

of a bidding credit for MDS. Some commenters support the provision of a bidding credit to help ensure that small businesses are given an opportunity to participate in the provision of spectrum-based services. See Comments of Vega at 19; Rural Wireless at 11-12. Other commenters either oppose the adoption of a bidding credit measure or support a bidding credit severely restricted in its applicability. See Comments of American Telecasting at 26; ACS Enterprises, *et al.* at 21; Association at 63-64. These commenters oppose the adoption of a widely-available bidding credit because they contend that the offering of such a credit to designated entities who may not possess MDS channels already may work against the accumulation of channels in the hands of entities with the ability to develop viable wireless cable operations. After consideration, we must disagree with those commenters who oppose the offering of a bidding credit. We believe that the adoption of a bidding credit for small businesses will not only enable small businesses generally to better compete in the MDS auction, but may also actually encourage the aggregation of channels in the hands of existing wireless cable operators by allowing these incumbents to compete successfully in the auction against larger enterprises, such as telecommunications carriers, who may not currently possess MDS channels.

188. For these reasons, we will offer a fifteen percent bidding credit to small businesses, and to consortia of small businesses, bidding on any of the BTA service areas available in the MDS auction. Given the encumbered nature of MDS and the presence of incumbents in most BTAs, it appears impractical to restrict the availability of bidding credits to certain channels or spectrum blocks. Additionally, we believe that we would provide greater opportunities for small businesses, including incumbent wireless cable operators, if we offer bidding credits on all BTA service areas. We feel that these bidding credits will help achieve the objectives of Congress by providing small businesses, including women-owned and minority-owned small businesses, with a meaningful opportunity to obtain BTA authorizations and to conserve scarce capital for building out their wireless cable systems after the auction. Although other services have provided larger bidding credits to certain designated entities, we believe that the fifteen percent credit is sufficient for MDS because, unlike these other services, we will offer this bidding credit on all authorizations to be awarded to small businesses.¹⁰³

¹⁰³ See, e.g., *Third Report and Order* at 2970 (providing twenty-five percent bidding credit on specified channels to certain designated entities in nationwide narrowband PCS auction); *Third Memorandum Opinion and Order* at 201 (providing forty percent bidding credit on specified channels to certain designated entities in regional narrowband PCS auction); *Fourth Report and Order* at 2337 (offering twenty-five percent bidding credit on one of two IVDS licenses available in each geographic license area). See also *Second Report and Order and Second Further Notice of Proposed Rulemaking* in PR Docket No. 89-553, PP Docket No. 93-253, and GN Docket No. 93-252, FCC 95-159 (released April 17, 1995) at ¶ 130 (proposing to provide ten percent bidding credit on all 900 MHz Specialized Mobile Radio channel blocks to be auctioned).

189. To prevent unjust enrichment by small businesses trafficking in BTA authorizations acquired through the use of bidding credits, we will require small businesses to reimburse the government, as set forth below, if BTA authorizations are transferred or assigned to entities that do not fulfill the small business eligibility requirements. *See Second Report and Order* at 2395. Small businesses seeking to transfer or assign a BTA authorization to an entity not meeting the definition of small business will 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 authorization was awarded, before transfer or assignment will be permitted. The amount of the required reimbursement will be reduced over time. A transfer or assignment in the first two years after issuance of the authorization will result in a reimbursement of one hundred percent of the value of the bidding credit; during year three, of seventy-five percent of the bidding credit; in year four, of fifty percent; in year five, of twenty-five percent; and thereafter, no reimbursement.¹⁰⁴

f. Eligibility for Installment Payments, Reduced Upfront Payments and Bidding Credits

190. In the *Second Memorandum Opinion and Order*, the Commission amended its generic auction rules to replace the small business definition used by the Small Business Administration (SBA) with a provision enabling the Commission to establish a small business definition in the context of each particular service, taking into consideration the characteristics and capital requirements of the particular service. *See* 47 C.F.R. § 1.2110(b)(1). In response to our specific request for comment on the appropriate definition of small business for MDS, the majority of commenters expressing an opinion supports the definition adopted by the Commission for the narrowband and broadband PCS. *See* Comments of Association at 61-62; Reply Comments of American Telecasting at 17-18; Reply Comments of ACS Enterprises, *et al.* at 8. Under this approach, a small business is an entity that, together with its affiliates, has annual average gross revenues for the three preceding years not in excess of \$40 million.

191. Following our review of the comments and our consideration of the capital requirements of MDS, we conclude that the approach utilized by the narrowband and broadband PCS is also appropriate for MDS. We will also allow consortia of small businesses, each member of which individually meets the \$40 million gross revenue standard, to qualify for installment payments, reduced upfront payments and bidding credits. *See* 47 C.F.R. § 1.2110(j). As noted by industry analysts and by commenters, wireless cable, although significantly less capital intensive than traditional coaxial cable, is not inexpensive. Tower and head end expenses may range from under \$1 million for a small rural system to \$2 to \$3 million per system in major markets, and the cost of adding each new subscriber

¹⁰⁴ Commenters addressing this issue agree with the Commission that measures to prevent unjust enrichment are needed. *See* Comments of ACS Enterprises, *et al.* at 22-23.

has been estimated to be \$400 to \$600.¹⁰⁵ Thus, even though the cost of acquiring BTA authorizations at auction are estimated to be relatively modest in comparison to other services, considerable capital is nonetheless required to construct a competitive wireless cable system. Moreover, analysts have emphasized that the wireless cable industry has historically had difficulty in obtaining financing and that the future success of wireless cable is crucially dependent upon its ability to obtain additional financing.¹⁰⁶

192. Given the capital requirements of the wireless cable industry and its past difficulties in attracting capital, we believe that the \$40 million gross revenue standard is appropriate for MDS.¹⁰⁷ If the Commission were to adopt a significantly lower standard for the definition of small business, we would exclude companies with the financial wherewithal to operate wireless cable systems competitive with cable television from eligibility for installment payments, reduced upfront payments and bidding credits. *See Second Memorandum Opinion and Order at 7268; Comments of Association at 63.* For example, if we define small businesses as entities with annual gross revenues of less than \$2 million, as one commenter urges, we would prevent wireless cable companies with the financial ability to construct systems and add subscribers from obtaining the benefits of these various special measures. *See Comments of Vega at 19.* We also believe that the standard SBA definition of small business -- an entity with no more than \$6 million net worth and no more than \$2 million in annual profits -- is similarly overly restrictive.¹⁰⁸ We accordingly decline to adopt the SBA's definition of small business for MDS, as a single commenter urges. *See Comments of Rural Wireless at 12.* We therefore conclude that the \$40 million gross revenue standard utilized by other services is appropriate, as it would not exclude enterprises

¹⁰⁵ *See* Gerard Klauer Mattison & Co., Inc., *The Wireless Cable Industry: Summary of 1994 and Outlook for 1995* (Dec. 22, 1994) at 2; Dillon Read & Co. Inc., *The Wireless Cable Industry* (Aug. 22, 1994) at 10; Gerard Klauer Mattison & Co., Inc., *The Wireless Cable Industry* (Jan. 21, 1993) at 4; Comments of Association at 62-63; Reply Comments of American Telecasting at 18.

¹⁰⁶ *See* Gerard Klauer Mattison & Co., Inc., *The Wireless Cable Industry: Summary of 1994 and Outlook for 1995* (Dec. 22, 1994) at 2; Gerard Klauer Mattison & Co., Inc., *The Wireless Cable Industry* (Jan. 21, 1993) at 4.

¹⁰⁷ We also note, as the commenters point out, that the capital requirements for certain narrowband PCS facilities appear comparable to or even lower than the capital required to construct a viable wireless cable system. Because the Commission adopted the \$40 million standard for narrowband PCS, these commenters assert that the adoption of the same standard is appropriate for MDS. *See* Comments of Association at 62; Reply Comments of American Telecasting at 18; *Third Report and Order at 2969 n.40; Third Memorandum Opinion and Order at 196.*

¹⁰⁸ *See Second Memorandum Opinion and Order at 7268; Third Memorandum Opinion and Order at 195; Fifth Report and Order at 5606-5608.*

in need of special incentives to compete successfully in the wireless cable industry, but would not provide such incentives to larger telecommunications enterprises with well-established revenue streams and easier access to capital.

g. Records Maintenance and Audits

193. All holders of BTA authorizations acquired by auction that claim designated entity status will be required to maintain, at their principal place of business or with their designated agent, an updated documentary file of ownership and revenue information necessary to establish their status. Holders of BTA authorizations or their successors in interest must maintain such files for a ten year period running from the date that their BTA authorizations are issued. The files must be made available to the Commission upon request.

194. BTA authorization holders claiming eligibility under designated entity provisions will be subject to audits by the Commission, using in-house or contract resources. Selection for an audit may be random, on information, or on the basis of other factors. Consent to such audits is part of the certification included in the short-form application. Such consent will include consent to the audit of the holders' books, documents and other material (including accounting procedures and practices), regardless of form or type, sufficient to confirm that such holders' representations are, and remain, accurate. Such consent will also include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business or keeping records regarding licensed MDS offerings, and will also include consent to the interviewing of principals, employees, customers, and suppliers of the BTA authorization holders.

195. We believe that the above records maintenance and audit provisions are necessary to prevent abuse of the special measures offered to those MDS auction winners claiming designated entity status. These provisions requiring the retention of records should not prove overly burdensome, and they will help to ensure that only entities eligible under the auction rules will be able to take advantage of the designated entity measures.

IV. ORDERING CLAUSES

196. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), and 403, this *Report and Order* is adopted, and Part 21 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix C.

197. IT IS FURTHER ORDERED that the rule amendments set forth in Appendix C WILL BECOME EFFECTIVE 60 days after their publication in the Federal Register.

198. IT IS FURTHER ORDERED that, upon approval by the Office of Management and Budget, FCC Form 304 as set forth in Appendix D will supersede FCC Form 494.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A -- LIST OF COMMENTING PARTIES

COMMENTS

1. American Telecasting, Inc. (American Telecasting)
2. CAI Wireless Systems, Inc. (CAI Wireless)
3. Caritas Telecommunications (Caritas)
4. Crowell & Moring
5. Dalager Engineering Company (Dalager)
6. du Treil, Lundin & Rackley, Inc. (du Treil)
7. Hammett & Edison, Inc. (Hammett)
8. Hardin and Associates, Inc. (Hardin)
9. Heartland Wireless Communications, Inc. (Heartland)
10. Marshall Communications, Inc. (Marshall)
11. Mitchell Communications Corp. (Mitchell)
12. The National ITFS Association (National ITFS)
13. Pacific Telesis Enhanced Services (PacTel)
14. Pepper & Corazzini, L.L.P. (Pepper)
15. The Richard L. Vega Group (Vega)
16. The Rural Wireless Cable Coalition (Rural Wireless) includes: Central Texas Wireless TV, Inc., Adams Telcom, Inc., Leaco Rural Telephone Cooperative, Inc., Delhi Telephone Company and Valley Telephone Cooperative, Inc.
17. Sioux Valley Rural Television, Inc.
18. South Carolina Educational Television Commission, State of Wisconsin-Educational Communications Board and University of Maine System (ITFS Parties)
19. United States Wireless Cable, Inc. (U.S. Wireless)
20. Vermont Wireless Cooperative (Vermont Wireless)
21. The Wireless Cable Association International, Inc. (Association)

LATE-FILED COMMENTS

1. ACS Enterprises, Inc., Baton Rouge Wireless Cable Television LLC, CableMaxx, Inc., Multimedia Development Corp., Rapid Choice TV, Inc., Reading Wireless Cable General Partnership, Shreveport Wireless Cable Television Partnership, Superchannels of Las Vegas, Inc., Wireless Holdings, Inc. and XYZ Microwave Systems, Inc. (ACS Enterprises, *et al.*)

REPLY COMMENTS

1. ACS Enterprises, *et al.*
2. American Telecasting, Inc. (American Telecasting)
3. CAI Wireless Systems, Inc. (CAI Wireless)
4. Cross Country Wireless, Inc. (Cross Country)
5. Crowell & Moring
6. Hardin and Associates, Inc. (Hardin)
7. Humanities Instructional Television Educational Center, Inc. (Humanities)

8. Multi-Micro, Inc. (Multi-Micro)
9. National Telephone Cooperative Association (Telephone Cooperative)
10. Pepper & Corazzini, L.L.P. (Pepper)
11. The Rural Wireless Cable Coalition (Rural Wireless)
12. United States Wireless Cable, Inc. (U.S. Wireless)
13. University of Arizona
14. The Wireless Cable Association International, Inc. (Association)

LATE-FILED REPLY COMMENTS

1. Applied Video Technologies, Inc.
2. People's Choice TV Corp.
3. Region IV Education Service Center (Region IV)
4. University of Maryland
5. University of Texas

COMMENTS FILED IN RESPONSE TO JULY 28, 1993 PUBLIC NOTICE

1. American Telecasting, Inc.
2. Philip E. Atkinson
3. Amelia N. Backus
4. Leo H. Bond
5. Cardiff Broadcasting Group
6. Eileen Cassidy
7. CellTek
8. Norman Cloutier
9. Coalition of Wireless Cable Operators includes: Air Cable Television Systems, Broadcast Services International, Inc., Continental Wireless Cable Television, Inc., Family Entertainment Network, Inc., Family Entertainment Network Partnership, Green Bay Entertainment Network Partnership, MultiMedia Development Corp., People's Cable, Inc., Rapid Choice TV, Inc., Skyline Entertainment Network, Inc., Wireless Entertainment Network, Inc., and Wireless Entertainment Network Partnership
10. Robert E. Hayes
11. Margaret K. Haynes
12. Byron Homa
13. Richard P. Heuschele, M.D.
14. Arthur C. Larson
15. Lawrence Behr Associates, Inc.
16. Alfred O. Martinson
17. Mt. Pleasant Wireless
18. Multi-Micro, Inc.
19. National Telephone Cooperative Association
20. Paul M. Parks
21. Mary Patterson
22. Zigmund F. Podkowa
23. Elizabeth J. Raudio

24. Arnold Rettig
25. Sioux Valley Rural Television, Inc.
26. Carl Stark
27. Transworld Telecommunications, Inc., Tampa Bay, Inc., Marrco Communications, Inc.,
United Communications, Ltd. and the Cellular Group
28. Tribune Broadcasting Company
29. United Telephone Mutual Aid Corporation, Pioneer Telephone Cooperative, Inc. and
Socorro Satellite Systems, Inc.
30. The Wireless Cable Association International, Inc.
31. Wireless One, L.L.C.
32. WJB-TV Limited Partnership

APPENDIX B -- FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis is as follows:

I. Need For, and Purpose of, This Action

The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, within the *Notice of Proposed Rulemaking* in MM Docket No. 94-131. As noted in that initial analysis, this proceeding will streamline the procedures for filing applications in MDS, and thereby expedite the provision of services to the public.

Under the terms of the 1993 Budget Act, the Commission may now utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis within the *Notice of Proposed Rulemaking* in PP Docket No. 93-253, and published a Final Regulatory Flexibility Analysis within the *Second Report and Order* in that docket. As noted in that previous final analysis, this proceeding will establish a system of competitive bidding for choosing among mutually exclusive initial MDS applications, and will carry out congressional mandates that certain designated entities be afforded an opportunity to participate in the competitive bidding process and the provision of spectrum-based services.

II. Legal Basis for This Action

Authority for the action taken in this proceeding may be found in Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), and 403.

III. Summary of the Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

No comments were submitted in response to our Initial Regulatory Flexibility Analysis for either MM Docket No. 94-131 or PP Docket No. 93-253.

IV. Significant Alternatives Considered

Although, as described in (III) above, no comments were received pertaining to our Initial Regulatory Flexibility Analysis for MM Docket No. 94-131 and PP Docket No. 93-253, the *Second Report and Order* addressed at length the general policy considerations raised as a result of the new competitive bidding legislation. This *Report and Order* considered in detail various alternatives for revising MDS application procedures and implementing competitive bidding for MDS, and the comments submitted on such alternatives.

This *Report and Order* also specifically considered the impact of the provisions adopted on small entities. Overall, the Commission believes that the provisions adopted herein would benefit small entities by employing short-form applications for MDS and by providing certain special incentives to small entities in the competitive bidding process. In addition, the Commission, while authorizing electronic filing, did not make such filing, with its possible associated costs, mandatory for MDS applicants.

APPENDIX C

I. Part 21 of Chapter 1 of Title 47 of the Code of Federal Regulations is 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, 314, 403, 404, 410, 602; 48 Stat. 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102, as amended; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 602; 47 U.S.C. 552, 554.

2. Section 21.2 is amended as follows:

§ 21.2 Definitions.

As used as follows:

* * * * *

Basic Trading Area (BTA). The geographic areas by which the Multipoint Distribution Service is licensed. BTA boundaries are based on the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition, pp. 36-39, and include six additional BTA-like areas as specified in § 21.924(b).

BTA authorization holder. The individual or entity authorized by the Commission to provide Multipoint Distribution Service to the population of a BTA.

BTA service area. The area within the boundaries of a BTA to which a BTA authorization holder may provide Multipoint Distribution Service. This area excludes the protected service areas of incumbent MDS stations and the registered receive sites of previously authorized and proposed ITFS stations.

Incumbent. An MDS station that was authorized or proposed before September 15, 1995, including those stations that are subsequently modified, renewed or reinstated.

Partitioned service area authorization holder. The individual or entity authorized by the Commission to provide Multipoint Distribution Service to the population of a partitioned service area.

Partitioned service area (PSA). The area within the coterminous boundaries of one of more counties or other geopolitical subdivisions, drawn from a BTA, to which an authorization holder may provide Multipoint Distribution Service or the area remaining in a BTA upon partitioning any portion of that BTA. This area excludes the protected service areas of incumbent MDS stations and the registered receive sites of previously authorized and proposed ITFS stations.

* * * * *

3A. Section 21.7 is amended to read as follows:

§ 21.7 Standard application form for domestic public fixed radio service licenses.

Except for the Multipoint Distribution Service, * * *

3. Section 21.13 is amended to read as follows:

§ 21.13 General application requirements.

a) * * * * *

(4) Except for applications in the Multipoint Distribution Service filed on or after September 15, 1995, state specifically the reasons why a grant of the proposal would serve the public interest, convenience, and necessity.

(b) Applications in the Multipoint Distribution Service, the Digital Electronic Message Service (DEMS) and the Point-to-Point Microwave Service shall not cross-reference previously filed material. Applications other than for the Multipoint Distribution Service, DEMS and Point-to-Point Microwave Services may cross-reference previously filed material where documents, exhibits or other lengthy showings already on file with the Commission contain information which is required by an application form and may specifically refer to such information, if:

* * * * *

4. Section 21.15 is amended to read as follows:

§ 21.15 Technical content of applications.

* * * * *

(a)(1) Except in the case of applicants for Multipoint Distribution Service stations who filed applications on or after September 15, 1995, applicants proposing a new station location (including receive-only stations and passive repeaters) must indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site must be demonstrated. Under ordinary circumstances, this requirement will be considered satisfied if the site is under lease or under written option to buy or lease.

* * *

(3) Except for BTA and PSA authorization holders, Multipoint Distribution Service applicants proposing a new station location must certify the proposed station site will be available to the applicant for timely construction of the facilities during the initial

construction period.

* * * * *

(c) Each application involving a new or modified antenna supporting structure or passive facility, the addition or removal of an antenna, or the repositioning of an authorized antenna for a station or receive-only facility (except receive-only facilities in Multipoint Distribution Service and the Digital Electronic Message Service) must be accompanied by a vertical profile sketch of the total structure depicting its structural nature and clearly indicating the ground elevation (above sea level) at the structure site, the overall height of the structure above ground (including obstruction lights when required, lightning rods, etc.) and, if mounted on a building, its overall height above the building. The proposed antenna on the structure must be clearly identified and its height above-ground (measured to the center of radiation) clearly indicated. Alternatively, applicants in the Multipoint Distribution Service who filed applications on or after September 15, 1995 may provide this information in the MDS long-form application.

* * * * *

(e) Except for applicants in the Multipoint Distribution Service who filed applications on or after September 15, 1995, an applicant proposing construction of one or more new stations or modification of existing stations where substantial changes in the operation or maintenance procedures are involved must submit a showing of the general maintenance procedures involved to insure the rendition of good public communications service. The showing should include but need not be limited to the following:

* * * * *

(g) Except for applications in the Multipoint Distribution Service filed on or after September 15, 1995, each application in the Point-to-Point Radio, Local Television Transmission and Digital Electronic Message Service (excluding user stations) proposing a new or replacement antenna (excluding omni-directional antennas) shall include an antenna radiation pattern showing the antenna power gain distribution in the horizontal plane expressed in decibels, unless such pattern is known to be on file with the Commission in which case the applicant may reference in its application the FCC-ID number that indicates that the pattern is on file with the Commission. Multipoint Distribution Service applicants who filed applications on or after September 15, 1995 must provide related information in completing an MDS long-form application.

* * * * *

5. Section 21.27 is amended to read as follows:

§ 21.27 Public notice period.

(a) * * * * *

(7) the BTAs designated for licensing through the competitive bidding process and the filing date for short-form applications for those areas;

(8) the auction winners in the competitive bidding process;

* * * * *

6. Section 21.35 is amended to read as follows:

§ 21.35 Comparative evaluation of mutually exclusive applications.

(a) In order to expedite action on mutually exclusive applications in services under this rules part where the competitive bidding process or random selection process do not apply, the applicants may request the Commission to consider their applications without a formal hearing in accordance with the summary procedure outlined in paragraph (b) in this section if:

* * * * *

7. Section 21.41 is amended to read as follows:

§ 21.41 Special processing of applications for minor facility modifications.

* * * * *

(b) * * * * *

(7) In the Multipoint Distribution Service, the modified facility would not produce a power flux density that exceeds - 73 dBW/m², pursuant to §§ 21.902 and 21.939 of this subpart, at locations on the boundaries of protected service areas to which there is an unobstructed signal path.

* * * * *

8. Section 21.42 is amended to read as follows:

§ 21.42 Certain modifications not requiring prior authorization.

(a) Equipment in an authorized radio station may be replaced without prior authorization or notification if:

(1) The replacement equipment is identical (i.e., same manufacturer and model number) with the replacement equipment;

(2) For the Multipoint Distribution Service, the replacement transmitter, transmitting antenna, transmission line loss and/or devices between the transmitter and antenna, or

combinations of the above, do not change the EIRP of a station in any direction.

(b) * * * * *

(3) The Commission is notified of changes made to facilities by the submission of a completed FCC Form 494 or for the Multipoint Distribution Service, an MDS long-form application, as applicable, within thirty days after the changes are made.

(4) In the Multipoint Distribution Service, the modified facility would not produce a power flux density at the protected service area boundary that exceeds - 73 dBW/m², pursuant to §§ 21.902 and 21.939 of this subpart.

(c) * * * * *

(3) * * *

(i) * * *

(ii) For Digital Electronic Message Service, the new antenna conforms with § 21.906 and the gain of the new antenna does not exceed that of the previously authorized antenna by more than one dB in any direction.

(iii) For the Multipoint Distribution Service, the new antenna conforms with § 21.906 and the EIRP resulting from the new antenna does not exceed that resulting from the previously authorized antenna by more than one dB in any direction.

* * * * *

(d) Licensees may correct erroneous information on a license which does not involve a major change (i.e., a change that would be classified as a major amendment as defined by § 21.23) without obtaining prior Commission approval by filing a completed FCC Form 494, or for the Multipoint Distribution Service licensees, by filing the MDS long-form application.

9. Section 21.43 is amended to read as follows:

§ 21.43 Period of construction; certification of completion of construction.

(a) Except for Multipoint Distribution Service station licenses granted to BTA and PSA authorization holders, each license for a radio station for the services included in this Part shall specify as a condition therein the period during which construction of facilities will be completed and the station made ready for operation. * * *

* * * * *

10. Section 21.44 is amended to read as follows:

§ 21.44 Forfeiture and termination of station authorization.

(a) * * *

(1) The expiration of the construction period specified therein, where applicable, or after such additional time as may be authorized by the Commission, unless within 5 days after that date certification of completion of construction has been filed with the Commission pursuant to § 21.43;

* * * * *

11. Section 21.900 is amended to read as follows:

§ 21.900 Eligibility.

* * * * *

(c) * * *

The applicant shall state whether or not service will be provided on a common carrier or non common carrier basis. In addition, a common carrier applicant shall state whether there is any affiliation or relationship to any intended or likely subscriber or program originator.
* * *

12. Section 21.901 is amended to read as follows:

§ 21.901 Frequencies.

* * * * *

(d) * * *

* * * * *

(5) Notwithstanding the provision of § 21.31(a) all applications, except for those filed on or after September 15, 1995, that propose to locate transmission facilities within or within 24.1 kilometers (15 miles) of the border of a Standard Metropolitan Statistical Area (SMSA) will be considered together. * * *

(6) * * *

(7) All applications for frequencies in this band, except for those filed on or after September 15, 1995, must contain a showing of how interference with the operation of adjacent channels will be avoided and what steps the applicant has taken to comply with § 21.902(a) of this part.

* * * * *

13. Section 21.902 is amended to read as follows:

§ 21.902 Frequency interference.

(a) All applicants, conditional licensees, and licensees shall make exceptional efforts to avoid harmful interference to other users and to avoid blocking potential adjacent channel use in the same city and cochannel use in nearby cities. In areas where major cities are in close proximity, careful consideration should be given to minimum power requirements and to the location, height, and radiation pattern of the transmitting antenna. Licensees, conditional licensees, and applicants are expected to cooperate fully in attempting to resolve problems of potential interference before bringing the matter to the attention of the Commission.

(b) As a condition for use of frequency in this service, each applicant, conditional licensee, and licensee is required to:

(1) Not enter into any lease or contract or otherwise take any action that would unreasonably prohibit location of another station's transmitting antenna at any given site inside its own protected service area.

* * * * *

(3) Engineer the system to provide at least 45 dB of cochannel interference protection within the 56.33 km (35 mile) protected service area of any authorized or previously proposed station that transmit, or may transmit, signals for standard television reception.

(4) Engineer the station to provide at least 0 dB of adjacent channel interference protection within the 56.33 km (35 mile) protected service area of any authorized or previously proposed station that transmits, or may transmit, signals for standard television reception.

(5)(i) Engineer the station to limit the calculated free space power flux density to - 73 dBW/m² at the boundary of a 56.33 km (35 mile) protected service area, where there is an unobstructed signal path from the transmitting antenna to the boundary; or alternatively, obtain the written consent of the entity authorized for the adjoining area to exceed the - 73 dBW/m² limiting signal strength at the common boundary.

(ii) In determining signal path conditions, the following shall be used: a 9.1 meter (30 feet) receiving antenna height, the transmitting antenna height, terrain elevations and 4/3 earth radius propagation conditions.

(6) If a proposed station is within 80 km (50 miles) of the Canadian or Mexican border, the station must be designed to meet the requirements set forth in international treaties.

(c) The following interference studies must be prepared, must be available to the Commission upon request, and may be submitted as part of any application:

(1) An analysis of the potential for harmful interference within the 56.33 km (35 mile) protected service areas of any authorized or previously proposed incumbent station:

(i) if the coordinates of the applicant's proposed transmitter are within 160.94 km (100 miles) of the center coordinates of any authorized or previously proposed incumbent station with protected service area of 56.33 km (35 miles) as specified in § 21.902(d); or

* * * * *

(2) Applicants may design interference studies in any manner that demonstrates the avoidance of harmful interference, as defined in this subpart.

(i) In lieu of interference studies, applicants may submit in accordance with § 21.938 a written statement of no objection to the operation of the MDS station.

(ii) The Commission may direct applicants to submit interference studies of a specific nature.

(3) Except for new stations proposed in applications filed after June 15, 1995, in the case of a proposal to operate a non-colocated station within the protected service area of an authorized, or previously proposed, adjacent channel station, an analysis that identifies the areas within the protected service areas of both the authorized or previously proposed adjacent channel station and the proposed station that cannot be protected as specified in § 21.902(b)(4) and an explanation of why the proposed station cannot be colocated with the existing or previously proposed station.

* * * * *

(5) [Removed.]

(d)(1) Subject to the limitations contained in subsection (e) of this section, each MDS station licensee shall be protected from harmful electrical interference, as determined by the theoretical calculations, for a protected service area of which the boundary will be 56.3255 kilometers (35 miles) from the transmitter site.

(2) As of September 15, 1995, the location of these protected service area boundaries shall become fixed. The center of the circular area shall be the geographic latitude and longitude of the transmitting antenna site specified in station authorizations or previously proposed applications filed at the Commission before September 15, 1995. Subsequent transmitter site changes will not change the location of the 56.3255 kilometers (35 mile) protected service area boundaries.

* * * * *

(f) In addressing potential harmful interference in this service, the following definitions, procedures and other criteria shall apply:

(1) * * * Harmful interference will be considered present when a free space calculation for an unobstructed signal path determines that this ratio is less than 45 dB.

(2) * * * Harmful interference will be considered present when a free space calculation for an unobstructed signal path determines that this ratio is less than 0 dB. * * *

* * * * *

(4) For purposes of this section, the received signal power level $(RSL)_{dBW}$ at the output of the FCC reference receiving antenna is obtained from the following formulas (or an equivalent adaptation):

$$(RSL)_{dBW} = (EIRP)_{dBW} - (L_{FS})_{dB} + (G_{AR})_{dB}$$

where the free space loss (L_{FS}) is

$$(L_{FS})_{dB} = 20 \log (4\pi d/\lambda) \text{ dB}$$

in which the parameters are defined as follows:

$(RSL)_{dBW}$ is the received power in decibels referenced to one watt.

$(EIRP)_{dBW}$ is the equivalent isotropically radiated power in decibels above one watt.

d is the distance of the signal path in meters.

λ is the wavelength of the signal in meters.

G_{AR} is the dB gain of the reference receiving antenna above an isotropic antenna (obtained from Figure 1 of this section.)

(5) A determination of signal path conditions shall use a 9.1 meters (30 feet) receiving antenna height, the transmitting antenna height, terrain elevation, and assume 4/3 earth radius propagation conditions.

(6) An application will not be accepted for filing if cochannel or adjacent channel interference is predicted at the boundary of the 56.33 km (35 mile) protected service area of an authorized or previously proposed incumbent station based on the following criteria:

(i) interference calculations shall be made only for directions where there is an unobstructed signal path from the site of a proposed station to the boundary of any protected area.

(ii) calculations of received power levels in units of dBW from the proposed station will be made at one degree intervals around the protected service area.

(iii) the assumed value of the desired signal level at the boundary of an incumbent station shall be - 83 dBW, which is the calculated received power in free space at a distance of 56.33 km (35 miles), given an EIRP of 2000 watts and a receiver antenna gain of 20 dBi.

(iv) harmful interference will be considered to occur at locations along the boundary wherever the ratio between the desired signal level of - 83 dBW and the received power from a proposed cochannel or adjacent channel station is less than 45 dB or 0 dB for cochannel or adjacent channel proposals, respectively.

(7) Alternatively, MDS applications will be accepted on the basis of an executed written interference agreement between potentially affected parties filed in accordance with § 21.938.

(g)(1) All interference studies submitted pursuant to paragraph (c) of this section must be served on all licensees, conditional licensees, and applicants for the stations required to be studied by this section. This service must include a copy of the FCC application and occur on or before the date the application is filed with the Commission.

(2) MDS licensees, conditional licensees and applicants of facilities with 56.33 km (35 mile) protected service areas shall notify in writing the holders of authorizations for adjoining BTAs or PSAs of application filings for modified station licenses, provided the proposed facility would produce an unobstructed signal path to any location within the adjoining BTA or PSA. This service must include a copy of the FCC application and occur on or before the

date the application is filed with the Commission.

(h) For purposes of § 21.31(a) an MDS application, except for those applications filed after June 15, 1995, filed for a facility that would cause harmful electrical interference within the protected service area of any authorized or previously proposed station will be presumed to be mutually exclusive with the application for such authorized or previously proposed station.

* * * * *

14. Section 21.904 is amended to read as follows:

§ 21.904 Transmitter power.

* * * * *

(c)(1) An increase in station transmitter power, above currently-authorized or previously proposed values, to the maximum values provided in subsections (a) and (b) of this section, may be authorized, if the requested power increase would not cause harmful interference to any authorized or previously proposed co-channel or adjacent-channel station with a transmitter site within 80.5 kilometers (50 miles) of the applicant's transmitter site, or if an applicant demonstrates that:

(i) A station, that must be protected from interference, potentially could suffer interference that would be eliminated by increasing the power of the interfered-with station; and

(ii) The applicant requesting authorization of a power increase agrees to pay all expenses associated with the increase in power to the interfered-with station.

* * * * *

15. Section 21.913 is amended to read as follows:

§ 21.913 Signal booster stations.

* * * * *

(b) In addition to the other application requirements of this part, each application for a signal booster station that would retransmit an MDS signal must certify that the proposed booster station site is within the protected service area, as defined in §§ 21.902(d) and 21.934, of the MDS station.

(c) In addition to the other application requirements of this Part, each application for a signal booster station that would retransmit an MDS signal must state in the application that it has prepared a study which demonstrates that the power flux density at the edge of the MDS

protected service area does not exceed - 73.0 dBW/m² at locations for which there is an unobstructed signal path to the boundary.

(d) In addition to the other application requirements of this part, each application for a signal booster station must state in the application that it has prepared a study which demonstrates that the proposed booster station will cause no harmful interference to co-channel and adjacent-channel existing or previously-proposed ITFS and MDS stations with transmitters within 80.5 kilometers (50 miles) of the proposed booster station's transmitter site.

(e) In addition to the other application requirements of this part, each application must include a written consent statement of the licensee of each MDS, ITFS, and OFS station whose signal is retransmitted.

* * * * *

(g) * * *

* * * * *

(8) The power flux density at the edge of the MDS station's protected service area does not exceed -73.0 dBW/m², if the signal of an MDS station is repeated;

* * * * *

II. The following sections are added as amendments to Part 21 of Chapter 1 of Title 47 of the Code of Federal Regulations:

§ 21.921 Basis and purpose for electronic filing and competitive bidding process.

(a) *Basis.* The rules for competitive bidding procedures for the Multipoint Distribution Service (MDS) in this part are promulgated under the provisions of the Communications Act of 1934, as amended, which vests authority in the Federal Communications Commission to regulate radio transmission and to issue licenses for radio stations, and § 309(j) of the Act, which vests authority in the Commission to conduct competitive bidding.

(b) *Purpose.* This part states the conditions under which portions of the radio spectrum are made available and licensed for Multipoint Distribution Service via the competitive bidding procedures.

(c) *Scope.* The rules in this part apply only to authorizations and station licenses granted under the competitive bidding procedures of this section. This subpart contains some of the procedures and requirements for the issuance of authorizations to construct and operate multipoint distribution services. One also should consult Part 1, Subpart Q of the Commission's rules, §§ 21.1 through 21.406 and 21.900 through 21.920 of this subpart, and

other Commission rules of importance with respect to the licensing and operation of MDS stations.

§ 21.922 Authorized frequencies.

The frequencies in the MDS service available through the competitive bidding process are in the frequency allocations table of § 21.901 of this subpart.

§ 21.923 Eligibility.

Any individual or entity, other than those precluded by §§ 21.4 and 21.912 of this subpart, is eligible to receive a Basic Trading Area (BTA) authorization and a station license for each individual MDS station within the BTA. There is no restriction on the number of BTA authorizations or MDS station licenses, including multiple cochannel station licenses, sought by or awarded to a qualified individual or entity.

§ 21.924 Service areas.

(a) MDS service areas are regional Basic Trading Areas (BTAs) which are based on the Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39. The BTA Map is available for public inspection at the public reference room, Multipoint Distribution Service, Video Services Division, Mass Media Bureau, Room 207, 2033 M Street, N.W., Washington, DC.

(b) The following additions will be available for licensing separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; San Juan, Puerto Rico; Mayagüez/Aguadilla-Ponce, Puerto Rico; and the United States Virgin Islands.

(c) The area within the boundaries of a BTA to which a BTA authorization holder may provide Multipoint Distribution Service excludes the protected service areas of any incumbent MDS stations and the registered receive sites of previously authorized or proposed ITFS stations.

§ 21.925 Applications for BTA authorizations and MDS station licenses.

(a)(1) An applicant must file a short-form application and, when necessary, the short-form application supplement, identifying each BTA service authorization sought.

(2) For purposes of conducting competitive bidding procedures, short-form applications are considered to be mutually exclusive with each other if they were filed for, and specified the same, BTA service area.

(b) Separate long-form applications must be filed for each individual MDS station license

sought within its the protected service area of a BTA or PSA, including:

- (1) an application for each E-channel group, F-channel group, and single H, 1, and 2A channel station license sought;
- (2) an application for authority to operate at an MDS station in the area vacated by an MDS station incumbent that has forfeited its station license; and
- (3) an application for each ITFS-channel group station license sought in accordance with §§ 74.990 and 74.991.

(c) The Commission shall grant BTA authorizations to auction winners as set forth in § 21.958.

(d) No long-form application filed by the BTA authorization holder will be accepted prior to completion of the competitive bidding process and no long-form application will be granted until expiration of the 30-day petition to deny period following the public notice listing of the application as being accepted for filing.

(e) Applicants may use the electronic filing procedures to file both the Multipoint Distribution Service short-form and long-form applications with the Commission.

§ 21.926 Amendments to long-form applications.

(a) A Multipoint Distribution Service long-form application may be amended as a matter of right up to the date of the public notice announcing the application has been accepted for filing provided that:

- (1) the proposed amendments do not amount to more than a *pro forma* change of ownership and control;
- (2) the Commission has not otherwise forbidden the amendment of pending applications.

(b) Requests to amend a long-form application placed on public notice as being accepted for filing may be granted only if a written petition demonstrating good cause is submitted and properly served on the parties of record.

§ 21.927 Sole bidding applicants.

Where the deadline for filing MDS short-form applications has expired and a particular BTA service area has been specified in a single short-form application only, the applicant shall be named the auction winner for that BTA authorization.

§ 21.928 Acceptability of short- and long-form applications.

The acceptability of short- and long-form applications will be determined according to the

requirements of §§ 21.13, 21.15, 21.20, 21.21 and 21.952.

§ 21.929 Authorization period for station licenses.

Notwithstanding § 21.45, each new MDS station licensed within a BTA or PSA will be granted for a term of ten years, terminating ten years from the date the Commission declared bidding closed in the MDS auction.

§ 21.930 Five-year build-out requirements.

(a)(1) A BTA authorization holder has a five-year build-out period, beginning on the date of the grant of the BTA authorization and terminating on the 5th year anniversary of the grant of the authorization, within which it may develop and expand MDS station operations within its service area.

(2) This period is not extended by the grant of subsequent authorizations (*i.e.*, grant of a station license or modification).

(3) Timely certifications of completion of construction for each MDS station within a BTA or partitioned service area must be filed upon completion of construction of a station.

(b) Each BTA authorization holder has the exclusive right to build, develop, expand and operate MDS stations within its BTA service area during the five-year build-out period. The Commission will not accept competing applications for MDS station licenses within the BTA service area during this period.

(c)(1) Within five years of the grant of a BTA authorization, the authorization holder must construct MDS stations to provide signals pursuant to § 21.907 that are capable of reaching at least two-thirds of the population of the applicable service area, excluding the populations within protected service areas of incumbent stations.

(2) Sixty days prior to the end of the five-year build out period, the BTA authorization holder must file with the Commission proof that demonstrates the holder has met the requirements of § 21.930(c)(1). The most recent census figures available from the U.S. Department of Commerce, Bureau of Census prior to the expiration of the authorization holder's five-year build-out period will be used to determine compliance with population-based requirements. In no event shall census figures gathered prior to 1990 be used.

(d)(1) If the Commission finds that the BTA authorization holder has demonstrated that it has met the requirements of § 21.930(c)(1), the Commission will issue a declaration that the holder has met such requirements.

(2) If the Commission finds that the BTA authorization holder has not provided a signal as required in § 21.930(c)(1), the Commission shall partition from the BTA any unserved area, using county lines as a guide, and shall re-authorize service to the unserved area pursuant to the MDS competitive bidding procedures of this subpart. Applications for such unserved areas are not acceptable for filing until a filing date is announced through a public notice.

(i) The competitive bidding procedures set forth in §§ 21.950 to 21.961 shall be

followed by applicants seeking authority to provide MDS service to the unserved partitioned area.

(ii) The BTA authorization holder originally authorized to provide service is ineligible to participate in the competitive bidding process for the unserved areas partitioned from its BTA.

§ 21.931 Partitioned service areas (PSAs).

(a)(1) The holder of a BTA authorization may enter into contracts with eligible parties to partition any portion of its service area according to county boundaries, or according to other geopolitical subdivision boundaries, or multiple contiguous counties or geopolitical subdivisions within the BTA service area.

(2)(i) Partitioning contracts must be filed with the Commission within 30 days of the date that such agreements are reached.

(ii) The contracts must include descriptions of the areas being partitioned and include any documentation necessary to convey to the Commission the precise boundaries of the partitioned area.

(3) Parties to partitioning contracts must file concurrently with such contracts one of the following, where appropriate:

(i) an MDS long-form application for authority to operate a new MDS station within the PSA;

(ii) applications for assignment or transfer of existing stations within the PSA; or

(iii) a statement of intention as defined in § 21.956(a) along with a completed FCC Form 430.

(b) The eligibility requirements applicable to BTA authorization holders also apply to those individuals and entities seeking PSA authorizations.

(c) Any individual or entity acquiring the rights to a partitioned area of a BTA also acquires the rights to any previously authorized individual stations located within the partitioned area that were held by the previous authorization holder, provided that grantable applications for assignment and transfer of control, FCC Forms 702 and 704, are filed for existing stations and that acceptable amendments to pending long-form applications are filed. Pending long-form applications filed by the previous authorization holder for transmitter sites within the PSA may also be dismissed without prejudice at the applicant's request.

(d) Authorizations for PSAs will be issued in accordance with § 21.958; however, when individual stations within an PSA are assigned along with the partitioned area, the authorization will be granted concurrently with the grant of the applications for assignment and transfer of the existing stations.

(e) Subsequent to issuance of the authorization for a PSA, the partitioned area will be treated as a separate protected service area.

(f)(1) When any area within a BTA becomes a PSA, the remaining counties and other

geopolitical subdivisions within that BTA will also be subsequently treated and classified as a PSA(s).

(2) At the time a BTA is partitioned, the Commission shall cancel the BTA authorization initially issued and issue a PSA authorization to the former BTA authorization holder.

(g) The duties and responsibilities imposed upon BTA authorization holders in this part and throughout the Commission's rules, such as § 21.930(c)(1), apply to the holders of PSA authorizations.

(h) The build-out period for PSAs voluntarily partitioned shall be the remainder of the five-year build-out period applicable to the BTA or PSA from which the PSA was drawn. For PSA authorizations issued pursuant to § 21.930(d)(2) and the competitive bidding process, the build-out period is five years, beginning on the date of the grant of the PSA authorization. The requirements of § 21.930(c)(1) also apply to the holders of authorizations for PSAs.

§ 21.932 Forfeiture of incumbent MDS station licenses.

(a) If the license for an incumbent MDS station is forfeited, absent the filing and grant of a petition for reinstatement pursuant to § 21.44(b), the 56.33 km (35 mile) protected service area of the incumbent station shall dissolve and the protected service area shall become part of the BTA or PSA surrounding it.

(b) If upon forfeiture the protected service area of a forfeited license extends across the boundaries of more than one BTA or PSA, the portions of the protected service area of the incumbent station shall merge with the overlapping BTAs or PSAs.

(c) The holder of the authorization for the BTA or PSA with which the service area of the forfeited incumbent station has merged has the exclusive right to file a long-form application to operate a station within the merged area and may modify the locations of its stations to serve the forfeited area.

§ 21.933 Protected service areas.

(a) The stations licensed to the holder of a BTA authorization shall have a protected service area that is coterminous with the boundaries of that BTA, subject to the exclusion of the 56.33 km (35 mile) protected service area of incumbent MDS stations and the registered receive sites of previously proposed and authorized ITFS facilities within that BTA.

(b) The stations licensed to the holder of a PSA authorization shall have a protected service area that is coterminous with the boundaries of the counties or other geopolitical subdivisions comprising the PSA, subject to the exclusion of the 56.33 km (35 mile) protected service area of incumbent MDS stations and the registered receive sites of previously proposed and authorized ITFS facilities within that PSA.

§ 21.934 Assignment or transfer of control of BTA authorizations.

(a)(1) A BTA or PSA authorization holder seeking approval for a transfer of control or assignment of its authorization within three years of receiving such authorization through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its authorization was obtained through competitive bidding.

(2) Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its authorization. This information should include not only a monetary price, but also any future, contingent, in-kind, or other consideration (*e.g.*, management or consulting contracts either with or without an option to purchase; below market financing).

(b) Transfers of control or assignments of BTA or PSA authorizations are subject to the limitations of §§ 21.4, 21.900 and 21.912 of this subpart.

(c) The anti-trafficking provision of § 21.39 does not apply to the assignment or transfer of control of a BTA or PSA authorization, which was granted pursuant to the Commission's competitive bidding procedures.

§ 21.935 Assignment or transfer of control of station licenses within a BTA.

Licenses for individual stations within a BTA or PSA area issued to authorization holders may not be transferred or assigned unless they are acquired as part of a PSA.

§ 21.936 Cancellation of authorization.

(a) The Commission may revoke or cancel a BTA or PSA authorization for gross misconduct, misrepresentation or bad faith on the part of the authorization holder.

(b) Cancellation of a BTA or PSA authorization shall result in termination of any rights the authorization holder holds in individual proposed or authorized stations within the BTA or PSA.

§ 21.937 Negotiated interference protection.

(a) The level of acceptable electromagnetic interference that occurs at or within the boundaries of BTAs, PSAs, or an incumbent MDS station's 56.33 km (35 mile) protected service area can be negotiated and established by an agreement between the appropriate parties, provided that:

(1) the parties to such an agreement file with the Commission a written statement of no

objection, acknowledging that the parties have agreed to accept a level of interference that does not meet the protection standards set forth in §§ 21.902 or 21.938 of the Commission's rules;

(2) the statement bears the signatures of all parties to the agreement, or the signatures of their representative agents; and

(3) the statement is filed with the Commission within 30 days of its ratification or filed in conjunction with an application with which the agreement is associated, whichever is earliest.

§ 21.938 BTA and PSA technical and interference provisions.

(a) BTA or PSA authorization holders are expected to cooperate with one another by designing their stations in a manner that protects service in adjoining BTAs and PSAs, including consideration of interference abatement techniques such as cross polarization, frequency offset, directional antennas, antenna beam tilt, EIRP decrease, reduction of antenna height, and terrain shielding.

(b) Unless the affected parties have executed a written interference agreement in accordance with § 21.937, stations licensed to a BTA or PSA authorization holder must not cause harmful electromagnetic interference to the following:

(1) the protected service areas of other authorization holders in adjoining BTAs or PSAs.

(2) the 56.33 km (35 mile) protected service areas of authorized or previously proposed MDS stations (incumbents).

(3) registered receive sites and protected service areas of authorized or previously proposed stations in the Instructional Television Fixed Service pursuant to the manner in which interference is defined in § 74.903(a).

(c) Unless the affected parties have executed a written interference agreement in accordance with § 21.937, it shall be the responsibility of a BTA or PSA authorization holder to correct at its expense any condition of harmful electromagnetic interference caused to authorized MDS service at locations within other BTAs or PSAs or within the 56.33 km (35 mile) protected service areas of authorized or previously proposed MDS stations (incumbents).

(d) Unless specifically excepted, BTA or PSA authorization holders are governed by the interference protection and other technical provisions applicable to the Multipoint Distribution Service.

(e) The calculated free space power flux density from a station may not exceed - 73 dBW/m² at locations on BTA or PSA boundaries for which there is an unobstructed signal path from the transmitting antenna to the boundary, unless the applicant has obtained the written consent of the authorization holder for the adjoining BTA or PSA.

(f)(1) Authorization holders for BTAs or PSAs must notify authorization holders of adjoining areas of their application filings for new or modified stations; provided the proposed facility would produce an unobstructed signal path anywhere within the adjoining BTA or PSA.

(2) This service of written notification must include a copy of the FCC application and occur on or before the date the application is filed with the Commission.

(3) With regard to incumbent MDS stations, authorization holders for BTAs or PSAs must comply with the requirements of § 21.902.

(g) Where a PSA adjoins a BTA and both authorizations are held by the same individual or entity, the PSA shall be considered an extension of the protected service area of the BTA regarding the interference protection, limiting signal strength, and notification provisions of this section.

§ 21.939 Harmful interference abatement.

In the event harmful interference occurs or appears to occur, after notice and an opportunity for a hearing, Commission staff may require any Multipoint Distribution Service conditional licensee or licensee to:

(a) modify the station to use cross polarization, frequency offset techniques, directional antenna, antenna beam tilt, or

(b) order an equivalent isotropically radiated power decrease, a reduction of transmitting antenna height, a change of antenna location, a change of antenna radiation pattern, or a reduction in aural signal power.

§ 21.940 to § 21.949

[Reserved.]

§ 21.950 MDS subject to competitive bidding.

Mutually exclusive MDS initial applications are subject to competitive bidding. The general procedures set forth in 47 C.F.R. Chapter I, Part 1, Subpart Q are applicable to competitive bidding proceedings used to select among mutually exclusive MDS applicants, unless otherwise provided in 47 C.F.R. Chapter I, Part 21, Subpart K.

§ 21.951 MDS competitive bidding procedures.

(a) The following competitive bidding procedures will generally be used in MDS auctions. Additional, specific procedures may be set forth by public notice. The Commission may also design and test alternative procedures. See 47 C.F.R. §§ 1.2103 and 1.2104.

(1) *Competitive bidding design.* Simultaneous multiple round bidding will be used in MDS

auctions, unless the Commission specifies by public notice the use of sequential oral (open outcry) bidding or sealed bidding (either sequential or simultaneous). Combinatorial bidding may also be used with any type of auction design.

(2) *Competitive bidding mechanisms.* The Commission may utilize the following mechanisms in MDS auctions:

(i) *Sequencing.* The Commission will establish and may vary the sequence in which the BTA service areas will be auctioned.

(ii) *Grouping.* In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which BTA service areas will be auctioned simultaneously or in combination.

(iii) *Reservation price.* The Commission may establish a reservation price, either disclosed or undisclosed, below which a BTA service area subject to auction will not be awarded.

(iv) *Minimum bid increments.* The Commission will, by announcement before or during an MDS auction, require minimum bid increments in dollar or percentage terms.

(v) *Stopping rules.* The Commission will establish stopping rules before or during multiple round MDS auctions in order to terminate an auction within a reasonable time.

(vi) *Activity Rules.* The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, the Commission will allow bidders to request and to receive automatically waivers of such rule, the number of which will be determined by the Commission.

(vii) *Suggested minimum bid.* The Commission may establish suggested minimum bids on each BTA service area subject to auction. Bids below the suggested minimum bid would count as activity under the activity rule only if no bids at or above the suggested minimum bid are received.

(b) *Identities of bidders.* The Commission will generally release information concerning the identities of bidders before each auction but may choose, on an auction-by-auction basis, to withhold the identity of the bidders associated with bidder identification numbers. The Commission will announce by public notice before the MDS auction whether the bidders' identities will be revealed.

(c) *Commission control of auction.* The Commission may delay, suspend, or cancel an MDS auction in the event of a natural disaster, technical obstacle, evidence of security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding starting from the beginning

of the current or some previous round or cancel the competitive bidding in its entirety.

§ 21.952 Bidding application procedures.

(a) *Short-form applications.* To participate in MDS auctions, all applicants must submit short-form applications, along with all required certifications and exhibits specified by such forms, pursuant to the provisions of § 1.2105(a) and any Commission public notices. See 47 C.F.R. § 1.2105(a).

(b) *Filing of short-form applications.* Prior to any MDS auction, the Commission will issue a public notice announcing the availability of BTA service areas and, in the event that mutually exclusive short-form applications (as defined by § 21.925(a)(2)) are filed, the date of the auction for those BTA service areas. This public notice also will specify the date on or before which applicants intending to participate in an MDS auction must file their short-form applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the material which must accompany the forms, any filing fee that must accompany the application or any upfront payment that will need to be submitted, and the location where the application must be filed.

(c) *Modification and dismissal of short-form applications.*

(1) Any short-form application that is not signed in some manner or form, including by electronic means, and does not contain all requisite certifications is unacceptable for filing and cannot be corrected subsequent to any applicable filing deadline. Such short-form application will be dismissed with prejudice.

(2) The Commission will provide bidders a limited opportunity to cure certain defects specified herein and to resubmit an amended short-form application. For MDS, we classify all amendments to a short-form application as major, except those to correct minor errors or defects, such as typographical errors, or those to reflect ownership changes or formation of bidding consortia or joint bidding arrangements specifically permitted under § 21.953. A short-form application may be modified to make minor amendments. However, applicants who fail to correct defects in their short-form applications in a timely manner as specified by public notice will have their applications dismissed with no opportunity for resubmission.

(3) A short-form application will be considered to be a newly filed application if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

§ 21.953 Prohibition of collusion.

(a) Except as provided in paragraphs (b), (c) and (d) of this section, after the filing of short-form applications, all applicants in an MDS auction are prohibited from cooperating,

collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the winning bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the applicant's short-form application. Communications among applicants concerning matters unrelated to the MDS auction will be permitted after the filing of short-form applications.

(b) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for the same BTA service areas.

(c) After the filing of short-form applications, applicants may make agreements to bid jointly for BTA service areas, provided the parties to the agreement have not applied for the same service areas.

(d) After the filing of short-form applications, a holder of a non-controlling attributable interest in an entity submitting a short-form application may, under the circumstances specified in § 1.2105(c)(4), acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for the same BTA service areas. *See* 47 C.F.R. § 1.2105(c)(4).

(e) To reflect the changes in ownership or in the membership of consortia or joint bidding arrangements specified in paragraphs (b), (c) and (d) of this section, applicants must amend their short-form applications by submitting a revised short-form application, filed within two business days of any such change; such modifications will not be considered major amendments of the applications within the meaning of § 21.952(c)(2). However, any amendment which results in the change of control of an applicant will be considered a major amendment of the short-form.

(f) For purposes of this section, the terms "applicant" and "bids or bidding strategies" are defined as set forth in 47 C.F.R. § 1.2105(c)(5).

§ 21.954 Submission of upfront payments.

(a) The Commission will require applicants to submit an upfront payment prior to the MDS auction. The amount of the upfront payment for each BTA service area being auctioned and the procedures for submitting it will be set forth in a public notice. Upfront payments may be made by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. No interest will be paid on upfront payments.

(b) For MDS auctions, the Commission will require each applicant to submit an upfront payment equal to the largest combination of activity units (as defined in the Commission's

activity rules established pursuant to § 21.951(a)(2)(vi)) associated with the BTAs on which the applicant anticipates being active in any single round of bidding. Applicants who are small businesses eligible for reduced upfront payments will be required to submit an upfront payment amount in accordance with § 21.960(c). If an upfront payment is not in compliance with the Commission's rules, or if insufficient funds are tendered to constitute a valid upfront payment, the applicant shall have a limited opportunity to correct its submission to bring it up to the minimum valid upfront payment prior to the auction. An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any BTA service area being auctioned will be ineligible to bid, its application will be dismissed, and any upfront payment it has made will be returned.

(c) The upfront payment(s) of a bidder will be credited toward any down payment required for the BTA service areas on which the bidder is the winning bidder. Where the upfront payment amount exceeds the required down payment of a winning bidder, the Commission may refund the excess amount after determining that no bid withdrawal payments are owed by that bidder. In the event a payment is assessed pursuant to § 21.959(a) for bid withdrawal or default, upfront payments or down payments on deposit with the Commission will be used to satisfy the bid withdrawal or default payment before being applied toward any additional payment obligations that the winning bidder may have.

§ 21.955 Submission of down payments.

(a) After bidding has ended on all BTA service areas, the Commission will identify and notify the winning bidders and declare the bidding closed in the MDS auction. Within five (5) business days after being notified that it is a winning bidder on a particular BTA service area(s), a winning bidder must submit to the Commission's lockbox bank such additional funds as are necessary to bring its total deposits (upfront payment plus down payment) up to twenty (20) percent of its winning bid(s). This down payment may be made by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

(b) Winning bidders who are small businesses eligible for installment payments under § 21.960(b) are only required to bring their total deposits up to ten (10) percent of their winning bids. Such small businesses must pay the remainder of the twenty (20) percent down payment within five (5) business days following release of the public notice stating that their BTA authorizations are ready to be issued.

(c) Down payments will be held by the Commission until the winning bidder has been issued its BTA authorization and has paid the remaining balance of its winning bid, in which case it will not be returned, or until the winning bidder is found unqualified to be a station licensee or has defaulted, in which case it will be returned, less applicable default payments. No interest will be paid on any down payment.

§ 21.956 Filing of long-form applications or statements of intention.

(a) Within 30 days of being notified of its status as a winning bidder, each winning bidder for a BTA service area will be required to submit either: (1) an initial long-form application for an MDS station license, along with any required exhibits; or (2) a statement of intention with regard to the BTA service area, along with any required exhibits, showing the encumbered nature of the BTA, identifying all previously authorized or proposed MDS and ITFS facilities, and describing in detail the winning bidder's plan for obtaining the previously authorized and/or proposed MDS stations within the BTA. A winning bidder that fails to submit either the initial long-form application or statement of intention as required under this section, and fails to establish good cause for any late-filed application or statement, shall be deemed to have defaulted and will be subject to the payments set forth in § 21.959(a).

(b) Each initial long-form application for an MDS station license within an auction winner's BTA service area, and each statement of intention with regard to an auction winner's BTA service area, must also include the following:

(1) FCC Form 430;

(2) an exhibit detailing the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement the winning bidder had entered into relating to the competitive bidding process prior to the time bidding was completed (*see* 47 C.F.R. § 1.2107(d));

(3) an exhibit complying with 47 C.F.R. §§ 1.2110(i) and 21.960(e), if the winning bidder submitting the long-form application or statement of intention claims status as a designated entity.

(c) Subsequent long-form applications for additional MDS station licenses within the BTA service areas of winning bidders may be submitted at any time during the five year build-out period and need not contain the exhibits specified in paragraph (b)(2)-(3) of this section.

§ 21.957 Petitions to deny against long-form applications; comments on statements of intention.

(a) Within thirty (30) days after the Commission gives public notice that a long-form application for an MDS station license submitted by a winning bidder within its BTA service area has been accepted for filing, petitions to deny that application may be filed. Any such petitions and oppositions thereto must comply with the requirements of §§ 47 C.F.R. 1.2108 and 21.30.

(b) Parties wishing to comment on or oppose the issuance of a BTA authorization issued in connection with the filing of a statement of intention by a winning bidder must do so prior to the Commission's issuance of the BTA authorization.

§ 21.958 Full payment and issuance of BTA authorizations.

Each winning bidder, except for small businesses eligible for installment payments under § 21.960(b), must pay the balance of its winning bid for its BTA service area(s) in a lump sum within five (5) business days following the release of the public notice stating that the BTA authorization(s) is ready to be issued. A winning bidder who submitted a long-form application for an MDS station license within its BTA service area pursuant to § 21.956(a) will receive its BTA authorization concurrent with the grant of its MDS conditional station license within its BTA service area. A winning bidder who submitted a statement of intention with regard to its BTA service area pursuant to § 21.956(a) will receive its BTA authorization following the Commission's review of its statement of intention. The Commission will issue a BTA authorization to a winning bidder within ten (10) business days following notification of receipt of full payment of the amount of the winning bid.

§ 21.959 Withdrawal, default and disqualification.

(a) When the Commission conducts an MDS simultaneous multiple round auction, the Commission will impose additional payment requirements on bidders who withdraw high bids during the course of an auction, who default on down or full payments due after an auction closes, or who are disqualified. The withdrawal and default payments set forth below will be deducted from any upfront payments or down payments that the withdrawing, defaulting or disqualified bidder has deposited with the Commission.

(1) *Bid withdrawal prior to close of auction.* A bidder who withdraws a high bid during the course of an auction will be subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment will be assessed if the subsequent winning bid exceeds the withdrawn bid.

(2) *Default or disqualification after close of auction.* If a winning bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (1) above, plus an additional payment equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the three percent payment will be calculated based on the defaulting bidder's bid amount.

(b) If the Commission were to conduct a sequential oral (open outcry) auction or sealed bid auction for MDS, the Commission may modify the payments set forth in paragraph (a) above to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such payments shall not exceed the payments specified in paragraph (a) above.

(1) In the case of sealed bidding:

(i) If a bid is withdrawn before the Commission releases the initial public notice announcing the winning bidder(s), no bid withdrawal payment will be assessed.

(ii) If a bid is withdrawn after the Commission releases the initial public notice announcing the winning bidder(s), the bid withdrawal payment will be equal to the difference between the high bid amount and the amount of the next highest bid. Losing bidders will only be subject to this bid withdrawal payment for a period of thirty (30) days after the Commission releases the initial public notice announcing the winning bidders.

(2) In the case of oral sequential (open outcry) bidding:

(i) If a bid is withdrawn before the Commission has declared the bidding to be closed for the BTA service area bid on, no bid withdrawal payment will be assessed.

(ii) If a bid is withdrawn after the Commission has declared the bidding to be closed for the BTA service area bid on, the bid withdrawal payment of paragraphs (a)(1) and (2) of this section will apply.

(c) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within five (5) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in paragraph (a)(2) above. In such event, the Commission may either re-auction the BTA service area to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids.

(d) A winning bidder who is found unqualified to be an MDS station licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the payment set forth in paragraph (a)(2) above. In such event, the Commission will generally conduct another auction for the BTA service area, affording new parties an opportunity to file applications for such service area.

(e) Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the MDS competitive bidding process may be subject, in addition to any other applicable sanctions, to loss of their upfront payment, down payment or full bid amount, and may be prohibited from participating in future auctions.

§ 21.960 Designated entity provisions for MDS.

(a) *Designated entities.* As specified in this section, designated entities that are winning bidders for BTA service areas are eligible for special incentives in the auction process. See 47 C.F.R. § 1.2110.

(b) *Installment payments.* Small businesses and small business consortia may elect to pay the full amount of their winning bids for BTA service areas in installments over a ten (10) year period running from the date that their BTA authorizations are issued.

(1) Each eligible winning bidder paying for its BTA authorization(s) on an installment basis must deposit by wire transfer or cashier's check in the manner specified in § 21.955 sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within five (5) business days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable for the payments set forth in § 21.959(a)(2).

(2) Within five (5) business days following release of the public notice stating that the BTA authorization of a winning bidder eligible for installment payments is ready to be issued, the winning bidder shall pay another ten (10) percent of its winning bid, thereby commencing the eligible bidder's installment payment plan. The Commission will issue the BTA authorization to the eligible winning bidder within ten (10) business days following notification of receipt of this additional ten (10) percent payment. Failure to remit the required payment will make the bidder liable for the payments set forth in § 21.959(a)(2).

(3) Upon issuance of a BTA authorization to a winning bidder eligible for installment payments, the Commission will notify such eligible BTA authorization holder of the terms of its installment payment plan. For MDS, such installment payment plans will:

(i) impose interest based on the rate of ten (10) year U.S. Treasury obligations at the time of issuance of the BTA authorization, plus two and one half (2.5) percent;

(ii) allow installment payments for a ten (10) year period running from the date that the BTA authorization is issued;

(iii) begin with interest-only payments for the first two (2) years; and

(iv) amortize principal and interest over the remaining years of the ten (10) year period running from the date that the BTA authorization is issued.

(4) A BTA authorization issued to an eligible winning bidder that elects installment payments shall be conditioned upon the full and timely performance of the BTA authorization holder's payment obligations under the installment plan.

(i) If an eligible holder making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a holder may request that the Commission permit a three (3) to six (6) month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the holder's payment history, including whether the holder has defaulted before, how far into the payment period the default occurs, the reasons for default, whether the holder has met construction build-out requirements within its BTA service area, the holder's financial condition, and whether the holder is seeking an eligible buyer. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue

to accrue and will be amortized over the remaining years of the ten (10) year payment period.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the BTA authorization will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O of the Commission's rules.

(5) Unjust enrichment.

(i) If an eligible BTA authorization holder that utilizes installment financing under this subsection seeks to assign or transfer control of its BTA authorization to an entity not meeting the eligibility standards for installment payments, the holder must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(ii) If a BTA authorization holder that utilizes installment financing under this subsection seeks to make any change in ownership structure that would result in the holder losing eligibility for installment payments, the holder shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of the change in ownership structure as a condition of approval. Increases in gross revenues that result from revenues from operations, business development or expanded service shall not be considered changes in ownership structure under this paragraph.

(c) *Reduced upfront payments.* A prospective bidder that qualifies as a small business, or as a small business consortia, is eligible for a twenty-five (25) percent reduction in the amount of the upfront payment required by § 21.954. To be eligible to bid on a particular BTA, a small business will be required to submit an upfront payment equal to seventy-five (75) percent of the upfront payment amount specified for that BTA in the public notice listing the upfront payment amounts corresponding to each BTA service area being auctioned.

(d) *Bidding credits.* A winning bidder that qualifies as a small business, or as a small business consortia, may use a bidding credit of fifteen (15) percent to lower the cost of its winning bid on any of the BTA authorizations awarded in the MDS auction.

(1) Unjust enrichment.

(i) If a BTA authorization holder that utilizes a bidding credit under this subsection seeks to assign or transfer control of its BTA authorization to an entity not meeting the eligibility standards for bidding credits, the authorization holder must reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the authorization was awarded, before assignment or transfer will be permitted. The amount of the required reimbursement will be reduced over time. An assignment or transfer in the first two years after issuance of the BTA authorization will result in a reimbursement of one hundred (100) percent of the value of the bidding credit;