**Lists of Subjects in 47 CFR Part 76**

Cable television.

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

**Rule Changes**

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

## PART 76—CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

**Authority:** 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

**§ 76.701 [Revised]**

2. Section 76.701 is revised to read as follows:

**§ 76.701 Leased access channels.**

(a) Notwithstanding 47 U.S.C. 532(b)(2) (Communications Act of 1934, as amended, section 612), a cable operator, in accordance with 47 U.S.C. 532(h) (Cable Consumer Protection and Competition Act of 1992, section 10(a)), may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

(b) A cable operator may refuse to transmit any leased access program or portion of a leased access program that the operator reasonably believes contains obscenity, indecency or nudity.

**§ 76.702 [Revised]**

3. Section 76.702 is revised to read as follows:

**§ 76.702 Public access.**

A cable operator may refuse to transmit any public access program or portion of a public access program that the operator reasonably believes contains obscenity.

[FR Doc. 97–13624 Filed 5–22–97; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 101

**[CC Docket No. 92–297; FCC 97–166]**

### Local Multipoint Distribution Service (''LMDS'')

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** On May 8, 1997, the Federal Communications Commission adopted an *Order* reconsidering on its own motion its decision in the 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, PP–22, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, FCC 97–82, released March 13, 1997 (''*LMDS Second Report and Order*''). The Commission affirmed its decision to refer CellularVision's Pioneer's Preference request to peer review, in order to clarify the Commission's basis for that decision. The *Order* also amends the LMDS competitive bidding affiliation rule in order to include an exemption for entities owned or controlled by Indian Tribes or Alaska Regional or Village Corporations. This affirmation and the rule change set forth in the *Order* are intended to clarify the Commission's decision and insure Indian tribes and Alaska Native Corporations a meaningful opportunity to participate in spectrum-based services.

**EFFECTIVE DATE:** June 23, 1997.

**FOR FURTHER INFORMATION CONTACT:** Mark Bollinger, Wireless Telecommunications Bureau, Federal Communications Commission, (202) 418–0660.

**SUPPLEMENTARY INFORMATION:** This summarizes the Commission's Order in FCC 97–166, CC Docket No. 92–297 and PP–22, adopted on May 8, 1997, and released on May 16, 1997. The complete text of this *Order* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. The complete *Order* is also available on the Commission's Internet home page (http://www.fcc.gov/).

**Synopsis of the Order**

1. In this *Order*, the Commission affirms its decision to refer CellularVision's Pioneer's Preference request to peer review, but clarifies its basis for doing so. Additionally, the Commission amends a rule it adopted in the *LMDS Second Report and Order* (62 FR 23148, April 29, 1997). Specifically, the Commission amends Section 101.1112 to include subsection 101.1112(d)(11) as set forth in Appendix A of the *Order*. Consistent with the Commission's rules governing the Wireless Communications Service (''WCS'') and broadband Personal Communications Services (''PCS''), 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.

**Pioneer's Preference**

2. In the *LMDS Second Report and Order*, the Commission ordered the initiation of a peer review process to examine the pending Pioneer's Preference request filed by CellularVision. The Commission stated that it was undertaking this action pursuant to Section 1.402(h) of the Commission's Rules, 47 CFR 1.402(h). On reconsideration, the Commission recognizes 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''), however, precludes the Commission from ordering peer review in cases where applications were 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.

4. In amending Section 1.402(h), the Commission did not intend to constrain its exercise of discretion with respect to invocation of the peer review process in the case of applications filed prior to September 1, 1994. Nor does the Commission believe that its action in amending the rule can be reasonably construed as resulting in any limitation on the exercise of the Commission's discretion. The rule, on its face, cannot be read to limit or terminate the Commission's 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, the Commission did not indicate any intention to limit its discretion to refer pre-September 1, 1994, applications to peer review. Although the Commission indicated that the new regulations would not apply to the Pioneer's Preference applicants that had been granted tentative preferences, including CellularVision, this means only that the revised rule *requiring* peer review would not apply; it did not nullify the Commission's ability to seek peer review *on a discretionary basis*, as provided under the preexisting policy.

6. Thus, in the case of CellularVision, the Commission clarifies that, consistent with the preexisting Pioneer's Preference rules, the Commission has concluded that it would benefit from a more thorough review and analysis by persons with highly specialized expertise before making a final determination on the CellularVision request. As a policy matter, the Commission appropriately exercised its discretion in this case to obtain the opinion of experts to assist it in determining whether CellularVision should be awarded a Pioneer's Preference. Although the Commission has tentatively decided to grant the request filed by CellularVision, 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 the Commission ordinarily relies upon the standard notice and comment process to guide its decision making, the highly technical nature of the issues presented by the CellularVision proposal leads the Commission to believe that it would benefit from the additional advice of technical experts who do not have a stake in the outcome of this proceeding. It is the Commission's responsibility to verify that the proposal constitutes a technological advancement. The peer review process will help ensure the reasonableness of the Commission's final decision on these highly technical matters.

7. Second, CellularVision for several years has been using millimeter wave technology to provide video service. 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. 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 the Commission utilize the peer review process to enable it to make a fully-informed, well-reasoned decision on the Pioneer's Preference request. For these reasons, the Commission affirms its decision to refer CellularVision's Pioneer's Preference request to peer review, and clarifies that the Commission does so pursuant to its pre-1994 policy.

**Competitive Bidding Rules**

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. 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. In its broadband PCS and WCS affiliation rules, the Commission 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. In the *LMDS Second Report and Order*, however, the Commission did not adopt this exemption.

9. The exemption the Commission provides 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. 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.'' 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.

(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.

10. The Commission believes 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 the 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 the Commission has adopted this exception, LMDS is expected to be a highly capital intensive wireless service. Furthermore, the Commission does 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. The Commission 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.

**Procedural Matters and Ordering Clauses**

11. Accordingly, *It Is ordered* that the Chief, Federal Communications Commission Office of Engineering and Technology, *Shall Select* a panel of experts to review the specific technologies set forth in the Pioneer's 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.

12. *It is further ordered* that part 101 of the Commission's Rules is amended as set forth in Appendix A, attached to the *Order*.

13. *It is further ordered* that the rule changes made by the *Order* are *adopted and effective* June 23, 1997. 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).

**List of Subjects in 47 CFR Part 101**

Communications common carriers, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

**Rule Changes**

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

1. The authority citation continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 309(j), unless otherwise noted.

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

**§ 101.1112 Definitions.**

* * * * *

(d) * * *

(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.

[FR Doc. 97–13545 Filed 5–22–97; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

## Surface Transportation Board

## 49 CFR Parts 1002 and 1180

**[STB Ex Parte No. 556]**

## Railroad Consolidation Procedures—Modification of Fee Policy

**AGENCY:** Surface Transportation Board (Board), DoD.

**ACTION:** Final rules.

**SUMMARY:** In this proceeding the Board adopts as final rules with one minor change in the interim rules relating to the Board's fee policy for proceedings involving major railroad consolidations, which were published in the **Federal Register** at 62 FR 9714 on March 4, 1997.

**EFFECTIVE DATE:** These final rules are effective May 15, 1997.

**FOR FURTHER INFORMATION CONTACT:** Kathleen M. King, (202) 565–1639 or David T. Groves, (202) 565–1551. (TDD for the hearing impaired: (202) 565–1695.)

**SUPPLEMENTARY INFORMATION:** On March 4, 1997, at 62 FR 9714, the Board published interim rules that modified the Board's user fee policy for proceedings involving major railroad consolidations under 49 CFR part 1180 and the Board's corresponding fee regulations at 49 CFR part 1002.

The interim rules modified the Board's fee policy to require that the primary applicant in a major railroad consolidation proceeding pay a separate filing fee for each and every directly related proceeding that is filed with the primary application. The Board's fee policy was further revised to provide that for filing fee purposes an inconsistent responsive application would be classified as a major, significant, or minor transaction under the Board's regulations in 49 CFR 1180.2 (a)–(c), and that the fee for an inconsistent application would be based on the classification of the transaction in the Board's fee schedule at 49 CFR 1002.2(f) (38)–(41). In addition, the Board's fee policy at 49 CFR 1180.4(d)(4)(ii) was modified to provide that the fee for any other type of responsive application would be the fee for that particular type of filing as set forth in the Board's fee schedule.

The interim rules also contained technical amendments to conform part 1180 to the ICC Termination Act of 1995, Pub. L. 104–88 (Dec. 29, 1995).

No comments were filed in this proceeding. Therefore, we are adopting the interim rules as final rules with only one minor change. We are modifying the interim rule for 49 CFR 1180.3(h) relating to responsive applications to provide a more accurate cross-reference to the proper fees for various responsive applications. To provide the appropriate cross-reference, we are deleting the last sentence of § 1180.3(h) and replacing it with the following two sentences:

> For fees covering inconsistent applications or responsive applications not otherwise covered in the Board's fee schedule see, 49 CFR 1002.2(f) (38)–(41) and 1180.4(d)(4)(ii). The fees for all other responsive applications are set forth in 49 CFR 1002.2(f).

We conclude that the fee and other changes adopted here will not have a significant economic impact on a