82. We therefore seek comment on the advantages and disadvantages of allowing unlicensed technologies to operate in current white space in the ITFS spectrum, and where ITFS licenses are returned to the Commission, on a primary basis. Would allowing unlicensed use of the ITFS spectrum on a primary basis provide educators with a useful new tool? Is it possible to allow unlicensed operation without undermining current ITFS operations (including educational, telemedicine or medical uses)? If so, what rules and technical requirements would be necessary to ensure sufficient interference protection to existing, licensed ITFS facilities? Should any antenna requirements be imposed? What would be the appropriate power and/or field strength limits for unlicensed transmitters operating on such a basis? Could GPS or other location techniques be incorporated into an unlicensed device so it could determine its precise location and identify licensed users in its vicinity by accessing a database? Would such an approach be reliable, and could it be combined with other methods to prevent interference to licensed services? If we ultimately revise the band plan for the 2500-2690 MHz band, particularly in a fashion segmenting low power and high power operations, is unlicensed use preferable in one portion but not the other?

5. Geographic Area Licensing for Current Licensees

a. Geographic Area Licensing for MDS BTA Authorization Holders

83. Under the current rules, qualified auction winners were granted licenses for BTAs. A BTA authorization holder may provide service within its BTA, excluding the PSA of incumbent stations and previously proposed MDS and ITFS facilities.[170] A BTA authorization holder, however, must also apply for an individual station license for each transmitter within its BTA.[171] In other services utilizing geographic area licensing, however, a geographic area licensee may generally construct a new transmitter within its licensed area and on a channel covered by its geographic area license so long as (1) the construction complies with the Commission's interference and other rules, (2) an environmental assessment is not required, (3) international coordination is not required, or (4) the proposed transmitter would not affect a radiofrequency quiet zone.[172] We believe that this approach results in efficient service to the public and fewer unnecessary regulatory burdens upon licensees and the Commission. For the reasons noted above, we believe that MDS BTA authorization holders should not be required to obtain individual station licenses for transmitters. We also see no basis for treating MDS BTA authorization holders differently than ITFS geographic area licensees.[173] Accordingly, we tentatively conclude that MDS BTA authorization holders should be allowed to place transmitters anywhere within their service area without prior authorization so long as the operation complies with the applicable service rules and that do not affect radiofrequency quiet zones or require environmental review or international coordination. We seek comment on this tentative conclusion.

84. We also propose to modify the procedures that apply when an incumbent license within a BTA is forfeited. Under current rules, if an incumbent site-based MDS license is forfeited, the incumbent's service area shall merge and become part of the surrounding BTA service area.[174] The BTA

[170] 47 C.F.R. § 21.924(c).

[171] 47 C.F.R. § 21.925(b).

[172] *See, e.g.*, 47 C.F.R. §§ 90.663, 101.525(a), 101.1009.

[173] *See* paras. 62-65 *supra*, regarding geographic area licensing for unassigned ITFS spectrum.

[174] 47 C.F.R. § 21.932(a).

authorization holder, however, cannot operate within that area until it files a long form application to operate a transmitter and the Commission grants that application.[175] In other wireless services, frequencies associated with cancelled or forfeited incumbent authorizations automatically revert to the geographic license holder.[176] We believe that requiring geographic area licensees to obtain a separate authorization prior to operating within the area of a cancelled or forfeited incumbent license is an unnecessary regulatory burden and causes delays in service. Consistent with the approach we have taken in other wireless services, we tentatively conclude to modify the rules to provide that in the case where an incumbent license cancels or is forfeited, the right to operate would automatically revert to the licensee that holds the BTA license.[177]

b. Geographic Area Licenses for Site-Licensed Incumbents

85. In tandem with our proposal to use geographic areas to license ITFS spectrum, we must assess the potential impact of this proposal on incumbent ITFS licensees that have site-based licenses. Previously, when implementing geographic area licensing for spectrum that had incumbents, the Commission traditionally has used an "overlay" licensing approach where the Commission grandfathered (protected) existing constructed and operating stations[178] or provided for specified relocation periods. While an overlay approach has worked well in the past, the Coalition contends that there are inherent difficulties with an approach that allows incumbents to remain in place indefinitely because high-power video and low-power cellular systems will share this band.[179] The Coalition believes these difficulties could hinder the implementation of new advanced services in this band because most geographic area licensees and incumbents would probably use the band to provide a low-power two-way service,'" while some incumbent licensees are using the band to provide high-power video operations (educational or commercial wireless cable).

86. Since we are proposing to protect incumbent operations on current ITFS channels, we must define the protected areas. The Coalition proposes to give each existing site-based MDS and ITFS licensees a GSA, based on the current rules.[181] In this regard, we note that applicants for new stations on ITFS channels must provide protection to incumbents based on PSAs.[182] We note that MDS incumbents

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[175] 47 C.F.R. §§ 21.925(c)(4), 21.932(c)

[176] ***See,*** *e.g.*, 47 C.F.R. § 101.1331 (MAS): Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, 12 FCC Rcd 18600, 18637-8 ¶ 79 (***39*** *GHz* ***Report and Order).***

[177] ***See. e.$., 39 GHz Report and Order,*** 12 FCC Rcd at 18637-8, ¶ 79

[178] (*e.g.*, geographic area licensees must protect existing co-channel stations located within their geographic service area) ***See*** Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, 15 FCC Rcd 11,956(2000); ***See*** *MDS* ***Auction*** *R&O,* 10 FCC Rcd 9589.

[179] Coalition Proposal at 10

[180] Other licensees agree that many existing ITFS licensees will move or are contemplating moving away from traditional one-way high-power video-based operations. ***See*** Joint Comments of ITFS Parties at 2.

[181] Coalition Proposal at 20

[182] 47 C.F.R. §§ 74.903, 21.902(d). Beginning on September 15, 1995, the initial service boundaries were frozen, i.e., the circular PSA boundaries were not to be changed regardless of whether or not the licensee subsequently (continued....)

that obtained their licenses prior to our 1996 MDS BTA auction have 35-mile PSAs around their main stations.[183] Except with respect to situations where MDS and ITFS PSAs overlap, we have not received many significant expressions of concern over electrical interference resulting from this approach. Therefore, we propose to provide each incumbent on a current ITFS channel and each MDS incumbent with a PSA based on a circle with a 35-mile radius around its main station, subject to the exceptions discussed below. We ask for comments on this proposal and, in addition, we inquire whether we should change the name of such areas from PSAs to GSAs. A benefit of making this change would be to allow incumbents to change the location of their transmitters without prior Commission approval.

87. In discussing the issue of protected areas for incumbents, the Coalition points out that the rules defining protected areas have changed over the years. As a result, the PSAs assigned to co-channel incumbent MDS and ITFS licensees can overlap.[184] The Coalition argues that since none of the licensees with service areas that overlap can satisfy the interference protection criteria in the overlap area, no one can operate in these areas.[185] According to the Coalition, the MDS/ITFS industry has informally developed a method for handling this problem. The Coalition notes that the general method for dividing the overlap area is to draw a straight-line (chord) beginning and ending at the two points where the protected service areas intersect.[186] This approach has the effect of drawing a boundary along the line connecting the ends of the football-shaped overlap area, with the licensees on either side agreeing to limit the interference they generate outside their boundaries. The Coalition proposes that we codify this approach.

88. The boundary-splitting proposal described above could leave some reception sites marooned on the "wrong" side of the line relative to ITFS stations from which they have been receiving service. Based on that concern, and on the fact that some registered reception sites fall outside a 35-mile radius, the Coalition proposes that we grandfather certain ITFS reception sites located outside the PSA.[187] Under the Coalition's proposal, ITFS licensees would be required to provide technical information to co-channel and adjacent channel licensees concerning the reception sites within twenty-one days of a request.[188] Generally, however, we do not protect sites outside the established protected areas in other

(Continued from previous page)
moved its transmitter. ***Id.*** An ITFS licensee's PSA includes the area within a 35-mile radius of its transmitter site plus any reception sites beyond that radius that were registered with the Commission on September 17. 1998.

[183] ***See*** 47 C.F.R. §§ 21.902(d), 21.933(a).

[184] Effective September 15, 1995, the Commission expanded the PSAs of incumbent site-based MDS and ITFS licensees from fifteen miles to thirty-five miles. ***See*** Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service. Instructional Television Fixed Service, & Cable Television Relay Service, ***Second Report and Order,*** Gen. Docket Nos. 90-54 and 80-113, 10 FCC Rcd 7074 (1995). In doing so, it created a number of overlaps between licensees whose PSAs had not overlapped before the standard PSA radius was increased.

[185] Coalition Proposal at 20-21 (*e.g.*, the rule changes have created a "no man's land)

[186] ***See*** Coalition Proposal Appendix C for a detailed explanation.

[187] Coalition Proposal at 35

[188] ITFS licensees must identify the location of such receive sites, the antenna make and model and the antenna height above ground and, if known, the adjacent channel D/U ratio that can be tolerated. ***See*** Coalition Proposal at 35-36.

services where we have implemented geographic area licensing.[189] Requiring licensees to provide such additional technical information is contrary to our goal of reducing regulatory burdens. We are also concerned that providing continued protection to out-of-area reception sites could confuse the definition of GSAs for site-licensed incumbents, whether or not we choose to allow continued high-power operations in part of the band. We invite comment on the costs versus benefits of continuing to protect reception sites that fall outside the 35-mile service areas of incumbents, or beyond boundaries established mathematically by splitting areas of overlap. Commenters supporting the Coalition's position on this issue should provide information on how many receive-only sites are located outside the PSAs of stations from which they have been receiving service. We seek comment on alternative ways of addressing this problem.

c. Gulf of Mexico Proceeding

89. ***Background.*** In the ***MDS Report and Order,*** the Commission adopted a licensing plan under which it assigned, through a simultaneous multiple round bidding process, one MDS authorization for each of the 487 BTAs and six additional geographic areas.[190] A BTA authorization holder may construct facilities to provide service over any usable MDS channels within the BTA.[191] A MDS channel is usable if the proposed station design is in compliance with the Commission's interference standards.[192]

90. The signals of a BTA authorization holder cannot interfere with any other BTA authorization holder's signals.[193] In addition, BTA authorization holders cannot interfere with the PSAs of incumbent MDS operators and ITFS licensees within their BTAs.[194] However, the BTA authorization holder may negotiate interference rights with BTA authorization holders and incumbents.[195]

91. On May 21, 1996, the Gulf Coast MDS Service Company (Gulf Coast) filed a Petition for Rulemaking requesting that the Commission amend its rules to permit licensing of MDS and ITFS spectrum in the Gulf of Mexico.[196] Specifically, Gulf Coast sought to have the Commission treat the Gulf of Mexico as one service area and to hold an auction to license service in the area. On November

[189] Examples of services where service areas are defined exclusively on the basis of signal strength limits at geographic borders include the lower 700 MHz band (47 C.F.R. § 27.55(a)(2)), broadband PCS (47 C.F.R. § 24.236), Part 27 services in the 2305-2320 and 2345-2360 MHz bands (47 C.F.R. § 27.55(a)(1)), and Part 27 services in the 1390-1395 and 1432-1435 MHz bands (47 C.F.R. § 27.55(a) (3)).

[190] See *MDS R&O*, 10 FCC Rcd at 9608-09; *see also Gulf Notice,* 17 FCC Rcd at 8448 ¶ 7. Rand McNally defined 487 BTAs in the 1992 *Commercial Atlas and Marketing Guide.* Because Rand McNally did not include some geographic areas that were the subject of the MDS auction, those areas were added to Rand McNally's list, bringing the total number for auctioning to 493 authorizations. The six additional areas are American Samoa, Guam, Northern Mariana Islands, San Juan, Puerto Rico; Mayaguez/Aguadilla-Ponce, Puerto Rico; and the United States Virgin Islands. *Id.* at 8447 n.4. *See also* 47 C.F.R. § 21.924(b).

[191] *See MDS R&O*, 10 FCC Rcd at 9615-18; *see also Gulf Notice*, 17 FCC Rcd at 8448 ¶ 7.

[192] *See MDS R&O*, 10 FCC Rcd at 9615-18; *see also Gulf Notice*, 17 FCC Rcd at 8448 ¶ 7.

[193] See 47 C.F.R. § 21.902

[194] See47 C.F.R. § 21.933

[195] *See Gulf Notice*, 17 FCC Rcd at 8448 ¶ 8.

[196] Petition for Rulemaking of Gulf Coast MDS Service Company (Gulf Coast Petition) (May 21, 1996)

23, 1998, PetroCom License Corporation (Petrocom), successor in interest to Gulf Coast, amended the petition.[197] PetroCom requested that the Commission authorize two licenses in the Gulf of Mexico and adopt eligibility restrictions to avoid excessive concentration of licenses.[198] Additionally, PetroCom asked the Commission to establish a service area in the Gulf similar to the service areas established in the ***MDS Report and Order***.[199] On August 11, 1999, the Commission sought comment on PetroCom's Amended Petition.[200] On May 3, 2002, the Commission issued the *Gulf* ***Notice*** seeking comments on PetroCom's amended petition."[201]

92. In the ***Gulf of Mexico MDS NPRM,*** the Commission proposed to establish a GSA in the Gulf of Mexico ("Gulf Service Area").[202] The Commission proposed to adopt the same rules, with certain limitations, as those service areas established in the ***MDS Report and Order.*** The Commission solicited comment on the technical and economic effects of implementing the proposals.[203]

93. ***Discussion.*** Generally, commenters support creation of a Gulf Service Area. However, they express concern over the timing of the adoption of rules for the service area.[204] The commenters seek to delay the licensing of **MDS** in the Gulf of Mexico until after the Commission establishes mobile service rules,[205] as well as until we address the Coalition's proposals.[206] We note that we are proposing mobile service rules in this proceeding.[207] We believe that by addressing the use of MDS in the Gulf simultaneously with the consideration of other MDS flexibility issues that we decrease any attendant delay in the provision of service in the Gulf of Mexico. Accordingly, we disagree with the commenters that we should defer consideration of all of the issues involving the Gulf of Mexico until after adoption

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[197] Amended Petition for Rulemaking of PetroCom License Corporation (Amended Petition) (Nov. **23,** 1998).

[198] **See** Pleading Cycle Established for Comments on Amended Petition for Rulemaking to Amend Parts **2** I and **74** of the Commission's Rules to Permit Licensing in the Multipoint Distribution Service and the Instructional Television Fixed Service for the Gulf of Mexico, ***Public Notice,*** 14 FCC Rcd **13,322** (1999) ***(Amended Petition PN)***. PetroCom also requested that the Commission set aside one of the licenses for small businesses, streamlining of the licensing process, modification of the two-way rules for stations operating in the Gulf. ***Id.***

[199] Amended Petition at 4

[200] ***Id.*** The WCA opposed the Amended Petition while Petrocom. Bachow/Coastel, L.L.C. (Bachow/Coastel) and RIG Telephones Inc. d/b/a Datacom (Datacom)each filed comments on September 10, 1999. ***See*** reply comments on September **27,** 1999. Bachow/Coastel, WCA and Datacom tiled reply comments. Finally, on October 8, 1999 and November 10, 1999, WCA and PetroCom filed comments in the form of a letters. These letters were not authorized pleadings pursuant to our rules; however, in order to develop a full and complete record, they were incorporated as part of the record in this proceeding.

[201] ***GulfNotice,*** 17 FCC Rcd **8446**

[202] ***See*** *Gulf Notice*, 17 FCC Rcd at 8447 ¶ **2**

[203] ***Id.***

[204] PetroCom Comments at **3-5;** Stratos Offshore Services Company Comments at **2-3** (Stratos Offshore); WCA Comments at 4; PetroCom Reply Comments at 1-4.

[205] ***See*** PetroCom Comments at 3-5; PetroCom Reply Comments at 1-4.

[206] ***See*** WCA Comments; Stratos Offshore Comments at 2-3

[207] ***See*** para. **132,** ***infra***

of mobile service rules. Resolving the primary issue of whether to establish a Gulf Service Area is a preliminary step that does not have to wait for the adoption of final rules in this proceeding. As no commenter opposed the establishment of a Gulf Service Area, we adopt the proposal to create a Gulf service area. The parties who asked the Commission to establish a Gulf Service Area state that establishing such a service area would allow specialized businesses that operate in the Gulf of Mexico to obtain advanced communications services that are currently unavailable to them and that would allow these businesses to operate more efficiently.[208] The Commission has also noted in other services that creating a service area for the Gulf of Mexico region will help meet the growing communications needs of businesses operating in the Gulf.[209]

94. We note that we have incorporated, as WCA asks, the Gulf of Mexico proceeding into this comprehensive review of the entire band.'" Although the Commission proposed to create a Gulf Service Area for MDS operations, the Commission proposed to exclude all ITFS channels from licensing in a Gulf Service area.'" The Commission indicated that **ITFS** licensees have not expressed an interest in obtaining licenses in the Gulf of Mexico, the area most likely has little need for educational service, and the requested commercial use does not require the full bandwidth available in the 2500-2690 MHz band?" No commenter specifically addressed the Commission's proposal to exclude ITFS channels."' In order to ensure that we have a full and complete record, we seek further comment on whether we should reallocate ITFS channels in the Gulf Service Area for other uses. We specifically seek comment on whether we should consider unlicensed uses.

95. Unlike BTAs established by Rand McNally, the Gulf Service Area does not have a significant population center and is based primarily on the geographic confines of the Gulf and on the commonality of commercial interests of the potential users of any service provided.[214] Thus, the Commission proposed to use the same boundary definitions for this Gulf Service Area as adopted in the *WCS R&O*.[215] As a result, the Commission proposed that land-based license regions abutting the Gulf of Mexico will extend to the limit of the territorial waters of the United States in the Gulf of Mexico, which is the maritime zone that extends approximately twelve nautical miles from the United States coastline.[216] Beyond that line of demarcation, the Commission created a Gulf Service Area, which extended from that line outward to the geographic limits consistent with international agreements?"

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[208] ***See*** Gulf Coast Petition at **4**

[209] ***See, e.g.,*** Amendment of the Commission's Rules to Establish Parr **27,** the Wireless Communications Service ("WCS"), GN Docket No. **96-228, *Report nnd Order,* 12** FCC Rcd **10785,10816 ¶ 59 (1997)** (*WCS R&O*).

[210] ***See*** WCA Comments at **7.**

[211] See *Gulf Notice*, **17** FCC Rcd at **8450 ¶ 13.**

[212] ***Id.*** at **8450¶ 13.**

[213] We note that PetroCom's Comments and Reply Comments refer to MDS/ITFS spectrum. PetroCom Comments at 5; PetroCom Reply Comments at ***2.***

[214] ***See Gulf Notice,*** 17 FCC Rcd at **8452** ¶ 16.

[215] ***Id.*** at **8453 ¶ 18.**

[216] ***Id.***

[217] ***Id.***

96. Although WCA supports the Commission's proposal to establish the demarcation line of the Gulf Service Area at twelve nautical miles from the coastline:[218] PetroCom maintains that the better approach is to employ the boundaries used for cellular service in the Gulf.[219] In the *Gulf Cellular Order.* the Commission established the Gulf Service Area boundary as the land-water line. PetroCom argues that because current MDS and ITFS licensees are providing fixed services that they do not require protection beyond the shore.[220] Additionally, PetroCom asserts that allowing land based MDS/ITFS operations to extend into the Gulf of Mexico will create interference issues for Gulf operations and discourage Gulf licensees from fully developing their systems.[221] Moreover, PetroCom asserts that this definition of the inner boundary of the Gulf Service Area is consistent with our Rules, which base BTA boundaries on market areas defined by Rand McNally, which follow county lines.[222] We seek comment on where to establish the demarcation line for the **Gulf** Service Area.

97. For the most part, commenters to this proceeding did not address the Commission's proposals with regard to licensing MDS in the **Gulf** of Mexico. Instead, commenters focused their remarks on requesting a delay in the consideration of the issues presented in the *Gulf of Mexico MDS NPRM* until after the Commission considered the Coalition's proposal to transform the service. Accordingly, we do not believe the record has developed satisfactorily to resolve issues concerning the amount of spectrum to license in the Gulf Service Area, competitive bidding, partitioning and disaggregation, interference protection requirements, construction period, and license term. We invite commenters to address these issues in the broader context of this comprehensive proceeding. However, where differences exist with regard to the treatment of Gulf licenses, commenters should explain those differences and expound upon the rationale for the different treatment.

6. Transition to New Band Plan

98. **An** important issue relating to the adoption of any new band plan is the mechanism to use to transition existing licensees to a new band plan. There are four alternative kinds of transition mechanisms that are relevant in this context:[223] expanded rights overlay licenses combined with mandatory relocation of incumbents; expanded rights overlay licenses with grandfathering of incumbents; expanded rights overlay licenses combined with voluntary band-clearing restructuring incentives for incumbents; and expanded rights granted to incumbent licensees under existing licenses.[224] The Coalition's proposal most nearly resembles the second of those four approaches, though it reflects elements of the fourth approach as well.

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[218] WCA Comments at 6.

[219] PetroCom Comments at 5-6 *citing* Cellular Service and Other Commercial Mobile Radio Services in the **Gulf** of Mexico, ***Report and Order,*** 17 FCC Rcd 1209 (2001) ***(Gulf Cellular Order);*** PetroCom Reply Comments at 4-6 ***citing Gulf Cellular Order,*** 17 FCC Rcd at 1219¶ **31.**

[220] Petrocom Comments at 6.

[221] PetroCom Reply Comments at 5

[222] PetroCom Comments to the Amended Petition at **4.**

[223] ***Spectrum Policy Report*** at 49.

[224] *Id.*

99. The Coalition proposes that we rely on a combination of regulatory and market forces to effect the transition to its proposed band plan. The Coalition recommends a market-by-market transition process to the new band plan that allows MDS and **ITFS** licensees to continue to operate pursuant to the current rules until an MDS or ITFS licensee or lessee (called a "proponent") triggers the transition process.[225] In general, the Coalition would require the Proponent to fund any conversion costs incurred by ITFS operators but would require MDS operators to pay their own conversion costs.[226] In addition, any party offering a commercial service using MDS or **ITFS** channels would be required to reimburse the Proponent for its ***pro rata*** share of the cost of transitioning the facilities that it uses and the cost of transitioning facilities associated with any overlapping transition impact area.[227] A Proponent would be permitted. at its sole discretion and at any time, to trigger the transition process with respect to any MPS or **ITFS** licensee that has a GSA located in whole or in part within 150 miles of any portion of its GSA.[228] At any time during the transition planning period, the Proponent would be permitted, in its sole discretion, to decide not to proceed with the transition process in whole or in part. [229] The Coalition plan would require the Commission to enact detailed rules concerning the mechanisms of the transition process and set forth nine safe harbors describing proposals that licensees subject to transition would have to accept from proponents.[230] The Coalition **does** not recommend that we set any fixed deadlines.

100. We seek comment on whether we should impose a date certain for completing the transition process if we adopt a process resembling that proposed by the Coalition. The Coalition recognizes that the absence of specific deadlines in its proposal could leave hold-out licensees in a position to obstruct the re-channelization process, but urges that we adopt a very detailed list of criteria defining what sorts of proposals ITFS licensees must accept if Proponents offered to implement them or pay **for** their implementation.[231] This proposal resembles the process we have applied for clearing incumbents from the upper **200** channels in the 800 MHz band to make way for Specialized Mobile Radio operators licensed to Economic Areas.[232] However, the Coalition proposes a far more detailed set of criteria for mandatory negotiations between MDS and **ITFS** operators, and does not provide for reimbursement of MDS operators undergoing involuntary conversion to lower signal strengths.

101. **As** an alternative, we ask whether we should impose a date or dates certain by which all licensees must comply with our new interference rules. In that regard, an *ad **hoc*** group of MMDS licensees has expressed concern that the detailed transition rules that the Coalition proposes as an alternative to specific deadlines would be cumbersome. These licensees view the plan as requiring complex reimbursement schemes, 150-mile daisy chains and other complications resulting from the voluntary market-by-market approach.[233] They assert that the net result of adopting the Coalition Plan

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[225] A detailed description of the Coalition transition process is contained in Appendix C.

[226] Coalition Plan, Appendix **B** at 5

[227] ***Id.***. Appendix B at 28-29.

[228] ***Id.,*** Appendix B at **13**

[229] ***Id.,*** Appendix **B** at 14

[230] *Id.*, Appendix **B** at 21-28.

[231] The Coalition does not propose that any MDS licensees receive compensation from Proponents.

[232] ***See 41*** C.F.R. § 90.699.

[233] Comments of MMDS Licensee Coalition **("MMDS** Licensees"), filed November 14,2002, at 3

would be to delay the transition rather than to expedite it because the patties would be embroiled in constant bickering over the terms of transition and who should be responsible for what costs.[234]

102. Another alternative would allow incumbents to bargain freely for the best inducements they can obtain from Proponents to convert their operations prior to a deadline for conformance with the new band plan, while requiring incumbents to fund their own conversions if they do not accept a Proponent's offer to fund the conversion ahead of time. Under such an approach, the incumbent's bargaining leverage would be greater the further in the future we established the conversion deadline, and it would gradually diminish as the deadline approached. We believe that we have the legal authority to apply such deadlines pursuant to Section 316(a) of the Communications Act, as amended, which permits us to modify a license or construction permit if such action is in the public interest.[235] Section 316(a) requires that we notify the affected stations of the proposed action, the public interest reasons for the action, and afford at least thirty days to respond. This procedure is now set forth in Section 1.87 of our Rules.[236] Licenses may be modified through rule making?" as we did when establishing the cellular telephone service.[238] We seek comment on alternative means by which we might lawfully and efficiently implement a schedule for modifying existing MDS and ITFS stations, such as the adoption of a single deadline by rulemaking rather than through station-by-station processes.

103. A second possible approach would be to adopt a three-phase transition process: a voluntary negotiation period, during which incumbents could bargain freely for the best inducements they could obtain from Proponents, followed by a mandatory negotiation and conversion phase, during which Proponents could compel incumbents to reduce their signal strengths by offering to fund their conversions, based on specific criteria to be defined in our rules. In the final stage, Proponents would be entitled to compel incumbents to take whatever steps are necessary to reduce their signal strengths at the incumbents' own expense. Such an approach would resemble the band-clearing procedures that we adopted for terrestrial fixed microwave services in the bands that we reallocated to PCS,[239] except that MDS and ITFS incumbents would ultimately be required only to reduce their signal strengths at their GSA boundaries, not cease operations altogether or relocate.

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[234] ***Id.***

[231] 47 U.S.C. § 316(a). We note that converting existing licensees to geographic service area licenses would eliminate the need to modify authorizations for individual transmitters.

[236] 47 C.F.R. § 1.87

[237] **See** Amendment of Part 22 of the Commission'sRules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, ***Notice*** of ***Proposed Rulemaking,*** 5 FCC Rcd 1,044, 1,048¶ 25 (1990), ***citing WEEN, Inc. v. United States,*** 396 F.2d 601 (2d Cir. 1968);***American Airlines, Inc. v.*** **CAB,** 359 F.2d 624 (D.C.Cir. 1966); *Upjohn* ***Co. v. Food and Drug Admin.,*** 911 F.2d 1583 (D.C.Cir. 1987).

[238] ***See generally,*** Cellular Communication Systems (Cellular Systems), ***Reporr and Order,*** 86 F.C.C.2d 469 (1981), ***modified,*** 89 F.C.C.2d ***58*** (1982), *further* ***modified,*** 90 F.C.C.2d 571 (1982);***appeal dismissed sub nom. United States v. FCC.*** No. 82-1526, Slip Op. (D.C. Cir. Mar. 3, 1983); Rules for Rural Cellular Service, ***First Report and Order,*** 60 Rad. Reg. 2d 1029 (1986), ***modified,*** 2 FCC Rcd 733 (1987), *further* ***modified,*** 2 FCC Rcd 3366 (1987). 4 FCC Rcd 5272 (1988). 3 FCC Rcd 4403 (1988), 4 FCC Rcd 4,464 (1989).

[239] **See** 47 C.F.R. §§ 101.69-101.79

104. A third alternative would be to refrain from providing for a voluntary negotiation period and proceed immediately to a mandatory negotiation and conversion phase, later to be followed by a sunset date after which incumbents would be required to assume their own conversion costs. The Commission used this procedure to clear terrestrial fixed microwave services from 18.58-19.3GHz band when the Commission reallocated it to FSS.[240] We seek comments on the benefits and disadvantages of a voluntary negotiation period, and inquire what mandatory conversion requirements should apply if we decide not to adopt a voluntary negotiation period. We seek comment on all of these approaches, on other possible alternatives, on the appropriate date or dates for any deadlines that we might apply under any of the transition proposals and on the criteria that we should apply during any mandatory negotiation and conversion phase, should we choose to adopt one.

105. An altogether different option would be to rely on an auction to restructure the bands."[241] Such an approach might mitigate the need for a complicated set of transition rules because bidders might be able to obtain efficient packages of encumbered and unencumbered spectrum for new uses without engaging in costly and time-consuming bilateral and multi-lateral negotiations.[242] The efficacy of such an approach. of course, would depend upon how many incumbents chose to make their licenses available for competitive bidding. Transition rules might be necessary as a fall-back even if we conduct such an auction, to transition incumbent licensees that choose not to participate or receive no bids that induce them to sell.

106. We seek comment on all issues relating to the transition of existing licensees to a new band plan, including, but not limited to, the Coalition Proposal. Commenters addressing this issue should discuss in detail their preferred mechanisms for adopting any transition."[243]

7. ITFS Eligibility Restrictions

107. ITFS main channels account for 120 MHz of the 2500-2690 MHz band. Initially, the Commission intended ITFS stations to provide formal educational and cultural development in aural and visual form to students enrolled in accredited public and private schools, colleges and universities.[244] Generally, our Rules limit eligibility for ITFS to: (1) accredited educational institutions, (2) governmental organizations engaged in the formal education of enrolled students, and (3) nonprofit organizations whose purposes are organizational and include providing educational and educational television materials to accredited institutions and governmental organizations.[245] In 1971, the

[240] See47 C.F.R. §§ 101.85-101.95.

[241] *See* Section III.J, *infra*

[242] *See* Evan Kwerel and John Williams, ***A Proposal for a Rapid Transition to Market Allocation*** of ***Spectrum*** (FCC Office of Plans and Policy Working Paper, Nov. 2002).

[243] Some MDS licensees, who also lease ITFS channels, employ CARS for their video operations as Wireless Cable Systems. They would continue to be eligible to be CARS licensees for those video operations, but not for low power broadband operations. Transition to the new band plan must also consider modification of those operations.

[244] 47 C.F.R. § 74.931(a)(1).

[245] *See* 47 C.F.R. § 74.932(a). Under certain circumstances, "wireless cable entities" may obtain access to ITFS channels so long as at least eight other ITFS channels remain available for future ITFS use. *See* 47 C.F.R. § 74.990-74.992.

Commission did not see a valid reason to change the ITFS eligibility rules.[246] In 1985, after recognizing that ITFS signals were reaching the homes of MDS subscribers, the Commission revised the main purpose of **ITFS.** The Commission determined that the transmission of instructional material for accredited educational institutions was an ***"essential use"*** of **ITFS** stations, *i.e.*, at least some of their capacity had to be used for the transmission of course-oriented formal instructional material.[247] In 1991, the Commission voiced its support of the role of ITFS in providing improved educational opportunities for all.[248] Consequently, the Commission remained committed to not jeopardizing the current or future ability of ITFS to fulfill its primary intended purpose of providing educational material for instructional use.[249] In fact, the Commission expressed its intention to enforce strictly the existing eligibility rules.[250]

108. In many respects, our regulatory policies toward **MDS** and, to a lesser extent, our treatment of **ITFS** over the years have represented pioneering movements toward flexible use. We initially limited **MDS** licensees to common carrier operations and adopted technical rules that limited the service to point-tomultipoint distribution from a single point, but we allowed **MDS** subscribers to transmit any of a broad range of content types: private television, high speed computer data, facsimile, control information, or other communications capable of radio transmission.[251] In 1983, the ***First Leasing Decision*** authorized ITFS operators to begin leasing unused channel capacity to commercial entities. Thus, as WCA notes in comments that it filed in our Spectrum Policy Task Force proceeding, "The secondary markets concept (under which licensees could lease the spectrum usage rights to third parties) has been a staple of the Commission's MDS/ITFS rules for twenty years."[252]

109. One byproduct of our flexible use policy toward ITFS has been a reduction in the proportion of ITFS channel capacity used for educational purposes. As the **MDS** industry struggled to achieve commercial viability and **ITFS** operators sought to generate enough revenue to survive, we gradually relaxed the restrictions on channel leasing. One step at a time, over a fifteen year period, we

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[246] Amendment of Parts 2 and 74 of the Commission's Rules and Regulations to Establish a New Class of Educational Television Service for the Transmission of Instructional and Cultural Material to Multiple Receiving Locations on Channels in the 2500-2690 MHz Frequency Band, Docket No. 14744, ***Second Report and Order.*** 30 F.C.C. 2d 197,200¶ 10 ***("ITFS Second R&O").***

[247] Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service. ***Second Report and Order,*** 101F.C.C.2d 50, 80¶¶ 75-78 (1985) ***(emphasis added) Part 74 Second R&O).*** The Commission **also** eliminated the requirement to transmit course-oriented material to selected accredited school sites if in lieu thereof the licensee names "the school(s) and the degree(s) or diploma(s) for which the formal programming will be offered and describe[s] the administration of the courses(s)," along with supporting documentation. 47 C.F.R. § 74.931(a)(2).

[248] Amendment of Parts 21.43, 74.78, and 94 of the Commission'sRules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service, ***Second Reporr and Order,*** 6 FCC Rcd 6,764, 6,774 ¶ 48 n.45 (1991).

[249] ***Id.***

[250] ***Id.*** at 6 FCC Rcd 6,774 n.45.

[251] Amendment of Parts 1, 2, and 43 of the Commission's Rules and Regulations to Provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service, *Report* ***and Order.*** 45 FCC 2d 616,617 ¶ 5 (1974).

[252] "Comments of WCA in ET Docket No. 02-135, at 5-6, filed Jan. 27.2003

reduced the educational obligations of ITFS operators to a minimal level, ultimately allowing them to lease all but a small fraction of their capacity to commercial operators:

- In 1985 the Commission determined that ITFS licensees would be required to transmit at least 20 hours of instructional programming per week on each of their channels between 8 AM and 10 PM. It also required ITFS operators to preserve their right to recapture at least an additional 20 hours per week, including at least three hours per day on weekdays between 8 AM and 10 PM.[253] The Commission further determined, however, that it would permit commercial channel lessees to build, own. and operate the transmitters involved, provided that ITFS licensees met the above-stated programming requirements.[254]

- By 1991, ITFS operators were increasingly reliant upon MDS operators as a source of revenue and operational support, but MDS operators were finding it difficult to compete against cable television and DBS while simultaneously supporting ITFS. The inability to lease ITFS channels on a 24-hour-per-day basis was impairing the ability of MDS operators to make effective commercial use of ITFS capacity, which depressed the prices that MDS operators were willing and able to pay for ITFS capacity. Thus, ITFS operators willingly acquiesced when the Commission eliminated the time-ofday restrictions on its minimum ITFS transmission requirements and authorized operators to use automatic channel-switching equipment to create the appearance, to end users, of channels that were 100 percent dedicated to commercial programming.[255] We referred to this process as "channel mapping."

- Three years later, the Commission acknowledged that channel-mapping was a costly endeavor and allowed ITFS licensees to load all of the educational programming required for a four-channel system onto one ITFS channel, leaving the other three channels available for full-time leasing to commercial operators.[256] In addition, the Commission determined that ITFS operators need not keep an additional 20 hours per channel available for recapture on their own ITFS channels if, in lieu thereof, the ITFS operator negotiated an option to obtain access to an equal number of hours on another licensee's ITFS or MDS channel within the same market-wide system.[251]

- In 1995, the Commission further relaxed its requirements by deciding that ITFS operators could fulfill their instructional obligations even if no more than one of their reception sites served an accredited educational institution.[258] In 1996, we authorized ITFS operators to expand their effective channel capacity through the use of digital transmission systems, making it possible to deliver more than a hundred channels over the available bandwidth. In doing so, we declined to

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[253] Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, *Second Report and Order,* 101 F.C.C.2d 50.87 ¶ 95 (1985).

[254] *Id.* at 99-91, ¶¶ 98-106

[255] Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, *Order on Reconsideration,* 6 FCC Rcd 6,764 ¶¶ 51-52 (1991).

[256] Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, *Repon and Order,* 9 FCC Rcd 3,360, 3,365 ¶ 18 (1994).

[257] *Id.* at 3,365 ¶ 20

[258] *Id.* at 2,920 ¶ 75

require a concomitant increase in the hours of educational programming provided by ITFS operators.[259]

- In 1998, the Commission again declined to increase the hours of educational programming offered on **ITFS** stations and further relaxed its requirements in four ways. First, we eliminated the requirement that **ITFS** operators fulfill their minimum educational usage obligations by transmitting such content on their own stations, allowing them the option of transmitting it on other licensees' ITFS or MDS stations.[260] Second, we determined that digital ITFS stations would in most cases be required to use or reserve no more than 5 percent of their transmission capacity for educational programming?' Third, we gave ITFS licensees increased flexibility in determining which transmissions would qualify as satisfying the service's educational usage requirements, to include but not be limited to teacher conferencing, remote test administration, distribution of reports and assignments, research toward and sharing work of progress in projects for courses, professional training, continuing education, and other similar uses.[262] Finally, we declined to impose any educational usage requirements upon digital ITFS response stations or response station hubs, based on the understanding that **ITFS** operators would not be able to control the content of upstream transmissions from end users.[263]

Thus, from 1983 through 1998 we progressively reduced the performance required of ITFS operators while expanding the opportunities for ITFS operators to generate income by leasing out their channels, and we substantially increased MDS operators' access to **ITFS** spectrum.

110. As noted above, in 1987, we provided **MDS** licensees the additional option of electing to provide service and be regulated on a non-common carrier (and non-broadcast) basis.[264] In 1998, we revised our rules to allow both MDS and **ITFS** licensees to construct digital two-way systems capable of providing high-speed, high-capacity broadband service, including two-way Internet service via cellularized communication systems.[265] In 2001, we applied a mobile allocation in the 2500-2690 MHz band.[266] Despite those several decisions removing various restrictions from MDS and ITFS, however, we

[259] ***Digital Modulation Declaratory Ruling and Order,*** 11 FCC Rcd at 18872-18873, ¶ 58.

[260] Amendment ***of*** **Parts 21** and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-way Transmissions, ***Report and Order,*** **13** FCC Rcd 19112, 19166, ¶ 101 (1998).

[261] ***Id.*** at 19159 ¶ 89. The Commission also maintained its longstanding requirement that the ITFS operator transmit at least *20* hours per week of educational programming per 6 MHz channel. ***Id.***

[262] *Id.* at 19154 ¶ 81.

[263] ***Id.*** at 19,155 ¶ 82

[264] Revisions to Part 21 of the Commission's Rules Regarding Multipoint Distribution Service, ***Report and Order,*** 2 FCC Rcd 4,251 (1987). In 1983, we determined that ITFS operators could choose to provide service on either a private or common carrier basis and would be subject to regulation commensurate with their style of operation. ***Allocation R&O***, 94 F.C.C.2d 1203, 1248-1255, ¶¶ 111-129.

[265] Amendment **of** Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-way Transmissions, MM Docket No. 97-217, ***Report and Order,*** **13** FCC Rcd 19,112 (1998). ***recon..*** 14 FCC Rcd 12,764 (1999), *further* ***recon.,*** 15 FCC Rcd 14.566 (2000) (*Two-Way Order).*

[266] ***Mobile Report and Order,*** 16 FCC Rcd **17,222** (2001)

have continued to limit the classes of applicants that are eligible to obtain ITFS licenses

111. In recent years, we have pursued a general policy of eliminating use restrictions in radio licenses except in circumstances where there are clear and compelling reasons for retaining them. The basis for this policy was articulated in the ***Spectrum Policy Statement*** in 2000: if market forces are allowed to operate without being restricted by government, they will tend to push the use of radio licenses to their highest valued applications.[267] Since then, we have applied that policy to broaden eligibility in the Cable Television Relay Service;[268] to establish eligibility for a broad variety of users in the 648-746 MHz band (reclaimed from broadcasters using TV channels 52-59);[269] to establish service rules for the 747-762 MHz and 777-792 MHz bands (reclaimed from broadcasters using TV channels 60-69);[270] to explore the possibility of introducing third generation cellular services in frequency bands previously reserved for traditional forms of cellular, broadband PCS, and SMR, as well as in the 1710-1755 MHz, 1755-1850 MHz, 2110-2150 MHz, 2160-2165 MHz and 2500-2690 MHz bands;[271] and to encourage the development of secondary markets in radio licenses.[272] Before adopting the Spectrum ***Policy Statement,*** the Commission applied a flexible use policy when establishing WCS. In that service, the Commission imposed no eligibility restrictions other than the foreign ownership restrictions set forth in Section 310 of the Communications Act."[273] All of those decisions have occurred since we last reaffirmed our ITFS eligibility policies in 1991.

112. While our general policy toward use restrictions has evolved since 1991, significant events specific to ITFS have occurred that warrant our revisiting whether an eligibility restriction continues to be necessary. Those events include the increased use of **ITFS** spectrum in MDS systems, and the development of alternative means of providing educational content to students. Based on those developments, we believe that it serves the public interest to consider providing both current MDS and ITFS licensees with additional flexibility.

113. Although our rules state that the primary use of ITFS is for educational and cultural development, they allow an ITFS licensee to lease up to ninety-five percent of its channel capacity for non-educational programming.[274] This increased use of ITFS spectrum in connection with MDS systems

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[267] Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets. 15 FCC Rcd 24,178 (2000) (Spectrum Policy Statement).

[268] Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service, ***Report and Order,*** 17 FCC Rcd 9,930 (2002).

[269] ***See*** Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), ***Notice of Proposed Rulemaking,*** 16 FCC Rcd 7,278 (2001).

[270] Service Rules for 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, ***First Repon and Order,*** 15 FCC Rcd 476 (2000).

[271] Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, ***Notice of Proposed Rulemaking and Order,*** 16 FCC Rcd 596 (2001).

[272] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, ***Notice of Proposed Rulemaking,*** 15 FCC Rcd 24,203 (2000).

[273] *WCS R&O*, 12 FCC Rcd 10,785.

[274] 47 C.F.R. § 74.931(d)(1).

through leasing arrangements enabled educational institutions to fund the construction of stations and to develop educational programming. By comparison, our rules require direct broadcast satellite (DBS) licensees to reserve four percent of their channel capacity for use by qualified programmers for noncommercial programming of an educational or informational nature.[275] Thus, while ITFS retains both its historic nomenclature and a codified statement of purpose identifying the transmission of educational programming as its primary purpose, the required amount of educational programming carried on such stations in actuality may barely exceed the minimum proportion required for DBS. We seek comments from other licensees and lessees to determine whether that degree of consolidation is typical of the industry as a whole.

114. We note currently, for example, that the public may obtain educational programming by using the Internet to receive college courses as well as obtaining the services of for-profit corporations that provide educational programming. Education is becoming more popular over the Internet because the Internet's ability to deliver media-rich content is improving rapidly. In 2002, approximately 2.2 million college students took courses over the Internet compared with 710,000 college students in 1998 – a 210% increase.[276] These students chose from over 6,000 online courses delivered by eighty-four percent of four-year colleges and universities.[277] These courses were accessible worldwide on the Internet to a rapidly expanding pool of users with sufficient connections. Already, more than twenty-eight percent of U.S. online households have broadband connections to the Internet; by one estimate, the number of broadband users experienced a nine percent average monthly growth rate between February 2000 and June 2002.[278] On the other hand, some educational institutions, especially those in rural areas and those with less economic resources, do not utilize broadband. We seek comment on what ITFS enables educators to achieve that the Internet could not. What role does educational broadcasting in other bands play? Finally, we seek comment from educators on whether commercial programming is able to fulfill some of these needs. We seek comment on whether continuing to restrict the eligibility for ITFS spectrum is in the public interest or whether maintaining educational responsibilities remains in the public interest.

115. Although we perceive that significant developments have occurred since the last examination of the ITFS eligibility restriction, retention of the restriction could be detrimental to the growth of services on the ITFS channels. The complexity of the contractual relationships that our rules require in the ITFS service may discourage investment and impair the ability of service providers to modify their operations in response to changing technology and market conditions. For example, an MMDS operator who wants to change from providing one-way, high-powered television transmission operations from a single tower to providing two-way Internet access from multiple low-powered base stations, it must gain the consent of the ITFS operators in the market, even though the MMDS operator may already have a leasing agreement with the ITFS licensee. Innovation could proceed more smoothly if commercial operators were able to aggregate spectrum in the 2500-2690 MHz band and purchase ITFS stations, which would allow them to exercise direct ownership control.

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[275] *See* 47 C.F.R. § 100.5.

[276] Jared Bleak, *Educated by the Market: A Researcher's Look at Educational Entrepreneurialism* (Harvard Graduate School of Education, Oct. 5,2001) http://www.gse.harvard.edu/news/features/market10052001.html).

[277] *Id.*

[278] *Broadband Increases Household Penetration, Silicon Valley/San Jose Business Journal,* Nov. 13, 2002, *citing* a Gartner Dataquest survey of 45,000 U.S. households. The article is accessible online at the following World Wide Web address: (http://sanjose.bizjournals.com/sanjose/stories/2002/11/11/daily39.html).

116. In light of these developments, we seek comment on various options relating to the ITFS service. We emphasize that we do not contemplate reclaiming licenses from any incumbent licensees, so long as they comply with any revised technical, service or other rules that we adopt for this band. We realize that if the FCC provides existing ITFS and MDS licensees with greater flexibility, those licensees may capture the increased value given that they could not have paid for that value when they obtained their original license. Accordingly, we seek comment on whether allowing these licensees to capture such value is in the public interest on balance with having this spectrum underutilized? If not, what other approach would parties recommend the FCC implement to ensure efficient use of the MMDS and ITFS spectrum? We request comment on combining the MMDS and ITFS services into a new Broadband Radio Service with requirements similar to those that apply now to MMDS, *i.e.*, open eligibility and no educational programming requirement. Additionally, we seek comment on maintaining ITFS as a separate service requiring educational programming but modifying the eligibility requirements to allow for-profit companies to be eligible licensees. Furthermore, we invite comment on whether or not we should eliminate or otherwise change our existing ITFS instructional content origination rules. We note, for example, that one such change could be to apply to ITFS channels public interest obligations comparable to those that apply to DBS under Section **100.5** of our rules.[279] We also ask commenters to suggest alternative changes to **ITFS** that will result in robust services to the public.[280] We also seek comment on whether data services can meet the ITFS programming requirement. While we note that these educational requirements were developed in a video context, we recognize that data service, i.e., high speed internet data connections may be useful to educational institutions. Moreover, we seek comment on what kind of requirements should be required of ITFS licensees providing data services. We believe that there is a public interest benefit in promoting data services in this context particularly given that they do not consume as much spectrum as video and may be more useful than a minimal amount of video programming. Commenters may also believe that educational requirements for ITFS remains important, and that the Commission should find ways of promoting more use of the spectrum for educational purposes. We also seek comment on requiring a higher percentage of educational use for new ITFS licensees, such as twenty-five percent which was advocated by the ITFS community in the past. Finally we seek comment on other ways the Commission can strengthen the public interest in spectrum-based services for educational institutions?

117. To the extent that commercial or noncommercial MDS or ITFS operators may prefer to continue leasing channel capacity from others, we do not propose to prevent licensees from entering into new lease arrangements. ITFS licensees, to the same extent as MDS licensees, may assign their underlying license rights to commercial lessees or to others. In general, we prefer to let the markets determine the outcome of such arrangements without imposing limits, unless specific reasons justify a contrary policy. As a result, we seek comment on whether there are any circumstances under which we should restrict or require leasing in order to ensure that access to spectrum is not unduly limited.

118. We propose to relieve ITFS operators of the burden of filing copies of every channel lease agreement with the Commission. While the Commission never codified these requirements, they

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[279] *As* noted in para. 113, supra. DBS operators must reserve four percent of their channel capacity for use by qualified programmers for noncommercial programming of an educational or informational nature. ***See*** 41 C.F.R. § 100.5.

[280] Presumably, licensees in the new Broadband Radio Service or **ITFS** licensees under the revised eligibility requirements would be eligible for CARS licenses, as MDS licensees currently are, but **only** to the extent they carry video programming—broadband data **is** not a permissible use for CARS stations.

were enunciated from time to time in various orders.[281] We propose to eliminate such requirements, with the proviso that licensees retain copies of channel lease agreements in their files and make them available to the Commission upon request. We seek comment on these proposals and the utility of retaining the ITFS eligibility restriction.

8. Other Eligibility Restrictions

119. Eligibility issues relevant to this proceeding are addressed in Sections 309(j), 257, and 613(a) of the Telecommunications Act of 1996. When granting the Commission authority in Section 309(j) of the Act to auction wireless spectrum, Congress acknowledged our authority to "[specify] eligibility and other characteristics of such licenses."[282] However, Congress specifically directed the Commission to exercise that authority so as to "promot[e] . . . economic opportunity and competition."[283] Congress also emphasized this pro-competitive policy in Section 257, where it articulated a "national policy" in favor of "vigorous economic competition" and the elimination of barriers to market entry by a new generation of telecommunications providers.[284] Section 613(a) also prohibits a cable operator from holding an MMDS license in any portion of the franchise area served by that cable operator's system.[285] The intent was to encourage entry of alternative providers of multichannel video service into markets dominated by incumbent cable systems in order to spur competition.[286] The cross-ownership restriction addressed Congress' concern that common ownership of different means of video distribution may reduce competition and limit the diversity of voices available to the public.[287] However, Section 613(a) does authorize the Commission to waive the cross-ownership prohibition in order to ensure that all

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[281] *See, e.g., Part 74 Second R&O*, 101 F.C.C.2d at 91 ¶ 105 (existing operators who begin to lease out excess capacity required to submit copies of their leases to the Commission).

[282] *See* 47 U.S.C. § 309(j)(3)

[283] *id.*

[284] *See* 47 U.S.C. § 257.

[285] Section 21.912 of our rules implements Section 613 of the Act. Section 613 of the Act states that: It shall be unlawful for a cable operator to hold a license for multichannel multipoint distribution service, or to offer satellite master antenna television services separate and apart from any franchised cable service in any portion of the franchise area served by that cable operator's cable system. The Commission (1) shall waive the requirements of this paragraph for all existing multichannel multipoint distribution services . . . which are owned by a cable operator on October 5, 1992; (2) may waive the requirements of this paragraph to the extent the Commission determines is necessary to ensure that all significant portions of a franchise area are able to obtain video programming; and (3) shall not apply the requirements of this subsection to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 623(l) (47 U.S.C. § 533(a)). Section 613(a) was added to the Act by Section 11(a) of the 1992 Cable Act (Cable Television Consumer Protection and Competition Act 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act)).

[286] Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal Limitations and Anti-Trafficking Provisions, ***Report and Order and Furthermore Notice of Proposed Rulemaking,*** MM Docket No. 92-264, 8 FCC Rcd 6,828, 6,845 ¶ 121 (1993) *citing* Senate Report 102-92 (1991) at 46 *(Cable R&O).*

[287] ***Cable R&O***, *8* FCC Rcd 6,828, 6841 ¶ 92 *citing* Senate Report 102-92 at 46. The Senate Committee also indicated that such cross-ownership rules were necessary to enhance competition and to further diversity, by preventing cable operators from warehousing spectrum in an attempt to preclude entry by alternative MVPD providers. *id.*

significant portions of the franchise area are able to obtain video programming.[288] In addition, the cross-ownership restriction shall not apply if the cable franchise operates in a geographic area that is subject to "effective competition."[289]

120. When the Cable Act was enacted in 1992, MDS operators were limited to offering television programming to paid subscribers and Congress was concerned with MDS providers' ability to compete with cable. Six years later, the Commission fundamentally changed the nature of the MDS service when it permitted MDS licensees to construct systems capable of providing high-speed, high-capacity broadband service. In light of the legislative history of Section 613 and the change to the MDS service, we seek comment on how this statutory restriction would apply to non-video services, such as broadband service or mobile phone service. In this regard, we note that the Act does not define "multichannel multipoint distribution service" but does define "multichannel video programming distributor" (MVPD) as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase by subscribers or customers, multiple channels of video programming."[290]

121. Under our precedent, eligibility restrictions should be imposed only when (1) there *is* a significant likelihood of substantial competitive harm in specific markets, and, (2) only when eligibility restrictions are an effective way to address such harm.[291] When assessing the need to restrict the opportunity of any class of service provider to obtain spectrum for the provision of communications services, our overall goal has been to determine whether the restriction is necessary to ensure that consumers will receive communications services in a spectrum-efficient manner and at reasonable prices.[292] Consequently, we believe we should rely on competitive market forces to guide license assignment absent a compelling showing that regulatory intervention to exclude potential participants is necessary. In order to determine the competitiveness of a market, there must be an examination of market concentration in addition to other relevant market facts and circumstances. Also important in determining the competitiveness of a given market are the economic incentives for entry into a market,

[288] *Id.* at 6841 ¶ 93 *citing* 47 U.S.C. § 533(c)(2)(B)

[289] 47 U.S.C. § 533(a). See 47 U.S.C. § 543(l). Section 623(l) of the Communication's Act defines "effective competition" as: A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; B) the franchise area is served by a minimum of two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least fifty percent of the households in the franchise area and the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds fifteen percent of the households in the franchise area; C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least fifty percent of the households in that franchise area; or D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programing services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

[290] 47 U.S.C. § 522(13)

[291] *See 39 GHz Report and* Order, 12 FCC Rcd at 18637 ¶ 79.

[292] *See* 47 U.S.C. § 151.

the existence of potential competitors, and the existence of barriers to entry.[293] According to the Department of Justice Merger Guidelines, a market is competitive if, in response to a price increase or quality decrease by the incumbents, "...entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."[294]

122. Based on our preliminary analysis, we do not believe it likely in most cases that cable operators and/or DBS providers would have the incentive to acquire MDS/ITFS licenses in order to foreclose entry by a wireless MVPD provider. New MDS licensees are very unlikely to be entrants into the MVPD market for reasons discussed earlier in the ***NPRM & MO&O***. This conclusion is based upon the fact that the current MDS video providers have been unable to penetrate the vast majority of markets within the United States. Overall, the service has proven to be unsuccessful and at the moment is not a viable alternative to cable and DBS. We request comment on whether opening up eligibility to cable providers would have a significant effect on concentration in video markets.

123. Although we anticipate that this spectrum will be largely used as a mobile voice and data service, the most relevant issue may be whether or not open eligibility for cable operators would have a negative impact on the broadband internet market. Industry analysts estimated that in the Fall of 2001 approximately 68% of residential broadband subscribers used cable modem service, 29% used Digital Subscriber Line (DSL) service, and about 3% used various radio-based technologies.[295] Industry analysts also estimated that in the second quarter of 2002. approximately 66% of the total cable and DSL subscribers were cable subscribers and about 34% were DSL subscribers.[296] Our own data indicate that 57% of high speed lines (connection to an end-user that is faster than 200 kbps in at least one direction) in service are cable lines, 31% are Asymmetric Digital Subscriber Line (ADSL) lines, and 11% are operated by other fringe competitors (other wireline, fiber, satellite, or fixed).[297] In addition, 36% of high-speed lines are provided by a Regional Bell Operating Company (RBOC) or other Incumbent Local Exchange Carrier (ILEC), 56% of high-speed lines are provided by cable (non-ILEC), and 7% are provided by other non-ILEC.[298] If we assume that a typical market consists of the incumbent service provider, one cable provider, and one other non-ILEC. and assume that the above numbers can be used to represent a typical market, the Herfindahl-Hirschman Index (HHI) is approximately 4500.[299] If we don't allow for an additional non-ILEC and again assuming that the national numbers of ILEC/RBOC and cable non-ILEC can be used to calculate market shares representative of a typical local broadband

[293] Rule Making 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 Services and for Fixed Satellite Services, ***Third Order on Reconsideration.*** 13 FCC Rcd 4856, 4861¶ 7, 4863¶ 12 (1998).

[294] 1992 Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, p. 25

[295] ***Declaratory Ruling,*** 17 FCC Rcd at 4804.

[296] http://www.cabledatacomnews.com/cmic/cmic16.html (visited Feb. 5, 2002)

[297] Figures derived from Table 1 of "High Speed Services for Internet Access: Status as of June 30,2002," Industry Analysis and Technology Division, Wireline Competition Bureau, Dec. 2002.

[298] High Speed Services for Internet Access: Status as of June 30, 2002, Industry Analysis and Technology Division, Wireline Competition Bureau, Dec. 2002, Table 5.

[299] Note that we do not have the data necessary to explicitly delineate the relevant product and geographic markets but believe that this analysis can give us a general idea of likely concentration levels.

market, the HHI ranges between approximately 5000 and 5400. The above figures indicate that the typical broadband internet market is very highly concentrated. We request comment on this analysis and any evidence to the contrary. Commenters also should identify and discuss any regional differences and/or differences between urban and rural areas that impact such analysis.

124. We note that broadband market shares **for** residential and small business markets are quite different from those of medium and large size business markets. **As** of June 30, 2002, national high-speed residential and small business lines consisted of 65% cable lines, 31% ADSL lines, and 3% other.'" Business (medium and large size) lines consisted of 1% cable lines, 32% ADSL lines, 43% other wireline, 23% fiber, and 1% satellite or fixed wireless.[301] In addition, 31% of residential and small business high-speed lines are provided by a RBOC or other ILEC, 65% are provided by cable (non-ILEC), and **4%** are provided by other non-ILEC on a national basis. Seventy-two percent of business (medium and large size) high-speed lines are provided by a RBOC or other ILEC, and **28%** are provided by non-ILECs. We note that cable seems to play a very insignificant role in the business market. If we assume that a typical residential (and small business) market consists of the ILEC provider, one cable provider, and one other non-ILEC, and assume that the national figures can be used to represent a typical local market, the HHI is approximately 5200. If we don't allow for an additional non-ILEC and again assuming that the national numbers of ILEC/RBOC and cable non-ILEC can be used to calculate market shares representative of a typical local broadband market, the HHI ranges between approximately 5500 and 5800. We note that the residential numbers indicate that the markets are more concentrated than the total numbers indicate. If we assume that a typical business (medium and large size) market consists of the incumbent service provider and one other non-ILEC, the HHI is approximately 6000. Markets in which the non-ILEC plays a very insignificant role are essentially monopolies and the HHI can approach 10,000. As the national market share **for** the non-ILEC (excluding cable) for the business market is quite a bit higher than **for** the residential market, we request comment as to whether there is likely to be more than one non-cable, non-ILEC provider in a typical broadband business market.

125. Although the typical broadband internet market is highly concentrated, in some circumstances there could be substantial benefits to allowing the incumbent cable or DSL operator to have more access to the MDS/ITFS spectrum. For example, in situations where expensive plant upgrades are not feasible, DSL service providers may be able to use spectrum to offer broadband internet service to customers who live in rural areas or beyond distance limitations from the central office. In addition, rural cable operators may be able to offer broadband internet service by using the spectrum to expand channel capacity (note that there are areas of the country that do not have access to DSL or cable modem service.[302] We note that Section 613(a) allows the Commission to waive the cable/MMDS cross-

[300] The market shares do not sum to one due to rounding. The data consists of information gathered from qualifying service providers who must submit FCC Form **477** on a biannual basis.

[301] The mutually exclusive types of technology are, respectively: Asymmetric digital subscriber line (ADSL) technologies, which provide speeds in one direction greater than speeds in the other direction; wireline technologies "other" than ADSL, including traditional telephone company high-speed services and symmetric DSL services that provide equivalent functionality; coaxial cable, including the typical hybrid fiber-coax (HFC) architecture of upgraded cable TV systems; optical fiber to the subscriber's premises (e.g., Fiber-to-the-Home. or FTTH); and satellite and (terrestrial) fixed wireless systems, which use radio spectrum to communicate with a radio transmitter at the subscriber's premises.

[302] For example, there are residences and businesses in Jacksonville, FL that have neither access to DSL nor cable modem service. Wireless Communications Association Bulletin, "Clearwire Launches Next-Gen ITFS Service In Jacksonville," Jan. 9,2003, p. 3.

ownership restriction to ensure that all significant portions of a franchise area are able to obtain video programming. If eligibility restrictions were to be implemented, competition in the broadband internet markets could be enhanced through the use of such a waiver.

126. Given the above analysis we request comment on whether allowing incumbent cable operators and/or DSL providers to be eligible to obtain MDS/ITFS licenses could have a negative impact in some broadband internet markets. If the incumbent cable and DSL operators believe that purchasing unlicensed spectrum at auction would have the effect of precluding current as well as future entry, they may purchase spectrum in an attempt to protect their market power. We request comment on this analysis and specific evidence, including the relevant market shares, for any local broadband internet market that may be negatively affected by allowing open eligibility to incumbent cable operators and/or DSL providers. We also request comment on the impact of an eligibility restriction on rural and underserved areas and whether eligibility waivers would be effective in allowing growth in these areas. When providing market share information, we request that commenters define the relevant geographic and product markets from which the market share information **is** derived. In addition, we request comment **on** the likelihood of future entry of wireless broadband internet service providers, assuming that they are not able to purchase the unlicensed lTFS spectrum. That is, are there substantial barriers to entry posed by the limited availability of spectrum?

127. As discussed earlier in the ***NPRM*** & MO&O, the proposed band restructuring will make mobile service a viable option in the MDS/ITFS hand. Therefore, the effect of open eligibility on the mobile voice and data markets also needs to be considered. The Commission decided last year to "sunset" the CMRS spectrum aggregation limit, or "spectrum **cap**,"[303] effective January 1, 2003.[304] The Commission found that the cap, by setting an ***a priori*** limit on spectrum aggregation without looking at the particular circumstances of specific proposed transactions, was unnecessarily inflexible and could be preventing beneficial arrangements that promote efficiency without undermining competition. However, the Commission also stated that the Commission would continue to pursue the objectives of "discourag[ing] anticompetitive behavior while at the same time maintaining incentives for innovation and **efficiency**,"[305] but would do so by performing case-by-case reviews of proposed CMRS spectrum transactions rather than by applying a prophylactic rule.'" And, as is most relevant here, the Commission found that "to the extent that the initial distribution of spectrum through auction is an issue in the future, that is also amenable to case-by-case review, in the sense that [the Commission] can shape the initial distribution through the service rules adopted with respect to specific auctions."[306][307]

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[303] ***See*** 47 C.F.R. § 20.6.

[304] ***See*** 2000 Biennial Regulatory Review: Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, ***Report and Order,*** 16 FCC Rcd 22,668 (2001) ***(Spectrum Cap Order), recon. pending.***

[305] ***Spectrum Cap Order,*** 16 FCC Rcd at 22,679 ¶ 26 n.71 ***(citing*** Implementation of Sections 3(n) and 332 of the Communications Act—Regulatory Treatment of Mobile Services, GN Docket No. 93-252, ***Third Report and Order,*** 9 FCC Rcd 7,988, 8,105 ¶ 251 (1993)).

[306] "[I]n light of the growth of both competition and consumer demand in CMRS markets, we conclude that case-by-case review, accompanied by enforcement of sanctions in cases of misconduct, is now preferable to the spectrum cap rule because it gives the Commission flexibility to reach the appropriate decision in each case, on the basis of the particular circumstances of that case." ***Spectrum Cap Order,*** 16 FCC Rcd at 22,693-94 ¶ 50.

[307] ***Id.*** at 22,696 ¶ 54.

128. Given the current state of competition in the CMRS industry, we believe that such restrictions are not necessary for the 2500-2690 MHz band. To the contrary, does opening this band to as wide a range of applicants as possible encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure efficient use of this spectrum? **Is** this approach consistent with our statutory mandates? We seek comment on these questions.

129. In sum, we seek comment on whether eligibility restrictions over and above those required by statute are necessary in the 2500-2690 MHz band. We seek comment **on** whether opening these bands to as wide a range of applicants as possible would encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure efficient use of this spectrum. To the extent any potential and substantial harms to competition are raised, we seek comment on whether the most effective means for addressing such allegations would be through a case-by-case review, taking into account all of the fact and circumstances.

E. Technical Issues

130. In the preceding section, we addressed band plan reconfigurations, geographic area licensing and eligibility issues. In this section, we address technical proposals to enhance the service. We ask for comments on these issues as well as suggestions concerning other technical rule changes that may be of benefit to the Services.

1. Signal Strength Limits at Geographic Service Area Boundaries

131. We seek comment on the signal strength limits to apply at geographic area boundaries. Last year, for example, we reallocated forty-eight megahertz in the lower **700** MHz band (broadcast television channels 52-59) to fixed and mobile services while allowing continued provision of broadcast services in the band on a secondary basis, and limited the permissible signal strength at service area boundaries to **40** dBμV/m, the same signal strength limit that we had adopted earlier for the upper 700 MHz hand and the 800-MHz EA-based and 900-MHz MTA-based SMR services.[308] By comparison, our rules apply a somewhat higher **47** dBμV/m limit at the geographic service area boundaries for broadband PCS,[309] for Part 27 services in the 2305-2320 and 2345-2360 MHz bands, and for Part **27** services in the 1390-1395 and 1432-1435 MHz bands."[310] In all of those cases, the allowed signal strengths are compatible with the provision of low-powered cellular services in adjacent service areas. We are tentatively inclined to follow the same general standard in this proceeding but seek comments on any unique characteristics of the 2500-2690 MHz band that might warrant a different approach.

2. Authorization of Mobile Operation

132. Although we have applied a mobile allocation to the 2500-2690 MHz band, until now we have required MDS and ITFS licensees to obtain separate authorizations before commencing mobile service. We propose to authorize MDS and **ITFS** licensees to engage in mobile operation by blanket-licensing such operation under those licensees' geographic service area authorizations. We seek comment on the advisability of such blanket licenses and any requirements they should contain, including but not limited to those discussed above and below.

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[308] ***See Lower*** 700 ***MHz Band R&O***, 17 FCC Rcd at **1.070**¶ 119. This limit is codified **at 47** C.F.R. § 27.55(a)(2)

[309] **47** C.F.R. § **24.236.**

[310] **47 C.F.R.** § 27.55(a)(1) and **(3).**

3. Power and Antenna Height Limits

133. ***Response*** *Stations.* Under **our** current rules, we limit response stations to a transmitter output power of *2* watts.[311] This is the same requirement that we have for broadband PCS mobile/portable operation in the 1.9 GHz band."[312] However, the Coalition notes that we adopted the 2-watt limit in the *Two-Way* ***Order*** without any explanation and urges that we delete this power limit.[313] It says that the limit unduly restricts the flexibility of equipment designers to make the most efficient use of the 2.1 and 2.5 GHz bands. The Coalition emphasizes, however, that it is not advocating any change in the restrictions on power contained in Parts 1 and 2 that are designed to assure the protection of human health and safety; in fact, it recommends that we clarify that those limits apply to MDS and ITFS by adding those services to the list of services specifically shown as being subject to the rules.[314]

134. While the 2-watt limit on PCS response stations seemed like a reasonable model to follow when we adopted a similar rule for **MDS** and ITFS, the record of the PCS proceeding indicates that the 2-watt limit was originally designed to reduce the likelihood of interference with fixed microwave stations in the PCS bands."[315] We seek comment on the extent to which similar concerns should apply for MDS and ITFS, bearing in mind the differences between the incumbent licensees in the MDS/ITFS bands – and their circumstances – as compared with the incumbent licensees in the PCS band. While compliance with our safety rules may by itself necessitate compliance with a 2-watt limit for devices that are normally held close to the user's body, those rules allow higher power levels in circumstances where the response station's transmission antenna is designed to be used at least twenty centimeters away from the body of the user or any nearby *persons.*[316]

135. Finally, we seek comment on whether we should establish a maximum antenna height for response stations in view of our proposal to blanket-license such stations. While mobile or portable stations would typically be close enough to the ground that they would be shielded by nearby structures, the rules that we contemplate adopting for these services would also permit the deployment of response stations at fixed locations, where they could be attached to antennas at high elevations. Such transmitters would have a greater potential for generating unwanted electrical interference. We seek comment on whether or not the signal strength limits that we propose to apply at geographic service area boundaries would obviate the need for antenna height limits.

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[311] See 47 C.F.R. §§ 21.909(g)(2) and 74.939(g)(2)

[312] ***See*** 47 C.F.R. § 24.232

[313] Coalition Proposal at 25.

[314] ***Id.*** at 26.

[315] Amendment of the Commission's Rules to Establish New Personal Communications Services. ***Second Report and Order, 8*** FCC Rcd 7,700, 7,764-7,765 ¶ 156 (1993).

[316] At frequencies above **1.5** GHz, mobile devices whose effective radiated power (ERP) is less than **3** watts are not required to undergo even routine environmental evaluation **for** radio frequency exposure prior to equipment authorization or use. 47 C.F.R. § 2.1091. A mobile device is defined for this purpose **as** "a transmitting device designed to be used in other than fixed locations and to generally be used in such a **way** that a separation distance **of** at least *20* centimeters is normally maintained between the transmitter's radiating structure(s) and the body of the user or nearby person." *Id.* Units designed to be used within twenty centimeters of a person are defined as "portable devices" and are subject to more stringent requirements. 47 C.F.R. § 2.1093.

136. ***Base/Main Stations.*** We note that there is no specific power limit specified for low power base stations nor are there base station transmitting antenna height limits for operating in this band. In view of **our** proposals above to limit power at other licensees' border areas, we ask for comment on whether there would be any benefit to establishing base station power and antenna height limits.

137. In particular, we seek comment upon a Coalition proposal to create incentives, but not an absolute requirement, for licensees to limit the height of low power base stations near their **GSA** borders.'" The Coalition expresses concern that a 47 $dB\mu V/m$ signal strength limit at GSA boundaries might not provide sufficient protection against interference to base station receivers. The scenario that causes them the most concern would arise when the interfering licensee is using a channel for downstream communications from its base stations, and the interfered-with licensee in a contiguous GSA is using the same channel for upstream communications to its base stations. Under these circumstances, the Coalition would have **us** apply a safe-harbor requirement that both licensees limit their antenna heights to $D^2/17$, where D is the distance in kilometers between the base station causing the interference and the point where a line connecting the transmitting base station with the neighboring receiving base station intersects the boundary between their respective GSAs. Antenna height for this purpose would be defined as the height in meters of the antenna's centerline above the average elevation along the line between the two base stations.[318] If a transmitting licensee's antenna is not within the safe-harbor height limit and the receiving licensee's antenna is within the safe harbor, the transmitting operator would he required to take such measures as are necessary to limit the level of the undesired signal at the receiving base station to -107 dBm **or** less.[319]

138. By comparison with the Coalition's recommendations, our Broadband PCS rules do not impose any direct limit on antenna heights, but they apply a graduated reduction in permissible e.i.r.p. output for base station antennas that are more than **300** meters in height.'" On first impression, the Coalition's proposal appears to lack certainty, insofar as the requirements imposed upon a licensee would be dependent upon actions taken by a neighboring licensee. However, a licensee could ensure its compliance with the recommended safe harbor, regardless of any future actions taken by the neighboring licensee, by drawing a line intersecting the nearest point on the GSA boundary and assuming that the other licensee might someday site a base station somewhere on that line. The recommended formula could then be applied to determine the maximum safe-harbor height for any given distance from the boundary. The safe harbor distance formula proposed by the Coalition does not adversely affect the typical 2-5 mile antenna service distance and 150' to 300' height above average terrain (HAAT) of base stations in low- power cellular networks. Although it seems to have a minimal effect on typical base station design, it is unclear how the coalition arrived at the formula itself. **Is** the formula really necessary? **Is** the formula "technology agnostic"?

139. In addition, given our licensing approach discussed herein, we seek comment on whether there is a need to reduce the maximum power permitted for high-powered video operations.[321] Finally, we request comment on the Coalition's proposal to eliminate the limitation pertaining to the use of digital

[311] **See** Second Supplement to the Coalition Proposal at **3-7,** filed Feb. **7.2003.**

[318] ***Id.*** at 5

[319] ***Id.*** at 6.

[320] **41** C.F.R. § **24.232(a).**

[321] **See 41** C.F.R. **\$74.935**

modulations with non-uniform spectral densities, i.e., the uneven or random distribution **of** energy throughout the specified spectrum .[322]

4. Emission Limits

140. The purpose of emission limits. also known as emission masks, is to provide protection against adjacent channel interference (*e.g.*, restrict transmitter emissions on a range of frequencies removed from the licensee's assigned frequency or frequency band). The current rules governing emission limits for MDS and ITFS are set forth in Section 21.905 and 74.936, respectively. The current rules are based, however, on high power video operation and vary slightly between the services. **As** discussed herein, MDS licenses have indicated an interest to use this band for **low** power two-way operations. Further, we are proposing rules for mobile operation in this band. Consequently, we believe that modification of the rules governing out-of-band emissions may be necessary.

141. The Coalition recommends that we require equipment on the LBS and **UBS** channels (both base stations and stations at a customer's premise) to attenuate the power below the transmitter power (P) by at least $43 + 10\log_{10}(P)$ dB on any frequency outside a licensee's authorized spectrum.[323] This recommendation is the same as the general emission mask the Commission adopted for operations in both the upper and lower 700 MHz band.[324] For the R channels the Coalition suggests requiring an attenuation of at least $80 + 10\log_{10}(P)$ dB. The Coalition also asserts that additional attenuation may be required in special circumstances. For example, the Coalition states that the rules be changed to require a licensee to take steps to attenuate out-of-band emissions by at least $67 + 10\log_{10}(P)$ dB upon written request from an adjacent channel licensee.[325] Requiring a licensee to reduce its out-of-band emissions at the request of an adjacent channel licensee, however, is not something we have done in the past. The Coalition also outlines a more restrictive mask **for** protecting operations on the MBS channels[326] and for licensees of MBS channels to protect operations on LBS and **UBS** channels.[327] Our initial observation here is that adopting all the Coalition's recommendations would be inconsistent with our attempt herein

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[322] ***See*** Coalition Proposal at 25 n.70

[323] Coalition Proposal at **29.**

[324] ***Lower 700 MHz Band*** *R&O*, 17 FCC Rcd at 1,070¶ **122**

[325] According to the Coalition's Proposal, the written request must include a certification from the requesting licensee that it intends to initiate service on the affected adjacent channel group at a date certain (not more than one year after the date of the written request), and that the additional attenuation is required due to the respective technical characteristics of the requesting licensee's planned facilities and those of the party receiving the request. The requesting licensee must also include in the written request currently available information regarding its planned network design comparable in scope to the information required to be filed upon completion of the construction **of** its facilities. ***See*** Coalition Proposal at 29.

[326] The Coalition states "[i]n addition to the other requirements imposed on out-of-band emissions by stations operating outside the MBS, the licensee of any transmitter operating in the LBS, UBS, I, J, or K channels shall manage its out-of-band emissions such that the noise power introduced into an MBS channel does not exceed an EIRP of -37 dBm without the consent of the affected MBS channel licensee. Notwithstanding the foregoing, if the licensee of a channel outside the MBS digitizes a channel within the MBS, the noise power introduced into that channel of the MBS shall not exceed an EIRP of -20 dBm without the consent of the affected **MBS** channel licensee." ***See*** Coalition Proposal at 30.

[327] ***See*** Coalition Proposal at 16, nn.39, 41.

to simplify the rules governing this band (*e.g.*, minimize harmful interference without establishing overly burdensome requirements). Nevertheless, we seek comment on whether we should adopt the Coalition's recommendations concerning out-of-band emissions or different criteria and details on measurement procedures to determine compliance.[328] Further, we seek comment on the appropriate emission mask for mobile operations. In that regard, we note that we recently adopted out of band emission requirements to ancillary terrestrial component (ATC) mobile units in the 2000-2020 MHz band in order to protect adjacent channel PCS operations.[329] Since Mobile Satellite Service (MSS) and ATC units will be operating in the band immediately below 2500 MHz, we seek comment on whether similar limits should apply. We also seek comment on whether any special rules are needed to protect the Earth Exploration Satellite (passive), Radio Astronomy, and Space Research allocations in the 2690-2700 MHz band.[330] Finally, we request comment on whether we should specify a frequency tolerance or require equipment to maintain its operations fully within the emission mask at all times.

5. Technology

142. The Coalition states that we should not restrict operation in this band to a particular technology or technologies and our **rules** should remain technology-neutral to the maximum extent possible."[331] However, it does mention second-generation equipment employing two different technologies – FDD and TDD. The Coalition notes that FDD technology requires a separation between the highest frequency used **in** one direction and the lowest frequency used in the other direction.[332] To allow for FDD technology, the Coalition proposes that when this technology is employed by a licensee, the **LBS** be restricted to subscriber-to-base (upstream) communications and the UBS be restricted to base-to-subscriber (downstream communications).[333] According to the Coalition, this framework will simplify adjacent channel coordination and provide the vendor community with a degree of certainty as to the band usage that will translate into lower equipment costs and smaller equipment. We seek comment on whether we should specify upstream and downstream channels in the rules should licensees **use** FDD or a similar technology. We also ask for comment on whether we should establish formal channel pairings to standardize the separation between channels used in upstream and downstream equipment.[334] In addition, we ask for comment on what role software defined radio technology can play

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[328] For example, the Coalition suggests that we measure out-of-band emissions at the outermost edges of the combined channels where two or more contiguous channels are employed in the same system. ***See*** Coalition Proposal at 29 n.79. ***See also*** Coalition Proposal at **30** n.81.

[329] 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 Bands, IB Docket No. 01-185, ***Report and Order and Notice of Proposed Rulemaking,*** FCC 03-15 (rel. Feb. 10,2003) at ¶ 119.

[330] ***See*** 41 C.F.R. § 2.106 n.US246

[331] Coalition Proposal at 11 and 15

[332] The Coalition points out that the Commission's ***Interim Report*** stated that a separation of at least **30** megahertz between upstream (customer to base) and downstream (base to customer) transmissions **is** needed to provide sufficientisolation of signals in the duplexer. ***See*** Coalition Proposal at 16. ***See also*** **Interim *Report*** at 54.

[333] Coalition Proposal at 16

[334] In raising these questions, we recognize that the Coalition Proposal does not provide for formal pairings of channels but that. as the Coalition notes, operators could choose *to* pair channel groups that are sufficiently separated to allow upstream and downstream **FDD** communications. ***See*** Coalition Proposal at 15, n.40.

here in resolving potential problems. Finally, we ask for comment on whether the Commission should adopt standards for mobile operation to promote interoperability and roaming.

6. Unlicensed "Underlay" Operation

143. As noted previously, one of the underlying goals of this proceeding is to promote increased access to spectrum. In this regard, we note that Intel and Microsoft advocate that we create or at least preserve the opportunity to create unlicensed "underlay" rights for very low-powered devices on these channels.[335] Recently, we issued a ***Notice*** of ***Inquiry*** concerning making additional spectrum available for use by unlicensed devices in the television bands and in the 3650-3700 MHz band.'"[336] In the ***Unlicensed NOI***, we noted that there have been significant advances in technology that that may make it feasible to design new types of unlicensed equipment that would not cause interference to existing services.[337] For example, equipment could be designed that could monitor spectrum before transmitting to avoid interference, or equipment could be designed that could use the Global Positioning System to know where it is located and determine whether there are licensed operators in the area.[338] We also noted that allowing unlicensed operation with minimal technical requirements could potentially permit the development of new and innovative types of devices, such as new wireless data networks.[339]

144. The proximity of the 2500-2690 MHz band to successful unlicensed technologies in the 2.4 GHz band, and our goal of increasing the intensiveness and efficiency of use of the 2500-2655 MHz band, suggests that it may be appropriate to consider enhancing unlicensed use in the that band on a secondary, non-interference basis.[340] While we recognize that unlicensed operations under our Part 15 rules are subject to the condition that the transmitter does not cause interference to authorized services, we nonetheless are mindful in this context that additional measures may be necessary to ensure that unlicensed operations do not cause interference to existing, licensed operations. In that regard, we note that WCA believes that Microsoft's and Intel's proposal is premature. WCA contends that the necessary technology for mass producing affordable devices capable of measuring and reliably adapting to the presence of background noise or "interference temperature" has not been demonstrated.[341]

145. As we observed in the ***Unlicensed NOI***, allowing unlicensed devices to operate on spectrum that is not being utilized in a particular area would be a more efficient use of spectrum.[342] We seek comment on possible revisions to our rules to enhance unlicensed operations in the 2500-2690 MHz band. Are equipment economies possible between the 2.4 GHz band and the 2.5 GHz band for

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[335] Intel Reply Comments in RM-10586, at 5; Microsoft Reply Comments in RM-10586, at 3-4.

[336] Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, ET Docket No. 02-380, Notice of Inquiry, 17 FCC Rcd 25,632. (2002) ***("Unlicensed NOI")***

[337] Id. ¶ 13.

[338] Id

[339] ***Id.*** ¶ 21.

[340] We also seek comment on a proposal to allow unlicensed operation on a primary basis for unassigned **ITFS** spectrum. See ***paras.*** 79-82, supra.

[341] WCA Comments in ET Docket No. 02-135, at 10.

[342] Unlicensed ***NOI,*** ¶ 14.

unlicensed operators? What Part 15 rules would need to he changed in order to allow enhanced unlicensed operation? Could we permit power levels greater than I watt for such operations without causing harmful interference to authorized MDS and ITFS users? If so, we seek comment on the maximum permissible power level. Would any restrictions on antenna gain or directivity he necessary? What other requirements would he necessary to protect existing MDS and ITFS users? Is unlicensed use appropriate for any of the hand plans we mentioned earlier?[343] If we create high-power and low-power sections of the band, should we permit unlicensed use in one section of the band but not the other?

146. We seek comment on the extent to which underlay rights would have practical utility if they were made available on a less-than-nationwide basis. Is it feasible to manufacture affordable transceivers that are capable of using underlay rights where and only where such access is offered, if some but not all licensees on a given channel allow underlay access? If not, what kinds of institutional frameworks could facilitate national aggregation and sale of underlay rights? If a licensee or a group of licensees were willing to sell such rights, what kinds of entities would be likely purchasers? To make such transactions feasible, would it be necessary for the Commission to issue separate licenses for underlay rights, or would it suffice for the primary licensees to commit themselves contractually to refrain from seeking enforcement of interference protection from underlay users? If companies like Intel or Microsoft were willing to consider paying licensees to allow underlay operation on their channels, would the vendors seek to restrict underlay operation to their own customers, or would it suffice, from their perspective, if licensees were to allow underlay operation by anyone on their channels?

147. In addition, we note that Part 15 transmitters may not operate in certain restricted bands. including 2655-2690 MHz.[344] Are there any circumstances under which unlicensed operation could he allowed in the 2655-2690 MHz hand without adversely affecting passive sensing operations in the 2655-2700 MHz hand?

148. We also seek comment on what rules might provide incentives for licensees to offer access to devices operating above Part 15 power limits either through secondary markets or an "easment" basis. Although our first choice is that licensees make available these rights via commercial transactions, we recognize that in many cases transaction costs may he too high to enable efficient transactions, and that in some cases licensees may refrain from entering into such transactions to preclude potential competitors. We seek comment on whether high transaction costs or anti-competitive motivations will hinder such transactions.

7. RF Safety

149. The Coalition states that to implement its proposed approach, we should amend our RF emissions rules. More specifically, the Coalition contends that we should amend Sections 1.1307(b)(2), 2.1091(c) and 2.1093(c)[345] to include MDS and ITFS services.[346] The Commission considers RF safety

[343] *See paras.79-82, supra.*

[344] 47 C.F.R. § 15.205.

[345] *See* 47 C.F.R. §§ 1.1307(b)(2), 2.1091(c) and 2.1093(c).

[346] *See* Coalition Proposal at 20, n.51 and 26.

procedures to be essential in protecting human beings from excessive exposure to RF energy.[347] Accordingly, we seek comment on whether and how we should amend the RF safety rules.

8. North American Datum (NAD) 83 Coordinate Data

150. The Coalition notes that our rules require the submission of different coordinate data for licensing actions. Applicants submit coordinate data in NAD83 for applications filed on FCC Form 331 but in NAD27 for all other MDS/ITFS forms. The Coalition asks that we require applicants to use NAD83 coordinate data and update or convert the current database.[348] As stated above, we propose to process applications using the ULS. We require NAD83 coordinate data for applications filed under ULS. Accordingly, we propose to require all licensees to file coordinate data using NAD83 and propose to convert existing data to NAD83. We seek comment on these proposals.[349]

9. MDS Response Station Hubs

151. Our existing rules treat hubs like main stations for application processing purposes. For instance, whereas 47 C.F.R. Section 1.1104 contains a special section on the application fee for signal booster applications and for signal booster certification of completion of construction applications ($70.00 in each instance), the rules do not differentiate between requirements for main station applications and certifications and response station hub applications and certifications. At present, the fee for a response station hub on a Form 331 is $210.00, and the fee for the Form 304A is $610.00.[350] Section 21.909 states that an MDS response station huh application must be filed on a Form 331. Licensees of MDS response station hubs must also file a certification of completion of construction application.[351] Response station hubs, signal booster stations and R channels are considered stand-alone stations, and thus have unique facility ID numbers separate from the associated main stations.[352] However, at this time, only signal booster stations are designated for special treatment in the application fee schedule. We do not believe that certifications of completion of construction of two-way hubs will be necessary under the GSA licensing approach that we propose, and therefore propose to eliminate such filing requirements.

10. 2150-2162 MHz baud

152. In the ***Third Report and Order,*** the Commission addressed relocation issues for the MDS channels in the 2150-2162 band. We stated that MDS incumbents would be entitled to comparable facilities and/or adequate replacement spectrum. The Commission noted that "our relocation policies do

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[347] The existing requirements are located in 47 C.F.R. §§ 1.1307(b), 1.1310, 2.1091 and 2.1093

[348] Coalition Proposal at 56

[349] With regard to the Coalition's request to convert the database. we note that the Wireless Bureau has asked MDS and ITFS licensees to review their license data, including coordinate data, to determine if it is correct. ***See*** Wireless Telecommunications Bureau Seeks to Verify ITFS. MDS and MMDS License Status and Pending Applications, ***Public Notice,*** DA 02-2751, released Oct. 18. 2002.

[350] *See* 47 C.F.R. §§ 1.1104 and 21.909(c)(1).

[351] 47 C.F.R. § 21.909(h)(i)(2).

[352] ***See Public Notice,*** Mass Media Bureau Multipoint Distribution Service and Instructional Television Fixed Service Applications Tendered For Filing, Report No. 148, (Nov. 29,2000).

not dictate that systems be relocated to the same amount of spectrum as they currently use. only that comparable facilities be provided."'' We further concluded that "[g]iven advances in technology, *e.g.*, changing from analog to digital modulation and the flexibility provided by our existing relocation procedures to make incumbents' whole, we believe that current MDS operations could be accommodated using substantially less spectrum than that of the existing 2150-2160/62 MHz allocation." We then sought comment on how much spectrum was necessary for MDS relocation. The Commission further noted "under **our** relocation policies only stations with primary status are entitled to relocation."[354]

153. In light of the fact that we do not yet know where MDS licensees operating on Channels 1 and 2 (or 2A) will be relocated, we will not propose changes to service rules for those channels at this time. Depending on the relocated spectrum that MDS licensees receive, additional technical rules may be necessary to accommodate the technical characteristics of that spectrum. Once relocation spectrum for these MDS licensees has been identified, we will issue a further notice of proposed rulemaking in this proceeding seeking comment on service rules for relocated licensees.

11. Radiation from Stations that are Not Engaged in Communications

154. On September 25, 1998, the Commission amended its rules to allow MDS and **ITFS** licensees to provide a wide range of high-speed, two-way services to a variety of users.[355] On July 29, 1999, the Commission made some additional rule modifications to facilitate the provision of these services.[356] On December 22, 1999, IPWireless, Inc. (IPWireless) requested reconsideration of the Commission's out-of-band emission limitations.[357] On February 10, 2000, the group of over 100 wireless communications system operators, Commission licensees, equipment manufacturers and consultants who were parties to the Petition for Rulemaking that commenced the ***Two-Way Proceeding*** (collectively, Petitioners) did not oppose IPWireless' petition, but sought clarification of Sections 21.909(m) and 74.939(o) of our Rules.[358] The Petitioners indicated that there was some uncertainty within the industry

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[353] ***See*** Amendment of Part 2 of the Commission'sRules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ***Third Report and Order, Third Notice of Proposed Rulemaking, and Second Memorandum Opinion and Order,*** ET Docket No. 00-258, FCC 03-16, ¶72 (2003) ***(AWS Third R&O, Third NPRM, and Second MO&O).***

[354] In 1992, when the 2160-2165 MHz band was reallocated to emerging technologies, the Commission implemented a policy by which incumbent MDS licensees that were using the 2160-2162 MHz hand would continue such **use** on a primary basis. ***See*** Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ***First Repon and Order and Third Notice of Proposed Rule Making,*** 7 FCC Rcd 6886, 6889 ¶17 (1992). However, any MDS station that applied for use of this band after January 16, 1992 would be granted only on a secondary basis to emerging technology **use.** ***Id.*** at n.22.

[355] ***Two-way R&O***, 13 FCC Rcd 19,112.

[356] Amendment **of** Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-way Transmissions, ***Report and Order on Reconsideration.*** 14 FCC Rcd 12,764 (1999) ***(Two-way R&O on Recon).***

[357] IPWireless, Inc. Petition for Reconsideration, filed Dec. 22, 1999.

[358] Petitioners Consolidated Comments and Partial Opposition at 5 (Consolidated Comments) tiled Feb. 10, 2000. Although the Commission inadvertently indicated that WCA requested clarification, we take this opportunity to correct the record to reflect that the Petitioners requested clarification of this issue. ***See*** Amendment of Parts 1 ,21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage (continued...)

as to the meaning of the language, "Radiation of an unmodulated carrier and other unnecessary transmissions are forbidden."[359]

155. The Petitioners requested clarification that this language requires a response station's transmitter to be biased off so that no RF Gaussian noise is emitted when the station is *not* engaged in communications.[360] The Petitioners argued that this interpretation assures the protection of the noise floor of adjacent channel and adjacent market licensees against unnecessary emissions from transceivers.[361] On May 11, 2000, the Petitioners and IPWireless notified the Commission that it had reached a compromise concerning the appropriate level of emissions that a response station may generate when not directly engaged in communications with a response hub.[362]

156. The Petitioners and IPWireless requested amendment of Sections 21.909(m) and 74.939(o) of our Rules to provide that when a response station is not in communications with its associated hub, it must restrict its field strength.[363] First, they proposed to set the permissible level of RF Gaussian noise at 10 microvolts/meter per 1 MHz bandwidth at a distance of 3 meters for response stations utilizing antennas with 6 dB or less gain over isotropic. Second, they proposed to set the permissible level of RF Gaussian noise at 10 microvolts/meter x 10exp[(antenna gain - 6 dB) / 201 per 1 MHz bandwidth at a distance of 3 meters for stations utilizing antennas with more than 6 dB gain over isotropic.[364]

157. We note that the Commission agreed to clarify this issue and sought comment[365] on specific issues relating to this matter.[366] In this *NPRM & MO&O*, we are seeking comments on comprehensive changes to the interference rules that would apply in these services. In light of that fact. we seek further comment on whether the rules changes suggested by the Petitioners are still necessary or appropriate. We note that other services do not have a similar requirement. We ask commenters who support imposition of such a requirement to explain the need for such a requirement in light of other changes we are proposing to our technical rules.

158. In a related matter, we also seek comment on requiring that subscriber handsets not transmit unless a base station pilot is present. Such a rule could be necessary in order to avoid interference to existing operations.

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in Fixed Two-way Transmissions, ***Report and Order on Further Reconsideration and Further Notice of Proposed Rulemaking,*** 15 FCC Rcd 14,566, 14,576 (2000) ***(Two-way FNPRM).***

[359] Petitioners Consolidated Comments at 6.

[360] ***Id.***

[361] ***Id.***

[362] Petitioners and IPWireless, ***Ex Parte,*** tiled ***May*** 11, 2000.

[363] ***Id.*** at 1.

[364] ***Id.***

[365] ***Two-way FNPRM,*** 15 FCC Rcd at 14,576.

[366] ***Two-way FNPRM,*** 15 FCC Rcd 14,576-77 ¶¶ 39-40.

F. Standardization of Practices and Procedures

1. Consolidation of Procedural Rules in Part 1

159. With the adoption of the *ULS R&O*, the Commission consolidated the majority of its wireless services procedural rules into Part 1.[367] By consolidating the procedural rules in Part I, the Commission improved the consistency of its rules across wireless services and provided a single point of reference for applicants, licensees, and the members of the public seeking information regarding our licensing procedures.[368] Additionally, the consolidation reduced confusion among applicants and licensees, accelerated the application process, and improved the speed with which wireless carriers were able to provide service to the public.[369] We believe that consolidating the MDS and ITFS procedural rules into one rule part will decrease confusion concerning the application of our MDS and ITFS rules. Because we believe that consolidation will benefit applicants, licensees and members of the public, we propose to consolidate the MDS and ITFS procedural rules into Part 1. We invite comment on this proposal.

2. Consolidation of Service Specific Rules in Part 101

160. Currently, three rules parts - Parts 21, 73 and 74 – contain our MDS and ITFS service specific rules. Part 21 contains our MDS rules while Parts 73 and 74 contain our ITFS rules. Although MDS and ITFS licensees use their licenses to provide similar services, our rules treat these licensees differently. We believe that regulatory parity will lead to efficiency in this band and spur the development of new and improved services for the public. Additionally, we believe that consolidating the MDS and ITFS service specific rules into one rule part will reduce confusion and provide a single reference point for these similar services. Because we believe that consolidation will benefit applicants, licensees and members of the public, we propose to consolidate the MDS and ITFS service specific rules into Part 101. We also seek comment on alternative means of consolidating the rules relating to these services, such as incorporating the rules into Parts 21 or 27 of our Rules.

3. Standardization of Major and Minor Filing Requirements

161. The license modification rules for MDS and ITFS are spread across seven rules. MDS licensees submit FCC Forms 304 or 331 to modify their licenses pursuant to Sections 21.40 and 21.41 of our Rules.[370] For a "major modification" to an MDS station, the Commission will not grant the modification unless it finds that the modification is in the public interest and in compliance with Communications Act.[371] A major modification to an MDS license would also include an amendment that

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[367] Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, *80,* 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, ***Report and Order,*** 13 FCC Rcd 21,027, 21,054 ¶ 56 (*ULS R&O*).

[368] *Id.*

[369] ***Id.***

[370] 47 C.F.R. §§ 21.40, 21.41

[371] ***See*** 47 C.F.R. § 21.40. A major modification for an MDS license includes a substantial modification of the engineering proposal such as (but not limited to) a change in, or addition of, a radio frequency channel; a change in polarization of the transmitted signal; a change in type of transmitter emission or an increase in emission bandwidth of more than ten percent; a change in the geographic coordinates of a station's transmitting antenna of more than ten seconds of latitude or longitude or both; any change which increases the antenna height by three meters or (continued...)

would require submission of an environmental assessment, would result in a substantial and material alteration of the proposed service, specifies a substantial change in beneficial ownership or control, or is deemed substantial by the Commission pursuant to section 309 of the Communication Act.[372]

162. Our existing rules require an ITFS licensee to file a formal application on FCC Form 330 for any of the following kinds of changes or modifications to its transmission system: adding a new channel; changing channels; changing polarization; increasing the EIRP in any direction by more than 1.5 dB; increasing the transmitting height by twenty-five feet or more; or relocating a facility's transmitter site by ten miles or more.[373] Our rules further provide that applications for "major changes" to existing ITFS facilities that are mutually exclusive with other such applications or with applications for new stations are subject to competitive bidding.[374] ITFS minor modification applications may continue to be filed at any time and are not be subject to competitive bidding.[375] Our rules also permit certain parties, subject to Commission approval, to modify involuntarily the facilities of an existing ITFS licensee in certain situations.[376]

163. We have adopted one set of modification rules for the services that we license using the ULS.[377] This consolidation of modification rules has led to efficient processing of modification applications in ULS. We treat all major modifications as new applications in ULS.[378] Licensees may make minor modifications as a matter of right without prior Commission approval (other than pro forma assignments and transfers) within thirty days of implementing such changes.[379] Where other rule parts permit licensees to make permissive changes to technical parameters without notifying the Commission (e.g., adding, modifying, or deleting internal sites), no notification is required.[380] Although there are similarities between our current MDS and ITFS license modification rules, we believe that there are substantial benefits to employing the simplified approach we use in ULS to the MDS and ITFS licenses. We believe that using our Part 1 ULS modification rules will reduce confusion with regards to the appropriate rules to use, increase the speed with which the Commission staff processes applications and will eliminate redundancy in our rules. Accordingly, we propose to use our Part 1 modification rules to

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more; any technical change that would increase the effective radiated power in any direction by more than 1.5 dB; or any changes or combination of changes that would cause harmful electrical interference to an authorized facility or result in a mutually exclusive conflict with another pending application. 47 C.F.R. § 21.23.

[372] *Id*

[373] 47 C.F.R. § 74.951

[374] 47 C.F.R. § 73.5000. We note that our rules permit ITFS licensees to exchange channels evenly with each other or with MDS licensees after filing pro forma applications. 47 C.F.R. § 74.902(f).

[375] Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, ***First Report and Order***, 13 FCC Rcd 15.920 ¶ 207 (1998).

[376] *See* 47 C.F.R. § 74.986.

[377] See 47 C.F.R. § 1.929.

[378] See 41 C.F.R. § 1.947.

[379] *See* 47 C.F.R. § 1.929.

[380] *See* 47 C.F.R. § 1.947(b).

determine major and minor modifications for MDS and ITFS licenses. We seek comment on this proposal.

4. Amendments to New and Modification Applications

164. The MDS community apparently did not raise any objections to the procedural rules regarding the filing of amendments in the Services in response to the Coalitions proposals. However, our consolidated approach to amendments for wireless applications'" differs in some respects with our approach to amendments for MDS/ITFS applications.[382] We must reconcile these differences. For instance, we must address the treatment of major amendments, and amendments regarding ownership and auction services. MDS operators have recommended that we revise our MDS/ITFS rules to use the same definitions for major and minor amendments as for major and minor modifications.[383] We invite comment on whether to adopt the consolidated wireless procedures for amendments to applications. Furthermore, ITFS applicants may amend applications to cure defects noted in deficiency letters to the applicant. MDS BTA applicants may amend a long-form application up to the date the application has appeared on public notice as accepted for filing or by written petition demonstrating good cause if the application is already on public notice.

5. Assignments of Authorization and Transfers of Control

165. MDS licensees use FCC Form 305 to apply for voluntary assignments; involuntary assignments; and pro forma assignments and FCC Form 306 to apply for voluntary transfers of control.

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[381] Our rules treat certain amendments as new applications that receive a new filing date as of the date the applicant submits the amendment. Amendments that we treat as new applications include applications submitted up to fourteen days after the application appeared as accepted on public notice and that reflects any change in the technical specifications of the proposed facility; submitted with a new or modified analysis of potential interference to another facility; or submitted with an interference consent statement from a neighboring licensee. 47 C.F.R. § 21.23. In such cases, the amended application must include an applicant certification that it has met all requirements regarding interference protection to existing and prior proposed facilities, and that it has obtained any necessary consent letters in lieu of interference protection. The applicant must also certify that it has served all potentially affected parties with copies of its amended application and engineering materials, and that the engineering analyses comply with the rules and methodology. *See* 47 C.F.R. §§ 21.23, 73.3522(a). Furthermore, ITFS applicants may amend applications to cure defects noted in deficiency letters to the applicant. See 47 C.F.R. § 73.3522(a). MDS BTA applicants may amend a long-form application up to the date the application has appeared on public notice as accepted for filing or by written petition demonstrating good cause if the application is already on public notice. *See* 47 C.F.R. § 21.926. In both Services, applicants may not amend applications if the proposed amendment seeks more than a pro forma change of ownership or control.

[382] Generally, under our consolidated approach for processing wireless applications, applicants may file amendments to pending applications as a matter of right if we have not designated the application for hearing or listed it in a competitive bidding public notice as accepted for filing. *See* 47 C.F.R. § 1.927. Where an amendment to an application constitutes a "major change" as defined in Section 1.929, we treat the amendment as a new application for determination of filing date, public notice, and petition to deny purposes. *See* 47 C.F.R. § 1.927(h). Where an amendment to an application specifies a substantial change in beneficial ownership or control (de jure or de facto) of an applicant, the applicant must provide an exhibit with the amended application containing an affirmative, factual showing as set forth in Section 1.948(h)(2). See 47 C.F.R. § 1.927(g).

[383] Memorandum to WCA Government Relations Committee from Paul J. Sinderbrand, Esq., Petition for Rulemaking - Amendment of Parts 21 and 74, at 11, August 1, 2001.

involuntary assignments, and pro forma transfers of control.[384] These licensees use FCC Form 304A to request a partial assignment.[385] However, the assignor should apply for deletion of the assigned facilities, indicating concurrence in an assignee's request.[386] The parties must consummate these transactions within forty-five days from the date of approval.[387] If the parties fail to consummate a partial assignment, the parties must submit FCC Form 304A to return the assignor's license to its original condition.[388] Before the Commission will consent to these transactions, the assignor/transferor must complete construction of the facility and file a certificate of completion of construction.[389]

166. The assignor/transferor must file the certificate of construction within one year from the initial license grant date, the consummation date of the transaction; or median date of the applicable commencement dates if the transaction involves a system of two or more stations. The Commission also requires an assignee/transferee to file FCC Form 430 License Qualification Report with the appropriate application form (Form 305 or Form 306) unless the assignee or transferee already has a current and substantially accurate report on file with the Commission. Finally, the parties of both transactions must notify the Commission of the date of consummation, by letter, within ten days of the date of consummation.

167. ITFS licensees use one form, FCC Form 330, to request an assignment of license or a transfer of control.[390] With both types of transactions, ITFS licensees must file their applications at least forty-five days before the contemplated effective date of the transaction.[391] However, in the case of an involuntary transaction, notification must be made to the Commission, in writing, promptly after the death or legal disability of a licensee.[392] Additionally, the Commission requires the filing of an application for involuntary transaction within thirty days of such occurrence.[393]

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[384] *See* 47 C.F.R. § 21.11(d) (Assignment of License); 47 C.F.R. § 21.11(e) (Transfer of control of corporation holding a conditional license or license); 47 C.F.R. § 21.13 (General Application Requirements); 47 C.F.R. § 21.15 (Technical Content of Applications); 47 C.F.R. § 21.17 (Certification of Financial Qualifications); 47 C.F.R. § 21.19 (Waiver of Rules); 47 C.F.R. § 21.38 (Assignment or Transfer of Station Authorizations); 47 C.F.R. § 21.39 (Considerations Involving Transfer or Assignment Applications); 47 C.F.R. § 21.912 (Cable Television Eligibility Requirements and MDS/Cable Cross Ownership); 47 U.S.C. § 310 (Limitation on Holding and Transfer of Licenses (Alien Ownership Restriction).

[385] 47 C.F.R. § 21.11(e)

[386] *Id.*

[387] *Id.*

[388] *Id.*

[389] *See* 47 C.F.R. § 21.934. We note that exceptions exist if there is not a substantial change in ownership or control of the authorized facility from the transaction (assignment/transfer); involuntary transaction due to the licensee's bankruptcy, death, or legal disability; and if the transaction involves BTA authorizations. See *id.*

[390] *See* 47 C.F.R. §§ 74.910, 73.3500.

[391] *See* 47 C.F.R. § 73.3540.

[392] *See* 47 C.F.R. § 73.3541

[393] *See* 47 C.F.R. § 73.3541.

168. When the Commission developed FCC Form *603* to process assignment of license and transfer of control applications in ULS, the Commission recognized there would be significant benefits to eliminating inconsistencies between similar services. Specifically, the Commission found that replacing service specific forms with consolidated forms would provide the public with a consistent set of procedures and filing requirements and would increase the speed and accuracy of the assignment and transfer process.[394] Although there are some differences in the information requirements for transfers and assignments, there is a sufficient degree of overlap in the information that both types of applicants supply that both **MDS** and ITFS applicants can use the FCC Form *603* for transfers and assignments. Furthermore, we designed the FCC Form **603** so that the applicant only has to answer the questions pertinent to the type of transaction involved.[395] We propose to revise our **MDS** and ITFS transaction requirements to conform to and merge with the ULS requirements in Section 1.948 of our rules.

169. Specifically, we propose to eliminate the prior consent requirement for non-substantial, pro forma assignments in **MDS,** and extend the consummation notice period to 180 days for both services. We believe these changes will lessen the administrative burden on applicants, licensees, and Commission staff,. With regard to involuntary assignments, we propose to integrate the **MDS** rules into our ULS consolidated rules. We invite comment on this integration.

170. Further, we propose to revise our channel exchange procedures'" to conform to our assignment of license procedures. Currently, our rules require both the filing of a major modification application to change a frequency assignment'" and each licensee seeking to exchange channels to file in tandem with the Commission separate *pro forma* assignment applications.[398] Furthermore, our engineers must generate and enter a minor modification application into **BLS** for each channel the parties seek to exchange. We find that this channel exchange procedure is unduly burdensome upon licensees and the Commission's resources. The MDS/ITFS community has also asked that we make changes in this area.[399] We propose instead to require the licensees involved to treat channel exchanges like any other set of license transfers, i.e., to file two or more applications showing the transferor and transferee for each channel or set of channels being transferred.

6. Partitioning and Disaggregation

171. In other services where we have implemented geographic area licensing[400] we have allowed licensees to partition their service areas and to disaggregate their spectrum."' **MDS** BTA

[394] *ULS R&O*, 13 FCC Rcd at 21079 ¶ 113

[395] *Id.*

[396] *See* 47 C.F.R. §§ 21.901(d); 74.902(f); 74.951(e)

[397] *See* 47 C.F.R. § 74.951(e).

[398] *See* 47 C.F.R. § 74.902; *see also* 47 C.F.R. § 21.901

'"Coalition Proposal at Appendix B n.49.

[400] *See, e.g.*, 47 C.F.R. §§ 27.15, 101.535, 101.1111, 101.1323.

[401] "Partitioning" is the assignment of geographic portions of a license along geopolitical or other boundaries. "Disaggregation" is the assignment of discrete portions of "blocks" of spectrum licensed to a geographic area licensee or qualifying entity.

licensees may partition their spectrum."[402] We seek comment on whether allowing such flexibility here to all licensees will promote efficient spectrum use, rule consistency and facilitate market entry by parties who may lack the financial resources for participation in ITFS auctions such as small businesses, educational, telemedicine or medical institutions. The Coalition also supports allowing disaggregation and partitioning to the maximum extent possible.[403] Should we allow geographic area licensees of current ITFS channels to partition and disaggregate. Under this proposal, licensees could file for partial assignment of a licensee, and licensees could apply to partition their licensed geographic service areas or disaggregate their licensed spectrum at any time following grant of their geographic area licensee. The area to be partitioned would be defined by the partitioner and partitionee. The partitionee or disaggregate would be authorized to hold its license for the remainder of the partitioner's or disaggregator's license term, and would be eligible for renewal expentancy on the same basis as other licensees. There would be no restriction on the amount of spectrum disaggregated and we would permit combined partitioning and disaggregation. Licensees that partition and disaggregate would be subject to provisions against unjust enrichment. We also propose to eliminate any separate provisions relating to "channel swapping" and rely upon the ability of licensees to partition and disaggregate their spectrum.[404]

172. We also seek comment on factors other than geography or frequency that licensees might reasonably use when disaggregating their licenses. For example, the ***Spectrum*** *Policy* ***Report*** discusses the possibility that licensees might also be willing to sell off parts of their license rights on the basis of time slots and power levels.[405] That report suggests that frequency-agile transceivers are already capable of sensing if a given channel is in use at a particular moment in time, by switching channels, reducing power, or remaining silent until a channel becomes available. Should we afford licensees in this band the right to sell spare capacity on that basis to others, on a preemptible basis?

7. License Renewal

173. Except for special temporary authorizations (STAs), MDS licensees must file FCC Form 405, in duplicate, to renew their licenses.[406] They must file the form between thirty and sixty days before the expiration date of the license to be renewed."[407] A licensee shall automatically forfeit its license in whole or in part without further notice to the licensee upon the expiration of the license period specified therein, unless prior thereto an application for renewal has been filed with the Commission."[408] An MDS licensee may seek reinstatement of its licenses by filing a petition within 30 days of the license's expiration explaining the failure to timely file the required notification or application and setting out with specificity the procedures that the petititioner has established to ensure that such filings will be submitted on time in the future..[409] Generally, a license period is ten years. The terms of MDS station licenses granted on the basis of underlying BTA service area authorizations obtained by competitive bidding

[402] 47 C.F.R. § 21.931.

[403] Coalition Proposal at 13.

[404] *See, e.g.*, 47 C.F.R. § 21.901, 47 C.F.R. § 74.902

[405] Spectrum ***Policy*** Report at 19.

[406] *See* 47 C.F.R. § 21.11(c)

[407] ***id.***

[408] See 47 C.F.R. § 21.44(a)(2).

[409] See 47 C.F.R. § 21.43(b).

extend until the end of the ten-year BTA authorization.[410]

174. ITFS licensees must file an FCC Form 330-R to renew a license.[411] Unless otherwise directed by the FCC, ITFS licensees must file their renewal applications no later than the first day of the fourth full month prior to the expiration date of the license to be renewed.[412] Licensees in auctionable services file FCC Form 601 no later than the expiration date of the authorization for which renewal is sought, and no sooner than ninety days prior to expiration. The Commission will reinstate expired ITFS licensees if the former licensee tiles a timely petition with adequate justification.[413]

175. The Commission designed ULS to provide wireless licensees with a pre-expiration notification approximately ninety days before their licenses expire and thereby avoid situations in which licensees allow their licenses to expire inadvertently and subsequently seek reinstatement.[414] The Commission provides pre-expiration letters of reminder to all wireless radio services licensees by regular mail. Specifically, the Commission sends letters of reminder to all wireless radio service licensees, both site-specific and geographic area licensees, ninety days before the expiration of their licenses. Although a license expires automatically on the date specified on the individual license, ULS does not show a license expiration as final until approximately thirty days after the renewal deadline. We note that while we generally provide renewal notices to licensees, the pre-expiration notice is not a prerequisite to cancellation should a licensee fail to renew its license. After the license expiration, the previous licensee may file a new application for use of those frequencies subject to any service specific rules. Once that thirty-day period has elapsed, or the prior holder of the license files a new application for that spectrum, the license then becomes available for the Commission to reassign by competitive bidding or other means according to the rules of the particular service.[415]

176. In 1999, the Commission adopted a new policy regarding treatment of late-filed renewal applications in the Wireless Radio Services.[416] Renewal applications that are filed up to thirty days after the expiration date of the license are granted ***nuncpro tunc*** if the application is otherwise sufficient under our Rules.[417] However, the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal

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[410] **See 47** C.F.R. § 21.929(b).

[411] ***See Public Notice,*** Wireless Telecommunications Bureau Suspends Electronic Filing for the Broadband Licensing System on October **11,2002** , 17 FCC Rcd **18,365** *(2002).*

[412] ***See*** **47** C.F.R. § 73.3539

[413] ***See,*** *e.g.,* Jonsson Communications Corp., ***Memorandum Opinion and Order,*** (DA 02-3099, released Nov. **13, 2002).** There is no codified rule specificallyaddressing reinstatement **of** ITFS licenses.

[414] *ULS R&O*, **13** FCC Rcd at **21071 ¶ 96**

[415] ***See*** Rules and Regulations to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, **63** Fed. Reg. **68904,68908 (1998).**

[416] **See** Biennial Regulatory Review - Amendment of **Parts** 0, 1, 13, 22, **24, 26, 27,** 80, **87,** 90, 95, and 101 **of** the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, ***Memorandum Opinion and Order on Reconsideration,*** WT Docket No. **98-20.** 14 FCC Rcd **11476, 11485 ¶ 22 (1999).**

[417] ***See id.*** at **11485 ¶ 22**

filing.[418] Applicants who file renewal applications more than thirty days after the license expiration date may also request renewal of the license ***nunc pro tunc***, but such requests are not routinely granted, and are subject to stricter review, and may be accompanied by enforcement action, including more significant fines or forfeitures.[419] In determining whether to grant a late-filed renewal application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.[420]

177. We believe that elimination of the reinstatement period will benefit all licensees and entities interested in acquiring abandoned spectrum.[421] Under our ULS procedures, failure to file for renewal of the license before the end of the license term results in automatic cancellation of the license.[422] We believe that we should eliminate reinstatement of expired licenses because licensees will receive notification that their licenses are about to expire and, therefore, should be responsible for submitting timely renewal applications. Additionally, interactive electronic filing will make it easier for all licensees to timely file renewal applications. Moreover, we believe elimination of the reinstatement procedures will facilitate our ability to efficiently, and quickly perform our licensing responsibilities by reducing the amount of late-filed renewal applications and eliminating the processing of reinstatement applications. Accordingly, we propose to eliminate reinstatement procedures and adopt the late-filed renewal policy for wireless radio services for **MDS** and ITFS. We seek comment on this proposal. Additionally, we seek comment on whether we should impose any special requirements or limitations on the renewal of ITFS licenses. For example, we seek comment on the possibility of imposing special performance requirements on ITFS licensees in order to ensure efficient utilization of the spectrum. We seek comment on these proposals.

8. Special Temporary Authority

178. In **MDS,** in circumstances requiring immediate or temporary use of facilities. entities may request special temporary authority to install and/or operate new or modified equipment.'" Requests may be submitted as informal applications, at least ten days prior to the date of the proposed construction or operation (however, in practice an FCC Form **304** is attached to the informal request).[424] We may grant STAs without regard to the thirty-day public notice requirement in certain instances. First, we may grant an STA when the STA period is not to exceed thirty days and the filing of an application to change the STA into a permanent situation is not contemplated. Second, we may grant an STA when the STA period is not to exceed sixty days, pending the filing of an application to change the special situation into a regular operation. Third, we may grant an STA to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously

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[418] ***Id.***

[419] ***Id.***

[420] ***Id.*** at 11485-6 ¶ 22.

[421] *ULS R&O,* 13 FCC Rcd at 21,071 ¶ 96. The Commission excluded Commercial Radio Operators Licenses and Amateur licenses from this policy. ***Id.***

[422] ***Id.***

[423] **See** 47 C.F.R. § **21.25.**

[424] 47 C.F.R. § 21.5.

authorized. Fourth, we may grant an STA when there are extraordinary circumstances requiring operation in the public interest. We may grant STAs and extensions of STAs up to 180 days pursuant to Section 309(f) of the Communications Act where extraordinary circumstances so require, but the licensee has a heavy burden to show it warrants such action. Finally, in times of national emergency or war, we may grant special temporary licenses (in place of construction permits, station licenses, modifications or renewals) for the period of the emergency.[425]

179. We may grant ITFS STAs in extraordinary circumstances requiring emergency operation to serve the public interest.[426] As in MDS. only an informal application is required. However. ITFS STA applicants must submit the request at least ten days before the date of the proposed operation. We may grant ITFS STAs for a period not to exceed 180 days with a limited number of extensions also granted for up to 180 days. However, we may grant an STA necessitated for technical reasons for an initial period of ninety days only.

180. Under our consolidated ULS approach, applicants must file STA requests electronically on an FCC Form 601 within ten days before the date of the proposed operation (although we may grant requests received less than ten days for compelling reasons).[427] As in MDS/ITFS, grant of STAs are without public notice. Wireless Services have the same requirements as MDS/ITFS for thirty, sixty, and 180-day STA requests. In addition, since MDS STA requests are informal applications, but in practice have an FCC Form 304 attached, adoption of the Form 601 for MDS/ITFS STA requests as currently used in WTB makes good sense. Since STAs are an emergency measure, mandatory electronic filing as now required in WTB, would also provide MDS/ITFS licensees with faster, more responsive service. For the foregoing reasons, we propose to include MDS and ITFS STA requests under the same ULS regulatory regime as the Wireless Services. We request comment on this proposal.

9. Ownership Information

181. MDS and **ITFS** licensees file FCC Form 430 to submit ownership information to the Commission. The Communications Act mandates the ownership information requested in Form 430.[428] The submission of ownership information enables the Commission to review whether applicants and licensees comply with **our** real-party-in-interest rules, eligibility for treatment as a small business at auction and foreign ownership restrictions.[429] Wireless licensees use Form 602 to file ownership information electronically in ULS.[430] FCC Form 602 and FCC Form 430 request the same ownership

[425] Id.

[426] See 47 C.F.R. § 73.3542; see also 47 C.F.R. §§ 73.1635; 74.910.

[427] See 47 C.F.R. § 1.931.

[428] See 47 U.S.C. § 310

[429] See *ULS NPRM*, 13 FCC Rcd 9672,9691 ¶ 43 (1998).

[430] ULS will pre-fill information that the licensee has previously submitted on a Form 602, enabling the licensee to limit new submissions to changed information. and ULS can also fill in certain parts of a Form 602 by reference to other previously filed information. For example, if Party A has previously submitted its own ownership filing and is subsequently listed as a disclosable interest holder on the ownership filing of of another licensee (Party B), Party A s FCC-regulated businesses may be automatically copied to Party B's filing. ***Public Notice.*** Wireless Telecommunications Bureau Announces Availability of Electronic Filing of FCC Form 602, 17 FCC Rcd 16,779 (2002).

information.[431] On June 14, 2002, the Wireless Bureau stopped accepting electronically tiled Forms 430 temporarily.[432] Therefore, in the short term, MDS and ITFS licensees may continue to file the Form 430 manually. The Form 430 requires the licensee to list its MDS and/or ITFS licenses or conditional licenses. We seek comment on whether this requirement is necessary in light of the proposed transition to ULS.[433] Additionally, we propose to require MDS and ITFS licensees to file Form 602 instead of Form 430 to submit ownership information. We request comment on this proposal.

10. Regulatory Status

182. Consistent with our goal to maximize flexibility to the extent possible, we tentatively conclude that MDS and ITFS applicants may request more than one regulatory status for authorization in a single license. Thus, under this approach, an MDS or ITFS license may authorize a combination *of* common carrier and non-common carrier services in a single license and licensees in this band may render any kind of communications service (*e.g.*, fixed, mobile, point-to-multi-point) consistent with that regulatory status and the existing rules. This approach is consistent with the approach we have used for other services licensed on a geographic area basis.[434] Applicants would not be required to describe the services they seek to provide but would be required to designate the regulatory status of services they intend to provide using the Form 601.[435] We seek comment on what procedures to adopt for licensees to change their regulatory status (*i.e.*, notify the Commission within a certain timeframe or seek prior approval).

11. Fee **Issues**

183. Currently, MDS applicants and licensees are subject to application fees under Section 8 of the Act, which directs the Commission to assess and collect charges for applications and other filings by regulated entities.[436] These fees were initially set by statute and are subject to adjustment by the Commission [437] MDS licensees are also subject to regulatory fees under Section 9 of the Act.[438] We collect these fees to recover the regulatory costs associated with our enforcement, policy and rulemaking, user information, and international activities.[439] Currently, we do not assess ITFS applicants and licensees with either application fees or regulatory fees. The Commission exempted ITFS from

[431] *See Public Notice,* Wireless Telecommunications Bureau Answers Frequently Asked Questions Concerning Reporting **of** Ownership Information on FCC Form 602, DA 99-1001 (May 25, 1999).

[432] *Public Notice,* Wireless Telecommunications Bureau to Temporarily Suspend Electronic Filing of FCC Form 430 via the Broadband Licensing System, 17 FCC Rcd 11,131 (2002).

[433] *See* para. 176 supra.

[434] *See e.g.*, 47 C.F.R. § 27.10; 47 C.F.R. § § 101.511 and 101.133.

[435] *ULS* R *&O*, 13 FCC Rcd 21027 at Appendix C.

[436] 47 U.S.C. § 158.

[437] Id. § 158(b).

[438] 47 U.S.C. § 159.

[439] 47 U.S.C. § 159(a).

application fees because the original statutory schedule of charges did not provide for fees for ITFS applicants and because ITFS stations were "traditionally used by public service organizations."[440]

184. In light of the possible changes to the ITFS service that we are proposing in this proceeding, we seek comment on whether ITFS licensees and applicants (or former licensees of the service, if we decide to reclassify ITFS as a new service) should become subject to application fees and regulatory fees, to the extent that such licensees or applicants do not fall within an express statutory exemption.[441] In light of our contemplated changes to the rules, the fact that **MDS** and ITFS licensees often provide service as part of the same system, and the fact that ITFS licensees can lease up to ninety-five percent of their capacity to other entities (usually **MDS** licensees), we seek comment on whether there currently is any valid basis for treating **MDS** and ITFS applicants and licensees differently for fee purposes. We note that under our proposal, those ITFS licensees that are governmental entities would continue to be exempt under the statute from application fees.[442] We also note that most existing ITFS licensees would likely remain exempt from regulatory fees because they would be covered under the statutory exemptions for governmental entities and nonprofit entities.[443] To the extent we change the eligibility criteria for ITFS, however, we propose to require new licensees that are not statutorily exempt to pay regulatory fees. We seek comment on this proposal.

185. We also seek comment on changing the regulatory fees applicable to **MDS** licensees. Congress has authorized the Commission to add, delete, or reclassify services in the regulatory fee schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.[444] The instant proceeding proposes major changes to the **MDS** service, including allowing mobile operation and expediting the use of MDS to provide advanced broadband services. In light of these potential changes, we seek comment on adjusting the regulatory fees for **MDS.** Currently, we assess **MDS** stations a regulatory fee of $450 per station.[445] We note that converting MDS stations to geographic area licensing would reduce the number of MDS licenses. Furthermore, to the extent **MDS** stations begin offering mobile services, it may be appropriate to begin assessing these licensees on a per unit basis, as we do for other mobile services.[446] Accordingly, we seek comment on the appropriate changes to the regulatory fee structure and amount for **MDS** licensees. To the extent we conclude that ITFS licensees should pay regulatory fees, we tentatively conclude that the regulatory fees for **MDS** and ITFS licensees should be the same. We seek comment on this tentative conclusion.

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[440] Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, Notice of Proposed ***Rulemaking,*** 51 Fed, Reg. 25792 ¶ 68 (1986).

[441] Governmental entities are statutorily exempt from Section 8 fees, and both governmental entities and nonprofit entities are statutorily exempt from Section 9 fees. 47 U.S.C. §§ 158(d)(1), 159(h).

[442] 47 U.S.C. § 158(d)(1).

[443] ***Compare*** 47 U.S.C. § 159(h) (exceptions to regulatory fees) and 47 C.F.R. § 74.932 (ITFS eligibility).

[444] 47 U.S.C. § 159(b)(3). Increases or decreases in fees made by amendments pursuant to this paragraph shall not be subject to judicial review. Id.

[445] 47 C.F.R. § 1.1153.

[446] *See* 47 C.F.R. § 1.1152 (CMRS Mobile Services and CMRS Messaging Services).

12. Discontinuance, Reduction or Impairment **of** Service

186. The Commission implemented its license forfeiture rules to ensure station operation and alleviate concerns about spectrum warehousing.[447] When considering forfeitures, cancellation and discontinuance of service, an **MDS** licensee has five separate rule sections to review an ITFS licensee has three separate rule sections to review[448] Because a system can have both ITFS and MDS channels, we believe that consolidating these rules will be advantageous to both the industry and the Commission staff. We tentatively conclude that consolidating these rules will reduce the confusion of the industry as to the appropriate rules and increase the efficiency of the Commission staff in processing these actions. We propose to move, revise, and consolidate these rules in Parts 1 and **101** of **our** rules.

187. We note that **MDS** licensees may alternate between providing service as a common carrier or a non-common carrier.[449] However, before alternating, the licensee must notify the Commission of the change at least thirty days before the change.[450] Additionally, common carriers who seek to alternate **or** who otherwise intend to reduce or impair service must notify all affected customers of the planned discontinuance, reduction, or impairment **on** or before providing notice to the Commission.[451] These provisions concerning licensees alternating between common carrier and non-common carrier status are not in our Part 101 rules. We invite comment on whether we should retain these rules and consolidate them in Part 101.

188. Through these actions, we are proposing above, we are endeavoring to ensure station operation and to alleviate concerns about the warehousing of spectrum in MDS/ITFS. The MDS/ITFS community, however, has asked **us** to liberalize the rules on forfeiture of license and discontinuance of service due to the transition of the spectrum to new uses. For instance, the industry has called for a liberalizing of the rules regarding the retention and periodic use of facilities to provide for simpler preservation of downstream authorization for stations operating upstream and to provide for preservation of licenses for channels being used as guard bands.[452] Therefore, we invite comment on the proposals described in this section. We invite alternate proposals that would allow for flexible use of the spectrum while preserving our policy of ensuring station operation and alleviating concerns about the warehousing of spectrum.

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[447] **See** Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-148, ***Report and Order,*** 11 FCC Rcd 13,449, 13,465 (1996).

[448] **See** 47 C.F.R. §§ 21.44; 21.303; 21.910; 21.932; 21.936; 73.3534; 73.3598; 74.932

[449] ***See*** 47 C.F.R. 55 21.903(d); 21.910.

[450] **See** 47 C.F.R. § 21.903(d) which provides that the notification must state whether there **is** any affiliation or relationship to any intended or likely subscriber **or** program originator.

[451] **See** 47 C.F.R. § 21.910 which provides that the notice shall be **in** writing and shall include the name and address of the carrier, the date of the event, the area(s) affected and the channels that are affected by the event. ***Id.*** at § 21.910(b).

[452] Coalition Proposal at 44-45

13. Foreign Ownership Restrictions

189. Sections 310(a) and 310(b) of the Communications Act, as modified by the Telecommunications Act of 1996, impose foreign ownership and citizenship requirements that restrict the issuance of licenses *to* certain applicants."[453] An applicant requesting authorization only for non-common carrier services would be subject to Section 310(a), but not to the additional prohibitions of section 310(b). **An** applicant requesting authorization for common carrier services would he subject to both Sections 310(a) and 310(b). We do not believe that common carriers and non-common carriers filing an application to operate in this band should be subject to varied reporting obligations. Rather, as a matter of fostering regulatory panty and transparency, we believe that all applicants should be required to file changes in foreign ownership information to the extent required by Part 101 of our Rules.[454] By establishing parity in reporting obligations, however, we do not propose a single, substantive standard for compliance. For example, we do not and would not deny a license to an applicant requesting authorization exclusively to provide services not enumerated in Section 310(b), solely because its foreign ownership would disqualify it from receiving a license if the applicant had applied for a license to provide the services enumerated in Section 310(b). We request comment on this proposal.

14. Performance Requirements

190. Incumbents in the 2500-2690 MHz band consist of **MDS** BTA Authorization holders and site-based ITFS and **MDS** licensees. In addition, as noted above, we are seeking comment on, among other things, whether geographic licensing for unassigned ITFS spectrum would be appropriate. In this section, we discuss the various performance requirements applicable to the categories noted above and seek comment on whether we should retain those requirements or whether we should make changes. We also seek comment on the construction benchmarks we should adopt to encourage licensees to deliver service to rural areas. We note that the Communications Act requires **us** to adopt policies to deter spectrum warehousing, promote the rapid development and deployment of new technologies and services, and promote service to rural areas.[455]

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[453] 47 U.S.C. § 310(a), (b)

[454] 47 C.F.R. §§ 101.7, 1.913, 1.919. Moreover, as we observed in the ***LMDS Zd R&O***, requiring submission of ownership information that may not be immediately necessary *to* assess the qualifications of a licensee (i.e., one who currently operates as a non-common carrier) is an efficient and reasonable measure to facilitate the flexibility accorded licensees to change status with a minimum **of** regulatory interference. With this approach. updated information can be used whenever the licensee changes to common carrier status without imposing an additional filing requirement when the licensee makes the change. Moreover, having access to this ownership information allows the Commission to monitor all of the licensed providers more effectively, in light of their ability to provide both common and non-common carrier services. 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, ***Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking,*** CC Docket No. 92-297, 12 FCC Rcd 12545 (1997) (*LMDS **Zd R&O***).

[455] "[T]he Commission is required under Section **309** (j) of the Communications Act *to* include 'safeguards to protect the public interest in use of the spectrum' and performance requirements 'to ensure prompt delivery **of** service *to* rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees. and to promote investment in and rapid deployment of new technologies and services." WCS ***Repori and Order,*** 12 FCC Rcd. at 10841 (quoting 47 U.S.C. § 309(j)(4)(B)) (footnote omitted).

191. ***MDS BTA Authorization Holders.*** Currently, **MDS** BTA authorization holders have a five-year build-out period, which begins on the date of the grant of the **MDS** BTA authorization and ends on the fifth anniversary of the authorization grant.[456] This build-out period is not extended by the grant of subsequent authorizations.[457] Timely certifications of completion of construction for each **MDS** station within a **MDS** BTA or partitioned service area must be filed on completion of the construction of a station.[458] Within five years of a grant of a **MDS** BTA-authorization, the authorization holder must construct **MDS** stations to provide signals pursuant to Section 21.907 of the Commission's Rules[459] that are capable of reaching at least two-thirds of the population of the applicable service area, excluding the populations within protected service areas of incumbent **MDS** stations[460] and the authorization holder must file sixty days prior to the end of the five-year build-out period that it has met this requirement.[461] If the Commission finds that the authorization holder has met this requirement, the Commission will issue a declaration so stating.[462] If the Commission finds that the BTA authorization holder did not meet this requirement, the Commission will partition from the BTA any unserved area and will reauthorize service to the unserved area pursuant to the **MDS** competitive bidding procedures[463] and the BTA authorization holder originally authorized to provide service will be ineligible to participate in the auction of the unserved areas.[464] We seek comment on whether we should retain these requirements as they are, or whether they should be changed or clarified in some way. If they should be changed, commenters should recommend specifically those requirements that should be changed, those that should be clarified, and those that should remain unchanged. In the alternative, we seek comment on whether we should adopt a different approach altogether, such as a substantial service approach. We note that for services that require ubiquitous coverage, the Commission has required that at the time of license renewal each geographic area authorization holder demonstrate that it has made "substantial service" available within its authorized service area.[465] The Commission has observed that the substantial service standard affords

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[456] *See 47* C.F.R. § 21.930(a)(1).

[457] *See47* C.F.R. § 21.930(a)(2).

[458] *See 47* C.F.R. § 21.930(a)(3)

[459] 47 C.F.R. § *21.907.*

[460] *See 47* C.F.R. § 21.930(c)(1)

[461] *See47* C.F.R. § 21.930(c)(2).

[462] *See47* C.F.R. § 21.930(d)(1)

[463] *See 47* C.F.R. § 21.930(d)(2)

[464] *See 47* C.F.R. § 21.930(d)(2)(ii).

[465] Amendment of the Commission's Rules to Establish Part *27,* the Wireless Communications Service *("WCS")*, GN Docket No. 96-228, *Report and Order,* 12 FCC Rcd *10785,* 10843-45 *(1997) (WCS Report and Order); LMDS 2d R&O,* 12 FCC Rcd at *12.659-61, aff'd Melcher v. FCC. 134* F.3d *1143. 1161-2* (D.C. Cir. *1998);* Amendments to Parts 1, *2. 87,* and 101 of the Commission's Rules to License Fixed Services at *24* GHz, WT Docket No. 99-327, *Report and Order,* 15 FCC Rcd *16934.* 16950-52 (2000) *(24 GHz Report and Order); 39 GHz R&O,* 12 FCC Rcd at 18624-25; Amendment of Parts *2* and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, ET Docket No. 98-206, *Memorandum Opinion and Order and Second Report and Order, 17* FCC Rcd *9614,* 9684-9685, ¶ *177* (2002) *(MVDDS Memorandum Opinion and Order and Second Report and Order).*

maximum flexibility for authorization holders to offer a range of services and fosters competition.[466] If we were to adopt a substantial service approach, should we also adopt safe harbors? We ask commenters who believe that we should adopt safe harbors to recommend specific safe harbors. Accordingly, if the Commission adopts a substantial service performance standard, we propose that any licensee who fails to meet the standard with respect to a license will forfeit the license or be ineligible to renew the license pursuant to sections 1.946(c) and 1.955(a)(2) of our rules."[467] Additionally, we propose to eliminate extension of time requests for MDS BTA Authorization holders who must satisfy a substantial service performance standard. We seek comment on this proposal.

192. ***Site-based licensees.*** As noted above, we are proposing to provide each incumbent on a current ITFS channel and each MDS incumbent with a PSA based on a circle with a 35-mile radius around its main station. Currently, the rules provide MDS incumbent stations with a maximum construction period of twelve months from the date of the license grant.[468] We note that the Commission extended the construction period from eight months to twelve months to provide MDS permittees with sufficient time to meet the construction requirements without requesting extensions of time.[469] ITFS licensees have eighteen months from the date of the issuance of the original construction permit to construct their facilities.[470] We seek comment on whether we should retain these requirements or

[466] "Based on the record in this proceeding, we believe that the substantial service standard, in lieu of specific coverage requirements best serves the public interest. In addition to being consistent with the approach used in other wireless services, we believe that this standard is sufficiently flexible to foster expeditious development and deployment of systems and will ultimately create competition among service providers in this band." 24 ***GHz Report and Order,*** 15 FCC Rcd at 16951. "This approach [substantial service] will permit flexibility in system design and market development, while ensuring that service is being provided to the public." ***39 GHz Report and Order.*** 12 FCC Rcd 18624.

[467] 47 C.F.R. §§ 1.946(c) and 1.955(a)(2). *See also* 47 C.F.R. § 101.1325.

[468] ***See*** 47 C.F.R. § 21.43(a).

[469] Revision of Part 21 of the Commission's Rules, ***Notice of Proposed Rulemaking,*** CC Docket No. 86-128, 104 F.C.C.2d 116, 125 n.41 (1986). We permit extensions of time to construct when the authorization holder applies for the extension and submits: 1) a verified statement of diligent efforts to construct, and 2a) the delay is due to circumstances beyond the applicant's control, or 2b) there are unique and overriding public interest concerns. ***See*** 47 C.F.R. §§ 21.11(b), 21.40(b). A carrier who does not promptly construct facilities precludes others who are willing and able to construct from access to the spectrum." ***See*** Revision of Part 21 of the Commission's Rules, ***Report and Order,*** 2 FCC Rcd 5713, 5721 (1987) ***(1987 Report and Order).*** "In order to ensure timely construction of facilities, the Commission announced its intent to enforce strictly construction deadlines . . . when it established a construction period of 12 months." ***See also Miami MDS Co.***, 7 FCC Rcd 4347. 4349 (1992), ***aff'd mem, Miami*** *MDS* Co., *v. FCC,* 14 F.3d 658 (D.C Cir. 1994). Consequently, we do not grant extensions of time for delays caused by the lack of financing or the lack of site availability. ***See*** 47 C.F.R. § 21.40(b).

[470] ***See*** 47 C.F.R. § 73.3534(a). The Commission recognized that a one-year period may not be sufficient for ITFS licensees due to the budgeting and scheduling processes for educational institutions could delay the construction of ITFS facilities beyond the one year period." Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, ***Report and Order,*** MM Docket No. 83-523, 98 F.C.C.2d 925,935 (1984). However, the Commission provided that ITFS licensees could obtain an extension of time to construct by submitting a specific, detailed narrative statement demonstrating that the delay is due to "causes not under the control of the permittee, or upon a specific and detailed showing of other sufficient justification for extension. ***See*** 47 C.F.R. § 73.3534(c). An ITFS extension of time applicant must demonstrare that 1) construction is complete and testing of facilities has begun; 2) substantial progress has been made; or 3) reasons clearly beyond the applicant's control, which the applicant has taken all possible steps to resolve, have prevented (continued....)

whether they should be changed. Do licensees need more time to construct? If licensees need more time to construct, how much is appropriate? Should MDS and ITFS site-based licensees be given the same time to construct? Or are there reasons to treat MDS and ITFS site-based licensees differently?

193. ***Geographic area licensing.*** As noted above, we seek comment on whether we should license unassigned ITFS spectrum via a geographic area overlay license. If we were to adopt such an approach, we seek comment on whether we should adopt the same performance standard for geographic licensees of unassigned ITFS spectrum as we do for MDS BTA Authorization holders. Are there any reasons that they should be treated differently? In other words, if we decide to retain the current performance requirements for MDS BTA authorization holders, discussed above, should we apply those same requirements to geographic licensees of unassigned ITFS spectrum? Or, if we were to adopt a substantial service standard for MDS BTA Authorization holders, should we adopt that same standard for geographic licensees of unassigned ITFS spectrum? If not, commenters should specify a different approach for geographic area licensee of unassigned ITFS spectrum. Commenters should also state the reason that licensees of unassigned ITFS spectrum should be treated differently than MDS BTA Authorization holders. We note that commenters to the recent ***Extension Memorandum Opinion and Order*** proceeding consistently advocated the replacement of the current build-out requirement with a substantial service benchmark."' Accordingly, if the Commission adopts a substantial service performance standard, we propose that any licensee who fails to meet the standard with respect to a license will forfeit the license or be ineligible to renew the license pursuant to sections 1.946(c) and 1.955(a)(2) of our rules.[472] Additionally, we propose to eliminate extension of time requests for geographic area licensees who must satisfy a substantial service performance standard. We seek comment on this proposal.

194. ***Coalition Proposal.*** Although the Coalition did not recommend an overlay approach for licensing unassigned ITFS spectrum, the Coalition did recommend that a transition to a pure geographic licensing system for the Services presents the need and opportunity to adopt revised performance requirements for licensees.[473] Instead of continuing to use site-based licensing procedures, the Coalition advocates using a substantial service requirement at the time of renewal, coupled with safe harbors designed to provide licensees with a measure of certainty and an appropriate period for service activation

(Continued from previous page)

construction. See ITFS ***Repon and Order,*** 10 FCC Rcd at 2921. Thus, depending on the circumstances, the lack of funding may warrant an extension of time to construct for an ITFS licensee See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service. and Cable Television Relay Service Gen. Docket No. 90-54, Gen. Docket No. 80-113, Amendment of Parts 21 and 73 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, ***Third Order on Reconsideration and Order to Clarify,*** 11 FCC Rcd 17003, 17011 (1996).

[471] See *e.g.* WCA Comments at 7-11 (tiled May 9, 2001); Sprint Comments at 2-3 (filed May 9, 2001); WorldCom, Inc. Comments at 4-6 (filed May 9, 2001); Nucentrix Broadband Networks, Inc. Comments at. 9-10 (filed May 9, 2001); Hubbard Trust Comments at 5 (tiled May 9, 2001); Wireless One of North Carolina, L.L.C. Reply Comments at 1-3 (tiled May 16,2001).

[472] 47 C.F.R. §§ 1.946(c) and 1.955(a)(2). *See also* 47 C.F.R. § 101.1325

[473] Coalition Proposal at 43

following adoption of the new rules, for those licensees with early forthcoming license expirations.[474]

195. The Coalition argues that using a case-by-case standard to evaluate MDS and ITFS construction is appropriate. Unlike most other services, they assert that MDS/ITFS system operators will provide service using channels combined from a variety of sources – their own BTA authorized stations, incumbent MDS stations they own, and leased capacity of MDS and ITFS stations licensed to others.[475] Thus, focusing solely on the population served via stations authorized pursuant to a particular license hardly tells the story as to whether the licensee is providing adequate service to the public.[476] In fact, they say, the Commission should recognize that in some cases a licensee may not use particular spectrum covered by one license, or certain channels authorized by a license, that is part of a larger operating system at the time of renewal. Instead, the licensee may use the spectrum in the system as a guard band – not used in the classic sense, but they argue a critical component of the system design.[477]

196. Alternatively, they say, the licensed spectrum may not be built-out, but instead the system operator may hold the spectrum for future use as the demands of the operating system expand.[478] Still licensees may construct other systems for use by particular constituents rather than the general population covered by a GSA.[479] The Coalition maintains that it is also essential that system operators just launching systems hold spectrum in reserve to address increases in demand and that there is no valid reason to penalize MDS and ITFS licensees for providing that spectrum. Particularly with respect to licenses that come up for renewal in the early years of MDS/ITFS broadband deployment, they assert that a channel-by-channel evaluation will not provide an accurate assessment of service development.[480] For those reasons, they conclude, the flexibility inherent in the case-by-case application of the substantial service standard provides the Commission with a means of examining the entire picture.[481]

197. The Coalition recommends that we clarify that a substantial service evaluation will include not only the service areas of incumbent stations that are directly owned by the entity, which holds the BTA authorization, but also the service areas of incumbent stations owned by any entity controlled by the same ultimate parent company as is the BTA authorization holder.[482] We seek comment on the Coalitions recommendations.

198. ***Rural areas.*** We seek comment on whether and how we may use construction benchmarks to encourage licensees to deliver wireless services to rural populations. To what extent are our current construction benchmarks effective in ensuring that spectrum-based services are provided to

[474] Id.

[475] ***Id.*** at 45.

[476] *Id.* at 47-48.

[477] Id. at 45.

[478] Id. at 46.

[479] Id.

[480] Id.

[481] Id. at 45-46.

[482] Coalition Proposal at 49.

rural areas? In what instances, and under what circumstances, should the Commission adopt a population-based, geography-based, or substantial service construction benchmark? For example, in licensing service areas that are predominantly rural, should the Commission adopt geography-based construction benchmarks? Are there other types of construction benchmarks that would promote service to rural regions better? For instance, should we adopt a separate construction benchmark applicable only to service areas that constitute rural areas? Alternatively, should we revise our current construction benchmarks to permit service providers to serve either smaller portions of the population or service area if they meet a second construction benchmark applicable to the rural portions of a licensee's market? If so. commenters should explain what construction benchmarks we should adopt for the **rural** portions of the service area and how to determine whether an area is rural? If, as suggested above, we were to require licensees to disaggregate or partition unused spectrum or unserved portions of geographic service areas, should we adopt additional construction benchmarks to implement this requirement? If so, what penalties should the Commission impose on licensees for failure to timely meet such additional construction benchmarks? The Commission has generally accepted certifications of CMRS carriers that they have met their construction benchmarks.[483] To what extent are our self-certification procedures an adequate means of ensuring compliance with our construction benchmark requirements?

199. ***Extension/Suspension of current performance requirements for MDS BTA Authorization holders.*** The Coalition requests that we immediately suspend the MDS BTA build-out deadline in Section 21.930. as extended by the ***MDS Build-Out Extension Order,*** while our build-out policy for this service remains subject to pending rulemaking proceedings?[484] We note that on August 16, 1996, the Commission granted 334 of the 493 BTA authorizations.[485] As a result, the five-year build-out period for these authorizations ended on August 16, 2001. However, before the end of the build-out period. the former Mass Media Bureau extended the construction deadline for BTA authorizations to August 16, 2003 or the existing build-out date, whichever is later.[486] The former Mass Media Bureau found that a maximum of two years would be a sufficient amount of time to allow the MDS industry to build-out its facilities and provide new and innovative two-way services to the public.[487] The former Mass Media Bureau found that a longer extension period would unreasonably delay MDS entry in both rural and urban markets.[488] At that time, the former Mass Media Bureau indicated that the Commission would address issues concerning the clarification, modification, or abolishment of the MDS BTA requirement in an upcoming rulemaking.[489]

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[483] ***See*** Facilitating The Provision Of Spectrum-Based Services **To** Rural Areas And Promoting Opportunities For Rural Telephone Companies To Provide Spectrum-Based Services, WT Docket No. 02-381, ***Notice*** *of Inquiry*, 17 FCC Rcd 25,554 at ¶ 22 (2002).

[484] ***Id.*** at ***5 0 see also*** paras. 168- 169

[485] ***See*** Extension of the Five-Year Build-out Period for BTA Authorization Holders in the Multipoint Distribution Service, ***Memorandum Opinion and Order,*** 16 FCC Rcd 12593, 12594-12595 ¶ 5 (2001). The Commission did not alter **the** construction deadlines that already fell after August 16.2003.

[486] ***Id.*** at 12593¶ I.

[487] ***Id.*** at 12,596¶ 8

[488] ***Id.*** at 12,596 ¶ 8.

[489] *Id.* at 12,597¶ 9

200. In light of the breadth of the proposals set forth in this ***NPRM & MO&O***, and our re-evaluation of performance standards for the 2500 -2690 MHz band, we believe that suspending the current August 16, 2003 construction deadline for BTA authorization holders is in the public interest. While we are normally reluctant to suspend a build-out requirement, a suspension of this construction deadline will allow the Commission to evaluate the performance requirements and service rules for this band. This approach is consistent with prior Commission actions suspending a deadline while relevant policy is subject to the pending rulemaking proceedings.[490] Accordingly, we will suspend the BTA construction deadline pending the release of a ***Report and Order*** in this proceeding. We seek comment, however, on how much additional time we should give MDS BTA Authorization holders. Should we toll the time from the release of the ***NPRM*** until the August 16, 2003 deadline, which is approximately five months and give them an additional five months from the release date of the ***Report and Order*** in this proceeding? Should we give them eight months from the release of the ***Report and Order*** in this proceeding? Should we give them an additional two years from the release date of the ***Report and Order*** in this proceeding?

201. ***Extension/Suspension of current performance requirements for site-based licensees.*** Moreover, we also believe that it is in the public interest to suspend the construction deadline for ITFS and MDS site-based licensees and permittees that have unexpired licenses or permits that have not expired as of the release date of the ***NPRM & MO&O*** and that have made a timely filed extension request. We seek comment, however, on whether we should review those timely filed extension requests to construct under our current rules and suspend the construction deadline only for those that comply with the current rules, or whether we should automatically suspend the construction deadline for all timely filed requests for extension of time to construct. If we should automatically grant such requests, how much time should licensees or permittees receive to construct? We seek comment on whether this suspension should also cover licensees and permittees whose requests for extension of time have been denied, but who have timely petitions for reconsideration or applications for review pending. We also request comment on the proper treatment of objections or other pleadings that have been filed against requests for extension of time. We emphasize that the suspension of this construction deadline for site-based licensees does not affect the requirement for such licensees to timely file a renewal application.[491] We stress that all site-based licensees are required to timely file renewal applications or face cancellation of their licenses regardless of the pendency of this proceeding.

202. In light of the changes we are proposing, we seek comment on whether we should continue our current policy with regard to extension requests to construct facilities. If we should continue our current policy, should we make any changes? If so, we seek comment on the specific changes that we should make.

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[490] ***See, e.g.***, Amendment of Parts **2** and **90** of the Commission's Rules to Provide for the Use of **200** Channels Outside the Designated Filing Areas in the 896-901 MHz and **935-940** MHz Bands Allotted to the Specialized Mobile Radio Pool Modification of FCC Rule Section 90.627(b) Governing Multiple Sites for Specialized Mobile Radio Service Systems In Rural Markets, ***Order,*** **8** FCC Rcd **3974 (1993);** Requests by Interactive Video And Data Service Auction Winners to Waive the January 18, **1998,** and February **28, 1998,** Construction Deadlines, ***Order,*** **13** FCC Rcd **756** (WTB **1998);** Requests by Interactive Video and Data Service Auction Winners **to** Waive the March **28, 1997** Construction Deadline, ***Order,*** **12** FCC Rcd **3,181, 3,184** (WTB **1997):** Deferral of Rate of Return Represcription Filings Pursuant to Section 65.102(c) of the Rules, ***Memorandum Opinion and Order,*** 3 FCC Rcd 7,220, 7,222 (CCB **1988).** *Cf.* ***Channel 16 of Rhodel Island, Inc. v. FCC,*** **440** F.2d 266, 275-76 (D.C. Cir. **1971).**

[491] ***See, e.g.*** Daniel R. Goodman, Receiver; Dr. Robert Chan, ***Memorandum Opinion and Order and Order*** *on* ***Reconsiderarion.*** **13** FCC Rcd 21,944, 21972-973, 21977 ¶¶ 53, 62 (1998).

15. Annual Reports

203. Our existing rules require MDS operators to file annual reports even if they are in full compliance with all of our rules.[492] We propose to eliminate this requirement because these reports do not appear to serve any purpose.

G. Application Processing

204. Currently, our MDS and ITFS application processing is cumbersome, time-consuming, and resource intensive. As noted above, we propose to replace the requirement to separately license individual transmitters with a geographic area licensing scheme in which most operations would be authorized under the geographic area license. We believe this change will substantially reduce the burdens on licensees, expedite the initiation of service, and provide greater flexibility. Nonetheless, we note that there will continue to be limited instances in which transmitters will have to be licensed individually. We therefore believe it is appropriate to review and streamline our application procedures.

205. With respect to the processing of ITFS applications, our rules require the opening of a filing window before we will accept applications.[493] Then we must announce a one-week filing period for applications for major changes, high-power signal booster station, response station hub and R channels point-to-multipoint transmissions licenses. At the conclusion of the one-week filing period, we announce the tendering for filing of applications submitted during the filing window and provide a sixty-day filing window for applicants to amend their applications.[494] At the end of the sixty-day filing window, we announce the acceptance for filing of all applications submitted during the initial window. as amended by the applicants.[495] Opposing parties receive sixty days from the release of the public notice announcing the acceptance for filing of the applications to file a petition to deny against an application.[496] On the sixty-first day, we grant the unopposed applications unless we notified the applicant that we were not granting the application. We are concerned that this process may result in delays to the public and hinders the efficient processing of ITFS applications. We seek comment on whether this concern is valid. Additionally, if this concern is valid, we seek comment on measures we may implement to streamline this process.

206. Although our MDS application processing procedures are different from the ITFS procedures, we seek comment on whether we should consolidate the MDS and ITFS application procedures. Generally, upon receipt of an MDS application, we give the application a file number.[497] After preliminary review, we place those applications that appeared complete on public notice as

[492] 47 C.F.R. § 21.911.

[493] See 47 C.F.R. § 74.911(c)(1), (d)

[494] See 47 C.F.R. § 74.911(d) (amendments were permissible as long as they did not result in any increase in interference to any previously-proposed or authorized station, or to facilities proposed during the window, absent consent of the applicant for or licensee of the stations that would receive the additional interference).

[495] *See id.*

[496] *See id.*

[497] See 47 C.F.R. § 21.26.

accepted for filing.[498] However, with regard to MDS two-way application filings, we currently use a rolling one-day filing window.[499] We announced the "tendering for filing" of applications submitted during the filing window.[500] After a sixty-day period, we released a second public notice announcing those applications that we accepted for filing.[501] Although the MDS application filing procedures appear quicker, we are concerned that these procedures can be stream-lined as well. Accordingly, we seek comment on whether we should stream-line the MDS application procedures. If so, we seek comment on methods to stream-line these procedures and where possible to consolidate the procedures.

207. Previously, applicants could file and view their applications on-line using the Broadband Licensing System (BLS).[502] The BLS contained the licensing data for MDS and ITFS.[503] The public could access the BLS via the Internet.[504] This on-line access enables users to search and display MDS and ITFS application and station information including Internet display of granted station authorizations?" Users could also view filed applications in the electronic format.'"

208. On October 11,2002, the Wireless Bureau suspended the electronic tiling capabilities of the BLS in order to improve the integrity of data in the BLS, prepare for converting the ITFS and MDS services to the ULS, and facilitate future enhancements to electronic filing?" Although the BLS had some on-line capabilities, we believe that conversion of the data from BLS to ULS will improve the efficiency of filing applications, as well as searching for data on these services.

209. In this vein, we note that we require the majority of the wireless applicants to file their applications electronically using ULS. The ULS has eliminated the need for wireless carriers to file duplicative applications and has increased the accuracy and reliability of licensing information for

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[498] *See id.* Neither the assignment of a file number nor the listing on a public notice as accepted for tiling indicates that the application has been found acceptable for tiling or precludes the subsequent return or dismissal of the application if it is found defective or not in substantial compliance with the Commission's rules. *Id.*

[499] *See* Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-way Transmissions, *Report and Order,* MM Docket No. 97-217, 13 FCC Rcd 19112, 19150 (1998); 47 C.F.R. § 21.27(d).

[500] Commission Announces Initial Filing Window for Two-way Multipoint Distribution Service and Instructional Television Fixed Service, *Public Notice,* 15 FCC Rcd 5,850 (MMB 2000).

[501] 47 C.F.R. § 21.27(d).

[502] *Pubic Notice,* Mass Media Bureau Implements , May 30,2000 (*BLS Implementation PN*).

[503] *Id.*; *see also,* Wireless Telecommunications Bureau Suspends Electronic Filing for the Broadband Licensing System on October 11, 2002, *Public Notice,* 17 FCC Rcd 18.365 (2002) (*Electronic Filing Suspension PM.*

[504] *ELS Implementation PN.*

[505] *Id.*

[506] *Id.*

[507] *Electronic Filing Suspension PN,* 17 FCC Rcd at 18,365. We note that effective March 25, 2002, the Commission transferred the regulatory functions for the Services from the former Mass Media Bureau to the Wireless Telecommunications Bureau. Radio Services are Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, *Public Notice.* 17 FCC Rcd 5077 (2002).

wireless services. Additionally, ULS has increased the speed and the efficiency of the application process because wireless licensees and applicants can file all licensing-related applications and other filings electronically. Since the implementation of ULS, the public may access all publicly available wireless licensing information on-line.[508] Because ULS is interactive, ULS prompts the applicant to input the required information for the type of action that the applicant seeks. As a result, applicants must submit all the appropriate information before they may file their applications electronically in ULS.[509] Notably, ULS will automatically "pre-fill" licensee information already in the system and will display only the portions of the form and schedules that require completion for the applicant's or licensee's indicated purpose.[510]

210. The Commission also created redundant systems and back up procedures to safeguard against loss of data or system access should a system failure occur.[511] We believe that transitioning MDS and ITFS to ULS will have the same benefits for MDS and ITFS carriers, the public and the Commission. Accordingly, we seek comment on the changes needed to transition MDS and ITFS to ULS.

211. In light of the interactively nature of ULS to assist an applicant through the application process, we propose to streamline the licensing process?[512] Generally, upon filing of an application in ULS, we place the application on public notice as accepted for filing.[513] The extra step of allowing applicants to amend their applications to make corrections is not necessary with ULS. We seek comment on this proposal. In addition to the concerns noted above with regard to streamlining the ITFS and MDS application processes, we tentatively conclude that the interactive nature of ULS will enhance the on-line capabilities of MDS and ITFS users. Accordingly, we propose to integrate the Services into ULS. We seek comment on this proposal.

1. Returns and Dismissals of Incomplete or Defective Applications

212. As noted above,[514] in some instances ITFS and MDS applicants submitted applications that were incomplete or required the submission of additional information before they could be placed on public notice as accepted for filing. We propose to extend our uniform rule for dismissal or return of defective applications in the Wireless Services to ITFS and MDS applications.

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[508] *ULS R&O*, 13 FCC Rcd 21027, 21031 ¶ 4.

[509] Phase I Mandatory Electronic Filing Deadline Extended for PCIA and ITA, ***Public Notice.*** 16 FCC Rcd 13,681 (2001) (the Commission extended the deadline for mandatory electronic filing to July 25. 2001).

[510] On-line help, including form instructions, is provided for electronic filers. Additionally, the FCC Technical Support Hotline is available Monday through Friday, 8 a.m. to 6 p.m. ***All calls to the FCC Technical Support Hotline are recorded.*** Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for Five C and F Block Broadband Personal Communications Services (PCS) Licenses, ***Public Notice,*** (DA 02-3585, rel. Dec. 24, 2002), Attachment B.

[511] *ULS R&O*, 13 FCC Rcd 21027, 21031 ¶ 5.

[512] ***See*** paras. 208-209 ***supra***

[513] See47 C.F.R. § 1.933(1)

[514] ***See*** paras. 204-205 ***supra***

213. In the *ULS Report and Order, the* Commission adopted a uniform application dismissal and return rule in all the Wireless Services.''' Pursuant to the uniform rule, the Commission indicated that it has the discretion to return applications for correction on minor filing errors, but it also has the authority to dismiss any incomplete or defective application without prejudice.[516] However, the Commission explained that it would automatically dismiss any application that is defective because the applicant failed to sign the application, failed to pay the required filing fee, or filed outside of the applicable filing window?" The Commission concluded that, in contrast to minor filing errors, such defects were "fatal to the consideration of the application."[518] Accordingly, the Commission found that, regardless of the manner in which applicants submitted their applications, ULS would automatically dismiss "applications that were unsigned, untimely, or not fee-compliant."[519]

214. The Wireless Bureau announced specific procedures for complying with the Commission's uniform policy.'" The Wireless Bureau explained that, "[g]enerally, timely filed renewal applications and construction notifications that *are* otherwise defective will be returned to the applicants for correction, rather than dismissed by the Bureau."[521] However, the Bureau clarified "that renewal applications and construction notifications that fail to comply with the applicable fee and signature requirements will be dismissed by the Bureau as defective, rather than returned to the applicants for correction, even if timely filed."[522] We propose to adopt this application dismissal and return policy for MDS and ITFS to ensure efficient processing and equal treatment of all applications. We invite comment on this proposal.

2. ULS Forms

215. The Commission consolidated the ULS application forms for wireless services to replace approximately forty-one application forms.[523] The consolidation streamlined the processing *of* applications and reduced the filing burden for wireless applicants and licensees.[524] We use four forms in ULS - Form 601 (Long-Form or FCC Application for Wireless Telecommunications Bureau Radio

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[515] *See ULS R&O*, 13 FCC Rcd 21,027: *See also* 47 C.F.R. § 1.934

[516] *ULS R&O*, 13 FCC Rcd at 21068 ¶ 90.

[517] *ULS R&O*, 13 FCC Rcd at 21068 ¶ 90

[518] *Id*

[519] *See, e.g.*, id.

[520] *See* Wireless Telecommunications Bureau Clarifies Unified Policy for Dismissing and Returning Applications, *Public Notice*, 17 FCC Rcd 30 (WTB 2001) *(Unified Dismissal and Return PN)*; Wireless Telecommunications Bureau Revises and Begins Phased Implementation of its Unified Policy for Reviewing License Applications and Pleadings, *Public Notice*, 14 FCC Rcd 11182, 11185 (WTB 1999); Wireless Telecommunications Bureau Announces Unified Policy for Dismissing and Returning Applications and Dismissing Pleadings Associated with Applications, *Public Notice*, 14 FCC Rcd 5499 (WTB 1999).

[521] *Unified Dismissal and Return PN*, 17 FCC Rcd at 30.

[522] *Id.* at 32.

[523] *ULS R&O*, 13 FCC Rcd 21,027, 21,033-21,034 ¶ 10

[524] *Id*

Service Authorization), Form 602 (FCC Ownership Disclosure Information for the Wireless Telecommunications Bureau), Form 603 (FCC Wireless Telecommunications Bureau Application for Assignment of Authorization or Transfer of Control) and Form 605 (Quick-Form Applications for Authorization in the Ship, Aircraft, Amateur, Restricted and Commercial Operator, and General Mobile Radio Services.[525] Currently, our rules require MDS and ITFS applicants to use eleven forms to request licensing actions.[526] We tentatively conclude that we will use the **ULS** forms to license the Services. Accordingly, we seek comment on the changes to the forms that will be needed to accommodate these Services. In the paragraphs that follow, we delineate the purposes of the specific ULS forms and the forms that they will replace.

216. *FCC **Form 601.*** Under our proposal, this form **will** replace FCC Forms 304, 304A, 330, 330A, 330R, 331, 405, 701 and most informal application filings. The FCC Form 601 and associated schedules will be used to apply for initial authorizations, modifications (major and minor) to existing authorizations, amendments to pending applications, renewals of station authorizations, developmental authorizations, special temporary authorities (STAs), certifications of construction, requests for extension of time, cancellations, and administrative updates. The required schedules are:

- New/Modification/Amendment (Regular Authorizations, Developmental Authority and Special Temporary Authority) – FCC Form 601 Main Form with required technical schedule.
- Renewals/Cancellation/Administrative Updates – FCC Form 601 Main Form and Schedule A (if requesting multiple call signs).[527]
- Certifications of Construction – FCC Form 601 Main Form and Schedule K.
- Extension of Time to Construct – FCC Form 601 and Schedule L.

217. *FCC **Form*** 602. This form will replace the FCC Form 430 for the submission of initial and updated ownership information for those wireless radio services that require the submission of such information.[528]

218. ***FCC Form 603.*** This form will replace FCC Forms 305, 306 and 330. Applicants use the FCC Form 603 and associated schedules to apply for consent to assignment of existing authorizations (including channel swaps), to apply for Commission consent to the transfer of control **of** entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers. Additionally, applicants use the form to apply for partial assignments of authorization, including partitioning and disaggregation. The required schedules are:

- Assignment/Transfer of Control – FCC Form 603 Main Form and Schedule A for auctionable services.[529]

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[525] ***Id.***

[526] The **MDS** and ITFS application forms are FCC Forms 304, 304A, **305, 306,** 330, 330A, 330R, 331, 405, 430, and 701.

[527] *See* **41 C.F.R.§ 1.949** for the **rules** governing renewals.

[528] **See *supra* n.415; 47 C.F.R.§ 0.408.**

[529] **See 47 C.F.R.§ 1.948.**

- Partitioning & Disaggregation – FCC Form **603** Main Form and Schedule B or Schedule D as required.
- Consummation Notifications – FCC Form **603** and Schedule D.
- Extension of Time for Consummation – FCC Form **603** and Schedule E.

219. We believe that eliminating the current MDS and ITFS forms and implementing the ULS forms for MDS and ITFS will streamline the processing of applications and reduce the filing burden for MDS and ITFS applicants and licensees. We note that by using the ULS Forms, we will eliminate a number of obsolete MDS and ITFS forms from our rules.[530] Accordingly, we propose to use the ULS forms for MDS and ITFS, thereby eliminating the current MDS and ITFS forms. We seek comment on this proposal.

3. Transition Periods

220. In light of the significant changes proposed to the ITFS and MDS forms and rules, we believe applicants and licensees should receive a transition period to familiarize themselves with ULS and begin using ULS forms. Accordingly, we propose to allow continued use of the current ITFS and MDS forms for a transition period of six months after the effective date of the release of a Report *and* Order in this proceeding. This period will provide ITFS and MDS applicants and licensees with sufficient time to familiarize themselves with ULS and to plan an orderly transition from using existing forms to using the ULS forms. At the conclusion of this period, we tentatively conclude that the we will accept ULS forms only for these Services. This period is consistent with the transition period the Commission used with the initial implementation of ULS.[531]

221. In the *ULS R&O*, the Commission provided a transition period for applicants and licensees to use ULS voluntarily before implementing mandatory electronic filing using the ULS forms.[532] Generally, the Commission determined that permitting a six-month transition period after application processing in ULS begins for a service before requiring mandatory electronic filing was appropriate.[533] We believe the six-month transition period has worked reasonably well for the other services that have transitioned to ULS.[534] Accordingly, we tentatively conclude that we will permit a six-month transition period after application processing in ULS begins before requiring mandatory electronic filing by MDS and ITFS applicants and licensees in ULS is appropriate. We invite comment on this tentative conclusion. As in the past, the Wireless Bureau will release a public notice announcing the relevant commencement date for the processing of the Services applications in ULS.[535]

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[530] See *e.g.* **47** C.F.R §§ **73.3500, 73.3536** (elimination of all references to FCC Form **330-L, "**Application for Instructional Television Fixed Station License); **47** C.F.R. §§ **21.11**(b); **73.3500;** 73.3533(b) (elimination of all references to FCC Form **307).** In addition. **we** propose to delete references to obsolete MDS forms mentioned in Part **74. See 47** C.F.R. § **74.991.**

[531] *ULS R&O*, **13** FCC Rcd at **21027,21038-21039** ¶ 16

[532] Id. at **21042-21043** ¶ 24.

[533] ***Id.***

[534] *ULS R&O*, **13** FCC Rcd **21027 (1998)** at 21042-3, ¶ **22-4**

[515] ***See.*** *e.g.*, ***Public*** Notice: Wireless Telecommunications Bureau to Begin Use of Universal Licensing System (ULS) for Microwave Services (DA 99-154, rel. **Aug. 30, 1999).**

222. We anticipate that ITFS and MDS operators will find the application and renewal process with the **ULS** to be easier and less error-prone than with the existing system. Before implementing the electronic **ULS,** the Commission established a task force to receive public input on the design of the system and to coordinate efforts. Consistent with the WTB's approach in implementing other services into ULS, Commission staff will conduct interactive demonstrations for licensees and their representatives on the proper **use** of the system for filing license applications and conducting database research. Such demonstrations will be announced by public notice and will include topics such as: (1)finding information in **ULS** for license and application searches; (2) filing and researching license transfers and assignments; and (3) general application filing procedures.

223. We also note that the WTB has ongoing initiatives designed to familiarize Commission licensees with the ULS and give notice of upcoming changes thereto. For instance, the WTB periodically updates its **"ULS** Newsletter" **on** the WTB web site to provide the public with current information on **ULS** and related topics of interest.[536] The WTB maintains an electronic mail list of interested parties. which are provided with updated ULS information free of charge. The WTB also maintains a toll-free phone line[537] to assist with licensing questions during the **ULS** transition and has established a technical support hotline (and e-mail address)[538] to assist the public with computer-related issues, including set-up and configuration.

224. To ensure that existing and potential licensees will be comfortable with the integration of MDS and **ITFS** into the ULS, we intend to pursue a variety of outreach efforts similar to those we have followed in the past when bringing new classes of licenses into the **ULS.** The WTB has operated booths at many industry trade shows, providing hands-on training regarding use of the Commission's **ULS** and auction bidding software over the Internet. The Commission's outreach program also includes a web page and telephone hot lines. Members of the Commission and its staff have spoken at numerous industry, trade association, public interest organization, and telecommunications user group conferences on opportunities in wireless services licensed by the Commission, and will continue to do so.[539] We also solicit comment on additional means by which we can afford MDS and ITFS licensees opportunities to become educated about and familiar with **ULS** and the new application procedures we adopt in this proceeding.

225. We note that the MDS/ITFS community requests clarification that it may **use** the FCC Form 331 for all modification applications for existing stations, whether main stations, boosters, or response station hubs, and that it should use the FCC Forms 304 and 330 only for applications for new stations.[540] Although the MDS community seeks a clarification that it may use FCC Form 331 to modify existing stations, whether main stations, booster stations or response stations, we believe that MDS

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[536] ***See Section*** 257 ***Repon to Congress: Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses,*** 15 FCC Rcd. 15,376, 15,408, ¶ 77 (2000) ***("Section*** 257 ***Report").*** **A** list of FCC Public Notices concerning ULS is available on the **WTB** ULS Homepage at www.fcc.gov/wtb/uls.

[537] The toll-free number regarding ULS questions is 1-888-CALL-FCC, option 2

[538] The Technical Support telephone no. is 202-414-1250 and the e-mail address ***for*** ULS technical questions *is* ulstech@fcc.gov.

[539] ***See Secrion*** 257 ***Reporr*** at 15,407-15,408, ¶ 76.

[540] Memorandum to WCA Government Relations Committee from Paul J. Sinderbrand, Esq., Petition for Rulemaking - Amendment of Parts 21 and 74, page 3, **August** 1, 2001.

applicants should use FCC Form 601, upon adoption of final rules, to ensure a smooth transition to ULS. We seek comment on this concern.

4. Suspension of Acceptance and Processing of Applications

226. In light of our actions described above, and effective as of the date of the release of this *NPRM & MO&O*, we will suspend acceptance of applications for ITFS channels for new licenses, amendments or modifications for any kind of station temporarily, except as provided below. The suspension is effective until further notice and applies to applications received on or after the date of release of this *NPRM & MO&O*. Any such applications received after the deadline will be returned as unacceptable for filing. We take this action to permit the orderly and effective resolution of issues in this proceeding. Absent this action, applications for new licenses, amendments, and modifications might limit the effectiveness of the decisions made and the standards developed in this proceeding. We note this action is consistent with the approach we have taken in other existing services where we have proposed to adopt geographic area licensing.[541] We therefore find that this temporary measure is in the public interest.

227. Notwithstanding this temporary suspension, we will continue to process applications for ITFS channels that involve minor modifications, assignment of license or transfer of control.[542] This exception should permit modifications that can improve the efficiency of incumbent operations on these channels without affecting the effective and orderly resolution of the issues in this proceeding. Again, we will continue to accept applications for minor modifications, license assignments and transfers of control under existing procedures.

228. With respect to pending ITFS applications that were tiled prior to the release date of this *Notice of Proposed Rulemaking,* and which are pending, we will process such applications provided that they are not mutually exclusive with other applications as of the deadline stated above. We believe that this approach gives the appropriate consideration to those applicants who tiled applications prior to our proposed changes and whose applications are not subject to competing applications. We note that we used this approach in other services where we have proposed a transition to geographic area licensing.[543] If applicants have filed settlement agreements prior to the release date of the *Notice of Proposed Rulemaking,* and such settlement agreements comply with our rules, we will act on the settlement agreements. If we approve such a settlement agreement, we will allow the processing and grant of the remaining non-mutually exclusive applications. We will not accept settlement agreements relating to mutually exclusive lTFS applications that are tiled after the release date of this *Notice of Proposed Rulemaking.* With respect to applications for ITFS stations filed prior to the adoption of this *Notice of*

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[541] *See e.g.,* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Notice of Proposed Rule Making, WT* Docket No. 96-18. PP Docket No. 93-253, 11 FCC Rcd 3108 (1996). *See also,* Amendment of the Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Notice of Proposed Rule Making,* 12 FCC Rcd 7973 (1997).

[542] The Commission reserves the right to classify amendments as major or minor on a case-by-case basis. Unless the Commission determines otherwise in a specific case. a minor amendment is an amendment that does not fall within the Commission's definition of a major amendment. which is codified at 47 C.F.R. §21.23(c). *See also* n.371.

[543] *See, e.g.,* Amendment of the Commission's Rules Regarding Maritime Communications. PR Docket No. 92-257, *Second Report and Order and Second Further Notice of Proposed Rule Making,* 12 FCC Rcd 16949, 17015-17016 (1997).

Proposed Rulemaking that do not meet the above criteria, we tentatively conclude that we will dismiss such applications without prejudice upon adoption of a ***Report and Order*** in this proceeding. Any commenters proposing that we retain such applications should address how such applications should be processed, particularly in the event of any auction for spectrum covered by the application.[544] This action would be consistent with our treatment of pending applications in other services that we have converted to geographic area licensing.[545] While we are proposing to convert ITFS to geographic area licensing, the pending applications were tiled in response to a site-based licensing scheme. We seek comment on this tentative conclusion.

229. These decisions are procedural in nature and therefore not subject to the notice and comment and effective date requirements of the Administrative Procedure Act.[546] Moreover, there is good cause **for** proceeding in this manner: to do otherwise would be impractical and contrary to the public interest because compliance would undercut the purpose of these interim measures.[547] It is well-established that the Commission may initiate a freeze without prior notice and hearing when the purpose **is** the "creation ***of*** conditions under which **formal** rulemaking proceedings can be held in an effective, efficient, and meaningful manner."[548] In this particular instance, we are undertaking a comprehensive review **of** the services to provide licensees maximum operational flexibility with minimal regulatory restrictions. Because we seek comment on virtually every area related to the services, we believe that it is appropriate to suspend the acceptance and processing of applications.

H. Competitive Bidding Procedures

230. ***Competitive Bidding Authority.*** As discussed earlier in this ***NPRM & MO&O***, the Commission determined in prior proceedings that the statutory mandate to use competitive bidding to resolve mutually exclusive applications **for** licenses applies to MDS[549] and ITFS[550] applications under

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[544] ***See, infra,*** para. **231,** regarding participation in auctions for licenses to use ITFS spectrum in currently unassigned areas.

[545] ***See, e.g.,*** Amendment of the Commission's Rules Regarding Maritime Communications, PR Docket No. 92-**257, *Second Memorandum Opinion and Order and Fifth Report and Order,* 17** FCC Rcd **22585, 6720 ¶ 83 (2002).**

[546] ***See*** **5** U.S.C. **§§** 553(b)(A), (d); ***Kessler v. FCC,*** **326** F.2d **673** (D.C. Cir **1963)**

[547] ***See*** 5 U.S.C. **§§** 553(b)(B), (d)(3).

[548] See Amendment of the Commission's Rules Regarding the **37.0-38.6** GHz and 38.6-40.0 Bands, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-**40.0** GHz Bands, ***Memorandum Opinion and Order,*** ET Docket No. 95-183, PP Docket No. 93-253, **12** FCC Rcd **2910.2915 ¶ 10** ***citing Kessler v. FCC*****, 326** F. **2d 673,679-81** (D.C.Cir. **1963).**

[549] ***See supra,*** para. 22

[550] ***See*** Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, MM Docket No. 97-234, GC Docket No. **92-52,** GEN Docket No. 90-264, ***First Report and Order,*** **13** FCC Rcd **15,920,** 15,998-16,004 **(1998)** ***("Competitive Bidding for ITFS Licenses First Report and Order"), recon. granted in part, Memorandum Opinion and Order,*** **14** FCC Rcd **8,724 (1999)** (in relevant part, granting ITFS applicants in future auctions a post-shon-form settlement period and clarifying that the new entrant bidding credit will not be applied in any **ITFS** auction), ***and rule modified in part,*** **14** FCC Rcd **12,541** (continued...)

current service rules. As the Commission recognized, Congress has mandated expressly that "if 'mutually exclusive applications are accepted for ***any*** initial license or construction permit, then. ***except as provided in paragraph (2)*** [of 47 U.S.C. §309(j)], the Commission ***shall*** grant the license or permit to a qualified applicant through a system of competitive bidding[.]'"[551] The Commission originally concluded that neither MDS nor ITFS come within any of paragraph 2's exceptions for "public safety radio services;" for initial digital television licenses given to existing broadcast licenses to replace analog televisions licenses; and for "noncommercial educational broadcast" and "public broadcast" stations, as those terms are defined in 47 U.S.C. §397(6).[552] The changes proposed in this ***NPRM & MO&O*** will not bring MDS or ITFS licenses within any of these exceptions, which Congress has not changed or expanded. Accordingly, we must use competitive bidding to resolve mutually exclusive applications for licenses in these bands.

231. ***Participation in Auctions for Licenses to Use ITFS Spectrum in Currently Unassigned Areas.*** What parties may participate in an auction for licenses to use ITFS spectrum in currently unassigned areas is a distinct question from what parties should be eligible to hold ITFS spectrum licenses.[553] Citing prior Commission proceedings, the Coalition proposes that participation in such an auction should be limited solely to parties with pending applications for licenses associated with unassigned ITFS spectrum.[554] Previously, the Commission observed that "it would not serve the public interest to accept additional competing ITFS applications despite our authority to do so under Section 309(j)(1)," and therefore the only "eligible bidders in any auction of the pending ITFS applications" ought to be "those with applications already on file."[555] However, this prior observation applied solely with respect to "any auction of the ***pending ITFS applications[.]"*** Pursuant to this ***NPRM & MO&O***, and consistent with the Coalition proposal, we now are considering an auction of new licenses for using ITFS spectrum in geographic areas that will encompass currently unassigned areas. As noted previously, geographic area licensing will give licensees greater operational flexibility to modify, move. and add to their facilities, which may improve spectrum utilization.[556] In addition, this greater operational flexibility may result in new and competing proposals for utilizing the public spectrum resource from parties not previously involved in pending site-based licensing applications. Applicants intending very different uses of these more flexible licenses can express the respective values a particular license has for their intended use in easy to compare competitive bids. This enables the Commission rapidly to assign licenses to parties that will put them to their highest value use. However, an auction must be open to all parties qualified to use the license in order to assign the license to the party that most highly values it.[557] We seek comment on whether the Commission should adopt the Coalition's plan or open participation to

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(1999) (modifying rules regarding attribution of ownership for determining eligibility for new entrant bidding credit).

[551] ***Competitive Bidding for ITFS Licenses First Repon and Order,*** 14 FCC Rcd at 15.999 n.245 (quoting and adding emphasis to 47 U.S.C. § 309(j)(1)).

[552] ***See*** 47 U.S.C. § 309(j)(2)

[553] ***See supra,*** paras. 107-117.

[554] White Paper at 41 and n.111 (quoting 13 FCC Rcd at 16.002).

[555] ***Id.***

[556] ***See supra,*** para. 62.

[557] ***See generally*** Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, ***Second Report And Order,*** 9 FCC Rcd 2348, 2360-2361, ¶¶ 70-71 (1994).