

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
Rulemaking To Amend Parts 1, 2, 21, and 25
Of the Commission's Rules to Redesignate
The 27.5-29.5 GHz Frequency Band, To
Reallocate the 29.5-30.0 GHz Frequency
Band, To Establish Rules and Policies for
Local Multipoint Distribution Service
And for Fixed Satellite Services
Petitions for Reconsideration of the
Denial of Applications for Waiver of the
Commission's Common Carrier Point-to-
Point Microwave Radio Service Rules
Suite 12 Group Petition for
Pioneer Preference
CC Docket No. 92-297
PP-22

Order On Reconsideration

Adopted: May 8, 1997

Released: May 16, 1997

By the Commission:

I. Introduction

1. On our own motion, pursuant to 47 C.F.R. § 1.108, we reconsider the Second Report and Order in the above captioned proceeding, in which we adopted rules for the Local Multipoint Distribution Service ("LMDS").

1 Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules To Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services; Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; and Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, FCC 97-82, released Mar. 13, 1997 ("LMDS Second Report and Order").

Preference request to peer review; however, we clarify our basis for doing so.² Second, we amend an LMDS competitive bidding rule, Section 101.1112, to include subsection 101.1112(d)(11), as set forth in Appendix A. Consistent with our rules governing the Wireless Communications Service ("WCS")³ and broadband Personal Communications Services ("PCS"),⁴ this new subsection exempts from the affiliation rules entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations for purposes of determining whether an entity meets the definition of a small business or a business with average annual gross revenues of not more than \$75 million.⁵

II. Pioneer's Preference

2. In the *LMDS Second Report and Order* we ordered the initiation of a peer review process to examine the pending Pioneer's Preference request filed by CellularVision.⁶ We stated that we were undertaking this action pursuant to Section 1.402(h) of the Commission's Rules.⁷ On reconsideration, we recognize that Section 1.402(h) does not apply directly to the request filed by CellularVision. The rule applies only to a Pioneer's Preference request accepted for filing after September 1, 1994, and CellularVision's predecessor in interest, Suite 12 Group, filed its request on September 24, 1991.

3. Nothing in Section 1.402(h) or in the Commission Orders amending the Pioneer's Preference rules pursuant to the legislation conferring competitive bidding authority upon the Commission, and the legislation implementing the General Agreement on Tariffs and Trade ("GATT"),⁸ however, precludes us from ordering peer review in cases where applications were

² CellularVision is the successor-in-interest to Suite 12 Group and Hye Crest Management, Inc.

³ Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, FCC 97-50 (rel. February 19, 1997) ("*WCS Report and Order*").

⁴ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 428 (1994) ("*Competitive Bidding Fifth Memorandum Opinion and Order*").

⁵ See Letter of Steve C. Hillard, President, Cook Inlet Communications to The Honorable Reed E. Hundt, March 17, 1997 (urging the Commission to clarify that its LMDS small business provisions include the Tribal Affiliation exemption).

⁶ *LMDS Second Report and Order* at para. 3.

⁷ *Id.*; 47 C.F.R. § 1.402(h).

⁸ Uruguay Round Agreements Act, Pub. L. No. 103-465, Title VIII, § 801, 108 Stat. 4809, 5050 (1994), codified at 47 U.S.C. § 309(j)(13); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 312, 397 (1993), codified at 47 U.S.C. § 309(j); In the Matter of Review of the Pioneer's Preference Rules, ET Docket No. 93-266, First Report and Order, 9 FCC Rcd 605 (1994), Second Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 4523 (1995), Third Report and Order, 10 FCC Rcd 13183 (1995).

filed before that date. While the rule is clear that applications filed after September 1, 1994, must be subject to peer review, the rule is silent with respect to applications filed before that date. The Commission's Pioneer's Preference policy prior to the enactment of the GATT legislation explicitly contemplated referral of preference requests to peer review at the Commission's discretion.⁹

4. In amending Section 1.402(h), we did not intend to constrain our exercise of discretion with respect to invocation of the peer review process in the case of applications filed prior to September 1, 1994. Nor do we believe that our action in amending the rule can be reasonably construed as resulting in any limitation on the exercise of our discretion. The rule, on its face, cannot be read to limit or terminate our ability to refer to peer review an application filed prior to September 1, 1994.

5. Likewise, in the Commission Reports and Orders discussing the applicability of the new rules, we did not indicate any intention to limit our discretion to refer pre-September 1, 1994, applications to peer review.¹⁰ Although we indicated that the new regulations would not apply to the Pioneer's Preference applicants that had been granted tentative preferences, including CellularVision,¹¹ this means only that the revised rule *requiring* peer review would not apply; it did not nullify our ability to seek peer review *on a discretionary basis*, as provided under the preexisting policy.

6. Thus, in the case of CellularVision, we clarify that, consistent with the preexisting Pioneer's Preference rules, we have concluded that we would benefit from a more thorough review and analysis by persons with highly specialized expertise before we make a final determination on the CellularVision request. As a policy matter, we appropriately exercised our discretion in this case to obtain the opinion of experts to assist us in determining whether CellularVision should be awarded a Pioneer's Preference. Although we have tentatively decided

⁹ See Establishment of Procedures To Provide a Preference to Applicants Proposing an Allocation for New Services, GEN Docket No. 90-217, Report and Order, 6 FCC Rcd 3488, 3494 (1991) (*Pioneer's Preference Order*) (noting that Commission staff, on a case-by-case basis, could refer a pioneer's preference request to peer review if it found that "a more focused solicitation of comments" would be beneficial).

¹⁰ See In the Matter of Review of the Pioneer's Preference Rules, ET Docket No. 93-266, First Report and Order, 9 FCC Rcd 605, Second Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 4523, Third Report and Order, 10 FCC Rcd 13183.

¹¹ See In the Matter of Review of the Pioneer's Preference Rules, ET Docket No. 93-266, First Report and Order, 9 FCC Rcd at 610-11, Second Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd at 4530, Third Report and Order, 10 FCC Rcd at 13187.

to grant the request filed by CellularVision,¹² there are several reasons why it would be advantageous to subject the application to peer review at this time. First, referring CellularVision's proposal to a panel of experts would supplement the record with the evaluations of disinterested experts who are familiar with the technology. Although we ordinarily rely upon the standard notice and comment process to guide our decision making, the highly technical nature of the issues presented by the CellularVision proposal leads us to believe that we would benefit from the additional advice of technical experts who do not have a stake in the outcome of this proceeding. It is our responsibility to verify that the proposal constitutes a technological advancement. The peer review process will help ensure the reasonableness of our final decision on these highly technical matters.

7. Second, CellularVision for several years has been using millimeter wave technology to provide video service.¹³ As a result, there may now be available more demonstrable evidence that would be relevant to an inquiry into whether the service being provided by CellularVision is either a new service or a substantial enhancement to an existing service, as required by the Pioneer's Preference rules. Of particular relevance is whether the work done by CellularVision merely constitutes an adaptation of existing technology.¹⁴ Finally, in light of the modifications to the Pioneer's Preference policy resulting from the GATT legislation and the decision to use competitive bidding to choose between mutually exclusive LMDS applications, CellularVision is now potentially eligible to receive a substantial discount on its license. Under these circumstances, which have changed during the pendency of the CellularVision request, it is particularly appropriate that we utilize the peer review process to enable the Commission to make a fully-informed, well-reasoned decision on the Pioneer's Preference request. For these reasons, we affirm our decision to refer CellularVision's Pioneer's Preference request to peer review, and clarify that we do so pursuant to our pre-1994 policy.

III. Competitive Bidding Rules

¹² See Rulemaking To Amend Part 1 and Part 21 of the Commission's Rules To Redesignate the 27.5-29.5 GHz Frequency Band and To Establish Rules and Policies for Local Multipoint Distribution Service and Suite 12 Group Petition for Pioneer's Preference, CC Docket No. 92-297, Notice of Proposed Rulemaking, Order, Tentative Decision, and Order on Reconsideration, 8 FCC Rcd 557, 566 (1993), Third Notice of Proposed Rulemaking and Supplemental Tentative Decision, 11 FCC Rcd 53, 78-81 (1995).

¹³ See *Hye Crest Management, Inc.*, 6 FCC Rcd 332 (1991). Hye Crest, formerly a wholly-owned affiliate of Suite 12 Group, was granted waivers of Commission rules in order to construct and operate a new fixed station in the 28 GHz band to provide point-to-multipoint service in New York City. The system has been in operation since 1992.

¹⁴ The issue of whether a particular service is an adaptation of previously developed technology in the context of a Pioneer's Preference request for personal communications service (PCS) was recently examined by the U.S. Court of Appeals for the District of Columbia Circuit. See *Freeman Engineering Associates v. FCC*, 103 F.3d 169 (1997) (remanding on other grounds the Commission's decision denying a Pioneer's Preference request).

8. In the *LMDS Second Report and Order*, the Commission adopted rules providing that, for purposes of determining eligibility for installment payments and bidding credits, an entity's average gross revenues for the preceding three years would be aggregated with the average gross revenues of its affiliates and controlling principals.¹⁵ Affiliation generally exists when the applicant controls or has the power to control another entity, another entity controls or has the power to control the applicant, the applicant and another entity are controlled by the same third party, or another entity has an identity of interest with the applicant.¹⁶ In our broadband PCS and WCS affiliation rules, we specifically exempted entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations from being considered affiliates of applicants or licensees that are owned and controlled by such entities.¹⁷ In the *LMDS Second Report and Order*, however, we did not adopt this exemption.

9. The exemption we provide in the broadband PCS and WCS rules mirrors Small Business Administration ("SBA") rules that exclude from affiliation coverage entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations.¹⁸ The SBA is required by statute to determine the size of a small business concern owned by an Indian tribe (or a wholly owned business entity of such tribe) "without regard to its affiliation with the tribe, any entity of tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category."¹⁹ Additionally, Section 29(e) of the Alaska Native Claims Settlement Act (43 U.S.C. § 1626(e)) provides that:

(1) For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.

¹⁵ *LMDS Second Report and Order*, at paras. 348-349, 352.

¹⁶ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532 paras. 204-207 (1994).

¹⁷ *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 428; *WCS Report and Order*, at para. 195.

¹⁸ See 13 C.F.R. §§ 121.103(b)(2) and 124.112(c)(2)(iii).

¹⁹ 15 U.S.C. § 636(j)(10)(J)(ii)(II).

(2) For all purposes of Federal law, direct and indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both--

(A) the total equity of the subsidiary corporation, joint venture, or partnership; and

(B) the total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers.

These statutory provisions have been incorporated into the SBA's regulations.²⁰

10. We believe that entities owned and controlled by Indian tribes and Alaska Regional or Village Corporations should be eligible to bid in LMDS auctions as small businesses or as businesses with average annual gross revenues not exceeding \$75 million, notwithstanding their affiliation with other entities owned by tribes or Alaska Native Corporations whose gross revenues cause the combined average gross revenues of the entity and its affiliates to exceed the general limits for eligibility for bidding as such a business. An exemption from our affiliation rules will ensure that these entities will have a meaningful opportunity to participate in spectrum-based services from which they would otherwise be precluded. As is true of other services where we have adopted this exception, LMDS is expected to be a highly capital intensive wireless service. Furthermore, we do not believe that this exemption for the specified entities will entitle them to an unfair advantage over entities that are otherwise eligible for small business status. We will therefore amend the LMDS affiliation rules so as not to preclude the eligibility of entities owned and controlled by Indian tribes and Alaska Native Corporations for classification as small businesses, or as businesses with average annual gross revenues not exceeding \$75 million.

IV. Ordering Clauses

11. Accordingly, IT IS ORDERED that the Chief, Office of Engineering and Technology, SHALL SELECT a panel of experts to review the specific technologies set forth in the Pioneer's

²⁰ 13 C.F.R. §§ 121.103(b)(2) and 124.112(c)(2)(iii).

Preference request that was filed by the Suite 12 Group on September 23, 1991, as amended on November 19, 1991, and that was accepted and placed on Public Notice on December 16, 1991.²¹

12. IT IS FURTHER ORDERED that Part 101 of the Commission's Rules is amended as set forth in the attached Appendix A.

13. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Section 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

²¹ Suite 12 Group, Petition, RM 7872, PP-22, Public Notice, Report No. 21049, released Dec. 16, 1991; *see* Rulemaking To Amend Part 1 and Part 21 of the Commission's Rules To Redesignate the 27.5-29.5 GHz Frequency Band and To Establish Rules and Policies for Local Multipoint Distribution Service and Suite 12 Group Petition for Pioneer's Preference, CC Docket No. 92-297, Notice of Proposed Rulemaking, 8 FCC Rcd at 565 (para. 56).

APPENDIX A

FINAL RULES

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

1. Section 101.1112 is amended by adding subsection (d)(11):

§ 101.1112 Definitions.

* * * * *

(d) Affiliate.

* * * * *

(11) Exclusion from Affiliation Coverage. For purposes of paragraphs (b) and (d) of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of paragraphs (b), except that gross revenues derived from gaming activities conducted by affiliated entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of paragraph (b) of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.