

Martinsville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. The coordinates for Channel 258A at New Martinsville are North Latitude 39-38-36 and West Longitude 80-51-36. See Supplementary Information, *infra*.

DATES: Effective January 29, 1996. The window period for filing applications will open on January 29, 1996 and close on February 29, 1996.

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MM Docket No. 95-113, adopted November 27, 1995, and released December 15, 1995. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Since Salem and New Martinsville are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained. With this action, this proceeding is terminated.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: Sections 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under West Virginia, is amended by adding Channel 277A at Salem, and by adding Channel 258A at New Martinsville.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 95-30897 Filed 12-19-95; 8:45 am]

BILLING CODE 6712-01-F

47 CFR Part 100

[IB Docket No. 95-168; PP Docket No. 93-253; FCC 95-507]

Direct Broadcast Satellite Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: On December 14, 1995, the Federal Communications Commission adopted a Report and Order in which it adopted a number of new rules and policies for the Direct Broadcast Satellite ("DBS") service, including the use of competitive bidding to resolve mutually exclusive applications for DBS resources. As part of its decision in *Advanced Communications Corporation*, FCC 95-428 (released October 18, 1995), the Commission reclaimed for the public 51 channels of DBS spectrum at two orbital locations (27 channels at 110° W.L. and 24 channels at 148° W.L.) that had previously been assigned to Advanced Communications Corporation ("ACC"). The Commission adopts rules and policies in the DBS service in order to update the current "interim" rules and to reassign, through a competitive bidding process, channels at orbital locations previously assigned to ACC.

EFFECTIVE DATE: January 19, 1996.

FOR FURTHER INFORMATION CONTACT: Suzanne Hutchings or Bill Wiltshire, International Bureau, (202) 418-0420; or Diane Conley, Wireless Telecommunications Bureau, (202) 418-0660.

SUPPLEMENTARY INFORMATION: This summarizes the Commission's Report and Order in IB Docket No. 95-168; PP Docket No. 93-253; FCC 95-507, adopted on December 14, 1995, and released on December 15, 1995. The complete text of this Report and Order ("Order") is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street NW., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, D.C. 20037. This Order contains new or modified information collections subject to the Paperwork Reduction Act of 1995 ("PRA"), Pub. L. 104-13, which were proposed in the NPRM and submitted to the Office of Management and Budget ("OMB") for approval. The Commission received no comments on the proposed information collections, and therefore adopts them as originally proposed. The effective date of the new and modified

rules being adopted falls after the deadline for OMB action under the PRA.

Synopsis of the Report and Order

I. Introduction

1. Over six years ago, in *Continental Satellite Corporation*, 4 FCC Rcd 6292 (1989), the Commission stated that existing DBS permittees would have first right to additional channel assignments upon surrender or cancellation of a DBS construction permit. The Notice of Proposed Rulemaking ("NPRM") in this proceeding, 60 FR 55822 (Nov. 3, 1995), tentatively concluded that this reassignment policy no longer serves the public interest, and accordingly proposed to use competitive bidding when the Commission has received mutually exclusive applications for reassignment of such DBS resources. Specifically, the NPRM proposed to auction two large blocks of channels that are currently available at two orbital locations. In addition, the NPRM proposed new service rules that would: (1) impose performance criteria intended to ensure that DBS resources are utilized in a timely manner; (2) guard against potential anticompetitive conduct by DBS providers; and (3) ensure timely DBS service to Alaska and Hawaii. The NPRM also requested comment on our existing policy governing the extent to which DBS resources may be put to alternative uses.

2. The Commission concludes that the public interest is no longer served by the *pro rata* methodology established in *Continental* for reassigning reclaimed DBS channels. Accordingly, the Commission adopts new rules for reassigning DBS resources. In the Order, the Commission finds that it has the statutory authority to auction DBS construction permits if the Commission receives mutually exclusive applications, and that the objectives of Section 309(j) of the Communications Act, 47 U.S.C. 309(j), would be served by doing so. Specifically, under the Order the Commission will auction two DBS construction permits: one for all 28 channels now available at the 110° W.L. orbital location (27 channels from ACC plus 1 channel that was never assigned), and another for all 24 channels now available at the 148° W.L. orbital location. The NPRM proposed to employ an oral outcry auction to award construction permits for these channel blocks. The Commission has instead determined that these two permits should be awarded through a sequential multiple round electronic auction. Other auction designs may be used for future DBS auctions.

3. The Commission also adopts three new service rules and revises an existing policy. First, a person receiving a new or additional DBS construction permit will be required to complete construction of its first satellite within four years of receiving its permit, and to complete all satellites in its DBS system within six years. Second, new permittees will be required to provide DBS service to Alaska and Hawaii from any orbital location where such service is technically feasible, and existing permittees will be required to provide such service from either or both of their assigned orbital locations in order to retain their channel assignments at western orbital locations. Third, the term for non-broadcast DBS licenses will be lengthened from five years to ten years, to encourage investment and innovation in the service and to better match the useful life of DBS satellites. In addition, the existing policy restricting non-DBS use of DBS resources will be restated in terms of capacity rather than time in order to allow DBS licensees to configure their systems more efficiently. The Commission believes that these rules are well designed to spur swift development of DBS spectrum resources to the benefit of the American public.

II. Proposed Service Rules

A. Performance Objectives

4. The Commission finds that combining existing due diligence requirements with additional milestones for construction and operation of DBS systems by new permittees will prevent unnecessary delays in the commencement of service. Accordingly, the Commission adopts, as proposed in the NPRM, two additional performance criteria for those receiving DBS construction permits after the effective date of the proposed rule: (1) completion of construction of the first satellite in a DBS system within four years of authorization; and (2) launch and operation of all satellites in a DBS system within six years of authorization.

B. Use of DBS Capacity

5. At present, Commission policy requires each DBS licensee to begin DBS operations before the end of its first five-year license term, but allows otherwise unrestricted use during that term. After expiration of the first term, a DBS operator may continue to provide non-DBS service only on those transponders on which it also provides DBS service, and only up to half of the use of each transponder each day. The Commission finds that capacity-based restrictions would allow DBS permittees and

licensees more flexibility in how they configure their satellites as a matter of technical efficiency in complying with the limitations we have imposed. Accordingly, the Order restates existing restrictions on the use of DBS resources as a function of capacity rather than time, but otherwise retains the existing use policy. Thus, the new policy will be that a DBS licensee must begin DBS operations within five years of receipt of its license, but may otherwise make unrestricted use of the spectrum during that time. After that five-year period, such a licensee may continue to provide non-DBS service so long as at least half of its total capacity at a given orbital location is used for DBS service.

6. The NPRM noted the possibility that, as a result of a separate proceeding, operators using DBS channels and orbital locations may be permitted to provide both domestic and international service. *See Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, Notice of Proposed Rulemaking, FCC 95-146, para. 38 (released April 25, 1995) ("Transborder/Separate Systems"), 60 FR 24817 (May 10, 1995). The Commission notes that the construction permits available at auction currently authorize only DBS service to the United States, and finds that the potential for international DBS service is no basis for delaying the auction pending resolution of international satellite service issues in the *Transborder/Separate Systems* proceeding.

C. Rules and Policies Designed to Promote Competition

1. Spectrum Aggregation Limitations. 7. The NPRM proposed certain rules intended to prevent strategic use of DBS resources for anticompetitive purposes and also requested comment on whether additional steps were necessary to achieve the desired goal of fostering competition among multichannel video programming distributors ("MVPDs"), such as DBS and cable systems. Two of the rules proposed were structural, in that they placed limits on the number of full-CONUS DBS channels a person could hold or use. The NPRM also proposed rules aimed at preventing specific types of potentially anticompetitive conduct, and requested comment on the degree to which existing rules might address those same concerns.

8. The Commission rejects both of the spectrum caps proposed in the NPRM, and instead adopts a one-time spectrum limitation applicable to the upcoming auction. Under this one-time auction

rule, a party currently holding an attributable interest in full-CONUS channels at one location may bid at auction for channels currently available at the 110° location, but if successful must divest its existing full-CONUS channels at any other location within twelve months. The Commission finds that the rule is necessary given the scarcity of full-CONUS DBS spectrum and the impact that concentration of this spectrum into the hands of any single provider might have on the overall MVPD market. The resulting intra-DBS competition will best serve the public interest by ensuring a level of rivalry between and among DBS firms and other MVPDs that should constrain any potential there might be for strategic anticompetitive conduct. The Commission also finds that twelve months should be sufficient to allow an orderly divestiture, if necessary, and strikes a proper balance between the time necessary for negotiation and the desire to ensure that spectrum not remain idle.

9. For purposes of implementing the spectrum aggregation limitation adopted in the Order, the Commission will only consider three orbital locations—101°, 110°, and 119°—to be capable of full-CONUS service. A fourth orbital location, at 61.5° W.L., should not be deemed to be capable of delivering full-CONUS service at this time since an operator serving customers in the western United States from that location would face interference from tall objects that an operator from the other three locations would not face due to their better look angles, and therefore would be at a qualitative disadvantage in attracting customers.

10. In applying the auction spectrum rule adopted in the Order, interests will be attributed to their holders and deemed cognizable under criteria similar to those used in the context of the broadcast, newspaper and cable television cross ownership rules. The rules adopted in the Order attribute the following interests: (1) any voting interest of five percent or more; (2) any general partnership interest and direct ownership interest; (3) any limited partnership interest, unless the limited partnership agreement provides for insulation of the limited partner's interest and the limited partner in fact is insulated from and has no material involvement, either directly or indirectly, in the management or operation of the DBS activities of the partnership; and (4) officers and directors. As with the broadcast rules, the attribution threshold for institutional investors is ten percent, and a multiplier will be used to

calculate interests held through successive and multiple layers of ownership.

2. Conduct Rules. 11. In addition to the structural solutions designed to promote competition by preventing the potential for undue concentration of DBS and MVPD resources, the NPRM also proposed conduct limitations on the use of DBS resources in order to address a number of specific forms of potential anticompetitive behavior. In the Order, the Commission finds that the one-time auction rule described above will significantly promote rivalry among DBS systems and encourage the development of competition in markets for the delivery of video programming. The Order states that there is little direct evidence of anticompetitive behavior specific to the DBS context. Accordingly, the Commission has decided to rely upon the competitive effect of its one-time spectrum rule to prevent the range of anticompetitive conduct discussed in the NPRM, and thus refrains from adopting conduct rules at this stage in the development of the DBS industry.

12. In view of the market structure set in motion by the Order's one-time spectrum rule, the Commission does not find it necessary to adopt rules prohibiting DBS services from being offered as "ancillary" to cable services. Thus, there is no reason to extend to all non-DBS MVPDs the restrictions imposed in the DBS construction permit issued to Tempo Satellite, Inc., or to maintain those restrictions with respect to Tempo. Similarly, the Commission finds no compelling need at this time for adopting rules designed to ensure that a cable-affiliated DBS operator will compete against other DBS providers for subscribers in cabled areas, or for determining that all joint marketing arrangements between DBS operators and other MVPDs will a fortiori reduce competition. Further, the Commission declines to amend the existing program access and carriage rules to address specific conduct by DBS operators. The Order states that there is no evidence in this record that exclusive agreements currently pose any anticompetitive concern or will do so in the future.

13. The NPRM identified as another area of concern program access issues related to the development of systems such as TCI's proposed "Headend in the Sky" ("HITS") service for satellite delivery of programming to terrestrial MVPD systems. It appears that a HITS-like service that provides most of the available programming, and provides it in a digital format that could be passed through to subscribers, could offer substantial efficiencies for many

MVPDs. The benefits of this service cannot materialize if competing DBS operators are unable to provide such service because, for example, programmers refuse to authorize MVPDs to receive programming services from the competing operator's DBS satellite. However, the Commission has no evidence before it of firms presently supplying HITS-like service, and the actual characteristics of such a service remain unclear. Moreover, resolution of the issues surrounding such a service is not necessary to the proceeding at hand. Accordingly, the Commission has decided that it would be imprudent to consider rules governing HITS service absent a better understanding of the nature of the service.

Other Concerns

14. The NPRM observed that in the Advanced Communications Corporation proceeding, commenters raised a number of other concerns about potential strategic conduct that could arise from cable-affiliated ownership of full-CONUS DBS spectrum. Those commenters argued that cable-affiliated ownership of full-CONUS DBS spectrum should be prohibited, or in the alternative, that several remedial conditions should be imposed. The NPRM sought comment on the extent to which those and related concerns are implicated by the proposed auction of DBS construction permits, and if so, whether additional DBS service rules might be appropriate to address those concerns. For the time being, the Commission has decided to rely upon the one-time auction spectrum limitation, the rivalry that rule should promote throughout the MVPD market, and the Commission's ongoing ability to monitor developments in the DBS and MVPD markets through its Title III authority, as adequate restraints on anticompetitive conduct. The Commission remains committed to fostering a vibrant DBS service and recognizes that periodic reviews will be necessary to ensure that the benefits of rivalry are available to the public. It intends to keep a watchful eye on developments in the service to ensure that DBS systems have an opportunity to develop into truly competitive MVPDs.

East/West Paired Assignments

15. The NPRM tentatively concluded that progress in the DBS service has rendered unnecessary the *Continental* policy of assigning DBS channels only in east/west pairs. The commenters supported this conclusion, and accordingly the Commission will no longer require DBS permittees and

licensees to retain their assigned channels in east/west pairs.

D. Service to Alaska and Hawaii

16. The Commission adopts the rules proposed in the NPRM to: (1) require that all new permittees must provide service to Alaska and Hawaii if such service is technically feasible from their orbital locations; and (2) condition the retention of channels assigned to current permittees at western orbital locations on provision of such service, from either or both of their assigned orbital locations. These rules should help achieve the important goal of bringing service to underserved regions of the United States. The Commission declined the proposal of some commenters that the first rule be applied to existing as well as new permittees. The Commission notes that service to Alaska and Hawaii has already been shown to be feasible from all but the 101°W.L. and 61.5°W.L. orbital locations, and that any party acquiring channels at those two locations that desires not to provide service to Alaska or Hawaii will bear the burden of showing that such service is not feasible as a technical matter, or that while technically feasible such service would require so many compromises in satellite design and operation as to make it economically unreasonable.

E. License Term

17. The Commission adopts the NPRM's proposal to increase the term of a non-broadcast DBS license from 5 years to 10 years, the maximum allowed under the Communications Act, which better reflects the useful life of a DBS satellite, is consistent with the current proposal for extending the term of satellite licenses in other services, and should encourage investment and innovation in the DBS service.

III. Adoption of a New Methodology for Reassigning DBS Resources

18. Over six years ago, in the *Continental* decision, the Commission stated that existing DBS permittees would have first right to additional channel assignments upon surrender or cancellation of a DBS construction permit. The NPRM tentatively concluded that this reassignment policy, adopted in an era before Congress explicitly authorized the Commission's use of auctions and well before any DBS system actually went into operation, no longer serves the public interest, and therefore should be abandoned.

19. After reviewing the comments received in response to the NPRM, the Commission remains convinced that the *pro rata* distribution of reclaimed

channels to existing permittees no longer serves the public interest. The historic policy of assigning a relatively small number of channels to each permittee was based upon a conception of DBS service that has not been put into practice. Instead, the service has experienced a move toward channel consolidation, an understandable trend given that DBS systems must compete in the MVPD market with cable systems that are promising a 500-channel service in the future. Under *Continental*, the channels available for reassignment would be divided *pro rata* to assign five pairs of channels at two orbital locations to each of six permittees. The result would be a piecemeal assignment of valuable spectrum, requiring the permittees to negotiate either joint operations or channel swaps. The process necessary in either case is often a time consuming one that is not always successful, which is further complicated by the time required for Commission consideration and approval of the resulting transactions. There is also no guarantee that the permittees eligible for this distribution value the channels most highly and can put them to use most efficiently.

20. By contrast, competitive bidding procedures are specifically designed and intended to assign scarce resources to those who value them most highly and can make the most efficient use of them. By offering the available channels in two large blocks, the Commission obviates the need for reaggregation and allows the auction winners to proceed directly to acquisition or construction of satellites and system operation of their systems. Since the Commission intends to hold an auction in January 1996, it concludes that an auction method is better suited to achieving expedited service from the channels available than is the existing policy under *Continental*. In addition, the Commission concludes that since it has determined that the public interest supports a change in its regulatory approach, it has full authority to modify existing DBS permits through notice and comment rulemaking, even if doing so frustrates the expectations of existing permittees.

21. All potential auction participants should be aware that the decision cancelling ACC's construction permit is currently on appeal, and that others may seek judicial review of this Order as well. In the unlikely event that a court either overturns the Advanced order and ACC's permit with its associated orbital/channel authorizations is ultimately reinstated, or overturns this rulemaking and the *Continental* reassignment methodology is ultimately maintained, the Commission would

rescind any permit awarded through the auction process and move with all deliberate speed to refund money paid up to that point. Participants in the auction are hereby put on notice of this possibility, and should be willing to facilitate that process if it becomes necessary.

IV. Adoption of Rules for Auctioning DBS Permits

A. Authority to Conduct Auctions

The Commission has authority under Section 309(j) of the Communications Act, 47 U.S.C. 309(j), to employ auctions to choose among mutually exclusive applications for initial licenses or construction permits where the principal use of the spectrum is likely to involve the licensee receiving compensation from subscribers. Having reviewed the comments received in response to the NPRM in this proceeding, the Commission concludes that it has the authority under Section 309(j) to award DBS construction permits for the spectrum reclaimed from ACC, as well as other available spectrum, by means of competitive bidding.

Given that both DBS licensees now providing service to the public operate on a subscription basis, and all other permittees planning to initiate service in the near future also plan to offer subscription-based service, the Commission believes that it is a reasonable assumption that a majority of the use of DBS spectrum is likely to involve the licensee receiving compensation from subscribers, and the "principal use" requirement of the statute is therefore satisfied. In light of current licensees' subscription-based operations, and all other permittees' plans for such operations, the Commission disagrees with the claim made by one commenter that competitive bidding will force DBS operators to offer all-subscription service.

The Commission also disagrees with the argument made by another commenter that construction permits awarded for the channels reclaimed from ACC are not initial. When channels are reclaimed from existing permittees, the construction permits for them are cancelled and cannot be modified. Thus, any construction permits awarded for reclaimed channels will be "initial" under Section 309(j) because they will be new permits for the channels in question.

With respect to the requirement of mutual exclusivity, the Commission does not accept the claim that it could have avoided mutual exclusivity by

applying the spectrum reassignment policy in *Continental*. The Commission has determined that this policy would delay the development of DBS service and would squander valuable spectrum, and thus would not be in the public interest. The Commission also notes that where it has scheduled an auction and it turns out that only one application is filed for a particular construction permit, the auction will be cancelled and the application will be processed. In addition, the Commission will consider mutual exclusivity to exist only when the number of DBS channels sought at a given orbital location exceeds the number available there.

The Commission further concludes that the use of competitive bidding to assign DBS spectrum will promote the statutory objectives of the rapid deployment of service and the efficient use of spectrum more effectively than any other spectrum assignment method. An auction is likely to promote the rapid deployment of service because those parties that are in the best position to deploy technologies and services are also likely to be the highest bidders. In addition, abandonment of the Commission's *Continental* policy opens the DBS industry to a wide range of potential new entrants and thus is consistent with the statutory objective of disseminating licenses among a wide variety of licensees. The possibility that auction costs will be passed on to consumers does not mean, as certain commenters assert, that auctions will not serve the statutory objective of recovering a portion of the value of DBS spectrum for the public. DBS operators may also pass on other costs to consumers. Moreover, auction winners will be constrained from charging rates higher than those of competitors who have not paid for spectrum. Finally, the auctioning of DBS channels will ensure that the ultimate holder of the channels has paid market value to the U.S. Treasury and thus will serve the statutory goal of avoiding unjust enrichment. The Commission will therefore award construction permits for the channels available at 110° and 148°, as well as DBS construction permits that become available in the future, by means of competitive bidding.

B. Competitive Bidding Design

The Commission will auction one construction permit for the block of 28 channels at 110° and one construction permit for the block of 24 channels at 148°. The Commission believes that designating two permits for these channels will best serve the public interest and the objectives of Section 309(j)(4)(B), 47 U.S.C. 309(j)(4)(B),

especially the promotion of investment in and rapid deployment of the DBS service. The construction permits available for auction include authority to transmit pursuant to allocations in accordance with the ITU feeder link plan allocating frequencies for establishing uplinks and downlinks. The Commission recognizes that there may be legitimate reasons for auctioning spectrum in smaller blocks; therefore, in the future, the Commission may auction DBS spectrum either channel by channel or in small blocks.

The Commission proposed in the NPRM to award the construction permits for the channels available at 110° and 148° by means of an oral outcry auction. However, the Commission is persuaded by the comments submitted that the auction for these channels should have more structure. The Commission concludes that a sequential multiple round electronic auction would be the best way of providing such structure. The primary benefit of additional structure is the reduced risk of bidders making errors in submitting bids, and bid submission errors are far less likely with electronic bidding than in a traditional oral auction. Multiple round electronic bidding also provides bidders more time to analyze previous bids, confer with decision makers, and refine their bidding strategy than a continuous oral auction. Multiple round electronic bidding with the activity rule adopted by the Commission also provides bidders with more information about other bidders' valuations. Finally, given the Commission's experience with electronic auctions, such an auction is likely to be easier for the Commission to implement.

In anticipation of a rapid auction pace, the Commission will provide for electronic bidding at an FCC auction site. The Commission does not anticipate allowing telephone bids and remote electronic bidding, but the Wireless Telecommunications Bureau will announce by Public Notice whether such bidding will be permitted. In the event that telephone bids and remote electronic bidding are not allowed, all bidders will be required to have an authorized bidding representative at the auction site. The channels at 110° and 148° will be auctioned separately since no commenter has made the case that there is significant interdependence between the channels available at these two orbital locations. The Commission may auction one channel block immediately after the other, but also reserves the discretion to hold two separate auctions for the two blocks.

Although the Commission will not use simultaneous multiple round bidding, oral outcry bidding, sealed bidding, or a combined sealed bid-oral outcry auction to award construction permits for the spectrum available at 110° and 148°, such auction designs could be suitable for DBS under certain circumstances. The Commission therefore adopts rules providing for these auction designs, and reserves the discretion to employ such auction designs for DBS in the future. The Commission also delegates to the Wireless Telecommunications Bureau the authority to implement and modify auction procedures—including the general design and timing of an auction, the number of authorizations to be offered in any one auction, the manner of submitting bids, and procedures such as minimum opening bids and bid increments, activity and stopping rules, and application and payment requirements—and to announce such procedures by Public Notice.

C. Bidding Procedures

Sequencing. The 28 channels available at 110° will be auctioned first. The sequence of future DBS auctions will be determined in keeping with the Commission's general finding that the highest value licenses should be auctioned first because the greater the value of the licenses, the greater the cost to the public of delaying licensing. See *Second Report and Order*, PP Docket No. 93–253, 59 FR 22980 (May 4, 1994). In the event that the Commission needs to assign separate blocks of channels that it believes to be interdependent, it may choose to utilize a simultaneous multiple round auction.

Bid Increments and Tie Bids. The Commission reserves the discretion to establish, raise and lower minimum bid increments in the course of DBS auctions. The Commission anticipates using larger percentage minimum bid increments early in the auction and reducing the minimum increment percentage as bidding activity falls. The Commission also reserves the discretion to establish and change maximum bid increments in the course of DBS auctions. Where a tie bid occurs, the high bidder will be determined by the order in which the bids were received by the Commission.

Minimum Opening Bid. The Commission believes that it would be useful to have a minimum opening bid for the channels at 110° to help move the auction along and to increase the likelihood that the public receives fair market value for the spectrum. A minimum opening bid therefore will be established for the channels available at

110°, the amount of which will be announced by Public Notice. The amount of this minimum opening bid will be determined using all available information and taking into consideration the uncertainty as to the value of the spectrum. No commenter has suggested a minimum opening bid for the channels available at 148°, and it appears that the value of these channels is substantially lower than the value of the channels at 110°. The Commission therefore will not set a minimum opening bid for the channels at 148°. The Commission also reserves discretion to decide whether to set minimum opening bids for individual auctions in the future as circumstances warrant.

Activity Rules. A bidder must be active in each round of the auction or use an activity rule waiver. To be active in the current round, a bidder must submit an acceptable bid in the current round or have the high bid from the previous round. Bidders will be provided with five activity rule waivers that may be used in any round during the course of the auction. A bidder who is not active in a round and has no remaining activity rule waivers will no longer be eligible to bid on the construction permit being auctioned.

If a bidder is not active in a round, a waiver will be applied automatically. An automatic waiver applied in a round in which there are no new valid bids will not keep the auction open. A proactive activity rule waiver is a waiver invoked by a bidder during the bid submission period. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open. The Commission retains the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control or in the event of a bid withdrawal, as discussed below. The Commission also retains the flexibility to adjust by Public Notice prior to an auction the number of waivers permitted.

Stopping Rules. A stopping rule specifies when an auction is over. The auction will close after one round passes in which no new valid bids or proactive activity rule waivers are submitted. The Commission retains the discretion, however, to keep the auction open even if no new valid bids and no proactive waivers are submitted. In the event that the Commission exercises this discretion, the effect will be the same as if a bidder had submitted a proactive waiver.

D. Procedural and Payment Issues

Application Procedures, Permittee Qualifications, and Payment for Construction Permits Awarded by Competitive Bidding. The Commission's general procedural and payment rules for auctions will be applied to the DBS service, along with certain modifications. Applicants for DBS auctions will be required to file a short-form application, FCC Form 175, prior to the auction in which they wish to participate. Filing deadlines will be announced by Public Notice. If administratively feasible, electronic filing of FCC Form 175 for the auction of spectrum available at 110° and 148° will be allowed; filing procedures will be announced by Public Notice. For subsequent DBS auctions, the Commission will also announce by Public Notice how such forms should be filed.

As discussed below, every DBS auction participant will be required to submit to the Commission an upfront payment prior to commencement of the auction. In addition, every auction winner will be required to submit an amount sufficient to bring its total deposit up to 20 percent of its winning bid within 10 business days of the announcement of winning bidders. Winning bidders will be required to file information in conformance with Part 100 of the Commission's Rules within 30 days of the announcement of winning bidders. Winning bidders must submit, as part of this post-auction application process, a signed statement describing their efforts to date and future plans to come into compliance with any applicable spectrum limitations, if they are not already in compliance.

After reviewing a winning bidder's information supplied in conformance with Part 100 and determining that the bidder is qualified to be a permittee, and after verifying receipt of the bidder's 20 percent down payment, the Commission will announce the application's acceptance for filing, thus triggering the filing window for petitions to deny. If the Commission dismisses or denies any and all petitions to deny, the Commission will issue an announcement to this effect, and the winning bidder will then have five (5) business days to submit the balance of its winning bid. If the bidder does so, the permit will be granted subject to a condition, if necessary, that the permittee come into compliance with any applicable spectrum limitations within twelve (12) months of the final grant. The permittee may come into compliance with applicable spectrum

caps by either surrendering to the Commission its excess channels or filing an application that would result in divestiture of the excess channels. If the bidder fails to submit the balance of the winning bid or the permit is otherwise denied, the Commission will assess a default payment as set forth below and re-auction the permit.

Upfront Payment. The Commission's approach to upfront payments varies from auction to auction depending on a balancing of the goal of encouraging bidders to submit serious bids with the desire to simplify the bidding process and minimize implementation costs imposed on bidders. In the *Second Report and Order* in the Competitive Bidding proceeding, the Commission outlined a rationale for setting upfront payments at roughly five percent of the estimated value of a winning bid. *Second Report and Order*, PP Docket No. 93-253, 59 FR 22980 (May 4, 1994). A year ago, Tempo would have paid ACC \$45 million for its channels at 110° and 148°. In view of the fact that MCI has stated it would bid \$175 million for the channels at 110°, and in the absence of any specific expression of interest in bidding on the channels at 148°, it seems clear that the channels at 110° are more valuable than those at 148°. Moreover, the Commission strongly believes that the value of the channels has increased over the past year. These considerations lead the Commission to set an upfront payment of \$10 million for the channels at 110° and \$2 million for the channels at 148°. The figure of \$10 million is well above five percent of \$45 million (it is actually 22.2 percent). This reflects a balancing of the assumed increase in value of the spectrum with the fact that the channels at 110° and 148° were included in the Tempo-ACC arrangement.

The magnitude of the upfront payment also reflects the Commission's concern that, if the upfront payment is too low, there is a risk of encouraging insincere bidding. Moreover, a \$10 million payment should not be an excessive burden for bidders because it will not be held for a significant amount of time. In addition, \$10 million is the lowest of the specific upfront payment suggestions in the comments. With respect to procedures for collecting upfront payments, the Commission will accept only wire transfers for the auction of the channels available at 110° and 148°.

Bid Withdrawal, Default and Disqualification. Any bidder who withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the

difference between its high bid and the amount of the winning bid the next time the construction permit is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid. No withdrawal payment will be assessed if the subsequent winning bid exceeds the withdrawn bid. To prevent multiple withdrawals by the same party, the Commission will bar a bidder who withdraws a bid from continued participation in the auction of the withdrawn construction permit.

In the event of a bid withdrawal, the Commission will reoffer the construction permit in the next round. The offer price will be the highest price at or above which bids were made in previous rounds by three or more bidders. The Commission may at its discretion reduce this price in subsequent rounds if it receives no bids at this price. Prior to restarting the auction, the Commission will also restore the eligibility of all bidders who have not withdrawn. After a withdrawal the Commission will also issue each eligible bidder one activity rule waiver in addition to any remaining waivers to provide additional time for bid preparation and to avoid accidental disqualification.

A default payment will be assessed if a winning bidder fails to pay the full amount of its 20 percent down payment or the balance of its winning bid in a timely manner, or is disqualified after the close of an auction. The amount of this default payment will be equal to the difference between the defaulting auction winner's "winning" bid and the amount of the winning bid the next time the construction permit is offered for auction by the Commission, if the latter bid is lower. In addition, the defaulting auction winner will be required to submit a payment of three (3) percent of the subsequent winning bid or three (3) percent of its own "winning" bid, whichever is less. If withdrawal, default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission retains the option to declare the applicant and its principals ineligible to bid in future auctions, or take any other action the Commission deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.

E. Regulatory Safeguards

Transfer Disclosure Provisions. In order to accumulate data to evaluate whether DBS authorizations are being issued for bids that fall short of market value, the Commission will require any entity that acquires a DBS license through competitive bidding and seeks

to transfer that license within six years of the initial license grant, to file, together with its application for FCC consent to the transfer, the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration received in return for the transfer of its license. Thus, the information submitted should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration. Any competitive concerns raised by the possible disclosure of sensitive information can be addressed by the provisions in Sections 0.457 and 0.459 of the Commission's rules, 47 CFR §§ 0.457, 0.459, providing for the nondisclosure of information.

Performance Requirements. In implementing auction procedures, the Commission is required under Section 309(j) to include performance requirements "to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(B). The Commission concludes that the performance requirements adopted as part of the DBS service rules are sufficient to achieve these goals, and it is unnecessary to adopt any further performance rules in connection with auction procedures.

Rules Prohibiting Collusion. The Commission adopts the anti-collusion rules proposed in the NPRM with one modification, as explained below. Under these rules, bidders must identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process. Bidders are also required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. In the NPRM, the Commission proposed that after short-form applications are filed, and prior to the time the winning bidder has submitted the balance of its bid, all applicants should be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other applicants for construction permits serving the same or overlapping

geographic areas, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application. The Commission adopts this prohibition, but extends it only until the winning bidder has submitted its 20 percent down payment, and not until the winning bidder has submitted the balance of its bid. Even when an applicant has withdrawn its application after the short-form filing deadline, the applicant may not enter into a bidding agreement with another applicant bidding on the same or overlapping geographic areas from which the first applicant withdrew. In addition, once the short-form application has been filed, a party with an attributable interest in one bidder may not acquire a controlling interest in another bidder bidding for construction permits in any of the same or overlapping geographic areas.

DBS applicants may (1) modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided that such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for construction permits for channels that may be used to cover the same or overlapping geographic areas; and (2) make agreements to bid jointly for construction permits after the filing of short-form applications, provided that the parties to the agreement have not applied for construction permits that may be used to serve the same or overlapping geographic areas. In addition, the holder of a non-controlling attributable interest in an entity submitting a short-form application may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with other applicants for construction permits that may be used to serve the same or overlapping geographic areas after the filing of short-form applications, provided that (1) the attributable interest holder certifies to the Commission that it has not communicated and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has a consortium or joint bidding arrangement, and which have applied for construction permits that may be used to serve the same or overlapping geographic areas, and (2) the arrangements do not result in any change in control of an applicant.

Winning bidders are required to submit a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process prior to the close of bidding. Such arrangements must have been entered into prior to the filing of short-form applications as provided in the Order.

In adopting these rules, the Commission reminds potential bidders for DBS construction permits that allegations of collusion in a petition to deny may be investigated by the Commission or referred to the U.S. Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules while participating in an auction may be subject to forfeiture of their down payment or their full bid amount, as well as revocation of their license, and may be prohibited from participating in future auctions.

F. Designated Entities

Because of the extremely high implementation costs associated with satellite-based services, the Commission tentatively concluded in the NPRM that no special provisions should be made for designated entities—i.e., small businesses, rural telephone companies, and businesses owned by members of minority groups and women—for the channels currently available at 110° and 148°. The Commission noted, however, that the expeditious implementation of DBS service at the two orbital locations in question might indirectly benefit designated entities by providing new opportunities for them to supply programming and equipment. Having reviewed the comments submitted in this proceeding, the Commission concludes that competition in the delivery of DBS service requires auction rules that will allow expedient assignment of the channels at 110° and 148°. Given the fact that these channels offer enough capacity to provide full DBS service in competition with current video providers, auction rules that put these two construction permits in the hands of entities that can quickly provide competition are in the public interest. No commenters assert that small businesses could attract the capital necessary to provide service on all the channels available at either 110° or 148°.

Accordingly, the Commission will not adopt special provisions for designated entities in the DBS auction for the channels at 110° and 148°, and will not set aside spectrum in this auction for

"independents," as suggested by one commenter. Another commenter's statement that small and minority businesses are developing services for the DBS industry confirms the Commission's belief that a wide variety of businesses will be involved in the DBS industry; however, the Commission does not have a record before it sufficient to support adoption of this commenter's suggestion that the Commission provide incentives to encourage companies to team up with small and minority-owned businesses. However, designated entity provisions for future DBS auctions may be appropriate, particularly if spectrum is auctioned in small blocks.

Paperwork Reduction Act

22. The Order contains new or modified information collections subject to the Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, which were proposed in the NPRM and were submitted to the Office of Management and Budget ("OMB") for approval. The Commission, as part of its continuing effort to reduce paperwork burdens, also invited the general public to comment on the information collections proposed. The Commission received no comments on the proposed collections, and adopts them as originally proposed. The effective date of the new and modified rules that have been adopted falls after the deadline for OMB action under the PRA.

47 CFR Part 100

OMB Approval Number: None.

Title: Direct Broadcast Satellite Service.

Form No.: None.

Type of Review: Approval of existing collection.

Respondents: Businesses or other for profit.

Number of Respondents: 8.

Estimated Time Per Response: 400 hours.

Total Annual Burden: 3200 hours.

Needs and Uses: In accordance with the Communications Act, the information collected will be used by the Commission in granting DBS authorizations, and in determining the technical and legal qualifications of a satellite applicant, permittee or licensee. Existing information collection requirements are set forth in Part 100 of the Commission's Rules and in Commission orders. See e.g., *Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, 90 FCC 2d 676 (1982), *recon. denied*, 53 RR 2d 1637 (1983);

CBS, Inc., 98 FCC 2d 1056 (1983); *Tempo Enterprises, Inc.*, 1 FCC Rcd 20, 21 (1986); and *United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858, 6861-62 (1988). Under the existing information collection requirements in the Commission's Rules, an entity awarded a DBS authorization would be required to submit the information required pursuant to 47 CFR 100.13, 100.19, 100.21, 100.51. The Commission proposed to require that DBS auction winners submit: (1) Ownership information to determine compliance with Parts 1 and 100 of the Commission's Rules; (2) a statement describing their efforts to comply with the proposed spectrum aggregation limitations; (3) an explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership, or other agreement or arrangement they enter into relating to the competitive bidding process prior to the close of bidding; and (4) any agreements or contracts pertaining to the transfer of the DBS authorization acquired through auction during the six years following grant of the authorization.

Final Regulatory Flexibility Analysis

Pursuant to Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rulemaking in IB Docket No. 95-168/PP Docket No. 93-253. Written comments on the proposals in the Notice, including the Regulatory Flexibility Analysis, were requested.

A. Need and Purpose of Rules

This rulemaking proceeding modifies the licensing and service rules for the DBS service. It also adopts rules for competitive bidding in the DBS service based on Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), which authorizes the Commission to use auctions to select among mutually exclusive applications for authorizations under certain circumstances. Our objectives have been to promote efficiency and innovation in the licensing and use of the electromagnetic spectrum, to develop competitive and innovative communications systems, and to promote effective and adaptive regulations.

B. Issues Raised by the Public in Response to the Initial Analysis

No comments were received specifically in response to the Initial Regulatory Flexibility Analysis. We have, however, taken into account all issues raised by the public in response

to the proposed rules. In certain instances, we have eliminated or modified rules in response to those comments.

C. Significant Alternatives Considered

We have attempted to balance all the commenters' concerns with our public interest mandate under the Communications Act in order to update the existing "interim" rules in the DBS service. We will continue to examine these rules in an effort to eliminate unnecessary regulations and to minimize significant economic impact on small businesses.

Ordering Clauses

Accordingly, IT IS ORDERED that Part 100 of the Commission's Rules is amended as specified below.

24. It is Further Ordered that the one-time auction spectrum limitation discussed above Will be Implemented in connection with the auction of the construction permits for the use of 28 DBS channels at the 110° orbital location and 24 channels at the 148° orbital location.

25. It is Further Ordered that the amendments to Part 100 adopted herein and the one-time auction spectrum limitation discussed above Will Become Effective January 19, 1996. This action is taken pursuant to Sections 1, 4(i), 4(j), 7, and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 157, and 309(j).

26. It is Further Ordered that, pursuant to 47 U.S.C. § 155(c), the Chief, Wireless Telecommunications Bureau, is granted Delegated Authority to implement and modify auction procedures in the DBS service, including the general design and timing of an auction, the number of authorizations to be offered in an auction, the manner of submitting bids, minimum opening bids and bid increments, activity and stopping rules, and application and payment requirements, and to announce such procedures by Public Notice.

27. It is Further Ordered that condition (a) placed on the construction permit of Tempo Satellite, Inc. in *Tempo Satellite, Inc.*, 7 FCC Rcd 2728, 2732 (1992), which imposed certain marketing restrictions, is Rescinded.

28. It is Further Ordered that the proceeding in IB Docket No. 95-168 is hereby terminated.

List of Subjects in 47 CFR Part 100

Radio, Satellites.

Federal Communications Commission.
William F. Caton,
Acting Secretary.

Rule Changes

Part 100 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 100—DIRECT BROADCAST SATELLITE SERVICE

1. The authority citation for Part 100 is revised to read as follows:

Authority: 47 U.S.C. 154, 303, 309, and 554, unless otherwise noted.

2. Section 100.17 is revised to read as follows:

§ 100.17 License term.

(a) Licenses for non-broadcast facilities governed by this part will be issued for a period of ten (10) years. Licenses for broadcast facilities governed by this part will be issued for a period of five (5) years.

3. Section 100.19 is revised to read as follows:

§ 100.19 Due diligence requirements.

(a) All persons granted DBS authorizations shall proceed with diligence in constructing DBS systems. Permittees shall be required to complete contracting for construction of the satellite station(s) within one year of the grant of the construction permit. The satellite stations shall also be required to be in operation within six years of the construction permit grant.

(b) In addition to the requirements stated in paragraph (a) of this section, all persons who receive new or additional DBS construction permits after January 19, 1996 shall complete construction of the first satellite in their respective DBS systems within four years of the grant of the construction permit. All satellite stations in such a DBS system shall be in operation within six years of the grant of the construction permit.

(c) DBS permittees and licensees shall be required to proceed consistent with all applicable due diligence obligations, unless otherwise determined by the Commission upon proper showing in any particular case. Transfer of control of the construction permit shall not be considered to justify extension of these deadlines.

4. A new Section 100.53 is added to Subpart D to read as follows:

§ 100.53 Geographic service requirements.

(a) Those holding DBS permits or licenses as of January 19, 1996 must either:

(1) Provide DBS service to Alaska and Hawaii from one or more orbital

locations before the expiration of their current authorizations; or

(2) Relinquish their western DBS orbital/channel assignments at the following orbital locations: 148° W.L., 157° W.L., 166° W.L., and 175° W.L.

(b) Those acquiring DBS authorizations after January 19, 1996 must provide DBS service to Alaska and Hawaii where such service is technically feasible from the acquired orbital location.

A new subpart E consisting of §§ 100.71 through 100.80 is added to Part 100 to read as follows:

Subpart E—Competitive Bidding Procedures for DBS

Sec.

100.71 DBS subject to competitive bidding.

100.72 Competitive bidding design for DBS construction permits.

100.73 Competitive bidding mechanisms.

100.74 Withdrawal, default and disqualification payments.

100.75 Bidding application (FCC Form 175 and 175-S Short-form).

100.76 Submission of upfront payments and down payments.

100.77 Long-form applications.

100.78 Permit grant, denial, default, and disqualification.

100.79 Prohibition of collusion.

100.80 Transfer disclosure.

§ 100.71 DBS subject to competitive bidding.

Mutually exclusive initial applications to provide DBS service are subject to competitive bidding procedures. The general competitive bidding procedures found in Part 1, Subpart Q of this chapter, will apply unless otherwise provided in this part.

§ 100.72 Competitive bidding design for DBS construction permits.

(a) The Commission will employ the following competitive bidding designs when choosing from among mutually exclusive initial applications to provide DBS service:

(1) Single round sealed bid auctions (either sequential or simultaneous);

(2) Sequential oral auctions;

(3) Combined sealed bid-oral auctions;

(4) Sequential multiple round electronic auctions; or

(5) Simultaneous multiple round auctions.

(b) The Wireless Telecommunications Bureau may design and test alternative procedures. The Wireless Telecommunications Bureau will announce by Public Notice before each auction the competitive bidding design to be employed in a particular auction.

(c) The Wireless Telecommunications Bureau may use combinatorial bidding, which would allow bidders to submit

all or nothing bids on combinations of construction permits, in addition to bids on individual construction permits. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount. Combinatorial bidding may be used with any type of auction design.

(d) The Wireless Telecommunications Bureau may use single combined auctions, which combine bidding for two or more substitutable construction permits and award construction permits to the highest bidders until the available construction permits are exhausted. This technique may be used in conjunction with any type of auction.

§ 100.73 Competitive bidding mechanisms.

(a) *Sequencing.* In sequential auctions, the Wireless Telecommunications Bureau will generally auction DBS construction permits in order of their estimated value, with the highest value construction permit being auctioned first. The Wireless Telecommunications Bureau may vary the sequence in which DBS construction permits will be auctioned.

(b) *Grouping.* All DBS channels available for a particular orbital location will be auctioned as a block, unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative auction scheme. In the event the Wireless Telecommunications Bureau uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Wireless Telecommunications Bureau will determine which construction permits will be auctioned simultaneously or in combination.

(c) *Bid Increments and Tie Bids.* The Wireless Telecommunications Bureau may, by announcement before or during an auction, establish, raise or lower minimum bid increments in dollar or percentage terms. The Wireless Telecommunications Bureau may establish and change maximum bid increments during an auction. The Wireless Telecommunications Bureau may also establish by Public Notice a suggested opening bid or a minimum opening bid on each construction permit. Where a tie bid occurs, the high bidder will be determined by the order in which the bids were received by the Commission.

(d) *Stopping Rules.* The Wireless Telecommunications Bureau may establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(e) *Activity Rules.* The Wireless Telecommunications Bureau may establish activity rules which require a minimum amount of bidding activity. In the event that the Wireless Telecommunications Bureau establishes an activity rule in connection with a simultaneous multiple round auction or sequential multiple round electronic auction, each bidder will be automatically granted a certain number of waivers of such rule during the auction.

§ 100.74 Withdrawal, default and disqualification payments.

(a) When the Commission conducts a sequential multiple round electronic auction or simultaneous multiple round auction pursuant to § 100.72, the Wireless Telecommunications Bureau will impose payments on a bidder who withdraws a high bid during the course of the auction, who defaults on payments due, or who is disqualified.

(b) A bidder who withdraws a high bid during the course of such an auction will be assessed a payment equal to the difference between the amount bid and the amount of the winning bid the next time the construction permit is offered for auction by the Commission. No withdrawal payment will be assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(c) If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (b) of this section plus an additional payment equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

(d) When the Commission conducts a sequential multiple round electronic auction, the Wireless Telecommunications Bureau will bar a bidder who withdraws a bid from continued participation in the auction of the withdrawn construction permit. When the Commission conducts any other type of auction, the Wireless Telecommunications Bureau may bar a bidder who withdraws a bid from continued participation in the bidding for the same construction permit or

other construction permits offered in the same auction.

(e) When the Commission conducts any type of auction other than those provided for in paragraphs (a), (b), (c), and (d) of this section, the Wireless Telecommunications Bureau may modify the payments to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such payments shall not exceed the payments specified above.

§ 100.75 Bidding application (FCC Form 175 and 175-S Short-form).

All applicants to participate in competitive bidding for DBS construction permits must submit applications on FCC Form 175 pursuant to the provisions of § 1.2105 of this chapter. The Wireless Telecommunications Bureau will issue a Public Notice announcing the availability of DBS construction permits and the date of the auction for those construction permits. This Public Notice also will specify the date on or before which applicants intending to participate in a DBS auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as any upfront payment that must be submitted, and the location where the application must be filed.

§ 100.76 Submission of upfront payments and down payments.

(a) Bidders in DBS auctions will be required to submit an upfront payment in accordance with § 1.2106 of this chapter, the amount of which will be announced by Public Notice prior to each auction.

(b) Winning bidders in a DBS auction must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 20 percent of their winning bids within ten (10) business days of the announcement of winning bidders.

§ 100.77 Long-form applications.

Each winning bidder will be required to submit the information described in §§ 100.13, 100.21, and 100.51 within thirty (30) days after being notified by Public Notice that it is the winning bidder. Each winner also will be required to file, by the same deadline, a signed statement describing its efforts to date and future plans to come into compliance with any applicable spectrum limitations, if it is not already in compliance. Such information shall be submitted pursuant to the procedures set forth in § 100.13 and any associated

Public Notices. Only auction winners will be eligible to file applications for DBS construction permits in the event of mutual exclusivity between applicants filing a short-form application.

§ 100.78 Permit grant, denial, default, and disqualification.

(a) Each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following Public Notice that the construction permit is ready for grant.

(b) A bidder who withdraws its bid during the course of an auction, defaults on a payment due, or is disqualified, will be subject to the payments specified in § 100.74.

§ 100.79 Prohibition of collusion.

(a) Bidders are required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process. Bidders are also required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid.

(b)(1) Except as provided in paragraphs (b)(2), (b)(3) and (b)(4) of this section, after the filing of short-form applications, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder submits its downpayment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.

(2) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided that such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for construction permits that may be used to serve the same or overlapping geographic areas. Such changes will not be considered major modifications of the application.

(3) After the filing of short-form applications, applicants may make agreements to bid jointly for construction permits, provided that the parties to the agreement have not applied for construction permits that may be used to serve the same or overlapping geographic areas.

(4) After the filing of short-form applications, a holder of a non-controlling attributable interest in an entity submitting a short-form application may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for construction permits that may be used to serve the same or overlapping geographic areas, provided that:

(i) The attributable interest holder certifies to the Commission that it has not communicated and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has a consortium or joint bidding arrangement, and which have applied for construction permits that may be used to serve the same or overlapping geographic areas; and

(ii) The arrangements do not result in any change in control of an applicant.

(5) Applicants must modify their short-form applications to reflect any changes in ownership or in the membership of consortia or joint bidding arrangements.

(c) Winning bidders are required to submit a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process prior to the close of bidding. Such arrangements must have been entered into prior to the filing of short-form applications pursuant to paragraphs (a) and (b) of this section.

§ 100.80 Transfer disclosure.

Any entity that acquires a DBS license through competitive bidding, and seeks to transfer that license within six years of the initial license grant, must file, together with its application for FCC consent to the transfer, the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration received in return for the transfer of its license. The information submitted must include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration.

[FR Doc. 95-30938 Filed 12-19-95; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 660

RIN 2132-AA54

Buy America Requirements; Removal

AGENCY: Federal Transit Administration, DOT.

ACTION: Final rule.

SUMMARY: This rule removes the Buy America requirements which are now obsolete and have been superseded by 49 CFR part 661.

EFFECTIVE DATE: December 20, 1995.

FOR FURTHER INFORMATION CONTACT: Rita Daguiard, Deputy Assistant Chief Counsel, Office of Chief Counsel, room 9316, 400 Seventh Street, S.W., Washington, D.C. 20590, (202) 366-1936.

SUPPLEMENTARY INFORMATION: Section 401 of the Surface Transportation Assistance Act of 1978 (the 1978 STAA) (Public Law No. 95-599) included a Buy America provision applicable for the first time to the Federal Transit Administration (FTA) program. This provision established a preference for products produced, mined or manufactured in the United States. The implementing regulation, 49 CFR part 660, applied these requirements to contracts exceeding \$500,000 financed by funds obligated under the 1978 STAA.

Both the statutory and funding authority of the 1978 STAA have now lapsed. FTA's current Buy America requirements are set out at 49 U.S.C. 5323(j) and the implementing regulation, 49 CFR part 661. Because 49 CFR part 660 is now obsolete, FTA finds that it is unnecessary to seek public comment on its removal from the Code of Federal Regulations. Part 660 is being removed as part of the President's "Reinventing Government" initiative.

Accordingly, and effective December 20, 1995, FTA is removing 49 CFR Part 660.

Regulatory Analyses and Notices

This is not a significant rule under Executive Order 12866 or under the Department's Regulatory Policies and Procedures. It does not impose costs on regulated parties. It merely removes an obsolete regulation. There are not sufficient Federalism implications to warrant the preparation of a Federalism Assessment. The Department certifies that this rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 49 CFR Part 660

Grant programs—transportation, Mass transportation.

PART 660—[REMOVED]

Accordingly, for the reasons set forth above, part 660 is hereby removed.

Gordon J. Linton,

Administrator.

[FR Doc. 95-30736 Filed 12-20-95; 8:45 am]

BILLING CODE 4910-57-U

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 285

[I.D. 121495A]

Atlantic Tuna Fisheries; Bluefin Tuna

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure of the General category fishery.

SUMMARY: NMFS has determined that the 10 metric tons (mt) of Atlantic bluefin tuna (ABT) set aside for the late-season General category fishery in the New York Bight beginning October 1, 1995, will have been taken by December 15, 1995. Therefore, the General category fishery will be closed effective at 2330 hours (11:30 pm) on Friday, December 15, 1995. This action is being taken to prevent overharvest of the quota established for this fishery.

EFFECTIVE DATE: 2330 hours on December 15, 1995, through December 31, 1995.

FOR FURTHER INFORMATION CONTACT: John Kelly, 301-713-2347, or Kevin Foster, 508-281-9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) governing the harvest of ABT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 285. Section 285.22 subdivides the International Commission for the Conservation of Atlantic Tunas recommended U.S. quota among the various domestic fishing categories.

Implementing regulations for the Atlantic Tuna Fisheries at 50 CFR 285.22(a) provide for an adjusted annual quota of 550 mt of large medium and giant ABT to be harvested from the Regulatory Area by vessels permitted in the General category. Based on landings