Public Radio, Inc. v. FCC*⁵⁹⁶ supports its reading of the ORBIT Act.⁵⁹⁷

243. As to Northpoint’s first argument, namely, that the ORBIT Act bars the assignment of licenses for MVDDS in the 12.2-12.7 GHz band by competitive bidding because the terrestrial licenses will be operating on the same frequencies as a satellite service, we note that the Commission has previously rejected this argument.⁵⁹⁸ All other commenters who addressed this issue agree with the Commission’s conclusion.⁵⁹⁹

244. We are not persuaded by Northpoint’s argument regarding Section 647 of the ORBIT Act, especially when the legislative history is taken into account. The language of the statutory prohibition, while not entirely clear, does appear to focus on whether the particular spectrum being “assigned” is “used for” international or global satellite communications services. The legislative history makes clear that licensing this spectrum for domestic terrestrial purposes is not prohibited by Section 647. In particular, the legislative history demonstrates that Congress’s concern was with “... the viability and availability of global and international satellite services ...” which could be threatened by concurrent or successive spectrum auctions in numerous countries.⁶⁰⁰ Thus, the legislative history states that the

⁵⁹⁴ Section 647 provides: “Notwithstanding any other provision of law, the Commission shall not have the authority to assign by competitive bidding ... spectrum used for the provision of international or global satellite communications services.” ORBIT Act, Pub. L. No. 106-180, 114 Stat. 48 § 647 (enacted Mar. 12, 2000).

⁵⁹⁵ Northpoint Comments at 16; Northpoint Reply Comments at 6.

⁵⁹⁶ *National Public Radio, Inc. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (NPR).

⁵⁹⁷ Northpoint Ex Parte filing on Sept. 19, 2001.

⁵⁹⁸ In the *Further Notice* we rejected Northpoint’s interpretation of the ORBIT Act and stated that where we establish a domestic terrestrial service, as we proposed to do here, the ORBIT Act does not bar auctioning licenses to provide that service. See *Further Notice*, 16 FCC Rcd at 4218 ¶ 326. See also Amendment of the Commission’s Rules With Regard to the 3650-3700 MHz Government Transfer Band, ET Docket No. 98-237; The 4.9 GHz Band Transferred from Federal Government Use, WT Docket No. 00-32, *First Report and Order and Second Notice of Proposed Rule Making*, 15 FCC Rcd 20488 at ¶ 20 n.64 (2000) (stating that the assignment of licenses for terrestrial services by competitive bidding is not prohibited by the ORBIT Act); *24 GHz Report and Order*, 15 FCC Rcd 16934 (adopting rules to award licenses for terrestrial fixed service by competitive bidding in the 24 GHz band, which is also allocated to satellite services); *39 GHz R&O*, 12 FCC Rcd 18600; *39 GHz Band Auction Closes, Public Notice*, DA 00-1035, Report No. AUC-30-E (rel. May 10, 2000) (assigning terrestrial fixed service licenses by auction in the 39 GHz band, which is also allocated to satellite services). See also TRW INC., Request for Waiver of the Commission’s Rules to Provide Fixed Satellite Service in the 39 GHz Band, *Memorandum Opinion and Order*, DA 01-371, File No. 0000137436 (rel. March 12, 2001). *But cf.* Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band, IB Docket No. 01-185, *Notice of Proposed Rule Making*, 16 FCC Rcd 15532 (2001).

⁵⁹⁹ See EchoStar Comments at 29; EchoStar Reply Comments at 14-15; Boeing Comments at 39-40; AT&T Comments at 3; AT&T Reply Comments at 2; DTV Reply Comments at 31; NRTC Comments at 13; NRTC Reply Comments at 6-7; SBCA Reply Comments at 8-9; SkyBridge Reply Comments at ii, 19-20 and 22.

⁶⁰⁰ The legislative history explains the purpose of the section as follows:

New section 649 [section 647] prevents the Commission from using competitive bidding procedures (*i.e.*, auctions) to award licenses for spectrum or orbital locations used for providing international satellite services.

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provision "prevents the Commission from using competitive bidding ... to award licenses for spectrum or orbital locations used for providing international satellite services."⁶⁰¹ There is no indication that Congress was concerned with auctioning spectrum licenses to terrestrial licensees or that auctioning licenses for this spectrum to licensees who use it solely for terrestrial use would have any financial or other impact on any international satellite licensees that may share this spectrum. Because of this, we believe that Section 647 does not prohibit the auction of spectrum licenses for terrestrial uses where the same spectrum may also be used for global or international satellite communications purposes by other licensees. The spectrum licenses at issue here would be "assigned" to licensees and auctioned only for domestic terrestrial use.

245. We further reject the argument that the recent *NPR* case supports Northpoint's argument that we may not auction the spectrum at issue. Northpoint asserts that the ORBIT Act represents the converse of *NPR*, claiming that the ORBIT Act's denial of auction authority is based on the part of the spectrum in which the applicant seeks to operate, and not on the nature of the applicant that ultimately receives the license. In *NPR*, the court determined that the statutory prohibition is grounded in "the nature of the station" rather than "the part of the spectrum in which the station operates."⁶⁰² In this instance, we are dealing with a shared spectrum band used both for "international or global satellite communications services" and, as envisioned, domestic terrestrial services. Because the international or global satellite communications service uses, and the domestic terrestrial uses, can be assigned separately and share the spectrum, there is no reason to read the ORBIT Act to constrain the terrestrial spectrum license assignments.

246. Northpoint further argues that it is the sole entity eligible to apply for the MVDDS licenses because only Northpoint completed equipment testing within the 60-day timeframe established by Section 1012(b) of the LOCAL TV Act.⁶⁰³ As discussed in Section V.B.4., *supra*, Northpoint misconstrues the LOCAL TV Act. Section 1012(b) requires that for "any pending application," equipment testing be completed "within 60 days after the date of enactment of this [LOCAL TV] Act."⁶⁰⁴

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In addition, it requires the Administration to oppose the adoption of auctions to award licenses for orbital locations or satellite services in the ITU and other fora.

The Committee believes that auctions of spectrum or orbital locations could threaten the viability and availability of global and international satellite services, particularly because concurrent or successive spectrum auctions in the numerous countries in which U.S.-owned global satellite service providers seek downlink or service provision licenses could place significant financial burdens on providers of such services. This problem would be compounded by the fact that the multi-year period required for design, construction and launch of global and international satellite systems usually requires service providers to invest substantial resources well before they obtain all needed worldwide licenses and spectrum assignments. The uncertainty created by spectrum auctions could disrupt the availability of capital for such projects, and significantly reduce the available benefits offered by global and international satellite systems.

Report of Committee on Commerce, Communications Satellite Competition and Privatization Act of 1998, H.R. Rep. No.494, 105 Cong., 2nd Sess. 64-65 (1998). *See also* Report on the Activity of the Committee on Commerce for the 106th Congress. H.R. Rep. 106-1047 at 38. (Jan. 2, 2001) (stating that the bill prohibits the Commission from auctioning orbital slots or spectrum assignments for global satellite systems).

⁶⁰¹ *Id.*

⁶⁰² *NPR*, 254 F. 3d at 228-29.

⁶⁰³ Letter from J.C. Rozendaal, counsel for Northpoint Technology, Ltd., to Magalie Roman-Salas, Secretary, FCC (filed Sept. 19, 2001) at 2.

⁶⁰⁴ LOCAL TV Act, § 1012(b).

By its plain language, Section 1012(b) applies retrospectively. That is, the testing requirement applies only to applications "pending" at the time the LOCAL TV Act was adopted. Northpoint, moreover, construes Section 1012(b) as a cut-off precluding mutually exclusive applications for MVDDS licenses. There is no evidence, however, of such a Congressional intent in this case. Indeed, if Congress had intended to establish a 60-day cut-off for terrestrial wireless applications in the 12 GHz band, it could have done so explicitly.⁶⁰⁵

247. Additionally, Northpoint argues that the Commission cannot justify an auction for MVDDS – a terrestrial wireless service – because the agency does not assign all licenses to provide terrestrial wireless services through competitive bidding.⁶⁰⁶ Specifically Northpoint argues that in the year 2001 alone, 93 percent of wireless licenses for both mobile and fixed microwave services were assigned without competitive bidding.⁶⁰⁷ We note that the number of licenses assigned without competitive bidding is irrelevant to the question of whether the Commission should adopt a licensing regime (such as geographic area licensing) for a particular service that is likely to result in the filing of mutually exclusive license applications, which would have to be resolved by auction. The Commission has broad discretion to establish licensing rules in the public interest.⁶⁰⁸ We have before us a record that suggests an interest in utilizing the 12.2-12.7 GHz band for ubiquitous terrestrial service. Northpoint is only one of several parties interested in this spectrum. Based on our experience and the requested use of this band, a geographic area licensing regime is both the most effective and efficient means of deploying licenses here.

248. Finally, Northpoint claims that the Commission unjustly discriminates in favor of satellite services because the agency has adopted mechanisms for assigning satellite licenses that avoid mutual exclusivity and, hence, auctions.⁶⁰⁹ We note that the Commission has conducted auctions to assign domestic satellite licenses in both the Direct Broadcast Satellite Service and the Digital Audio Radio Service.⁶¹⁰ Section 309(j), however, requires the Commission to consider procedures that avoid or reduce

⁶⁰⁵ See *SBCA Ex Parte* (filed Dec. 21, 2001) at 11 ("If Congress had meant to establish a deadline, it would have done so directly. Indeed, in other parts of the LOCAL TV Act, Congress specifically directed the Commission not to accept particular filings. See, e.g., section 1007(a)(2), 47 U.S.C. § 1106(a)(2) (precluding petitions to deny major modifications of cellular applications). The fact that explicit language precluding the submission of certain documents is set forth in section 1007 but not in section 1012 undermines Northpoint's argument that such a limitation should be read into section 1012. See, e.g., *Moshe Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1990) (when Congress includes language in one section of a statutory scheme but omits it in another, the exclusion is presumed "intentional and purposeful"); *Russello v. United States*, 463 U.S. 16, 23, 78 (1983) (same)).

⁶⁰⁶ Ex-Parte Letter to The Honorable Michael K. Powell, Chairman, FCC, from Sophia Collier, President, BroadwaveUSA, dated Nov. 28, 2001.

⁶⁰⁷ *Id.* Notably, Northpoint does not distinguish between site-based and geographic area licenses. Site-based licenses authorize one or more individual transmitters in a city, or a set of microwave paths. In contrast, the auctioned licenses authorize service in an entire geographic area, e.g., nationwide, MTA, EA, etc. The proffered calculation inaccurately suggests that award of a large number of licenses is tantamount to award of a large amount of spectrum when, in fact, a single geographic area license may confer the right to use more spectrum than many site-based licenses. A comparison of license grants is only indicative of the number of physical license records that we retain.

⁶⁰⁸ See *Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 691-692 (D.C. Cir. 2001); *Benkelman Telephone Co. v. FCC*, 220 F.3d at 606.

⁶⁰⁹ Ex-Parte Letter to The Honorable Michael K. Powell, Chairman, FCC, from Sophia Collier, President, BroadwaveUSA, dated Nov. 28, 2001. SkyBridge disputes Northpoint's contention and states that Northpoint mischaracterizes many relevant facts and regulatory practices. See *SkyBridge Ex-Parte* filed on Dec. 21, 2001.

⁶¹⁰ See MCI Telecommunications Corporation bids \$682,500,000 for last available nationwide DBS slot, *FCC News* (rel. Jan. 25, 1996); EchoStar DBS Corporation wins 24 DBS channels at the 148 degree orbital location with a high bid of \$52,295,000, *FCC News* (rel. Jan. 26, 1996); Wireless Telecommunications Bureau announces auction

(continued...)

the likelihood of mutually exclusive license applications where such procedures serve the public interest,⁶¹¹ and pursuant to this provision the Commission has concluded that licensing mechanisms for international satellite services that avoid mutual exclusivity serve the public interest. The Commission has reached this conclusion because, *inter alia*, licensing such services requires international coordination; the inability of U.S. auctions to confer global licenses might prevent market entry by satellite providers interested in global service; and coordinated, multilateral-transnational auctions are not feasible.⁶¹² We also note that Congress shared these concerns and stated its reservations about assigning licenses for orbit locations and international satellite services by competitive bidding when it expanded the Commission's auction authority in 1997.⁶¹³ As explained above, the ORBIT Act now prevents the Commission from assigning licenses for international or global satellite services by competitive bidding.⁶¹⁴ Thus, the differences in the Commission's licensing approaches to international satellite and terrestrial services have arisen from public interest considerations associated with the particular characteristics of the services and now are based as well on the different treatment of these services by Congress.

b. Incorporation by Reference of the Part 1 Standardized Competitive Bidding Rules

249. Background. In the *Further Notice* we proposed to conduct any auction of MVDDS licenses in the 12.2-12.7 GHz band in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's Rules, and substantially consistent with the bidding procedures that have been employed in previous auctions.⁶¹⁵ Specifically, we proposed to employ the Part 1 rules governing competitive bidding design, designated entities, application and payment procedures, reporting requirements, collusion issues, and unjust enrichment.⁶¹⁶

250. Discussion. We adopt our proposal to auction MVDDS licenses in the 12.2-12.7 GHz band in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's Rules. This decision is consistent with our ongoing effort to streamline our general competitive bidding rules for all auctionable services, increase the efficiency of the competitive bidding process, and provide more guidance to auction participants.⁶¹⁷ Moreover, all commenters that addressed

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winners of DBS auction, *Public Notice* (rel. Jan. 29, 1996); and FCC Announces Auction Winners for Digital Audio Radio Service, *Public Notice*, DA 97-656 (rel. Apr. 2, 1997).

⁶¹¹ 47 U.S.C. § 309(j)(3), (6).

⁶¹² See *BBA NPRM*, 14 FCC Rcd 5206, ¶ 65 (1999).

⁶¹³ See H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (stating that the Balanced Budget Act's omission of an auction exemption for licenses to provide global satellite services should not be construed as a Congressional endorsement of auctions for such licenses and stating that the treatment of global satellite systems raises numerous public policy questions which are better handled in the context of substantive legislation rather than budget legislation).

⁶¹⁴ See para. 242, *supra*.

⁶¹⁵ *Further Notice*, 16 FCC Rcd at 4221-4222 ¶ 335.

⁶¹⁶ *Id.*

⁶¹⁷ See, e.g., Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686 (1997); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (modified by Erratum, DA 98-419 (rel. Mar. 2, 1998)) (*Part 1 Third Report and Order*); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed*

(continued...)

the issue support the use of the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's Rules.⁶¹⁸ Our application of the Part 1 rules to MVDDS will include any amendments that may be adopted in the ongoing Part 1 proceeding.⁶¹⁹

c. Provisions for Designated Entities

251. **Background.** In the *Further Notice* we proposed small business size standards and bidding credits that would afford licensees substantial flexibility and that would also be appropriate for the provision of services with varying capital costs.⁶²⁰ Specifically, we proposed to define a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years. We further proposed to provide very small businesses with a bidding credit of 35 percent, small businesses with a bidding credit of 25 percent, and entrepreneurs with a bidding credit of 15 percent.⁶²¹

252. **Discussion.** We will adopt our proposed three small business definitions and three levels of bidding credits. We believe that this approach provides a variety of businesses, including local businesses, with opportunities to participate in the auction of licenses for this spectrum, and will also promote opportunities for the provision of services with varying capital costs. Moreover, we have not received any opposition to our proposed small business definitions or three levels of bidding credits. Accordingly, we define a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years. We will also adopt our proposed bidding credits, which are the same as those set forth in the standardized schedule in Part 1 of our rules.⁶²² Thus, very small businesses will receive a bidding credit of 35 percent, small businesses will receive a bidding credit of 25 percent, and entrepreneurs will receive a bidding credit of 15 percent.⁶²³

d. EchoStar's Proposals

(i) Spectrum Set-Aside and Special Bidding Credits for DBS Licensees

253. **Background.** EchoStar argues that DBS licensees should be exempt from competitive bidding for MVDDS licenses. Pointing out that it has already paid for its DBS licenses, by participating

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Rule Making, 15 FCC Rcd 15293 (2000) (*Part 1 Recon Order and Part 1 Fifth Report and Order*); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Seventh Report and Order*, 16 FCC Rcd 17546 (2001); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Eighth Report and Order*, FCC 02-34 (rel. Feb. 13, 2002).

⁶¹⁸ See Pegasus Comments at 19.

⁶¹⁹ See *Part 1 Recon Order and Part 1 Fifth Report and Order*, 15 FCC Rcd 15293 (recons. pending).

⁶²⁰ *Further Notice*, 16 FCC Rcd at 4222-4223 ¶¶ 336-339.

⁶²¹ *Id.*

⁶²² In the *Part 1 Third Report and Order*, we adopted a standard schedule of bidding credits, the levels of which were developed based on the Commission's auction experience. *Part 1 Third Report and Order*, 13 FCC Rcd at 403-04 ¶ 47. See also 47 C.F.R. § 1.2110(f)(2).

⁶²³ 47 C.F.R. § 1.2110(f)(2).

in an FCC auction and by purchasing a license acquired through an FCC auction, EchoStar further contends that allowing terrestrial use of the 12.2-12.7 GHz band by DBS licensees would be consistent with the Commission's spectrum flexibility policy.⁶²⁴ Thus, EchoStar argues that DBS licensees are entitled to use at least a significant portion of the 12.2-12.7 GHz band for terrestrial services without having to participate in a terrestrial license auction, and that the Commission should set aside no less than 250 MHz of this spectrum for interested DBS licensees. EchoStar further contends that if the Commission accepts mutually exclusive applications from other interested parties for terrestrial use of the remaining portion of the 12.2-12.7 GHz band, DBS licensees should receive a special bidding credit in the auction of MVDDS licenses.⁶²⁵ EchoStar claims that such a set-aside and bidding credits are justified because any payment for spectrum to which a licensee has already "purchased the rights" would be an "overpayment."⁶²⁶ Pegasus opposes EchoStar's request.⁶²⁷

254. Discussion. We decline to adopt a set-aside of MVDDS spectrum or special bidding credits for DBS licensees. DBS licenses do not include an authorization to use the 12.2-12.7 GHz band for terrestrial services.⁶²⁸ EchoStar in effect argues that it should be assigned additional flexibility in its authorization because it acquired its DBS licenses through auction. In adopting Section 309(j) of the Act, Congress expressly provided that the Commission's use of competitive bidding should not be construed to limit or otherwise affect its authority to regulate spectrum licenses.⁶²⁹ Accordingly, the previous assignment of DBS licenses through competitive bidding does not limit our authority to assign MVDDS licenses through competitive bidding once we determine that it will serve the public interest to do so. In choosing a license assignment mechanism we are required to consider the public interest objectives of Section 309(j). We find that the public interest would not be served by providing terrestrial rights to existing DBS authorizations solely because DBS licensees acquired their existing licenses by auction. Such a licensing mechanism would not ensure that the new terrestrial licenses are assigned to those that value them the most, which may or may not be the current DBS licensees. Further, as discussed above, we have determined that assigning licenses for MVDDS spectrum as one single block per geographic service area promotes the public interest objectives of Section 309(j)(3), an approach that precludes a set-aside of a portion of the spectrum for DBS licensees.⁶³⁰ Moreover, EchoStar has not shown that either a set-aside or bidding credits for DBS licensees would promote the public interest objectives of Section 309(j). With respect to the promotion of competition in particular, we note that third parties can share the 12 GHz band without causing significant harm to existing services and that assigning MVDDS licenses

⁶²⁴ EchoStar Comments at 29-30.

⁶²⁵ *Id.* at 30.

⁶²⁶ *Id.*

⁶²⁷ Pegasus Reply Comments at 21.

⁶²⁸ See, e.g., Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellite or the Period Following the 1983 Regional Administrative Radio Conference, *Report and Order*, 90 FCC2d 676 (1982); Revisions of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Rcd 9712 (1995); Amendment to Commission's Regulatory Policies Governing Domestic Fixed Satellite and Separate International Satellite Systems, *Report and Order*, 11 FCC Rcd 2429 (1996); Policy and Rules for the Direct Broadcast Satellite Service, 13 FCC Rcd 6907 (1998); Amendment to Commission's Regulatory Policies Governing Domestic Fixed Satellite and Separate International Satellite Systems, *Order on Reconsideration*, 16 FCC Rcd 15579 (2001); and 47 C.F.R. Part 100. See also 47 U.S.C. § 301. Section 301 expressly states that a license does not convey the ownership of the channels and no license shall be construed to create any rights beyond the terms, conditions, and periods of the license.

⁶²⁹ 47 U.S.C. § 309(j)(6)(B)(C). See also 47 U.S.C. § 309(j)(6)(D) for the fact that a license obtained in an auction will not convey any additional rights beyond its terms and conditions.

⁶³⁰ See paras.134-135, *supra*.

only to incumbent DBS licensees or granting them special bidding credits would limit the opportunity for entry of new competitive service to both cable and DBS.⁶³¹

255. EchoStar also states that the Commission should grant its request because it is consistent with the Commission's Spectrum Policy Statement supporting flexible use of spectrum.⁶³² We note that our Spectrum Policy Statement outlines in general terms a series of initiatives that the Commission intends to undertake.⁶³³ This Policy Statement does not, by itself, provide a basis upon which to increase the spectrum usage rights of a particular licensee. The Commission weighs competing policy goals in each rulemaking proceeding and, as discussed above, it has not been shown that flexibility of the kind EchoStar envisions is in the public interest under these circumstances.⁶³⁴

(ii) Use of Auction Proceeds to Mitigate Interference

256. Background. EchoStar suggests that part of the auction proceeds for MVDDS should be used to compensate incumbents for disruption of their operations.⁶³⁵ EchoStar also contends that such compensation would be analogous to other Commission provisions (e.g., provisions to encourage early clearing of the 700 MHz band) for payment to incumbents to cover the cost of relocating or disrupting their operations.⁶³⁶

257. Discussion. We decline to adopt EchoStar's suggestion. Section 309(j)(8) of the Communications Act requires the Commission to deposit all proceeds from a competitive bidding system in the United States Treasury, except for expenditures made for the purposes of conducting competitive bidding.⁶³⁷ In light of this statutory requirement, the Commission has no authority to use auction proceeds for the purpose of offsetting costs incurred by DBS from MVDDS licensees.

(iii) Transfer of MVDDS Licenses

258. Background. EchoStar argues that in order to prevent speculative auction participation and unjust enrichment the Commission should prohibit any transfer of a license or transfer of control of a

⁶³¹ See 47 U.S.C. § 309(j)(3)(B).

⁶³² EchoStar Comments at 30 (citing Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Notice of Proposed Rulemaking*, 15 FCC Rcd 24203 (2000) (*Secondary Markets NPRM*)).

⁶³³ See *Policy Statement on Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, 14 FCC Rcd 19868 (1999) (*Spectrum Policy Statement*). See also *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, *Policy Statement*, 15 FCC Rcd 24178 (2000) (*Secondary Markets Policy Statement*).

⁶³⁴ We note that the Commission has sought comment, in a pending rulemaking proceeding, on its DBS "non-conforming use" policy. Specifically, the Commission has asked whether it should eliminate, relax, or maintain time or other restrictions on non-DBS uses of DBS spectrum, and whether permitting "flexible use" of DBS spectrum will enhance or impede competition in the multichannel video programming distribution market. The Commission's request for comment, however, is limited to the issue of DBS providers' satellite uses of DBS spectrum and does not contemplate flexible use that would extend to DBS licensees' use of their authorizations to provide terrestrial service. See *Public Notice*, "The Commission Requests Further Comment in Part 100 Rulemaking Proceeding on Non-Conforming Use of Direct Broadcast Satellite Service Spectrum," IB Docket No. 98-21, FCC 00-426 (rel. Dec. 8, 2000).

⁶³⁵ EchoStar Comments at 30-31.

⁶³⁶ *Id.* Pegasus disagrees, noting that EchoStar provides no appropriate precedent. See Pegasus Reply Comments at 21-22.

⁶³⁷ 47 U.S.C. § 309(j)(8).

license until all of the licensee's facilities in all of its license areas are fully constructed and operational.⁶³⁸

259. Discussion. We decline to adopt a prohibition of transfer of MVDDS licenses. We believe that our Part 1 rules are sufficient to deter speculative auction participation because these rules, including rules on procedures and payment issues, bidder and licensee qualifications, and penalties in the event of default or disqualification, ensure that the competitive bidding process is limited to serious, qualified applicants.⁶³⁹ Our Part 1 rules also provide safeguards, including anti-collusion and unjust enrichment provisions, that will deter possible abuses of the bidding and licensing processes.⁶⁴⁰ Moreover, the public interest favors giving licensees flexibility to assign, transfer, or partition their MVDDS licenses; such flexibility will advance the more efficient and innovative use of spectrum.⁶⁴¹ We also believe that partitioning fosters rapid delivery of service to rural areas and encourages the participation of smaller entities at auction, consistent with our mandate to ensure that licenses are disseminated among a wide array of applicants.⁶⁴² Thus, we find that it is not necessary to prohibit any transfer of license until all of the licensee's facilities are fully operational, and that the benefits of allowing transfers outweigh any risk of unjust enrichment. We also believe that adopting such a prohibition would needlessly penalize licensees that may wish to implement changes to their business plans based on subsequent market conditions.

VI. PROCEDURAL INFORMATION

A. Final Regulatory Flexibility Analysis

260. *Final Regulatory Flexibility Analysis.* The analysis regarding the *Second Report and Order*, pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 603, is contained in Appendix E.

B. Further Information

261. For further information contact the following: for MVDDS/DBS and MVDDS/NGSO FSS sharing issues, Office of Engineering and Technology – Thomas Derenge at (202) 418-2451, Gary Thayer at (202) 418-2290 or Ira Keltz at (202) 418-0616. For MVDDS service rules, Wireless Telecommunications Bureau – Michael Pollak, Jennifer Burton, or Brian Wondrack at (202) 418-0680, TTY (202) 418-7233.

262. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426, TTY (202) 418-7365, or via e-mail to bmillin@fcc.gov. This *Memorandum Opinion and Order and Second Report and Order* can be downloaded at <http://www.fcc.gov>.

VII. ORDERING CLAUSES

263. Authority. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i), 7(a), 301, 303(c), 303(f), 303(g), 303(r), 308, and 309(j) of the Communications Act of

⁶³⁸ EchoStar Comments at 31.

⁶³⁹ See 47 C.F.R. § 1.2101 *et. seq.*

⁶⁴⁰ *Id.*

⁶⁴¹ See para.180, *supra*. See also *Secondary Markets Policy Statement*, 15 FCC Rcd 24178, and *Secondary Markets NPRM*, 15 FCC Rcd 24203.

⁶⁴² 47 U.S.C. §§ 309(j)(3)(B), 309(j)(4)(C).

1934, as amended, 47 U.S.C. §§ 154(i), 157(a), 301, 303(c), 303(f), 303(g), 303(r), 308, 309(j), this *Memorandum Opinion and Order and Second Report and Order* IS ADOPTED.

264. IT IS FURTHER ORDERED that, effective as of the date of the release of this *Memorandum Opinion and Order and Second Report and Order*, revised rules 101.147(p) and (q), 47 C.F.R. § 101.47(p), (q) are in effect. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r) and 309(j).

265. IT IS FURTHER ORDERED that, Parts 25 and 101 of the Commission's Rules ARE AMENDED as specified in Appendix D, effective 60 days after publication in the Federal Register, except as specified. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r) and 309(j).

266. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 302, 303(e), 303(f), 303(g), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303(e), 303(f), (303(g), 303(r) and 405, the petitions for reconsideration filed by SkyBridge, DirecTV, Inc., EchoStar Satellite Corporation, Satellite Broadcasting and Communications Association, the Boeing Company, and SkyTower, Inc. as they relate to our decision to allocate MVDDS in the 12 GHz band ARE DENIED.

267. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 302, 303(e), 303(f), 303(g), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303(e), 303(f), (303(g), 303(r) and 405, the DBS Petition for Consolidation and Declaration filed by DirecTV and EchoStar IS DISMISSED.

268. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 302, 303(e), 303(f), 303(g) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303 (e), 303(f), 303(g) and 303(r), the May 9, 2001 letter filed by Michael K. Kellogg, counsel to Northpoint Technology, Ltd. to Jane Mago, General Counsel, Federal Communications Commission IS DISMISSED.

269. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), and Section 1.934(d) of the Commission's Rules, 47 C.F.R. § 1.934(d), the Broadwave Network, LLC Applications for Licenses to Provide a New Terrestrial Transport Service in the 12 GHz band, Various DMAs, filed on January 8, 1999, ARE DISMISSED.

270. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), and Section 1.934(d) of the Commission's Rules, 47 C.F.R. § 1.934(d), the PDC Broadband Corporation Applications for Licenses to Provide Terrestrial Service in the 12 GHz Band in All DMAs, filed on April 18, 2000, ARE DISMISSED.

271. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), and Section 1.934(d) of the Commission's Rules, 47 C.F.R. § 1.934(d), the Satellite Receivers, Ltd. Applications for Licenses to Provide Terrestrial Television Broadcast and Data Services in the 12.2-12.7 GHz Band in Illinois, Indiana, Iowa, Michigan, Minnesota and Wisconsin, filed on August 25, 2000, ARE DISMISSED.

272. IT IS FURTHER ORDERED that, effective as of the date of the release of this *Memorandum Opinion and Order and Second Report and Order*, NO NEW APPLICATIONS WILL BE ACCEPTED FOR FILING in the 12.2-12.7 GHz band for private operational fixed service, except for applications for minor modifications or for license assignment or transfer of control.

273. IT IS FURTHER ORDERED that pending applications, as of the release date of this *Memorandum Opinion and Order and Second Report and Order*, for Private Operational Fixed Service licenses in the 12.2-12.7 GHz band WILL BE PROCESSED on a first-come, first-served basis.

274. IT IS FURTHER ORDERED that the Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order and Second Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink that reads "Marlene H. Dortch". The signature is written in a cursive, flowing style.

Marlene H. Dortch
Secretary