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**FEDERAL EMERGENCY  
MANAGEMENT AGENCY**

**44 CFR Part 206**

RIN 3067-AC39

**Exemption From Garnishment for  
Temporary Housing Assistance**

**AGENCY:** Federal Emergency  
Management Agency (FEMA).

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would establish that all financial assistance provided under the Disaster Housing Program is exempt from garnishment, seizure, encumbrance, levy, execution, pledge, attachment, release, or waiver.

**DATES:** Comments will be accepted until October 23, 1995.

**ADDRESSES:** Please send comments to the Rules Docket Clerk, Office of the General Counsel, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (facsimile) 202-646-4536.

**FOR FURTHER INFORMATION CONTACT:** Laurence W. Zensinger, Response and Recovery Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646-4262, (facsimile) 202-646-2730.

**SUPPLEMENTARY INFORMATION:** Financial assistance provided under the Disaster Housing Program is not currently exempt from garnishment. Financial assistance under the Individual and Family Grant (IFG) Program is exempt from garnishment as specified in 44 CFR 206.131(l). The purpose of financial assistance provided under the Disaster Housing Program is to aid the applicant in obtaining safe housing following a Presidentially declared disaster. When financial assistance provided to an applicant is garnished, the housing needs of the applicant remain unmet. Regulatory exemption from garnishment serves the intent of the Disaster Housing Program and this proposed rule would provide needed protection for applicants who are awarded assistance.

**National Environmental Policy Act**

This proposed rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

**Executive Order 12866, Regulatory  
Planning and Review**

This proposed rule would not be a significant regulatory action within the meaning of § 2(f) of E.O. 12866 of September 30, 1993, 58 FR 51735. To the extent possible this proposed rule would adhere to the regulatory principles set forth in E.O. 12866, but has not been reviewed by the Office of Management and Budget under the provisions of E.O. 12866.

**Paperwork Reduction Act**

This proposed rule does not contain a collection of information requirement as described in section 3504(h) of the Paperwork Reduction Act.

**Executive Order 12612, Federalism**

This proposed rule involves no policies that have federalism implications under E.O. 12612, Federalism, dated October 26, 1987.

**Executive Order 12778, Civil Justice  
Reform**

This proposed rule meets the applicable standards of § 2(b)(2) of E.O. 12778.

**List of Subjects in 44 CFR Part 206**

Administrative practice and procedure, Disaster assistance, Housing.

Accordingly, 44 CFR part 206 is proposed to be amended as follows:

**PART 206—FEDERAL DISASTER  
ASSISTANCE FOR DISASTERS  
DECLARED ON OR AFTER  
NOVEMBER 23, 1988**

**Subpart D—Temporary Housing  
Assistance**

1. The authority citation for part 206 is proposed to be revised to read as follows:

**Authority:** The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq.; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329, 5 U.S.C. App. 1; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412, as amended; and E.O. 12673, 54 FR 12571, 3 CFR, 1989 Comp., p. 214.

2. Section 206.101(g) is proposed to be amended to add introductory text to read as follows:

(g) *Forms of Temporary Housing Assistance.* All proceeds received or receivable by the applicant under § 206.101 shall be exempt from garnishment, seizure, encumbrance, levy, execution, pledge, attachment, release, or waiver. No rights under this provision are assignable or transferable.

\* \* \* \* \*

Dated: August 16, 1995.

**Richard W. Krimm,**

*Associate Director, Response and Recovery.*  
[FR Doc. 95-20900 Filed 8-22-95; 8:45 am]  
BILLING CODE 6718-02-P

**FEDERAL COMMUNICATIONS  
COMMISSION**

**47 CFR Parts 21 and 25**

[CC Docket No. 92-297, FCC 95-287]

**Redesignating the 27.5-29.5 GHz  
Frequency Band, Reallocating the  
29.5-30.0 GHz Frequency Band, and  
Establishing Rules and Policies for  
Local Multipoint Distribution Service  
and for Fixed Satellite Services**

**AGENCY:** Federal Communications  
Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This is the Third Notice of Proposed Rulemaking to establish Local Multipoint Distribution Service (LMDS) in the 27.5-29.5 GHz (28 GHz) frequency band. In this Notice, the Commission proposes a band segmentation plan designed to permit both LMDS and Fixed Satellite Service (FSS) systems to operate in the 28 GHz frequency band. It also proposes to accommodate feeder links for certain Mobile Satellite Service (MSS) systems in this band. The proposal ensures the rapid dissemination of innovative communications services by facilitating the entry of multiple providers into the market. New providers will offer facilities-based competition to each other and traditional cable and telephone carriers—greatly enhancing customer choice. A wealth of innovative services will include two-way video, teleconferencing, telemedicine, telecommuting, data services and global networks. The Commission proposes the use of competitive bidding to choose among mutually exclusive LMDS and FSS applicants. It also proposes to reallocate the 29.5-30.0 GHz band in connection with the band segmentation plan. The Commission is also supplementing its earlier Tentative Decision on CellularVision's request for a Pioneer Preference.

**DATES:** Comments are due on or before August 28, 1995 and replies are due on or before September 18, 1995.

**FOR FURTHER INFORMATION CONTACT:** Susan Magnotti, Private Wireless Division, Wireless Telecommunications Bureau, (202) 418-0871; Donna Bethea, Satellite and Radiocommunication Division, International Bureau, (202) 739-0728.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Third Notice of Proposed Rulemaking* in CC Docket 92-297, adopted July 13, 1995, and released July 28, 1995.

The complete text of the *Third Notice of Proposed Rulemaking* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 230), 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Services, at (202) 857-3800, 1919 M Street, NW., Room 246, Washington, DC 20554.

**Synopsis of Third Notice of Proposed Rulemaking and Supplemental Tentative Decision**

In the first NPRM, 58 FR 6400 (January 28, 1993), the Commission considered three petitions for rulemaking proposing a redesignation of the 28 GHz band. That band currently is designated for fixed point-to-point and fixed satellite service use. It found that redesignation of the point-to-point use of the band to point-to-multipoint use could stimulate greater use of a band that largely has lain fallow. However, the Commission asked for

comment from satellite entities regarding the effect of redesignation on any proposed fixed satellite use of the band. Non-geostationary orbit (NGSO) and Geostationary orbit (GSO) FSS systems were proposed. In addition, entities planning mobile satellite services requested spectrum for their uplink feederlinks.

In this Notice, the Commission proposes a band segmentation plan that it tentatively concludes will permit both LMDS and Fixed Satellite Service (FSS) systems to operate in the 28 GHz frequency band. It also proposes to accommodate feeder links for certain Mobile Satellite Service (MSS) systems in this band.

The proposal ensures the rapid dissemination of innovative communications services by facilitating the entry of multiple providers into the market. New providers will offer facilities-based competition to each other and traditional cable and telephone carriers—greatly enhancing customer choice. A wealth of innovative services will include two-way video, teleconferencing, telemedicine, telecommuting, data services and global networks. Flexible service rules will

also promote the efficient use of scarce spectrum by allowing providers to adjust and respond to changes in technology and market demand.

The Commission proposes a segmentation scheme for the 28 GHz band that it believes is equitable, allows licensees to operate viable systems, promotes competition within the band, allows the public to receive service as soon as possible, and provides for future growth of both satellite and terrestrial services. The plan also supports the NII and GII, creates competition to cable, LECs, cellular, and PCS, and continues to promote the U.S. as a leader in satellite technology. The Commission believes this spectrum band plan accommodates the expected needs of all of the parties, although it does not reflect their exact requests. The Commission maintains that each proponent can still develop and operate viable systems within the band, and initiate competitive services. Moreover, this proposal allows both terrestrial LMDS and satellite industries to implement services in the near term.

The Commission's proposed plan is depicted graphically as follows:<sup>1</sup>  
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**PROPOSED BAND SEGMENTATION PLAN**

27.5	28.35	28.60	29.1	29.25	29.5	30.0 GHz
LMDS fss	GSO/FSS ngso/fss	NGSO/FSS gso/fss	MSS FEEDER LINKS & LMDS	MSS FEEDER LINKS & GSO/FSS	GSO/FSS ngso/fss	
850 MHz	250 MHz	500 MHz	150 MHz	250 MHz	500 MHz	

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The Commission's recommended proposals for the WRC-95 include proposals designed to eliminate a principle regulatory obstacle to NGSO service—ITU Radio Regulation 2613 from applying in Ka-Band uplink and downlink spectrum. The proposals, if adopted at WRC-95, would facilitate the implementation of the band segmentation plan it proposes. However, adoption of different provisions at the WRC-95 could affect

the ability to implement the plan. Accordingly, the Commission requests comment on what, if any, contingency plans may be appropriate at this stage, and on any other information that develops from the WRC-95 Preparatory process that may be relevant to implementation of the proposed plan.

*Supplemental Tentative Decision on CellularVision's Pioneer's Preference Application*

In the Tentative Decision on CellularVision's request for a pioneer's preference, the Commission found that CellularVision is the innovator of LMDS technology. Accordingly, it tentatively found that CellularVision should be awarded a pioneer's preference. CellularVision's specific pioneer's preference request was for the Los

<sup>1</sup> Primary services are listed in capital letters. Lower-case letters indicate secondary services. Primary services in a particular frequency band have equal rights to any other services operating in the same band. Stations operating in primary

services are protected against interference from stations of "secondary" services. Moreover, stations operating in a secondary service cannot claim protection from harmful interference from stations of a primary service. 47 CFR 2.104(d) and 2.105(c).

Angeles MSA—it argued that the service it was providing in New York was substantially different from the service for which it requested a pioneer's preference in Los Angeles. The Commission disagreed, however, and determined not to award a pioneer's preference for LMDS in more than one service area. Accordingly, the Commission stated that if a pioneer's preference to CellularVision were to be awarded, that it would "modify the authorization to (CellularVision) to meet the service area, frequency, and other technical rules developed in this proceeding for the area encompassing (CellularVision's) New York PMSA authorization." However, the Commission further stated that if CellularVision were to inform the Commission that it prefers Los Angeles, and if it were to surrender its New York license, the Commission would grant its pioneer's preference for Los Angeles.

CellularVision filed comments to the Tentative Decision in which it argued that it was entitled to a pioneer's preference in the Los Angeles area without its affiliate Hye Crest being forced to surrender its New York license. Specifically, CellularVision argued that: (a) Hye Crest was licensed prior to the adoption of the pioneer's preference rules; (b) the proposed 28 GHz service rules are an outgrowth of the work commenced by CellularVision after Hye Crest was authorized and the pioneer's preference rules were adopted; and, (c) the service provided by Hye Crest is different than the service for which CellularVision seeks a pioneer's preference.

A number of parties supported CellularVision's pioneer's preference arguments in comments and reply comments to the Tentative Decision. However, in this supplemental tentative decision, the Commission notes that all of those filings were made prior to the Commission being granted competitive bidding authority by Congress in August 1993. Due to the fact such authority has drastically altered the pioneer's preference rules by requiring payment from pioneers, and due to the unique circumstances discussed below, the Commission finds no further need to consider whether CellularVision is entitled to a preference in Los Angeles. Rather, it proposes to change its earlier tentative decision, and grant CellularVision a preference for that portion of the New York BTA (or other geographic service area ultimately adopted) which includes the New York PMSA. The pioneer's preference, covering the portion of the BTA lying outside the PMSA, would be for the portion of the 28 GHz band proposed to

be available for LMDS in the Commission's band splitting plan, *infra*, i.e., 27.5–28.35 GHz and 29.1–29.25 GHz (or whatever band plan is ultimately adopted by the Commission). The Commission notes that if a pioneer's preference is awarded for the remainder of the BTA, section 309(j)(13)(B) of the Communications Act, requiring an 85 percent payment of the value of the pioneer's preference license, would apply only to the portion of the New York BTA not covered by CellularVision's existing license for the PMSA. The Commission also clarifies that the rules governing its evaluation of CellularVision's pioneer's preference request are those that were in effect when the Tentative Decision was adopted.<sup>2</sup>

Since the Commission's tentative decision on its pioneer's preference request in the First NPRM, CellularVision has begun serving a significant number of customers within its New York license area. Therefore, the Commission does not believe it is in the public interest for it to continue proposing, in the context of a pioneer's preference award, that CellularVision voluntarily discontinue service in New York and turn in its license. Moreover, it believes that CellularVision has made a commitment to providing service in New York, as evidenced by the fact that it has applied for additional cell sites to cover the remainder of the PMSA. The Commission has held that the choice of which geographic area to be awarded as the pioneer's preference license will be the licensee's. CellularVision's circumstances are unique, however, in that the original license was granted before the Commission established an LMDS service category and adopted regulations to govern the service. Further, the license was granted pursuant to waiver, prior to the Commission's adoption of the pioneer's preference rules, and for reasons that are consistent with the underlying objectives of those rules. These unique circumstances warrant the Commission's tentative decision to waive its rules on its own motion to the extent they would afford CellularVision the opportunity to choose the geographic area to be awarded as the pioneer's preference license. The Commission also notes that CellularVision would have the

opportunity (as would any interested party) to participate in any competitive bidding procedures we may establish in this proceeding for purposes of licensing LMDS service in the Los Angeles area.

It is the Commission's intention to accommodate CellularVision's operations within the New York PMSA to the maximum extent possible, while minimizing adverse effects of its operations in the 28.35–28.5 frequency band on eventual GSO licensees. It proposes, if it takes favorable action on any renewal application CellularVision files pursuant to its existing license (such a filing would be due in January 1996), to include as a condition of the PMSA license a provision permitting CellularVision to operate on the contiguous 1 GHz for which it is presently licensed for a period of time sufficient to accommodate its operations within the New York PMSA without adversely affecting the eventual GSO licensee. The Commission tentatively concludes that a grandfathering period of 36 months following the release date of the First Report and Order in this proceeding, or until the first GSO satellite is successfully launched, whichever occurs later, is appropriate. The Commission tentatively intends to instruct the Wireless Telecommunications Bureau to condition any such renewed license with a provision specifying that, after the end of the grandfathering period it adopts, the CellularVision license would become subject to the generally applicable rules for the provision of LMDS service. Thus, if the proposed band segmentation plan is adopted, at the end of the grandfathering period CellularVision would be required to cease operation on the 150 MHz allocated for GSO/FSS operations 36 months after release of the First Report and Order in this proceeding or until the first GSO satellite is launched, whichever is later. Simultaneously, CellularVision would be permitted to operate on a co-primary basis on the 150 MHz at 29.1–29.25 GHz.

Finally, the Commission seeks comment on whether it would be appropriate to place conditions on any pioneer's preference license issued to CellularVision, similar to those placed on other pioneer's preference licensees in PCS. For the pioneer's preference licenses heretofore granted, the Commission placed a condition on the broadband and narrowband PCS licenses that required that they be held for three years or until the construction requirements applicable to the five-year build-out period have been met, whichever is earlier.

<sup>2</sup> When the Commission adopted amendments to its pioneer's preference evaluation criteria in 1994, it explicitly held that the new criteria would not apply to proceedings in which tentative decisions had been issued, such as this one, see In the Matter of Review of the Pioneer's Preference Rules, First Report and Order, 59 FR 8413, February 22, 1994 9 FCC Rcd 605, para. 9 (1994).

### *Local Multipoint Distribution Service Licensing Issues*

The Commission seeks comment on whether it is advisable, from a competitive standpoint, to license more than one LMDS operator per market and on any competitive concerns raised by the grant of a 1000 MHz block to a single LMDS licensee in each market.

While allowing one LMDS provider per market may help ensure the competitive viability of this fledgling service, and thereby maximize the ability of LMDS licensees to provide significant competition to other services, the Commission recognizes that digital LMDS is being developed that has the potential to greatly increase the capacity of LMDS systems. Possible schemes include issuing only one license per market for the entire 1000 MHz; issuing two licenses, one for the 850 MHz contiguous band of spectrum and one for the 150 MHz coprimary portion; and issuing three licenses, two for 425 MHz and one for the 150 MHz coprimary segment. If the licensing scheme which is ultimately adopted includes more than one license per market, the Commission seeks comment on whether to permit aggregation of licenses within the same geographic service area.

The Commission continues to believe that BTAs are the best geographic area for licensing LMDS.<sup>3</sup> It believes that, based on the record submitted thus far in this proceeding, there is a reasonable likelihood that services provided through use of the LMDS spectrum will have a local focus. BTA service areas, it tentatively concludes, will best approximate the likely scope of the service areas for these services.

The Commission seeks comment on whether the most rapid build-out of LMDS would occur if it were to permit partitioning of the license pursuant to eligibility and other rules adopted for this service. It seeks comment regarding whether geographic partitioning should be established in the case of LMDS licenses, and on the manner in which the proposed build-out requirement

would be applied to a partitioned license.

The Commission requests comment on three alternatives for regulating LMDS licensees. One option is that licensees would be presumed to be common carriers subject to Title II regulation to the extent the system is used to provide two-way data, voice, and other telecommunications services, and in the absence of evidence demonstrating that they provide only private carriage. The second option is the same one set forth in the First NPRM, i.e., in their applications, successful bidders would specify the types of services they expect to offer and indicate the regulatory status under which those services would be offered. Licensees would be required to describe their proposed service in sufficient detail for the Commission to confirm that their requested status complies with relevant judicial and/or statutory standards. The Commission would retain oversight of the parties' compliance with the statutory and judicial standards for status based on the type of service offered. The third option for LMDS licensees is to treat them similarly to the way in which MMDS licensees are treated. MMDS licensees are permitted to provide service as common carriers or private carriers. Under the MMDS rules, however, licensees operating as private carriers must comply with common carriage rules, except for the tariffing requirement.

The Third NPRM seeks comment on the eligibility of telephone companies, commercial mobile radio service providers, cable television companies, and multichannel multipoint distribution service providers to be licensed for LMDS within their service areas.

Since the Commission is proposing the use of competitive bidding to award LMDS licenses, it withdraws its proposal to limit transfer or assignment of LMDS licenses, except in the case of licenses awarded to designated entities. Because of the special consideration accorded designated entities in the auction process, the Commission proposes that such licenses be restricted in a manner similar to that proposed for Specialized Mobile Radio licenses. A designated entity would be prohibited from voluntarily assigning or transferring control of its license to any other entity during the three years after license grant. In the fourth and fifth years of the license term, the designated entity would only be able to assign or transfer control of its license to another qualified designated entity, and no

unjust enrichment could be gained through the transfer.

Although the Commission proposed in the First NPRM to forbear from regulating rates of LMDS licensees if regulated as common carriers, subsequent judicial interpretation of the Communications Act forecloses this approach to the extent that LMDS providers operate as common carriers. *AT&T v. FCC*, 978 F.2d (D.C. Cir. 1993), *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995) Accordingly, to the extent LMDS licensees offer services which are categorized as common carrier offerings that are not within the definition of Commercial Mobile Radio Services (CMRS), the Commission has no alternative but to impose all statutory requirements pertaining to common carriers. In the case of filings required under Section 214 of the Act, the Commission seeks comment regarding whether we should consider the development of streamlined filing provisions in the case of LMDS service providers.

The Commission tentatively concludes that some build-out requirement is necessary for LMDS, but one which is more moderate than was proposed in the First NPRM. The Commission proposes to require licensees to have made service available to a minimum of one-third of the population of their geographic areas within five years from license grant. It proposes that licensees will have made service available to a minimum of two-thirds of the population of their geographic areas within ten years from license grant.

### *Satellite Services Licensing*

There are existing rules for the GSO/FSS systems in place in part 25 of the Commission's rules. These include technical rules, such as 2° orbital spacing and full frequency reuse, and licensee qualification rules, for example, a rigorous financial qualification standard. The Commission proposes to apply these rules to GSO/FSS systems that will use the 27.5-30.0 GHz band. The Commission requests comment on whether specific rules, such as the financial qualification requirement, should be altered and whether any additional rules should be created. It requests specific comment on any technical standards that will facilitate sharing under the band segmentation plan.

Following the release of this Notice, the Commission will place the pending satellite applications on separate Public Notice, and will establish cut-off periods for both the GSO/FSS and NGSO/FSS applications to be

<sup>3</sup>Rand McNally is the copyright owner of the MTA/BTA Listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally's Trading Area System MTA/BTA Diskette, and geographically represented in the map contained in Rand McNally's Commercial Atlas & Marketing Guide. The conditional use of Rand McNally's copyrighted material by interested persons is authorized under a blanket licensee agreement dated February 10, 1994, and covers use by LMDS applicants. This agreement requires authorized users of the material to include a legend on reproductions (as specified in the license agreement) indicating Rand McNally's ownership.

considered concurrently with these.<sup>4</sup> If all qualified applicants in the processing group cannot be accommodated, it proposes to use competitive bidding as the procedure to choose among the mutually exclusive applications to provide domestic service within the United States. The Commission is not auctioning access rights to other countries from either NGSO/FSS or GSO/FSS systems. The Commission is also auctioning access rights to serve the U.S. market only from certain orbit locations for specific frequency bands.

#### *Competitive Bidding Proposal and Procedures*

Following is the verbatim text of that portion of the third NPRM pertaining to competitive bidding issues:

#### **A. Competitive Bidding**

Section 309(j)(1) of the Communications Act, as amended, 47 U.S.C. 309(j)(1), permits auctions only where mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission and where the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals.<sup>5</sup>

The Commission has previously determined that auctions are permissible if at least a majority of the use of the spectrum would be for service to subscribers. In making this determination, we looked to classes of licenses and permits rather than to individual licenses.<sup>6</sup> Based on the service proposals in the extensive record developed in this proceeding to date, we believe that the principal use of the LMDS spectrum will meet these requirements.

With respect to the NGSO and GSO FSS applicants, we tentatively conclude that the principal use of the spectrum will be to provide subscription based services,<sup>7</sup> even though certain portions of the spectrum will be used for large

bandwidth applications through gateway terminals. We request comment on these tentative conclusions, including information from any potential LMDS or satellite applicants on the type of service they contemplate offering.

In addition, we tentatively conclude that the use of competitive bidding to award LMDS and satellite licenses will promote the objectives described in section 309(j)(3) of the Communications Act. These objectives are:

(A) The development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) Promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) Recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resources; and

(D) Efficient and intensive use of the electromagnetic spectrum.

First, based on our experience conducting PCS auctions, we believe that the use of competitive bidding to award GSO/FSS and NGSO/FSS and LMDS licenses, as compared with other licensing methods, will speed the development and deployment of new technologies, products and services to the public with minimal administrative or judicial delay, and will encourage efficient use of the spectrum as required by sections 309(j)(3) (A) and (D). Second, use of auctions to assign LMDS and satellite licenses will clearly advance the goals of section 309(j)(3)(C) by enabling us to recover for the public a portion of the value of the public spectrum.<sup>8</sup> By using a licensing methodology which ensures that licenses are assigned to those who value them most highly, it follows that such licensees can be expected to make the most efficient and intensive use of the spectrum. Finally, we believe that using auctions will meet the objectives of section 309(j)(3)(B) because we propose to adopt competitive bidding rules that foster economic opportunity and the distribution of licenses among a wide

variety of applicants including small businesses, rural telephone companies and businesses owned by women and minorities (collectively referred to as "designated entities") who might otherwise face entry barriers.

#### **B. Determining Mutual Exclusivity**

As noted above, one of the prerequisites for use of the auction procedures is that applications must be mutually exclusive. The Communications Act states that "[n]othing in [Section 309(j)], or in the use of competitive bidding, shall \* \* \* be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings \* \* \*." 47 U.S.C. 309(j)(6)(E). With respect to LMDS, we propose to use discrete geographic service areas and spectrum blocks, thus avoiding the possibility of "daisy chain" mutual exclusivity among applications. However, because of the great interest shown in LMDS in this proceeding to date, we anticipate that there will be multiple applications filed for each geographic area. Moreover, we tentatively conclude that it would not serve the public interest for the Commission to avoid mutual exclusivity altogether because doing so would greatly circumscribe the geographic service areas and would defeat the Commission's ability to determine the applicants who would put the spectrum to its highest valued use.

We propose to determine mutual exclusivity based on the FCC Form 175 application for LMDS licenses. If more than one application is filed for the same LMDS frequency in the same geographic area then mutual exclusivity would be established and the license will be auctioned. As we indicated in the Second Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) 59 FR 22980, May 4, 1994, if the Commission receives only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, the Commission by Public Notice will cancel the auction for this license and establish a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny.<sup>9</sup> We seek comment on this proposal, particularly whether some other type of filing method would be more appropriate for

<sup>4</sup> All applicants would have to pay the filing fees set out in our rules, for applications for authority to construct, launch, and operate a satellite in the FSS.

<sup>5</sup> As discussed *infra*, the LMDS services proposed to date all appear to be subscriber-based services. However, we are aware that interest in the use of this spectrum has been demonstrated by two entities interested in manufacturing point-to-point equipment (Digital Corporation and Harris Corp.—Farinon Div.) which is unlikely to be subscriber-based.

<sup>6</sup> *Second Report and Order, supra, n. 79 at 2354.*

<sup>7</sup> See First Report and Order and Second Notice of Proposed Rulemaking in ET Docket No. 94-32, FCC 95-47, 60 FR 13102 (March 10, 1995) at 33.

<sup>8</sup> *Id.*

<sup>9</sup> See Second Report and Order at para. 165.

determining whether initial applications are mutually exclusive.

With respect to GSO/FSS service and NGSO/FSS systems, it is premature to determine whether mutual exclusivity will occur. We intend to open a new filing period permitting additional parties to apply for this spectrum. If additional entities file applications during this filing period, it is possible, given the limited amount of spectrum available, that we may not be able to accommodate all of the applicants' proposals. Under these circumstances the Commission proposes to award these licenses by auction. We seek comment on this proposal.

### C. Competitive Bidding Issues

#### 1. Competitive Bidding Design

##### (a) General Competitive Bidding Principles

The Competitive Bidding Second Report and Order,<sup>10</sup> as modified by the Competitive Bidding Reconsideration Order,<sup>11</sup> established the criteria to be used in selecting which auction design method to use for each particular auctionable service. Generally, we concluded that awarding licenses to those parties who value them most highly will foster the statutory policy objectives. In this regard, we noted that since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum.<sup>12</sup>

Based on the foregoing, we concluded that where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding.<sup>13</sup> We also noted, however, that simultaneous multiple round auctions may not be appropriate for all licenses. For example, where there is less interdependence among licenses, there is less benefit to auctioning them simultaneously. Similarly, we explained that when the

values of particular licenses to be auctioned are low relative to the costs of conducting a simultaneous multiple round auction, we may consider auction designs that are relatively simple, with low administrative costs and minimal costs to the auction participants.<sup>14</sup>

##### (b) Competitive Bidding Methodology for LMDS Licenses

*Simultaneous Multiple Round Bidding.* We believe that simultaneous multiple round bidding should be the preferred method for licensing LMDS spectrum blocks. Based on the record in this proceeding and our successful experience conducting simultaneous multiple round auctions for narrowband and broadband PCS licenses, we believe that this auction design is the most appropriate for auctioning LMDS licenses. First, we believe that for certain bidders the value of these licenses will be significantly interdependent because of the desirability of aggregation across geographic regions and because, if the Commission provides for more than one license in each geographic service area, licenses within the same area would likely be close substitutes or strong complements. As indicated above, under these circumstances, simultaneous multiple round bidding will generate more information about license values during the course of the auction and provide bidders with more flexibility to pursue back-up strategies than if these licenses are auctioned separately. Simultaneous multiple round bidding is therefore most likely to award licenses to the bidders who value them the most highly and to provide bidders with the greatest likelihood of obtaining the license combinations which best satisfy their service needs. Finally, we expect the value of these licenses to be sufficiently high to warrant the use of simultaneous multiple round auctions. Therefore, we intend to use simultaneous multiple round bidding to award LMDS licenses. We ask commenters to address this tentative conclusion and whether any other competitive bidding designs would be more appropriate for the licensing of this spectrum.

*Grouping of Licenses.* Assuming we use simultaneous multiple round auctions for LMDS licenses, we also seek comment on which blocks should be auctioned together, and the sequencing of each auction. The importance of the choice of license groupings increases with the degree of interdependence among the individual licenses or groups of licenses to be

auctioned. Grouping interdependent licenses together and putting them up for bid at the same time will facilitate awarding licenses to bidders who value them the most highly by providing bidders with information about the prices of complementary and substitutable licenses during the course of the auction. Based on the foregoing, we propose to auction all LMDS licenses together in one simultaneous multiple round auction because of the expected value and significant interdependence of the licenses. We seek comment on this tentative analysis and on possible alternative license groupings.

*Combinatorial Bidding.* Another issue for consideration in auction design is whether to permit combinatorial bidding. In general terms, combinatorial bidding allows bidders to bid for multiple licenses as all-or-nothing packages (e.g., all licenses nationwide on a particular spectrum block, with the licenses awarded as a package if the combinatorial bid is greater than the sum of the high bids on the individual licenses in the package).<sup>15</sup> Combinatorial bidding can be implemented with either simultaneous or sequential auction designs. At this time, we do not plan to use combinatorial bidding in LMDS licensing because although we recognize that there may be significant benefits associated with combinatorial bidding, especially in terms of efficient aggregation of licenses, we tentatively conclude that simultaneous multiple round auctions offer many of the same advantages without the same degree of administrative and operational complexity and without biasing auction outcomes in favor of combination bids. We seek comment on the specific combinatorial bidding procedures that should be adopted if combinatorial bidding is used.

Alternatively, we may consider modifying the auction rules to directly limit the risk associated with bid withdrawal for those seeking nationwide aggregations. For example, we might cap the bid withdrawal payment (discussed below) for nationwide bidders at five percent of the

<sup>15</sup> In combinatorial bidding, if a bid for a group of licenses exceeds the sum of the highest bids for the individual licenses that comprise the package, then the package bid would win. In the Second Report and Order we also indicated that if we were to utilize combinatorial bidding we might institute a premium so that the combinatorial bid would win only if it exceeded the sum of the bids for individual licenses by a set percentage.

See Second Report and Order at para. 114. NTIA is the main advocate of combinatorial bidding. See comments of NTIA, and *ex parte* submission of NTIA in PP Docket No. 93-253, Feb. 28, 1994.

<sup>10</sup> Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, para. 69 (1994) (Competitive Bidding Second Report and Order).

<sup>11</sup> Competitive Bidding Reconsideration Order, 9 FCC Rcd at 7249-50.

<sup>12</sup> See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2360-61, para. 70.

<sup>13</sup> See 9 FCC Rcd at 2367, paras. 109-111.

<sup>14</sup> See *id.* at 2367, paras. 112-113.

withdrawn bids. To discourage those who do not truly seek nationwide aggregations of taking advantage of the limitations on bid withdrawal payments and to speed up the auction, nationwide bidders might be subject to the requirement that they be active (defined below) on all license on each nationwide aggregation on which they did. To ensure adequate competition for licenses which are reoffered after a nationwide withdrawal we might also modify the activity rules (discussed below) so that if any bidder withdraws a bid, the eligibility of all other bidders will be increased by the amount of the withdrawal bid up to each bidder's initial maximum eligibility. We seek comment on this alternative method of facilitating efficient nationwide aggregations.

#### (c) GSO/FSS Auction Proposals

In the event a competitive bidding approach is adopted to award GSO/FSS and NGSO/FSS licenses, we emphasize that we would be auctioning access to the United States only for use of specific frequency bands within the U.S. Any international access by the satellite users depends on the rules of that particular country. To afford licensees some flexibility in designing their systems and to allow for the uncertainties of the international coordination process, we propose to allow applicants to bid on the total amount of spectrum designated for GSO/FSS and NGSO/FSS services, respectively, set out in the band segmentation plan.

As we discussed earlier, it is premature for us to determine whether there will be mutually exclusive applications for GSO/FSS licenses in the band. Applications for GSO/FSS licenses would be mutually exclusive if we do not have a sufficient number of orbit locations to accommodate all qualified applicants. We request comment, with accompanying justification, from applicants and potential applicants, on how many users, within our two degree spacing rule, they believe can be supported in the GSO/FSS segments to provide service to the continental United States (CONUS), without causing harmful interference. If a mutually exclusive situation should arise, we propose to auction the GSO/FSS spectrum at each orbit location in two paired, uplink and downlink, 500 MHz blocks, allowing applicants to bid for up to two blocks. We believe 500 MHz blocks are the smallest spectrum blocks feasible to support a viable FSS system at 28 GHz. We request comment on whether this amount of spectrum is sufficient. If

auctions are used to award GSO/FSS licenses, we propose to use a simultaneous multiple round bidding, which will enable bidders to express the value interdependencies between the two blocks. We request comment on whether simultaneous multiple round bidding procedures are appropriate for this spectrum or whether other bidding procedures would better serve the statutory goals.

#### (d) NGSO/FSS Auction Proposals

The band segmentation plan designates 500 MHz of unrestricted contiguous spectrum to NGSO/FSS systems. Our preliminary technical analysis indicates that 500 MHz is the minimum amount of spectrum required to implement a viable system offering NGSO/FSS services. For NGSO/FSS systems, a mutually exclusive situation will arise if all qualified applicant are unable to share the spectrum. If mutually exclusive applications are received, we propose to use competitive bidding to award a single license. If competitive bidding is used to award such a license, we propose to conduct a multiple round auction for the entire 500 MHz block of spectrum. This multiple round auction may be either oral or electronic. We request comment from NGSO/FSS applicants and potential applicants on this proposal. Specifically we ask commenters to address the specific application and auction procedures that should be used.

#### (e) MSS Feeder Links

We are not proposing competitive bidding rules for MSS feeder links. In the Second Report and Order in the Competitive Bidding Rulemaking Proceeding, the Commission decided not to auction intermediate links, including feeder links in the Mobile Satellite Services (MSS).<sup>16</sup> We reasoned that before employing competitive bidding, the Commission is required to determine that mutually exclusive applications are likely to be filed and that such bidding would promote the objectives of section 309(j)(3)(A) through (D) of the Communications Act. With regard to mutual exclusivity, we noted that in those frequency bands most often utilized as intermediate links, mutual exclusivity is usually avoided by employing a frequency coordination process for each intermediate link prior to the time an application is granted. With regard to the objective of section 309(j)(3)(A)

<sup>16</sup> See Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93–253, Second Report and Order, 9 FCC Rcd. 2348, 2355–56 n. 30 (1994).

through (D), we concluded that auctioning intermediate links could significantly delay the development and rapid deployment of new technologies, products and services for the benefit of the public, that auctions for these links could impose significant administrative costs on licensees and the Commission, and that it was unclear whether competitive bidding for intermediate links would recover for the public a significant portion of the value of the spectrum, prevent unjust enrichment or promote efficient and intensive use of the spectrum.<sup>17</sup>

We tentatively conclude that FSS spectrum used for MSS feeder links should be excluded from competitive bidding. We base this tentative conclusion on the finding that auctions for MSS feeder links would not achieve the public interest objectives in Section 309(j)(3). The feeder links are an integral part of the MSS systems and the systems would be unable to operate without them. Three MSS systems have also already been licensed and auctioning the feeder links would only delay implementation of service to the public.

#### (f) Bidding Procedures

If we use simultaneous multiple round auctions, we generally propose to use bidding procedures similar to those used for broadband PCS.<sup>18</sup> We seek comment, however, on whether any variations on these procedures should be adopted for LMDS or FSS licenses.

*Bid Increments and Tie Bids.* In using simultaneous multiple round auctions to award licenses it is important to specify minimum bid increments. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction comes to closure within a reasonable period of time. Establishing an appropriate minimum bid increment is especially important in a simultaneous auction with a simultaneous closing rule. In that case, all markets remain open until there is no bidding on any license, and a delay in closing one market will delay the closing of all markets. As we recognized in the Second Report and Order in the

<sup>17</sup> Id at 2355, para. 43.

<sup>18</sup> Fifth Report and Order in PP Docket No. 93–253, 59 FR 37566, July 22, 1994 9 FCC Rcd 5532 (1994) (Fifth Report and Order), recon. granted in part, Fifth Memorandum Opinion and Order, 59 FR 63210, December 7, 1994 10 FCC Rcd 403 (1995) (Fifth Memorandum Opinion and Order).

competitive bidding docket, it is important in establishing the amount of the minimum bid increment to express such increment as the greater of a percentage and fixed dollar amount.<sup>19</sup> This will ensure a timely completion of the auction even if bidding begins at a very low dollar amount. Accordingly, we propose to impose a minimum bid increment equal to some percentage of the high bid from the previous round or a dollar amount per MHz per pop, whichever is greater where multiple round bidding is used.

We propose to announce by public notice prior to auction the specific bid increment that generally will be used. We anticipate using large bid increments early in the auction and reducing the increment as bidding activity falls. We note, however, that the Commission proposes to retain the discretion to set and, by announcement before or during the auction, vary the minimum bid increments for individual licenses or groups of licenses over the course of an auction.<sup>20</sup>

Where a tie bid occurs, we propose that the high bidder be determined by the order in which the bids were received by the Commission.<sup>21</sup>

**Stopping Rules.** When simultaneous multiple round auctions are used, a stopping rule must be established for determining when the auction is over. In simultaneous multiple round auctions, bidding may close separately on individual licenses, simultaneously on all licenses, or a hybrid approach may be used. Under an individual, license-by-license approach, bidding closes on each license after one round passes in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding generally remains open on all licenses until there is no new acceptable bid on any license. This approach has the advantage of providing bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions, unless an activity rule (see discussion *infra*, paras. 157 ff) is imposed. A hybrid approach combines the first two stopping rules. For example, we may use a simultaneous stopping rule (along with an activity rule designed to expedite closure for licenses subject to the simultaneous stopping rule) for the higher value licenses. For lower value

licenses, where the loss from eliminating some back-up strategies is less, we may use simpler license-by-license closings. In the Competitive Bidding Second Report and Order we recognized that such a hybrid approach might simplify and speed up the auction process without significantly sacrificing efficiency or expected revenue.<sup>22</sup>

For LMDS and FSS auctions, we propose to use a simultaneous stopping rule. Under this proposal, bidding will remain open on all licenses in an auction until bidding stops on every license. We propose that the auction will close after one round passes in which no new valid bids or proactive activity rule waivers (as defined below in the section on activity rules) are submitted. The Commission proposes to retain the discretion, however, to keep the auction open even if no new valid bids and no proactive waivers are submitted. In the event that the Commission exercises this discretion, the effect would be the same as if a bidder had submitted a proactive waiver.<sup>23</sup> Since we intend to impose an activity rule (as discussed below), we believe that allowing simultaneous closing for all licenses will afford bidders flexibility to pursue back-up strategies without running the risk that bidders will hold back their bidding until the final rounds.

In addition, we propose to retain the discretion to declare after forty rounds that the auction will end after some specified number of additional rounds. If this option were used, we propose to only accept bids on licenses where the high bid had increased in at least one of the last three rounds. We seek comment on our proposed use of a simultaneous stopping rule and ask commenters to indicate whether an alternative stopping rule would be more appropriate.

**Duration of Bidding Rounds.** In simultaneous multiple round auctions, bidders may need a significant amount of time to evaluate back-up strategies and develop their bidding plans. We seek comment on the appropriate duration of the bidding rounds as well as the interval between bidding rounds. We propose to retain the discretion to establish the duration and frequency of bidding rounds by public notice before each auction. We also propose to announce any changes to the duration of

or intervals between bidding rounds either by public notice prior to the auction, or announcement during the auction. We request comment on this proposal.

**Bid Withdrawals.** We propose to permit a high bidder to withdraw one or more of its high bids during the bid withdrawal period in each round subject to the bid withdrawal payments specified below. If a high bid is withdrawn, we propose that the license be offered in the next round at the second highest bid price. The Commission may at its discretion adjust the offer price in subsequent rounds until a valid bid is received on the license. In addition, to prevent a bidder from strategically delaying the close of the auction, we propose that the FCC retain the discretion to limit the number of times that a bidder may re-bid on a license from which it has withdrawn a high bid.

**Activity Rules.** In the Second Report and Order, we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used. See Second Report and Order at paras. 144-145. The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of MHz-pops, and make an upfront payment proportional to that eligibility level.<sup>24</sup> (See discussion of upfront payments *infra*, para. 167.) That is, in each round, bidders will be limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. Licenses on which a bidder is the high bidder at the end of the bid withdrawal period in the previous round count against this bidding limit. Under this approach, bidders have the flexibility to shift their bids among any licenses for which they have applied so long as, within each round, the total MHz-pops encompassed by those licenses does not exceed the total number of MHz-pops on which they are eligible to bid. Under this approach, to preserve their maximum eligibility, bidders are required to maintain a certain level of bidding activity during each round of the auction. The auction is divided into three stages with increasing levels of bidding activity required in each stage of the auction. A bidder is considered active on a license

<sup>22</sup> *Id.*

<sup>23</sup> This will help ensure that the auction is completed within a reasonable period of time, because it will enable the Commission to utilize larger bid increments, which speed the pace of the auction, without risking premature closing of the auction. See Memorandum Opinion and Order in PP Docket No. 93-253, 59 FR 64159, December 13, 1994 9 FCC Rcd 7684-7685 (1994).

<sup>24</sup> The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. We use the terms "per MHz-pop" and "per MHz per pop" interchangeably.

<sup>19</sup> See Second Report and Order, *supra*, at para. 126.

<sup>20</sup> In oral or electronic sequential auctions the auctioneer may within his or her sole discretion establish and vary the amount of the minimum bid increment in each round of bidding.

<sup>21</sup> See Second Report and Order at 2369.



in the current round if the bidder has submitted an acceptable bid for that license in the current round, or has the high bid for that license at the end of the bid withdrawal period in the previous round in which case, the bidder does not need to bid on that license in the current round to be considered active on that license. A bidder's activity level in a round is the sum of the MHz-pops associated with licenses on which the bidder is active.

We tentatively conclude that the Milgrom-Wilson activity rule should be used in conjunction with the proposed simultaneous stopping rule for LMDS and FSS auctions. We believe that the Milgrom-Wilson approach will best achieve the Commission's goals of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time.

Under the Milgrom-Wilson proposal, the minimum activity level, measured as a fraction of the bidder's eligibility in the current round, will increase during the course of the auction. Milgrom-Wilson divide the auction into three stages. We propose to establish the following minimum required activity levels for each stage of the auction: In each round of Stage One of the auction, a bidder who wishes to maintain its current eligibility is required to be active on licenses encompassing at least 60% of the MHz-pops for which it is currently eligible. Failure to maintain the requisite activity level will result in a reduction in the amount of MHz-pops upon which a bidder will be eligible to bid in the next round of bidding (unless an activity rule waiver, as defined below, is used). During Stage One, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-thirds ( $\frac{5}{3}$ ). Eligibility for each applicant in the first round of the auction is determined by the amount of the upfront payment received and the licenses identified in its auction application. In each round of the Stage Two, a bidder who wishes to maintain its current eligibility is required to be active on 80% on the MHz-pops for which it is eligible in the current round. During the second stage, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-fourths ( $\frac{5}{4}$ ). In each round of Stage Three, a bidder who wishes to maintain its current eligibility is required to be active on licenses encompassing 95 percent of the MHz-pops for which it is eligible in the current round. In Stage

Three, if activity in the current round is below 95 percent of current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by twenty-nineteenths ( $\frac{20}{19}$ ). We note, however, that the Commission proposes to retain the discretion to set and, by announcement before or during the auction, vary the required minimum activity levels (and associated eligibility calculations) for each auction stage. Retaining this flexibility will improve the Commission's ability to control the pace of the auction and help ensure that the auction is completed within a reasonable period of time.

In the PCS auctions, we specified transition guidelines for deciding when the auction would move from Stage One to Stage Two to Stage Three. Those guidelines are based on the "auction activity level," the sum of the MHz-pops of PCS licenses for which the high bid increased in the current round as a percentage of the total MHz-pops of all licenses offered in the auction.<sup>25</sup> However, we also retained the discretion to move the PCS auctions from one stage to another at a rate different from that set out in the guidelines.<sup>26</sup>

For the LMDS and FSS auctions, we propose to use the following transition guidelines: The auction will begin in Stage One and move from Stage One to Stage Two when the auction activity level is below ten percent for three consecutive rounds in Stage One. The auction will move from Stage Two to Stage Three when the auction activity level is below five percent for three consecutive rounds in Stage Two. In no case can the auction revert to an earlier stage. We propose, however, that the Commission retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next, based on a variety of measures of bidder activity, including, but not limited to, the auction activity level as defined above, the percentage of licenses (measured in terms of MHz-pops) on which there are new bids, the number of new bids, and the percentage increase in revenue.

To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission in a particular round, we proposed to provide bidders with a limited number of waivers of the above-described

activity rule. We believe that some waiver procedure is needed because the Commission does not wish to reduce a bidder's eligibility due to an accidental act or circumstances not under the bidder's control.<sup>27</sup>

We propose to provide bidders five activity rule waivers that may be used in any round during the course of the auction.<sup>28</sup> If a bidder's activity level is below the required activity level, a waiver will automatically be applied. That is, if a bidder fails to submit a bid in a round, and its activity level from any standing high bids (high bids at the end of the bid withdrawal period in the previous round) falls below its required activity level, a waiver will be automatically applied. A waiver will preserve current eligibility in the next round.<sup>29</sup> An activity rule waiver applies to an entire round of bidding and not to a particular BTA service area.

Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level.<sup>30</sup> If a bidder overrides the automatic waiver mechanism, its eligibility will be permanently reduced (according to the formulas specified above), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no new valid bids will not keep the auction open. Bidders will have the option of proactively entering an activity rule waiver during the bid submission period.<sup>31</sup> If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

The Commission proposes to retain the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. We also propose to retain the flexibility to adjust by public notice prior to an auction the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction.<sup>32</sup>

<sup>27</sup> See Second Report and Order at 2372.

<sup>28</sup> See Second Report and Order at 2373.

<sup>29</sup> An activity rule waiver cannot be used to correct an error in the amount bid.

<sup>30</sup> See Fourth Memorandum Opinion and Order in PP Docket No. 93-253, 9 FCC Rcd 6858, 6861 (1994).

<sup>31</sup> Thus, a "proactive" waiver, as distinguished from the automatic waiver described above, is one requested by the bidder.

<sup>32</sup> See Second Report and Order at 2373.

<sup>25</sup> See, e.g., Fifth Report and Order at 5555.

<sup>26</sup> See Fourth Memorandum Opinion and Order in PP Docket No. 93-253, 9 FCC Rcd 6858, 6860 (1994), 59 FR 53364, October 24, 1994.

We request comment on these proposals.

## 2. Procedural and Payment Issues

In the Competitive Bidding Second Report and Order, as modified by the Competitive Bidding Reconsideration Order in PP Docket No. 93-253, 9 FCC Rcd 7245 (1994), the Commission established general procedural and payment rules for auctions, but also stated that such rules may be modified on a service-specific basis.<sup>33</sup> As discussed below, we generally propose to follow the procedural and payment rules established in subpart Q of part 1 of the Commission's rules, but seek comment on whether any service-specific modifications of these rules are needed based on the particular characteristics of LMDS services.

### (a) Upfront Payments

As in the case of other auctionable services, we propose to require participants in the LMDS and FSS auctions to tender to the Commission in advance of the auction, a substantial upfront payment. We have previously determined that a substantial upfront payment requirement is necessary to ensure that only serious, qualified bidders participate in auctions and to ensure that sufficient funds are available to satisfy any bid withdrawal or default payments (discussed *infra*) that may be incurred. We seek comment on the appropriate amount of such upfront payments for LMDS and satellite auctions. In the PCS auctions the upfront payments was established based on a formula of \$0.02 per pop per MHz for the largest combination of MHz-pops a bidder anticipates being active in any single round of bidding. This upfront payment was designed to require an upfront payment representing approximately 5 percent of the expected value of such licenses. We seek comment on what the appropriate upfront payment price per MHz-pop should be for LMDS and satellite licenses. We also seek comment on whether we should establish a minimum upfront payment for applications and if so what the amount of that minimum upfront should be. In the Competitive Bidding Second Report and Order, we established a minimum upfront payment of \$2,500, but we also indicated that the minimum amount could be modified on a service-specific basis.<sup>34</sup> With respect FSS auctions, we seek comment on whether a fixed upfront payment would be more

appropriate, and if so, what the amount of that upfront should be.

### (b) Down Payment and Full Payment for Licenses Awarded by Competitive Bidding

The Competitive Bidding Second Report and Order generally established a 20 percent down payment requirement for winning bidders to discourage default between the auction and licensing and to ensure payment if such default occurs. We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while at the same time not being so onerous as to hinder growth or diminish access.

We similarly propose to require all winning bidders in LMDS, GSO/FSS and NGSO/FSS auctions to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).<sup>35</sup> Under this approach, winning bidders would be required to submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date to be specified by Public Notice, generally within five (5) business days following the close of bidding. All auction winners would generally be required to make full payment of the balance of their winning bids within five (5) business days following notification by the Commission that it was prepared to award the license. The license would then be granted after this payment was received. We seek comment on whether this is an appropriate requirement for licensing of these services, and whether 20 percent represents an appropriate level of payment. In addition, as discussed more fully below, we ask commenters to address whether any special payment provisions, for example a reduced down payment, should be adopted for designated entities, and if

<sup>35</sup> If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default payments due, the additional monies will be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the payment cannot yet be determined, the bidder will be required to make a deposit of 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the additional payment, any excess deposit will be refunded. Upfront payments will be applied to such deposits and to bid withdrawal and default payments due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.

so, for which specific categories of designated entities and why.

### (c) Bid Withdrawal, Default, and Disqualification

As we discussed in the Second Report and Order, it is important to the success of our system of competitive bidding that potential bidders understand that there will be a substantial payment assessed if they withdraw a high bid, are found not to be qualified to hold licenses or default on payment of a balance due. Accordingly, we propose to use the bid withdrawal, default and disqualification rules contained §§ 1.2104(g) and 1.2109 of the Commission's rules for LMDS, GSO/FSS and NGSO/FSS auctions. Pursuant to these rules, any bidder who withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.<sup>36</sup> No withdrawal payment will be assessed if the subsequent winning bid exceeds the withdrawn bid. After bidding closes, a defaulting auction winner (i.e., a winner who fails to remit the required down payment within the prescribed time, fails to pay for a license, or is otherwise disqualified) will be assessed an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less.<sup>37</sup> The additional three percent payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We propose to hold deposits made by defaulting or disqualified auction winners until full payment of the

<sup>36</sup> If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay an amount equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license which is the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, i.e., they may decline without additional payment. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore we will not hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

<sup>37</sup> See 47 CFR §§ 1.2104(g) and 1.2109.

<sup>33</sup> 9 FCC Rcd at 7249-50, paras. 23-26.

<sup>34</sup> 9 FCC Rcd at 2379, para. 180.

additional amount.<sup>38</sup> We believe that these additional payments will adequately discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. In the case of defaults, we also propose to retain discretion to offer a license to the next highest bidder at its final bid price if the default occurs within five business days after the close of bidding. We seek comment on these propose procedures.

In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, we propose to retain the option to declare the applicant and its principals ineligible to bid in future auctions, or take any other action we deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant.<sup>39</sup>

### 3. Regulatory Safeguards

#### (a) Unjust Enrichment Provisions

The Budget Act directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment and as a result of the methods employed to issue licenses and permits." We therefore propose to adopt the transfer disclosure requirements contained in § 1.2111(a) of our rules for all LMDS, GSO/FSS and NGSO/FSS licenses obtained through the competitive bidding process. In addition, we propose specific rules governing unjust enrichment by designated entities, which are discussed below. Generally, applicants transferring their licenses within three years after the initial license grant will be required to file, together with their transfer application, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of their licenses. We seek comment on these proposals.

#### (b) Performance Requirements

The Budget Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, 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." 47 U.S.C. 309(j)(4)(B). In the Competitive Bidding Second Report and Order, we determined that it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services. Our proposed LMDS service rules (and GSO/FSS and NGSO/FSS service rules) contain specific performance requirements, such as the requirement to construct and provide service within a specific period of time. Thus, we do not propose to adopt any additional performance requirements for competitive bidding purposes. We seek comment on this tentative conclusion.

#### (c) Rules Prohibiting Collusion

In the Competitive Bidding docket, we adopted special rules prohibiting collusive conduct in the context of competitive bidding. We indicated that such rules would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and that disadvantage other bidders. We propose to apply these rules to LMDS, GSO/FSS and NGSO/FSS auctions. Pursuant to these rules, from the time the short-form applications are filed until a winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application. In addition, bidders are required by § 1.2105(a)(2) of the Commission's Rules to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Bidders will also be required to certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid.

We also propose to require winning bidders, pursuant to § 1.2107 of the Commission's Rules, to attach as an exhibit to their license application a detailed explanation of the terms and conditions and parties involved in any

bidding consortium, joint venture, partnership, or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding. All such arrangements must have been entered into prior to the filing of short-form applications. In addition, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions. We seek comment on these proposals.

### 4. Treatment of Designated Entities

#### (a) Introduction

In authorizing the Commission to use competitive bidding, Congress mandated that the Commission "ensure that small business, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. 309(j)(4)(D). The statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" in order to achieve this Congressional goal. In addition, section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." Finally, section 309(j)(4)(A) provides that to promote these objectives, the Commission shall consider alternative payment schedules including installment payments.

In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the problems that designated entities would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in accessing capital. For example, the legislative history accompanying our

<sup>38</sup> In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision.

<sup>39</sup> See Second Report and Order at para. 198.

grant of auction authority states generally that the Commission's regulations "must promote economic opportunity and competition," and "(t)he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women."<sup>40</sup> The House Report states that the House Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small business, competitive bidding could result in a significant increase in concentration in the telecommunications industries."<sup>41</sup> More specifically, the House Committee was concerned that adoption of competitive bidding should not have the effect of "excluding" small businesses from the Commission's licensing procedures, and anticipated that the Commission would adopt regulations to ensure that small businesses would "continue to have opportunities to become licensees."<sup>42</sup> On the other hand, the House Report also states that "the characteristics of some services are inherently national in scope, and are therefore ill-suited for small businesses."<sup>43</sup>

Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installation payments were intended to assist small businesses. The House Report states that these related provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations, including those owned by members of minority groups and women."<sup>44</sup> It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups."<sup>45</sup>

In addition, with regard to access to capital, Congress had made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing

increased difficulties in obtaining credit."<sup>46</sup> As a result of these difficulties, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."<sup>47</sup> In the Competitive Bidding Second Report and Order, we also indicated that special measures may not be appropriate in all circumstances.

We have employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to designated entities in other spectrum-based services. For instance, we determined that minority-owned and women-owned businesses in the nationwide narrowband PCS auction would receive a 25 percent bidding credit on certain channels;<sup>48</sup> in the regional narrowband PCS auction women-owned and minority-owned businesses would receive a 40 percent bidding credit on certain channels and small businesses would be eligible for installment payments on all channels;<sup>49</sup> in the broadband PCS auction, on separate entrepreneurs' blocks, the bidding credits would vary according to the type of qualifying designated entity that applied,<sup>50</sup> and all entrepreneurs' block licensees would be eligible for installment payments.<sup>51</sup> For the Multipoint Distribution Service ("MDS") we adopted a 15 percent bidding credit, reduced upfront payments and installment payments for small businesses, including those owned by members of minority groups and women.<sup>52</sup> In satellite services, we have not proposed or adopted specific measures for designated entities.<sup>53</sup>

<sup>46</sup> Small Business Credit and Business Opportunity Enhancement Act of 1992, section 331(a)(3), Pub. L. 102-366, Sept. 4, 1992.

<sup>47</sup> Id. section 331(b)(2)-(3).

<sup>48</sup> Auctions Third Report and Order at para. 72.

<sup>49</sup> Id. at para. 87. See implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, para. 58 (1994), 5Q FR 44058, August 26, 1994.

<sup>50</sup> Auctions Fifth Report & Order at para. 133; Auctions Fifth Memorandum Opinion & Order at para. 99; See also Further Notice of Proposed Rulemaking, FCC 95-263 (released June 23, 1995), 60 FR 34201, June 30, 1995.

<sup>51</sup> Auctions Fifth Memorandum Opinion & Order at para. 103.

<sup>52</sup> Report and Order, MM Docket No. 94-131 and PP Docket 93-253, FCC 95-230 (adopted June 15, 1995), 60 FR 36524, July 17, 1995.

<sup>53</sup> See Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483-2500 MHz Frequency Bands, Report and Order, CC Docket No. 92-166, 9 FCC Rcd 5936, 5969-70

The measures considered thus far for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of designated entity opportunities. After examining the record in the competitive bidding proceeding in PP Docket 93-253, we established provisions necessary to enable designated entities to overcome the barriers to accessing capital in each particular service. Moreover, the measures we adopted also were designed to increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of wireless services.

As in other auctionable services, we fully intend in services using the 28 GHz band to meet the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. At the same time, we must be cautious and deliberative in our selected approach in light of the auction statute's directive to avoid judicial delays<sup>54</sup> and the substantial legal risks involved with providing preferential treatment on the basis of race or gender. In this regard, on June 12, 1995, the Supreme Court ruled in *Adarand Constructors v. Peña*<sup>55</sup> that measures adopted by the federal government awarding preferential treatment on the basis of race are subject to strict scrutiny.<sup>56</sup> To pass muster under that standard, such measures must be narrowly tailored to further compelling government interests.<sup>57</sup>

Adarand thus introduces an additional level of complexity in implementing Congress' mandate to ensure that businesses owned by minorities and women are provided "the opportunity to participate in the provision of spectrum-based services."<sup>58</sup> Although Adarand did not address gender-based preferences, we

(1994); Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Notice of Proposed Rulemaking, IB Docket No. 95-91, paras. 107-108, FCC 95-229 (released June 15, 1995) 60 FR 35166, July 6 1995.

<sup>54</sup> 47 U.S.C. 309(j)(3)(A).

<sup>55</sup> 63 U.S.L.W. 4523 (U.S. June 12, 1995).

<sup>56</sup> Id., 63 U.S.L.W. at 4530.

<sup>57</sup> Id.

<sup>58</sup> 47 U.S.C. 309(j)(4)(D).

<sup>40</sup> H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993).

<sup>41</sup> Id.

<sup>42</sup> Id. at 255.

<sup>43</sup> Id. at 254.

<sup>44</sup> Id.

<sup>45</sup> Id.

have included them here in an effort to seek the broadest possible comment. We welcome comment as to the appropriateness of our approach. Accordingly, we seek comment on how we can best promote opportunities for businesses owned by minorities and women in the provision of LMDS and satellite services in light of Adarand. We seek the broadest possible comments including, but not limited to, responses to the following questions:

(1) Does the Commission have a compelling interest in establishing opportunity-enhancing measures in the provision of LMDS and satellite services specifically for minority- and women-owned businesses? If so, what is that compelling interest? Would the goal of assuring a "diversity of voices" in the provision of LMDS and satellite services suffice as a compelling interest?<sup>59</sup>

(2) What evidence (statistical, documentary, anecdotal or otherwise) can be marshalled to support the proposed compelling interest?

(3) What techniques could the Commission employ that would be narrowly tailored to further the proposed compelling interest? Would such techniques include bidding credits and installment payments? Are race-conscious or gender-conscious measures necessary, or are there race- or gender-neutral measures that would be effective?

Commenters are encouraged to provide the Commission as much evidence as possible with regard to past discrimination, continuing discrimination, discrimination in access to capital, underrepresentation and other significant barriers facing businesses owned by minorities and women in satellite services, services similar to LMDS, and in licensed communications services generally.

In the Competitive Bidding docket, we established eligibility criteria and general rules that would govern the award of special provisions for small businesses, rural telephone companies, and minority- and women-owned businesses (collectively, "designated

entities"). We also established a menu of possible special provisions that could be awarded to designated entities in particular services, including installment payments, spectrum set-asides, bidding credits, and tax certificates.<sup>60</sup> In addition, we set forth rules to prevent unjust enrichment by designated entities seeking to transfer licenses obtained through use of one of these special provisions.

In keeping with the general parameters set forth in the Competitive Bidding docket, we propose specific measures and eligibility criteria for designated entities who seek to obtain spectrum to provide LMDS and satellite services, designed to ensure that such entities are given the opportunity to participate both in the competitive bidding process and in the provision of these services. We seek comment on these proposals, and specifically on identifying special provisions that are tailored to the unique characteristics of the LMDS and satellite services and that will create meaningful incentives and opportunities for designated entities.

#### (b) Installment Payments

We propose to adopt installment payments for small businesses bidding for LMDS licenses. The record in the Competitive Bidding proceeding suggests that the most significant barrier for small business participation in the auctioning of LMDS spectrum will be access to adequate private financing to ensure their ability to compete against larger firms in the competitive bidding process. In the Competitive Bidding Second Report and Order, we concluded that a reduced down payment requirement coupled with installment payments is an effective means to address the inability of small businesses bidding for PCS licenses. We seek comment on our proposal to use this same approach in the LMDS auctions, and on whether any additional or alternative special provisions should be provided for small businesses bidding on LMDS spectrum. We also seek comment on whether installment payments are appropriate to encourage small businesses participation in the provision of satellite services.

To ensure that large businesses do not become the unintended beneficiaries of installment payment provisions meant for small businesses, we also propose to make the unjust enrichment provisions adopted in the Competitive Bidding Second Report and Order applicable to

installment payments by small business applicants. Specifically, if a small business making installment payments seeks to transfer a license to a non-small business entity during the term of the license, we propose to require payment of the remaining principle balance and accrued interest as a condition of the license transfer. We seek comment on this proposal including whether additional unjust enrichment provisions are necessary for LMDS licensing. We also see comment on whether these unjust enrichments would be appropriate if installment payments are also adopted for small businesses participating in satellite auctions.

*Eligibility Criteria.* We propose to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of less than \$40 million. We believe this standard is appropriate for LMDS service because build-out costs are likely to be significant. Additionally, the cost of acquiring a license is likely to be higher than for other services. We also seek comment on whether this definition is appropriate for small businesses in the context of satellite auctions.

Commenters should address whether this is an appropriate threshold given the expected cost associated with the provision of LMDS and satellite services. Should it be higher or lower, based on the types of companies that are likely to benefit from the special provisions proposed here? We also propose not to attribute the gross revenues of investors that hold less than 25 percent interest in the applicant, but we will include the gross revenues of the applicant's affiliates and investors with ownership interests of 25 percent or more in the applicant in determining whether an applicant qualifies as a small business. Is a different attribution threshold warranted for LMDS or for satellite services? We seek comment on these issues.

#### (c) Bidding Credits

*Specific Special Provisions.* Based on the list of special provisions for designated entities established in the Competitive Bidding Second Report and Order, we propose to utilize bidding credits for small businesses participating in LMDS or FSS auctions. We tentatively conclude that affording such businesses bidding credits and installment payments is the most cost-effective and efficient means of achieving Congress' objective of ensuring an opportunity for these designated entities to participate in the provision of LMDS service, while preserving the advantages of

<sup>59</sup> We suggest "diversity of voices" as a possible compelling interest because LMDS is likely to be used as a "medium of mass communication" similar to other multipoint distribution services. See 47 U.S.C. 309(i)(3)(C)(i). In *Metro Broadcasting v. F.C.C.*, the Supreme Court upheld the Commission's minority preference programs in the awarding of broadcast licenses because they served the "important" governmental interest of promoting diversity in broadcast programming. *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 566-68 (1990). While *Adarand* overrules *Metro*, to the extent that *Metro* applied "intermediate scrutiny," *Adarand* did not reject the diversity interest; rather, it simply held that the diversity interest must be "compelling."

<sup>60</sup> Congress has now repealed the tax credit program in the Communications Act, except with respect to fixed microwave licenses not at issue here. 109 Stat. 93 (1995), Pub. L. 104-7, April 11, 1995.

competitive open bidding. We seek comment on this proposal.

We request comment on how we should determine the appropriate amount of the bidding credit. Our analysis of the telecommunications industry suggests the possibility that incumbent telecommunications providers may be able to utilize existing infrastructure and thus enjoy economies of scope in the provision of many of the services that may develop in LMDS. Therefore, these incumbents may have the ability to bid more than first-time operators.

We propose a bidding credit of 25 percent that would be available on one of the proposed spectrum blocks. We seek comment on the appropriateness of the proposed bidding credits for LMDS and FSS auctions.

To prevent unjust enrichment by small businesses trafficking in licenses acquired through the use of bidding credits, we propose imposition of a payment requirement on transfers of such licenses to entities that are not owned by small businesses. Small businesses seeking to transfer a license to an entity that does not meet the eligibility criteria for a small business would be required to reimburse the Government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer will be permitted. The amount of the penalty would be reduced over time so that a transfer in the first two years of the license term would result in a payment of 100 percent of the value of the bidding credit; in year three of the license term the payment would be 75 percent; in year four the penalty would be 50 percent and in year five the payment would be 25 percent, after which there would be no payment. We seek comment on these proposals.

#### (d) Rural Telephone Companies

We seek comment on whether we should provide bidding credits or other special provisions for rural telephone companies. In addition, the vast majority of rural telephone companies will qualify as small businesses and thus will receive installment payment options. Because many of the specific uses proposed for LMDS, including wireless cable and video telecommunications, may be of interest to rural telephone companies, such entities may be interested in bidding for LMDS spectrum. However, we are unable to determine with any certainty the potential prices these services may bring in rural areas. If service prices in such areas are low, acquiring a license should not present significant barriers to

rural telephone companies. Also, under one possible approach, the degree of flexibility we would afford in the use of this spectrum, including provisions for partitioning or leasing spectrum, should assist in satisfying the spectrum needs of rural telephone companies at low cost. Finally, as with other incumbent providers of telecommunications services, rural telephone companies may be able to benefit from the use of their existing infrastructure in the provision of some services. Such economies of scale would give rural telephone companies an advantage in the bidding for such licenses. For these reasons, we do not believe that special preferences are needed to ensure adequate participation by rural telephone companies in the provision of services in this spectrum. However, comments on this analysis are requested.

#### (e) Additional Special Provisions

In addition to the special provisions proposed above for the various classes of designated entities, we seek comment on whether additional special provisions should be adopted that would enhance our goal of ensuring their participation in the competitive bidding process for LMDS and satellite licenses. We request that commenters give particular attention to the alternatives described below.

**Reduced Upfront Payments.** In the Competitive Bidding Second Report and Order, we concluded that upfront payment requirements would ensure that bidders are qualified and serious and would provide the Commission with a source of funds in the event of default or bid withdrawal. 9 FCC Rcd at 2377, 2379, paras. 169, 176. We also noted that reduced upfront payments may be particularly appropriate for auctions of spectrum specifically set aside for designated entities as a means of encouraging participation in the auctions, particularly by all eligible designated entities.<sup>61</sup> We seek comment on whether there should be a similar reduction in upfront payments for small businesses or any other designated entities applying for LMDS or satellite licenses. In addition, we ask commenters to address the costs and benefits with respect to auction administration and designated entity participation associated with a reduced upfront payment for licenses in LMDS or satellite services in the absence of a spectrum set-aside.

#### Comment Dates

Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before August 28, 1995, and reply comments on or before September 18, 1995. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

#### Initial Regulatory Flexibility Analysis

**Reason for action.** The purposes of this NPRM are four-fold; first, to obtain comment on the Commission's designation proposal for the 27.5–29.5 GHz frequency band; second, to obtain comment on the Commission's proposal for a reallocation pertaining to the 29.5–30.0 GHz frequency band; third, to obtain comment on proposed service rules for LMDS and FSS; and fourth, to obtain comment on the Commission's supplemental tentative decision to grant CellularVision a Pioneer's Preference.

**Objectives.** The objective of this Notice is to request public comment on the proposals made herein for the efficient licensing of services in the 27.5–30.0 GHz band, for the development and implementation of a new technology to provide innovative telecommunications services to the public.

**Legal basis.** The authority for this action is the Administrative Procedure Act, 5 U.S.C. 553; and sections 4(i), 4(j), 301, 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. 145, 301, and 303(r).

**Reporting, recordkeeping and other compliance requirements.** Reporting requirements are proposed to ensure that the spectrum, if redesignated for these new uses, is used to serve the public's need for communications services.

**Federal rules which overlap, duplicate or conflict with these rules.** None.

**Description, potential impact and number of small entities involved.** Any rule changes in this proceeding could

<sup>61</sup> Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5599–5600, para. 154.

affect MMDS licensees, the majority of which are small businesses. These entities may have some additional competition from video programming service which could be provided by Suite 12's multicell technology. In addition, rule changes could affect rural telephone companies, to the extent that any are considered small businesses. These entities may have competition to their local exchange service; alternatively, these entities may be considered designated entities and given bidding and other benefits. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

*Significant Alternatives.* While there are alternative methods to provide the services proposed by LMDS and FSS parties, we find that the services proposed will provide significant competition to existing service providers, thus bringing the benefits of competition to the public.

**Ordering Clauses**

According, it is ordered that the Notice of Proposed Rulemaking is hereby adopted with proposed rules below.

It is further ordered that the Petition for Rulemaking filed by Harris Corporation-Farion Division and Digital Equipment Company is denied.

It is further ordered that CellularVision, the successor-in-interest to Suite 12 Group, is tentatively granted a pioneer's preference in accordance with the discussion in paragraphs 68-73 of this Supplemental Tentative Decision.

It is further ordered that the Acting Secretary shall mail a copy of this document to the Chief Counsel for Advocacy, Small Business Administration.

**List of Subjects**

47 CFR Part 21

Communications common carriers, Radio.

47 CFR Part 25

Satellites.

Federal Communications Commission.

**LaVera F. Marshall,**  
*Acting Secretary.*

**Proposed Amendatory Text**

47 CFR Parts 21 and 25 are proposed to be amended as follows:

**PART 21—DOMESTIC PUBLIC FIXED RADIO SERVICES**

1. The authority citation for part 21 continues to read as follows:

**Authority:** Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 403, 404, 410, 602, 48 Stat. as amended, 1064, 1066, 1070-1073, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602.; 47 U.S.C. 552,554.

2. Section 21.2 is proposed to be amended by adding the following definitions, in alphabetical order, to read as follows:

\* \* \* \* \*

**§ 21.2 Definitions.**

\* \* \* \* \*

*Local Multipoint Distribution Service Hub Station.* A fixed point-to-multipoint radio station in a Local Multipoint Distribution Service System

that provides one-way or two-way communication with Local Multipoint Distribution Service Subscriber Stations.  
\* \* \* \* \*

*Local Multipoint Distribution Service System.* A fixed point-to-multipoint radio system consisting of Local Multipoint Distribution Service Hub Stations and their associated Local Multipoint Distribution Service Subscriber Stations.  
\* \* \* \* \*

*Local Multipoint Distribution Service Subscriber Station.* Any one of the fixed microwave radio stations located at users' premises, lying within the coverage area of a Local Multipoint Distribution Service Hub Station, capable of receiving one-way communications from or providing two-way communications with the Local Multipoint Distribution Service Hub Station.  
\* \* \* \* \*

*Local Multipoint Distribution Service Backbone Link.* A point-to-point radio service link in a Local Multipoint Distribution Service System that is used to interconnect Local Multipoint Distribution Service Hub Stations with each other or with the public switched telephone network.  
\* \* \* \* \*

3. Section 21.107(b) is amended by removing the entry for the frequency band 27,500 MHz to 29,500 MHz, and adding new entries 27,500 MHz to 28,350 MHz and 29,100 MHz to 29,250 MHz to read as follows:

**§ 21.107 Transmitter power.**

\* \* \* \* \*

(b) \* \* \*

Frequency band (MHz)	Maximum allowable transmitter power		Maximum allowable EIRP	
	Fixed (W)	Mobile (W)	Fixed (dBW)	Mobile (dBW)
* * * * *				
27,500 MHz to 28,350 MHz	.....	.....	- 52 dBW/Hz	.....
29,100 MHz to 29,250 MHz	.....	.....	( <sup>5</sup> )	.....

<sup>5</sup> This value is based on the value in §§ 21.1018-21.1021.

\* \* \* \* \*  
4. Section 21.1002 (proposed at 58 FR 6378, Jan. 28, 1993), is amended by adding new paragraph (c) to read as follows:

**§ 21.1002 Frequencies.**

\* \* \* \* \*

(c) Special requirements for operations in the band 29.1-29.25 GHz.  
(1)(i) LMDS receive stations operating on frequencies in the 29.1-29.25 GHz

band within a radius of 75 nautical miles of the geographic coordinates provided by a non-GSO MSS licensee pursuant to paragraphs (c)(2) or (c)(3)(i) of this section (the "feeder link earth station complex protection zone") shall accept any interference caused to them by such earth station complexes and shall not claim protection from such earth station complexes.

(ii) LMDS licensees operating on frequencies in the 29.1-29.25 GHz band

outside a feeder link earth station complex protection zone shall cooperate fully and make reasonable efforts to resolve technical problems with the non-GSO MSS licensee to the extent that transmissions from the non-GSO MSS operator's feeder link earth station complex interfere with an LMDS receive station.

(2) At least 45 days prior to the commencement of LMDS auctions, feeder link earth station complexes shall

be specified by a set of geographic coordinates in accordance with the following requirements: No feeder link earth station complex may be located in the top eight (8) metropolitan statistical areas ("MSAs"), ranked by population, as defined by the Office of Management and Budget as of June 1993, using estimated populations as of December 1992; two (2) complexes may be located in MSAs 9 through 25, one of which must be Phoenix, AZ (for a complex at Chandler, AZ); one (1) complex may be located in MSAs 26 to 50; three (3) complexes may be located in MSAs 51 to 100, one of which must be Honolulu, Hawaii (for a complex at Waimea); and the two (2) remaining complexes must be located at least 75 nautical miles from the borders of the 100 largest MSAs or in any MSA not included in the 100 largest MSAs. Any location allotted for one range of MSAs may be taken from an MSA below that range.

(3)(i) Any non-GSO MSS licensee may at any time specify sets of geographic coordinates for feeder link earth station complexes with each earth station contained therein to be located at least 75 nautical miles from the borders of the 100 largest MSAs.

(ii) For purposes of paragraph (c)(3)(i) of this section, non-GSO MSS feeder link earth station complexes shall be entitled to accommodation only if the affected non-GSO MSS licensee reapplies to the Commission for a feeder link earth station complex or certifies to the Commission within sixty days of receiving a copy of an LMDS application that it intends to file an application for a feeder link earth station complex within six months of the date of receipt of the LMDS application.

(iii) If said non-GSO MSS licensee application is filed later than six months after certification to the Commission, the LMDS and non-GSO MSS entities shall still cooperate fully and make reasonable efforts to resolve technical problems, but the LMDS licensee shall not be obligated to re-engineer its proposal or make changes to its system.

(4) LMDS licensees or applicants proposing to operate hub stations on frequencies in the 29.1-29.25 GHz band at locations outside of the 100 largest MSAs or within a distance of 150 nautical miles from a set of geographic coordinates specified under paragraphs (c)(2) or (c)(3)(i) of this section shall serve copies of their applications on all non-GSO MSS applicants, permittees or licensees meeting the criteria specified in § 25.257(a). Non-GSO MSS licensees or applicants shall serve copies of their feeder link earth station applications on any LMDS applicant or licensee within

a distance of 150 nautical miles from the geographic coordinates that it specified under paragraphs (c)(2) or (c)(3)(i) of this section. Any necessary coordination shall commence upon notification by the party receiving an application to the party who filed the application. The results of any such coordination shall be reported to the Commission within sixty days. The non-GSO MSS earth station licensee shall also provide all such LMDS licensees with a copy of its channel plan.

5. A new § 21.1018 is proposed to be added to read as follows:

**§ 21.1018 LMDS single station EIRP limit.**

Point-to-point stations in the 29.1-29.5 GHz band for the LMDS backbone between LMDS hubs shall be limited to a maximum allowable EIRP density per carrier of 23 dBW/MHz in any one megahertz in clear air, and may exceed this limit by employment of adaptive power control in cases where link propagation attenuation exceeds the clear air value due to precipitation and only to the extent that the link is impaired.

6. A new § 21.1019 is proposed to be added to read as follows:

**§ 21.1019 LMDS subscriber transmissions.**

LMDS licensees shall not operate transmitters from subscriber locations in the 29.1-29.25 GHz band.

7. A new § 21.1020 is proposed to be added to read as follows:

**§ 21.1020 Hub transmitter EIRP spectral area density limit.**

(a) LMDS applicants shall demonstrate that, under clear air operating conditions, the maximum aggregate of LMDS transmitting hub stations in a Basic Trading Area in the 29.1-29.25 GHz band will not transmit a co-frequency hub-to-subscriber EIRP spectral area density in any azimuthal direction in excess of X dBW/(MHz-km<sup>2</sup>) when averaged over any 4.375 MHz band, where X is defined in Table 1. Individual hub stations may exceed their clear air EIRPs by employment of adaptive power control in cases where link propagation attenuation exceeds the clear air value and only to the extent that the link is impaired.

(b) The EIRP aggregate spectral area density is calculated as follows:

$$10 \log \left[ \frac{1}{A} \sum_{i=1}^N p_i g_i(a_i) \right] \text{dBW/MHz} - \text{km}^2$$

Where:

- N=number of co-frequency hubs in BTA
- A=Area of BTA in km<sup>2</sup>
- p<sub>i</sub>=spectral power density into antenna of i-th hub (in W/MHz)

g<sub>i</sub>=gain of i-th hub antenna at zero degree elevation angle

Each p<sub>i</sub> and g<sub>i</sub> are in the same 1 MHz

(c) The climate zones in Table 1 are defined for different geographic locations within the US as shown in Appendix 28 of the ITU Radio Regulations and § 25.254 of this chapter.

TABLE 1\*

Climate zone	EIRP spectral density (clear air) (dBW/MHz-km <sup>2</sup> )**
1 .....	-23
2 .....	-25
3,4,5 .....	-26

\*LMDS system licensees in two or more BTAs may individually or collectively deviate from the spectral area density computed above by averaging the power over any 200 km by 400 km area, provided that the aggregate interference to the satellite receiver is no greater than if the spectral area density were as specified in Table 1. A showing to the Commission comparing both methods of computation is required and copies shall be served on any affected non-GSO MSS providers.

\*\*See § 21.1007(c)(i) for the population density of the BTA.

8. A new § 21.1021 is proposed to be added to read as follows:

**§ 21.1021 Hub transmitter EIRP spectral area density limit at elevation angles above the horizon.**

(a) LMDS applicants shall demonstrate that, under clear air operating conditions, the maximum aggregate of LMDS transmitting hub stations in a Basic Trading Area in the 29.1-29.25 GHz band will not transmit a co-frequency hub-to-subscriber EIRP spectral area density in any azimuthal direction in excess of X dBW/(MHz-km<sup>2</sup>) when averaged over any 5.375 MHz band where X is defined in Table 2. Individual hub stations may exceed their clear air EIRPs by employment of adaptive power control in cases where link propagation attenuation exceeds the clear air value and only to the extent that the link is impaired.

(b) The EIRP aggregate spectral area density is calculated as follows:

$$10 \log \left[ \frac{1}{A} \sum_{i=1}^N \text{EIRP}(a_i) \right] \text{dBW/MHz} - \text{km}^2$$

Where:

- N=number of co-frequency hubs in BTA
- A=Area of BTA in km<sup>2</sup>
- EIRP(a<sub>i</sub>)=equivalent isotropic radiated spectral power density of the i-th hub (in W/MHz) at elevation angle a



TABLE 2\*

Elevation angle (a)	Relative EIRP density (dBW/MHz-km <sup>2</sup> )
0° ≤ a ≤ 4.0°	EIRP(a) = EIRP(0°) + 20 log (sin πx) / (1/πx) Where x = (a+1)/7.5°
4.0 < a ≤ 7.7°	EIRP(a) = EIRP(0°) - 3.85a + 7.7
a > 7.7° .....	EIRP(a) = EIRP(0°) - 22

\*LMDS system licensees in two or more BTAs may individually or collectively deviate from the spectral area density computed above by averaging the power over any 200 km by 400 km area, provided that the aggregate interference to the satellite receiver is no greater than if the spectral area density were as specified in Table 1. A showing to the Commission comparing both methods of computation is required and copies shall be served on any affected non-GSO MSS providers.

Note: Where a is the angle in degrees of elevation above horizon. EIRP(0°) is the hub EIRP area density at the horizon used in Section 21.1020. The nominal antenna pattern will be used for elevation angles between 0° and 8°, and average levels will be used for angles beyond 8°, where average levels will be calculated by sampling the antenna patterns in each 1° interval between 8° and 90°, dividing by 83.

9. A new § 21.1022 is proposed to be added to read as follows:

#### § 21.1022 Power reduction techniques.

LMDS hub transmitters shall employ methods to reduce average power levels received by non-GSO MSS satellite receivers, to the extent necessary to comply with §§ 21.1020 and 21.1021, by employing the methods set forth below:

(a) *Alternate Polarizations.* LMDS hub transmitters in the LMDS service area may employ both vertical and horizontal linear polarizations such that 50 percent (plus or minus 10 percent) of the hub transmitters shall employ vertical polarization and 50 percent (plus or minus 10 percent) shall employ horizontal polarization.

(b) *Frequency Interleaving.* LMDS hub transmitters in the LMDS service area may employ frequency interleaving such that 50 percent (plus or minus 10 percent) of the hub transmitters shall employ channel center frequencies which are different by one-half the channel bandwidth of the other 50 percent (plus or minus 10 percent) of the hub transmitters.

(c) *Alternative Methods.* As alternatives to paragraphs (a) and (b) of this section, LMDS operators may employ such other methods as may be shown to achieve equivalent reductions in average power density received by non-GSO MSS satellite receivers.

#### PART 25—SATELLITE COMMUNICATIONS

1. The authority citation for part 25 continues to read as follows:

**Authority:** Secs. 25.101 to 25.601 issued under sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101–104, 76 stat. 419–427; 47 U.S.C. 701–744; 47 U.S.C. 554.

2. A new § 25.257 is proposed to be added to read as follows:

#### § 25.257 Special requirements for operations in the band 29.1–29.25 GHz

(a) Special requirements for operations in the band 29.1–29.25 GHz.

(1) Non-geostationary mobile satellite service (non-GSO MSS) operators shall use the 29.1–29.25 GHz band for Earth-to-space transmissions from feeder link earth station complexes. For purposes of this subsection, a “feeder link earth station complex” may include up to three (3) earth station groups, with each earth station group having up to four (4) antennas, located within a radius of 75 nautical miles of a given set of geographic coordinates provided by a non-GSO MSS operator pursuant to paragraphs (c)(5) or (c)(6)(i) of this section.

(2) A maximum of eight (8) feeder link earth station complexes in the contiguous United States, Alaska, and Hawaii may be operated concurrently in the band 29.1–29.25 GHz.

(b) Coordination of LMDS systems and geostationary fixed satellite systems in the band 29.1–29.25 must be done in accordance with the technical standards of §§ 21.1018–21.1024 of this chapter.

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#### DEPARTMENT OF DEFENSE

#### 48 CFR Parts 204, 223, and 252

[DFARS Case 95–D001]

#### Defense Federal Acquisition Regulation Supplement; Safeguarding Sensitive Conventional Arms, Ammunition, and Explosives

**AGENCY:** Department of Defense (DoD).

**ACTION:** Proposed rule with request for comment.

**SUMMARY:** The Director of Defense Procurement is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to provide guidance on physical security requirements for contracts involving sensitive conventional arms, ammunition, and explosives (AA&E).

**DATES:** *Comment date:* Comments on the proposed rule should be submitted in writing to the address shown below on or before October 23, 1995, to be considered in the formulation of the final rule.

**ADDRESSES:** Interested parties should submit written comments to: Defense Acquisition Regulations Council, Attn: R.G. Laysen, PDUSD (A&T) DP (DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telefax number (703) 602–0350. Please cite DFARS Case 95–D001 in all correspondence related to this issue.

#### FOR FURTHER INFORMATION CONTACT:

Rick Laysen, (703) 602–0131.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD 5100.76–M, Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives, prescribes standards and criteria intended to protect against loss or theft of sensitive conventional AA&E in the custody of DoD components or DoD contractors. This rule proposes amendments to the DFARS to provide guidance for the incorporation of the requirements of DoD 5100.76–M in DoD contracts.

##### B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule merely provides a standard method of implementing security requirements which already exist under DoD 5100.76–M. An initial regulatory flexibility analysis has therefore not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts will be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DFARS Case 95–D001 in correspondence.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act applies. A request for approval of the information collection has been submitted to the Office of Management and Budget.

#### List of Subjects in 48 CFR Parts 204, 223, and 252

Government procurement.

**Michele P. Peterson,**

*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, 48 CFR Parts 204, 223, and 252 are proposed to be amended as follows: