

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 2 and 25 of the)	
Commission’s Rules to Permit Operation of)	ET Docket No. 98-206
NGSO FSS Systems Co-Frequency with GSO and)	RM-9147
Terrestrial Systems in the Ku-Band Frequency)	RM-9245
Range;)	
)	
Amendment of the Commission’s Rules to)	
Authorize Subsidiary Terrestrial Use of the)	
12.2-12.7 GHz Band by Direct Broadcast Satellite)	
Licensees and Their Affiliates; and)	
)	
Applications of Broadwave USA, PDC Broadband)	
Corporation, and Satellite Receivers, Ltd. to)	
Provide a Fixed Service in the 12.2-12.7 GHz)	
Band)	

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: April 10, 2003

Released: April 15, 2003

By the Commission:

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this *Second Further Notice of Proposed Rule Making (Second Further Notice)*, we seek further comment on the appropriate service area definition for the Multichannel Video Distribution and Data Service (MVDDS) in the 12.2-12.7 GHz band (12 GHz band). Specifically, we seek comment on the most appropriate service area definition for the geographic licensing of MVDDS. We also seek comment on whether Designated Market Areas (DMAs) will facilitate delivery of advanced wireless services, such as video and data broadband services, to a wide range of populations, including those areas that are unserved and underserved. In addition, we seek comment on whether we should modify the MVDDS build out requirement as a means to foster expeditious deployment of advanced wireless services, such as video and data broadband services, to these communities as well.

II. BACKGROUND

2. In the *First Report and Order* in this proceeding, the Commission concluded that MVDDS could operate in the 12 GHz band on a co-primary non-harmful interference basis with incumbent Broadcast Satellite Service providers and on a co-primary basis with entities providing non-geostationary satellite orbit fixed-satellite services.¹ At the same time, in the *Further Notice*, the Commission sought comment on service, technical, and licensing rules for the MVDDS, including but not limited to, the appropriate service area definition.²

3. In the *Second R&O*, the Commission adopted a geographic licensing approach for the service.³ In addition, the Commission decided to define the service areas for the MVDDS based on Component Economic Areas (CEAs).⁴ In reaching its decision to use CEAs, the Commission noted that it declined to use Nielsen Media Research's DMAs⁵, despite support in the record for such use,⁶ in part

¹ Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band with Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. To Provide A Fixed Service in the 12.2-12.7 GHz Band, *First Report and Order and Further Notice of Proposed Rule Making*, FCC 00-418, ET Docket No. 98-206, 16 FCC Rcd 4096, 4099-4100 ¶ 2 (2000) (*First R&O* and *Further Notice*).

² *Further Notice*, 16 FCC Rcd at 4202 ¶ 285.

³ *Memorandum Opinion and Order and Second Report and Order*, FCC 02-116, ET Docket No. 98-206, 17 FCC Rcd 9614, 9665 ¶ 130 (2002) (*Second R&O*).

⁴ *Id.* at 9665-9666 ¶ 132. CEAs are based on Economic Areas delineated by the U.S. Dept. of Commerce. Each CEA consists of a single economic node and the surrounding counties that are economically related to the node. The 354 CEA service areas are based on the 348 CEAs delineated by the Regional Economic Analysis Division, Bureau of Economic Analysis, U.S. Department of Commerce February 1995, with the following six FCC-defined service area additions: American Samoa, Guam, Northern Mariana Islands, San Juan (Puerto Rico), Mayagüez/Aguadilla-Ponce (Puerto Rico), and the United States Virgin Islands.

⁵ Nielsen Media Research (Nielsen) uses audience survey information from cable and non-cable households to determine the assignment of counties to local television markets, or DMAs. Nielsen then determines what constitutes a separate market based on a complex statistical formula based upon viewership and other factors. See <http://www.nielsenmedia.com/DMAs.html>. The station's assignment to a DMA is then made available in Nielsen's *Directory of Stations* publication. There are 210 DMAs (from 211 DMAs in 2000) delineated by Nielsen (continued....)

because Nielsen, the copyright owner of the DMA listing, had not given the Commission a blanket license to use the listing for the MVDDS.⁷ Thus, the Commission reasoned that absent a copyright license (through a blanket license agreement or some other arrangement) from Nielsen for use of the copyrighted material, a MVDDS licensee could not rely on the grant of a Commission authorization as a defense to any claim of copyright infringement brought by Nielsen. Consequently, the Commission concluded that economic benefits would accrue to MVDDS licenses from the establishment of a geographic licensing approach premised on service areas in the public domain.⁸

4. With respect to its decision to use CEAs, the Commission noted that adopting CEAs would provide similar benefits as DMAs, but would better promote its objectives and address commenters' concerns.⁹ Specifically, the Commission premised its decision on three factors. First, the smaller CEA service areas would better track actual deployment of fixed services. Second, CEAs would encourage rapid service deployment to less populated and rural regions because they will permit additional opportunities for small businesses to provide MVDDS. Third, the use of CEAs would encourage the meaningful participation of small businesses better than a nationwide or regional geographic licensing approach because the smaller areas would likely require a lower minimum investment. Further, the Commission noted that for those seeking a regional or national footprint, the use of CEAs would not prevent them from aggregating areas to create such larger networks.¹⁰

5. Subsequent to the release of the *Second R&O*, Commission staff continued discussions with Nielsen representatives regarding a blanket licensing agreement or some other arrangement by which Nielsen would consent to the Commission's use of the DMA listing in the MVDDS context.¹¹ Although Nielsen does not wish to enter into a blanket license agreement with the Commission regarding use of

(Continued from previous page) _____

in its publication entitled "U.S. Television Household Estimates" dated September 2002. See Nielsen Media Research, *Nielsen Station Index: Methodology Techniques and Data Interpretation*. Nielsen's website contains the above publications. See <http://www.nielsenmedia.com>."

⁶ Northpoint and SRL supported licensing on the basis of DMAs which they aver are well-suited to the low-power character of their technologies. See Northpoint Technology Ltd. and Broadwave USA Comments at 32 (filed Mar. 12, 2001); Satellite Receivers Limited (SRL) Comments at 3 (filed Mar. 12, 2001). In addition, Northpoint, Pegasus Broadband Corporation (Pegasus) and SRL applied for licenses utilizing DMAs. See Broadwave Network, L.L.C. Application for License to Provide a New Terrestrial Transport Service in the 12.2-12.7 GHz Band (filed Jan 8, 1999); Application of PDC Broadband Corp. for Licenses to Provide Terrestrial Services in the 12.2-12.7 GHz Band (filed Apr. 18, 2000); and SRL Application for Licenses to provide Terrestrial Television Broadcast and Data Services in the 12.2-12.7 GHz Band in Illinois, Indiana, Iowa, Michigan, Minnesota and Wisconsin (filed Aug. 25, 2000).
See *Second R&O*, 17 FCC Rcd at 9665-66 ¶ 132.

⁸ *Id.* (citing Revision of Part 22 and 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-18, 12 FCC 2732, 2735 n.3 (1997)).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission and Jane Mago, General Counsel, Federal Communications Commission, to David Schwartz-Leeper, Vice President/GC, Nielsen Media Research (Jan. 24, 2003).

DMAs for licensing MVDDS,¹² it now appears that Nielsen would agree to extend a perpetual, royalty-free license to the Commission with certain conditions as discussed *infra*.¹³

6. On January 30, 2003, the Wireless Telecommunications Bureau (Bureau) sought comment on reserve prices, minimum opening bids, and other auction procedures regarding an MVDDS auction.¹⁴ The *Auction PN* sought comment on these issues as they would apply to an MVDDS auction based on either CEAs or DMAs in order to minimize any delay in the auction process resulting from a change in geographic license areas.¹⁵

7. On March 25, 2003, MDS America, Inc. (MDS America) filed an *ex parte* notification (*ex parte*) which describes its continued concern about the current build out requirements for the MVDDS.¹⁶ In the *Second R&O*, the Commission determined that it would apply a ten-year build out requirement with a demonstration of substantial service by the MVDDS licensee as the basis for its license renewal expectancy.¹⁷ In its *ex parte*, MDS America indicated that the current ten-year build out period for MVDDS licenses is too long. It also expressed concern that the build out requirement presented the potential for anti-competitive warehousing of the MVDDS spectrum. It noted that a five-year build out would better address the demand for rural broadband service.

III. DISCUSSION

A. Service Area

8. Based on the differing responsive comments to the *Auction PN* received from Northpoint Technology, Ltd. (Northpoint)¹⁸ and MDS America,¹⁹ and our belief that initially MVDDS licensees will provide multichannel video programming distribution (MVPD) services, we take this opportunity to initiate this *Second Further Notice*. Based on the record in this proceeding, we continue to believe that initially MVDDS licensees will provide multichannel video distribution of local television programs and

¹² See Letter from David A. Schwartz-Leeper, Senior Vice President/ GC, Nielsen Media Research, to Thomas J. Sugrue, [former] Chief, Wireless Telecommunications Bureau, Federal Communications Commission and Jane Mago, [former] General Counsel, Federal Communications Commission at 2 (Mar. 26, 2003) (Nielsen letter). See also Appendix C for the text of the Nielsen Letter.

¹³ See para. 10, *supra*.

¹⁴ See *Public Notice*, Auction of Multichannel Video Distribution and Data Service Licenses Rescheduled for June 25, 2003, Report No. AUC-03-53-A, DA 03-286, 2003 WL 202902 (rel. Jan. 30, 2003) (*Auction PN*).

¹⁵ *Id.*

¹⁶ See, e.g., Letter from Nancy Killien Spooner, Counsel for MDS America, Inc., to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (Mar. 25, 2003 Notice of *Ex Parte* Meeting).

¹⁷ *Second R&O*, 17 FCC Rcd at 9683 ¶ 175.

¹⁸ Northpoint supports the use of DMAs in the 12 GHz band. Comments of Northpoint and Broadwave USA, Inc., Regarding Auction Procedures at 5-6 (filed Feb. 13, 2003).

¹⁹ MDS America supports the use of CEAs in the 12 GHz band. Reply Comments of MDS America at 2-4 (filed Feb. 20, 2003)

high-speed Internet access in the MVPD marketplace. Consequently, we believe that licensees will require ubiquitous coverage within their geographic service areas to compete.²⁰ We also continue to believe that with the exception of the Direct Broadcast Satellite Service, most MVPD service remains local or regional service. We also recognize that generally, licensees deploy fixed services, such as high-speed Internet access, on a localized basis.

9. Against this backdrop, we note that the absence of a blanket license agreement with Nielsen regarding the use of the DMA listing for the MVDDS was a significant decisional factor in the Commission's previous decision to forego using DMAs as the service area definition for MVDDS.²¹ Absent such license or other formal agreement, the Commission reasoned that establishing a designation that was in the public domain would be more appropriate for the MVDDS.²² Consequently, the Commission adopted CEAs -- a service area definition that would provide similar benefits as DMAs, but without the copyright concerns.²³

10. In a letter received on March 26, 2003,²⁴ counsel for Nielsen stated that Nielsen would agree to extend a perpetual, royalty-free license to the Commission, without the right to sublicense, to "Nielsen Media Research's DMA market and regions,"²⁵ provided that the Commission:

- (i) agrees, and continues to communicate to prospective MVDDS suppliers, that a territorial license from the Commission to supply MVDDS does not confer the right to use Nielsen Media Research's DMA mark, regions or data, and that such right must be obtained from Nielsen Media Research on such terms as may be mutually acceptable to Nielsen Media Research and the supplier, in their sole and respective discretion, and (ii) does not republish DMA regions or data in any statute, regulation or rule or otherwise.²⁶

11. We are concerned that Nielsen's conditions on the use of DMAs may unduly limit the business plans and opportunities for MVDDS licensees. By its most recent letter, Nielsen makes it clear that it is unwilling to consent to allowing the Commission's MVDDS licensees use the DMA mark, regions or data in their MVDDS business without an individual license from Nielsen.²⁷ Thus, it does not appear that the license Nielsen described would give Commission licensees sufficient flexibility to make practical use of the DMA designation in connection with their MVDDS operations. Additionally, although the Commission could cross-reference DMAs in its rules, Nielsen's limitations may interfere with our enforcement flexibility, since Nielsen does not want us to "republish DMA regions or data in any

²⁰ *Second R&O*, 17 FCC Rcd at 9664 ¶ 128.

²¹ *Id.* at 9664 ¶ 132.

²² *Id.*

²³ *Id.*

²⁴ *See* Nielsen letter.

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ *Id.*

statute, regulation or rule or otherwise."²⁸ We seek comment on whether the conditions described by Nielsen are so restrictive that use of DMAs would be of limited utility.

12. While we do not prejudge the type of services licensees will offer in the 12 GHz band, we nonetheless believe that it is appropriate to adopt a service area definition that will afford MVDDS licensees the opportunity to provide a wide array of services. Based on the record in this proceeding, we believe that utilizing DMAs could be more effective in this regard. DMAs, as compared to CEAs, provide a better method to delineate television markets based on viewing patterns.²⁹ In addition, MVDDS licensees may find it easier to compete with cable if our regulatory structure makes it easier for MVDDS licensees to organize their systems by DMAs. Northpoint has argued that cable systems are organized along these lines, and a compulsory copyright license is available for retransmitting local television broadcast stations within DMAs.³⁰ It appears that the definition of "cable system" for purposes of rebroadcasting television programming under the compulsory copyright licensing provisions of the Copyright Act are quite broad and may extend to MVDDS licensees.³¹ We ask for comment on this possibility and whether MVDDS systems must be organized along DMA lines in order to gain the same type of benefits that are available to cable providers under the compulsory license. In addition, it appears that MVDDS licensees with service offerings involving the delivery of television programming may find the use of DMAs to be administratively easier due to the close nexus between the television viewer market areas as determined by the DMA delineation and the proposed use of the service. We ask for specific comment on any such administrative benefits and on any other additional economic benefits that may flow from the use of a DMA service area.

13. As to other uses, including fixed services, we believe that DMAs and CEAs are equally advantageous because they are both local in nature. While we recognize that CEAs are smaller than DMAs, we continue to believe that DMAs, which are county-based, provide a viable option in facilitating local access to cable, non-cable, and MVDDS service offerings.³² Consequently, we believe that both DMAs and CEAs would encourage rapid service deployment in unserved or underserved areas and encourage meaningful participation by small businesses. Additionally, entities desiring a national footprint, may aggregate either DMAs or CEAs to create such larger networks.

14. In conclusion, DMAs, as opposed to CEAs, may provide a better method of delineating service areas for those who seek to provide MVPD service offerings involving the retransmission of broadcast programming. In addition, DMAs may allow MVDDS licensees to compete more vigorously with cable systems who generally have a royalty-free statutory copyright license to retransmit local TV

²⁸ *Id.*

²⁹ See Definition of Markets for Purposes of the Cable Television, Broadcast Signal Carriage Rules, *Order on Reconsideration and Second Report and Order*, CS Docket No. 95-178, 14 FCC Rcd 8366, 8372 ¶ 13 (1999).

³⁰ Consolidated Response of Northpoint Technology, Ltd., and Broadwave USA, Inc., to Petitions for Reconsideration of Second Report and Order at 3 (filed Sep. 3, 2002).

³¹ See 17 U.S.C. § 111(f).

³² *First R&O*, 16 FCC Rcd at 4202 ¶ 285.

programming within the DMA of the station being rebroadcast.³³ In addition, DMAs, as opposed to CEAs, may be administratively easier due to the close nexus between the television viewer market areas as determined by the DMA delineation and the proposed use of the service. However, as noted above, Nielsen's limitations on the use of DMAs may constrain both the Commission's and licensees use of DMAs. Thus, we seek comment on the appropriate service area designation for MVDDS.

15. In the event that we ultimately adopt a licensing system based on DMAs for the MVDDS, we propose to license MVDDS based on 214 service areas. Specifically, we would utilize the 210 DMAs delineated by Nielsen in its publication entitled "U.S. Television Household Estimates" dated September 2002. We also would include the following four FCC-defined service areas: (1) Alaska - Balance of State (all geographic areas of Alaska not included in Nielsen's three DMAs for the state: Anchorage, Fairbanks, and Juneau); (2) Guam and the Northern Mariana Islands; (3) Puerto Rico and the United States Virgin Islands; and (4) American Samoa. We seek comment on our proposals.

B. Build Out Requirement

16. Given that we are revisiting the service area definition, we also take this opportunity to explore whether the current build out requirement sufficiently promotes expeditious deployment of service. We seek to ensure that we generate a complete record as to the best approach to fostering advanced wireless services to the various communities, particularly those communities that are traditionally unserved or underserved. As indicated earlier, the *Second R&O* establishes a ten-year build out requirement for the MVDDS licensees based on substantial service as a basis for a renewal expectancy. The Commission reasoned that given the complexity and contention surrounding the issues involving band sharing that a ten-year build out period will provide ample time and flexibility for the MVDDS licensees to work with other service providers in the 12 GHz band as they determine the best method to deploy valuable services to the public. MDS America has expressed concern that a ten-year build out period for MVDDS licenses was too long given the potential for anti-competitive warehousing of spectrum in this service and the great demand for rural broadband service.³⁴ Specifically, MDS America supports a five-year build out period, a requirement advocated by other commenters in this record.³⁵

17. We believe that this *Second Further Notice* is a good opportunity to seek additional comment on the practicality of the current build out requirement for this service. We, however, do not believe, nor has any party suggested that we should revisit the substantial service requirement. Rather, we seek limited comment on the timing of whether a ten-year build out requirement is optimal for fostering expeditious delivery of advanced wireless services to all communities, in particular communities that are traditionally unserved or underserved. In addition, we seek comment on whether a shorter build out requirement will facilitate more effective deployment of these services. If so, what is the appropriate

³³ 17 U.S.C. § 111; 37 C.F.R. § 201.17 (establishing a royalty-free copyright linked to cable must-carry area); *cf. also* 47 C.F.R. § 76.55(e) (the default must-carry market is DMA-based). We note that MVDDS does not have must-carry obligations.

³⁴ *See* Letter from Helen E. Disenhaus, Counsel for MDS America, Inc., to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 3, 2002 Notice of *Ex Parte* Meeting); Letters from Nancy Killien Spooner, Counsel for MDS America, Inc., to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 11, 2002, Mar. 7, 2003 and Mar. 25, 2003 Notice of *Ex Parte* Meeting).

³⁵ *Id.*; *see also* Pegasus Comments at 19 (filed Mar. 12, 2001).

benchmark for a build out requirement? For example, should the Commission consider a hybrid approach, requiring MVDDS licensees to submit a showing of service deployed, five years from license grant with an additional showing of substantial service by the tenth year. We also ask whether the substantial service requirement would be appropriate as a construction requirement some time earlier in the license term, as well as at the end of the license term. So instead of just meeting the substantial service requirement once at the end of the license term, the licensee would have to meet it twice - at year 10 to justify a renewal expectancy and at an earlier time to meet the license build-out requirement. We seek comment on these matters and any alternative proposals.

C. Impact on Competitive Bidding

18. Currently, the auction of MVDDS licenses is scheduled to commence on June 25, 2003.³⁶ Consequently, we are seeking comment on these issues in an expeditious manner in order not to unduly disrupt the auction process or the efforts that interested parties have undertaken in preparation for participating in such process. Accordingly, we also request comment on the potential impact on business plans if we change the service area designation or the build out requirement. Additionally, we invite comment on whether revising the service area definition or the build out requirement at this time is more likely to speed deployment of advanced services to consumers. Commenters also should discuss whether a change in the service areas at this time would adversely affect the Commission's objectives in establishing the licensing and service rules for the MVDDS. In this regard, we note that the Commission's expressed objectives were to provide a regulatory framework to encourage robust competition in the MVPD marketplace, provide opportunities for small businesses to provide niche services across the nation, encourage innovation and advances in MVDDS technology that will not only complement other MVPD offerings, but will expand those offerings.³⁷

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

19. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document.³⁸ Appendix A contains the IRFA. We request written public comments on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions regarding the prevalence of small businesses in the affected industries.

20. Interested parties must file comments in accordance with the same filing deadlines as comments filed in this *Notice*, but they must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.³⁹

³⁶ See *Auction PN*.

³⁷ *Second R&O*, 17 FCC Rcd at 9664 ¶ 127.

³⁸ 5 U.S.C. § 603 (1996).

³⁹ *Id.*

B. *Ex Parte* Rules – Permit-But-Disclose Proceedings

21. This is a permit-but-disclose notice and comment rule making proceeding. Our rules permit *ex parte* presentations, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.2306(a).

C. Comment Dates

22. Pursuant to Sections 1.415 and 1.419 of our Rules, interested parties may file comments on or before **7 days from the date of publication in the Federal Register** and reply comments on or before **14 days from the date of publication in the Federal Register**.⁴⁰ Comments may be filed using the Commission's Electronic Comment Filing System (ECFS), <http://www.fcc.gov/e-file/ecfs.html>, or by filing paper copies.⁴¹

23. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should including the following words in the body of the message, "get form <your e-mail address.>" A sample form and directions will be sent in reply.

24. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rule making number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commissioner's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., TW-A325, Washington, D.C. 20554. All filings must be addressed to the Commissioner's Secretary, Office of the Secretary, Federal Communications Commission.

25. Parties who choose to file by paper should also submit their comments on diskette. Such a submission should be on a 3.5-inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the lead docket number, type of pleading (comment or reply comment), date of

⁴⁰ 47 C.F.R. §§ 1.415, 1.419.

⁴¹ See Electronic Filing of Documents in Rulemaking Proceedings, *Report and Order*, 13 FCC Rcd 11322 (1998).

submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy – Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contract, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, D.C. 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com.

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

D. Further Information

27. For further information concerning this *Notice of Proposed Rule Making*, contact Jennifer Burton, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau at (202) 418-0680, email jburton@fcc.gov.

28. The World Wide Web addresses/URLs that we give here were correct at the time this document was prepared but may change over time. They are included herein in addition to the conventional citations as a convenience to readers. We are unable to update these URLs after adoption of this *Notice*, and readers may find some URLs to be out of date as time progresses. We also advise readers that the only definitive text of FCC documents is the one that is published in the FCC Record. In case of discrepancy between the electronic documents cited here and the FCC Record, the version in the FCC Record is definitive.

V. ORDERING CLAUSES

29. IT IS ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Further Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a).

30. IT IS FURTHER ORDERED, that pursuant to the authority contained in Sections 4, 4(i), 7, 303, 303(g), 303(r), 307 and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 154(i), 157, 303, 303(g), 303(r), 307, this *Second Further Notice of Proposed Rule Making* IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A: INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁴² the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Second Further Notice of Proposed Rule Making (Notice)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided in paragraph 124 of the item. The Commission will send a copy of this *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).⁴³ In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.⁴⁴

Need for, and Objectives of, the Proposed Rule

2. In this *Notice*, we revisit the issues of the geographic licensing scheme for MVDDS and build-out requirements. In the *Second Report and Order*, the Commission adopted geographic license service areas for MVDDS on the basis of Component Economic Areas (CEAs). Based on the previously-established record in this proceeding, and on subsequent discussions between Commission staff and Nielsen representatives which indicate that, although Nielsen remains unable to enter into a formal agreement to allow the Commission to use its Designated Market Area (DMA) designation for the MVDDS service areas, Nielsen does not object to the Commission's use of DMAs in this manner, subject to certain parameters.⁴⁵ Specifically, in a letter received on March 26, 2003,⁴⁶ it appears that Nielsen would agree to extend a perpetual, royalty-free license to the Commission, without the right to sublicense, to its DMA mark and regions, provided that the Commission:

- (i) agrees, and continues to communicate to prospective MVDDS suppliers, that a territorial license from the Commission to supply MVDDS does not confer the right to use Nielsen Media Research's DMA mark, regions or data, and that such right must be obtained from Nielsen Media Research on such terms as may be mutually acceptable to Nielsen Media Research and the supplier, in their sole and respective discretion, and (ii) does not republish DMA regions or data in any statute, regulation or rule or otherwise.⁴⁷

⁴² See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, (SBREFA) Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁴³ See 5 U.S.C. § 603(a).

⁴⁴ See 5 U.S.C. § 603(a).

⁴⁵ See Letter from David A. Schwartz-Leeper, Senior Vice President/ GC, Nielsen Media Research, to Thomas J. Sugrue, (Letter from former) Chief, Wireless Telecommunications Bureau, Federal Communications Commission and Jane Mago, (former) General Counsel, Federal Communications Commission at 2 (March 26, 2003) (Nielsen letter).

⁴⁶ See Nielsen letter.

⁴⁷ *Id.* at 3.

3. We are concerned that Nielsen's conditions on the use of DMAs may unduly limit the business plans and opportunities for MVDDS licensees. By its most recent letter, Nielsen makes it clear that it is unwilling to consent to allowing the Commission's MVDDS licensees use the DMA mark, regions or data in their MVDDS business without an individual license from Nielsen.⁴⁸ Thus, it does not appear that the license Nielsen described would give Commission licensees sufficient flexibility to make practical use of the DMA designation in connection with their MVDDS operations. Additionally, although the Commission could cross-reference DMAs in its rules, Nielsen's limitations may interfere with our enforcement flexibility, since Nielsen does not want us to "republish DMA regions or data in any statute, regulation or rule or otherwise."⁴⁹ We seek comment on whether the conditions described by Nielsen are so restrictive that use of DMAs would be of limited utility to small businesses. We also request comment on the potential impact on small business plans if we change the service area designation.

31. Given that we are revisiting the service area definition, we also take this opportunity to explore whether the current build out requirement sufficiently promotes expeditious deployment of service, particularly for those communities that are traditionally unserved or underserved. As indicated earlier, the *Second R&O* establishes a ten-year build out requirement for the MVDDS licensees based on substantial service as a basis for a renewal expectancy. MDS America has expressed concern that a ten-year build out period for MVDDS licenses was too long given the potential for anti-competitive warehousing of spectrum in this service and the great demand for rural broadband service.⁵⁰ MDS America supports a five-year build out period, a requirement advocated by other commenters in this record.⁵¹

4. We seek limited comment on the timing of whether a ten-year build out requirement is optimal for fostering expeditious delivery of advanced wireless services to all communities, in particular communities that are traditionally unserved or underserved. In addition, we seek comment on whether a shorter build out requirement will facilitate more effective deployment of these services as well as the appropriate benchmark for a buildout requirement. Finally, we seek comment on the potential impact on small business plans if we change the build out requirement.

5. We seek comment on the following issues under consideration in this *Notice*:

- The appropriate service area designation for MVDDS.
- The appropriate buildout requirement for MVDDS.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See MDS America Ex Parte Notifications (filed Oct. 3, 2002, Oct. 11, 2002, Mar. 7, 2003 and Mar. 25, 2003).

⁵¹ *Id.*; see also Pegasus Comments at 19 (filed Mar. 12, 2001).

Legal Basis

3. The proposed action is authorized under the Administrative Procedure Act, 5 U.S.C. § 553; and Sections 1.4(i), 7, 301, 303, 308 and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 157, 301, 303, 308 and 309(j).

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

1. The RFA directs agencies to provide a description of, and, where feasible an estimate of, the number of small entities that may be affected by the rules adopted herein.⁵² The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁵³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁵⁴ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵⁵

2. *Small Multichannel Video Programming Distributors (MVPDs)*. SBA has developed a definition of small entities for cable, which includes all such companies generating \$11 million or less in annual receipts.⁵⁶ This definition includes cable system operators and DBS services. According to the Census Bureau data from 1992, there were 1,758 total cable and other pay television services and 1,423 had less than \$11 million in revenue.⁵⁷ We address below each service individually to provide a more precise estimate of small entities.

- Cable Services. The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.⁵⁸ We last estimated that there were 1439 cable operators that qualified as

⁵² 5 U.S.C. § 603(b)(3).

⁵³ 5 U.S.C. § 601(6).

⁵⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, in consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

⁵⁵ Small Business Act, 15 U.S.C. § 632 (1996).

⁵⁶ 13 C.F.R. § 121.201 (Cable Networks (NAICS 513210) Cable and Other Program Distribution (NAICS 513220)).

⁵⁷ *Id.* (U.S. Department of Commerce, Bureau of the Census, Industry and Enterprise Receipts Size Report, Table) (Bureau of the Census data under contract to the Office of Advocacy of the SBA).

⁵⁸ 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 7393 (1995).

small cable companies.⁵⁹ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, using this definition, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules adopted in the *Second Report and Order*.

- The Communications Act defines a small cable system operator as "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."⁶⁰ The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, an operator serving fewer than 617,000 subscribers shall be deemed a small operator under the Communications Act definition, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate. Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals approximately 1450.⁶¹ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.
- *DBS Service.* Because DBS provides subscription services, DBS falls within the SBA definition of Cable Networks (NAIC 513210) and Cable and Other Program Distribution (NAIC 513220). This definition provides that a small entity is expressed as one with \$11 million or less in annual receipts. The operational licensees of DBS services in the United States are governed by Part 100 of the Commission's Rules. The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees meeting this definition that could be impacted by these rules. DBS service requires a great investment of capital for operation, and we acknowledge that there are entrants in this field that may not yet have generated \$11 million in annual receipts, and therefore may be categorized as a small business by the SBA, if independently owned and operated.

3. *Auxiliary, Special Broadcast and other program distribution services.* This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radio networks (NAICS 513111), radio stations (NAICS 513112), and television broadcasting (NAICS 513120). These definitions provide, respectively, that a small entity is one with either \$5 million or less in annual receipts or \$10.5 million in annual receipts. The numbers of these stations are very small. The Commission does not collect financial information on these auxiliary

⁵⁹ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

⁶⁰ 47 U.S.C. § 543(m)(2).

⁶¹ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

broadcast facilities. We continue to believe, however, that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most of these types of services are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business (as noted, either \$5 million for a radio station or \$10.5 million for a TV station). Furthermore, they do not meet the SBA's definition of a "small business concern" because they are not independently owned and operated.

4. *Private Operational Fixed Service.* Incumbent microwave services in the 12.2-12.7 GHz bands include common carrier, private operational fixed (POF), and BAS services. Presently, there are approximately 22,015 common carrier licensees, and approximately 61,670 POF licensees and broadcast auxiliary radio licensees in the microwave service. Inasmuch as the Commission has not yet defined a small business with respect to these incumbent microwave services, we utilized the SBA's definition applicable to cellular and other wireless telecommunications companies (NAICS 513322); *i.e.*, an entity with no more than 1500 persons. We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

5. The rules set forth in the *Second Report and Order* will affect all entities that intend to provide terrestrial MVDDS operations in the 12.2-12.7 GHz band. In the *Second Report and Order*, the Commission stated that licensees are permitted to use MVDDS spectrum for, among other things, fixed one-way direct-to-home/business video and data services.

6. Additionally, in the *Second Report and Order*, the Commission adopted definitions for three tiers of small businesses for the purpose of providing bidding credits to small entities. Specifically, we defined the three tiers of small business as: (a) an "entrepreneur" is an entity with average annual gross revenues not exceeding \$40 million for the preceding three years; (b) a "small business" is an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and (c) a "very small business" is an entity with average annual gross revenues not exceeding \$3 million for the preceding three years.⁶² We will not know how many auction participants or licensees will qualify under these definitions as entrepreneurs, small businesses, or very small businesses until an auction is held. However, upon reviewing the record in the MVDDS proceeding, we assume that, for purposes of our evaluations and conclusions in the FRFA, a number of the prospective licensees will be entrepreneurs, small businesses, or very small businesses under our adopted definitions.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

7. This *Notice* imposes no new reporting, recordkeeping or other compliance requirements not previously adopted in this proceeding under the Paperwork Reduction Act of 1995.⁶³

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

⁶² These definitions have been approved by the U.S. Small Business Administration. See Letter to Margaret W. Weiner, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, U.S. Small Business Administration (Sept. 14, 2000).

⁶³ See Pub. L. No. 104-13.

8. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁶⁴

9. With respect to its decision to use CEAs as the basis for the MVDDS service, the Commission noted that adopting CEAs would provide similar benefits as DMAs but would better promote its objectives and address commenters' concerns.⁶⁵ Specifically, the Commission premised its decision on three factors. First, the smaller CEA service areas would better track actual deployment of fixed services. Second, CEAs would encourage rapid service deployment to less populated and rural regions because they will permit additional opportunities for small businesses to provide MVDDS. Third, the use of CEAs would encourage the meaningful participation of small businesses better than a nationwide or regional geographic licensing approach because the smaller areas would likely require a lower minimum investment. Further, the Commission noted that for those seeking a regional or national footprint, the use of CEAs would not prevent them from aggregating areas to create such larger networks.⁶⁶

10. While we do not prejudge the type of services licensees will offer in the 12 GHz band, we nonetheless believe that it is appropriate to adopt a service area definition that will afford MVDDS licensees the opportunity to provide a wide array of services. Based on the record in this proceeding, we believe that utilizing DMAs may be more effective in this regard. DMAs, as compared to CEAs, provide a better method to delineate television markets based on viewing patterns. Consequently, for those MVDDS licensees seeking to provide MVPD service offerings involving the retransmission of broadcast programming, the use of DMAs could provide additional economic benefits. For example, MVDDS licensees with service offerings involving the delivery of television programming may find the use of DMAs to be administratively easier due to the close nexus between the television viewer market areas as determined by the DMA delineation and the proposed use of the service.

11. As to other uses, including fixed services, we believe that DMAs and CEAs are equally advantageous because they are both local in nature. While we recognize that CEAs are smaller than DMAs, we continue to believe that DMAs, which are county-based, provide a viable option in facilitating local access to cable, non-cable, and MVDDS service offerings.⁶⁷ Consequently, we believe that both DMAs and CEAs would encourage rapid service deployment in unserved or underserved areas and encourage meaningful participation by small businesses. Additionally, entities desiring a national footprint, may aggregate either DMAs or CEAs to create such larger networks.

Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

⁶⁴ See 5 U.S.C. § 603(c).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *First R&O*, 16 FCC Rcd at 4202 ¶ 285.

12. None.

APPENDIX B: PROPOSED RULES

Part 101 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 101 - FIXED MICROWAVE SERVICES

1. The authority citation for Part 101 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303.

Subpart P- Multichannel Video Distribution and Data Service Rules for the 12.2-12.7 GHz Band

2. Section 101.1401 is amended to read as follows:

§ 101.1401 Service areas.

Multichannel Video Distribution and Data Service (MVDDS) is licensed on the basis of Designated Market Areas (DMAs). The 214 DMA service areas are based on the 210 Designated Market Areas delineated by Nielsen Media Research and published in its pamphlet entitled U.S. Television Household Estimates, September 2002, plus four FCC-defined DMA-like service areas: (1) Alaska - Balance of State (all geographic areas of Alaska not included in Nielsen's three DMAs for the state: Anchorage, Fairbanks, and Juneau); (2) Guam and the Northern Mariana Islands; (3) Puerto Rico and the United States Virgin Islands; and (4) American Samoa.

* * * * *

3. Section 101.1421 is amended by revising paragraphs (b) and (c) to read as follows to read as follows:

§ 101.1421 Coordination of adjacent area MVDDS stations and incumbent public safety POFS stations.

* * * * *

(b) Harmful interference to public safety stations, co-channel MVDDS stations operating in adjacent geographic areas, and stations operating on adjacent channels to MVDDS stations is prohibited. In areas where the DMAs are in close proximity, careful consideration should be given to power requirements and to the location, height, and radiation pattern of the transmitting and receiving antennas. Licensees are expected to cooperate fully in attempting to resolve problems of potential interference before bringing the matter to the attention of the Commission.

(c) Licensees shall coordinate their facilities whenever the facilities have optical line-of-sight into other licensees' areas or are within the same geographic area. Licensees are encouraged to develop operational agreements with relevant licensees in the adjacent geographic areas. Incumbent public safety POFS licensee(s) shall retain exclusive rights to its channel(s) within the relevant geographical areas and must be protected in accordance with the procedures in § 101.103 of this part. A list of public safety incumbents is attached as Appendix I to the Memorandum Opinion and Order and Second Report and Order, Docket 98-206 released May 23, 2002. Please check with the Commission for any updates to that list.

APPENDIX C:

NIELSEN LETTER