

MDS is located below 3 GHz while LMDS is in the higher microwave frequencies. Accordingly, we request comment on how LMDS should be categorized for regulatory fee purposes. We note that in a separate proceeding, we have sought comment on possible long-term modification of our regulatory fees for MDS in conjunction with proposed major changes to our MDS rules to facilitate use of the 2500–2690 MHz band for mobile and advanced services.<sup>8</sup>

7. Those who argue for such a reclassification of LMDS for regulatory fee purposes have pointed out other differences between MDS and LMDS, such as individually licensed station hub sites (MDS) versus geographically based licenses (LMDS), differing markets, and different financial/investment requirements. Proponents of moving LMDS to another category also note the differences in the spectrum propagation characteristics of MDS and LMDS—with LMDS having more propagation limitations.

8. Those opposing such a reclassification of LMDS for regulatory fee purposes note that there are many similarities between the services of LMDS and MDS, including that they both provide high speed voice and data services. They also point out that past arguments for making a change have only come forward after the Commission has issued its final annual fee assessments.

9. The Commission's denial of the past requests to move LMDS to a microwave fee category—or any other category—has not been based on rejection or acceptance of either set of arguments, but simply the fact that insufficient evidence has been provided. Thus, the NPRM asks for public comment on how LMDS should be

categorized for regulatory fee purposes, including whether an entirely new fee category should be established just for LMDS, in order to build a complete record on whether LMDS is properly classified within its current fee category of “Multipoint Distribution.”<sup>9</sup> We also seek comment on whether LMDS should be classified in the same manner as other point-to-point fixed microwave services, or on the basis of other geographically licensed services.

#### iv. Adjustment of Fee Waiver Policies

10. Section 9 of the Communications Act (47 U.S.C. 159) requires the Commission to assess and collect regulatory fees to cover the costs of certain regulatory activities. The statute also specifies when these fees may be waived.<sup>10</sup> Additionally, Section 8 of the Communications Act (47 U.S.C. 158) requires the Commission to collect application fees to reimburse the United States for amounts appropriated to the Commission (see 47 U.S.C. 158(e)). These fees may also be waived.<sup>11</sup> The Commission clarified the general policies applicable to waivers, including those based on financial hardship, in *Implementation of Section 9 of the Communications Act*<sup>12</sup>, that “We will grant waivers of the fees on a sufficient showing of financial hardship.”<sup>13</sup> We further stated that: “It will be incumbent upon each regulatee to fully document its financial position and show that it lacks sufficient funds to pay the regulatory fees and to maintain its service to the public.”<sup>14</sup> Additionally, we explained that “Evidence of

bankruptcy or receivership is sufficient to establish financial hardship \* \* \*. Thus, we will waive the regulatory fees for licensees whose stations are bankrupt, undergoing Chapter 11 reorganizations or in receivership.”<sup>15,16</sup>

11. Although fee waivers will generally be given in cases of financial hardship, we nevertheless note that even under our current policies, in some circumstances a significant question may exist as to whether bankruptcy represents extraordinary and compelling circumstances justifying a waiver when balanced against the public interest in reimbursing the Commission for its costs as reflected in the statutory fee provisions. A policy of automatically granting a waiver, in the case of large entities owing millions of dollars in fees, for example, might have significant impact on the Commission's overall ability to collect fees to reimburse the government for its costs as required by law. Therefore, under such circumstances a waiver may well not promote the public interest, as provided in sections 8(d)(2) and 9(d). We therefore emphasize that under the statutory waiver provisions, case-by-case review of fee waiver requests is necessary to determine the public interest, even in bankruptcy cases.

12. We also seek comment on whether we should set a cap on the amount of fees that we will generally waive in circumstances involving bankruptcy or otherwise. Fees owed above this cap would, of course, be subject to the provisions of the Bankruptcy Act (11 U.S.C. 101 *et seq.*) and the disposition of the relevant bankruptcy court. By leaving the ultimate disposition of these large fees to bankruptcy law, rather than waiving them, we believe that we would be giving appropriate weight to our congressionally-mandated obligation to collect regulatory and other fees. Moreover, we believe that we would also be giving due regard to our practice, approved by the courts, of reconciling our regulatory responsibilities with the goals of the Bankruptcy Act.<sup>17</sup> In the case of regulatees alleging financial hardship but not in bankruptcy, we would consider waiver, partial waiver or deferral of fees above the cap on a case-by-case basis. We tentatively propose that the cap be set at either \$500,000 or \$1 million, reviewed annually. In computing the proposed cap, all of the subsidiaries and other

of the 2500–2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems, Public Notice, DA 00–2583, 5 FCC Rcd 22310 (2000). A large deployment of LMDS has occurred in the frequencies at 17.7–20.2 GHz and 27.5–30 GHz (28 GHz band). See Biennial Review 2000 Staff Report Released, Public Notice, FCC 00–346 (Sept. 19, 2000).

<sup>8</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands; Part 1 of the Commission's Rules—Further Competitive Bidding Procedures; Amendment of parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; WT Docket Nos. 02–68; 03–66; 03–67; MM Docket No. 97–217; *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, FCC 03–56 (released April 2, 2003).

<sup>9</sup> Effective March 25, 2002, the Commission transferred regulatory functions for Instructional Fixed Service, Multipoint Distribution Service, and the Multichannel Multipoint Distribution Service, from the Mass Media Bureau to the Wireless Telecommunications Bureau (See 47 CFR section 1.1153). The Commission intends to modify its rules on annual regulatory fees to reflect the fact that these services are now regulated by the Wireless Telecommunications Bureau.

<sup>10</sup> Section 9(d) (47 U.S.C. 159(d)) provides that: “The Commission may waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest.” See also 47 CFR section 1.1166 (implementing statutory provision).

<sup>11</sup> Section 8(d)(2) (47 U.S.C. 158(d)(2)) provides that: “The Commission may waive or defer [payment of an application fee] in any specific instance for good cause shown, where such action would promote the public interest.” See also 47 CFR section 1.1117 (implementing statutory provision).

<sup>12</sup> We held generally that we would waive regulatory fees on a case-by-case basis upon a demonstration of: “‘extraordinary and compelling circumstances’ outweighing the public interest in recouping the cost of the Commission's regulatory services from a particular regulatee.” 9 FCC Rcd at 5344, paragraph 29. See also 9 FCC Rcd 5333 (1994), *recon. granted*, 10 FCC Rcd 12759 (1995).

<sup>13</sup> 10 FCC Rcd at 12761, paragraph 13.

<sup>14</sup> *Id.* at 12762, paragraph 13.

<sup>15</sup> *Id.* at 12762, paragraph 14.

<sup>16</sup> See also *Mobilemedia Corp.*, 14 FCC Rcd 8017, 8027 paragraph 40 (1999) (applying this policy to Section 8 application fees).

<sup>17</sup> See *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974).