

DOCKET FILE COPY ORIGINAL

DOCKET FILE COPY ORIGINAL

ORIGINAL
RECEIVED

MAR 16 1993

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Rulemaking to Amend Part I and Part 21)
of the Commission's Rules to Redesignate)
the 27.5 - 29.5 GHz Frequency Band and)
to Establish Rules and Policies for)
Local Multipoint Distribution Service)

CC Docket No. 92-297
RM-7872; RM-7722

COMMENTS OF
COLE, RAYWID & BRAVERMAN

The law firm of Cole, Raywid & Braverman ("CRB") submits these Comments in the referenced proceeding to establish rules and procedures for the proposed Local Multipoint Distribution Service ("LMDS"). CRB's Comments will solely address and support the Commission's cross-ownership proposals and tentative conclusions as they relate to cable television operators.

The Notice of Proposed Rulemaking in CC Docket No. 92-297 ("NPRM") tentatively concludes that the Commission should not impose any cross-ownership restrictions on any video distribution or telecommunications firm in licensing LMDS. 8 FCC Rcd. No.2 557, 563 (1993). The Commission reasons that the potentially exploitive market conditions that justified the imposition of certain cable cross-ownership restrictions on the provision of Multichannel Multipoint Distribution Service ("MMDS") will not be present in the development of the 28 GHz band. As explained

No. of Copies rec'd
List A B C D E

herein, CRB supports the Commission's tentative determination with respect to cable television operators. In addition, CRB demonstrates that Section 11 of the 1992 Cable Act does not apply to LMDS.

I. Cable Cross-Ownership Restrictions Are Unnecessary and Anti-Competitive

A. Ample Competition For Multichannel Video Services Exists

In 1990, the Commission established cross-ownership restrictions barring cable companies from acquiring or using MDS and MMDS (hereafter collectively "MMDS") licenses in their franchised service areas. Report and Order, 5 FCC Rcd. 6410, 6416 (1990). The FCC balanced two competing interests in imposing the restriction. While cable use of MMDS to serve sparsely settled areas and to economically expand capacity would benefit the public, allowing cable operators access to MMDS would eliminate a multichannel competitor in the cable operator's franchised territory. Id. at 6416-6417. Because MMDS represented "one of the most imminent" sources of competition to cable in 1990, the Commission decided that, on balance, a cross-ownership restriction was justified. Id. at 6417.

CRB submits that the competitive climate has shifted significantly since 1990, and competition for multichannel service exists or is imminent from numerous sources. For example,

Direct Broadcast Satellite service is expected to be commenced in early 1994 by Direct TV and United States Satellite Broadcasting. Another DBS permittee (EchoStar Satellite Corp.) has announced plans to commence service, and several other DBS permittees are actively planning competitive services.

In 1992, the Commission adopted its video dial tone decision which permits telephone companies to offer video transport facilities to video programmers within the telephone companies' service areas. Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd. 5781 (1992). The FCC requires a basic platform capable of providing "multiple video programmers" access to the video dial tone transmission service. Id. at 5797 (emphasis added). Already, the local telephone companies have begun the process of establishing video dial tone services competitive with local cable offerings. See, e.g., Application of New Jersey Bell Telephone Company for 214 Authority to Provide Video Dial Tone Service in Dover Township, Ocean County, New Jersey, File No. W-P-C-6840.

In addition, wireless cable companies using MMDS facilities have accelerated their entry into numerous markets around the country. Such systems have been established in market areas such as Los Angeles, Austin, Fort Worth, Corpus Christi and Albany. Systems are scheduled to be launched in Minneapolis,

Pittsburgh and numerous other markets later this year. Obviously, the MMDS technology that was poised to provide "imminent" competition to cable in 1990 has done just that.

In 1990, wireless cable was the only significant imminent competitor. Cross-ownership restrictions were necessary to allow that competitor to develop. Today the landscape has changed dramatically with numerous multichannel video providers poised to compete. By the time this rulemaking is concluded, and assuming the proposed LMDS service is established, LMDS will be one of a number of alternative multichannel video delivery mechanisms available. Consequently, there is no basis, as there was in 1990 with MMDS, to impose any cross-ownership restrictions on cable television ownership and use of LMDS facilities.

B. LMDS Will Provide Competition for
Non-Video Telecommunications Services

Although the Commission acknowledges the innovative proposals and experimental video operations of the Suite 12 Group, in the NPRM, the Commission refused to require, or even encourage, that video programming be the primary service offered by future LMDS operators. The NPRM does predict that video programming will represent the largest use of the 28 GHz spectrum "at this time." NPRM 8 FCC Rcd. No. 2 at 559. However, the Commission also agreed with certain aspects of the Video/Phone Systems, Inc. petition, and proposed technical rules that would

allow maximum flexibility for LMDS licensees when designing their systems. See Id. at 559-560.

In other words, LMDS, as proposed, is not synonymous with video service. Other telecommunications options have also been proposed as part of this new service. In many geographic areas, where several multichannel video service providers already exist (or are operational before LMDS) the offering of additional, traditional video services may not be economically viable. However, the provision of local exchange and innovative telecommunications services, such as videoconferencing and telecommuting, may be demanded in such markets. It may even develop that non-video applications will provide the greatest utility and value for the LMDS. Since the Commission does not propose to limit use of the 28 GHz band to video applications only, it would be premature and counterproductive for the Commission to exclude cable television companies from access to a service that promises to introduce competition for traditional telephone service, as well as, to usher in a host of innovative wireless telecommunications services.

II. Cable Cross-Ownership Restrictions Are Not Required By The 1992 Cable Act

The NPRM questions whether Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 would prohibit a cable operator from holding an LMDS license in its

franchised service area. Id. at 563. CRB submits that Section 11 does not impose a statutory cable cross-ownership restriction. In Section 11, Congress prohibits cable operators from holding MMDS licenses in their cable franchise areas. The language of the statute is specific in referring to the Multichannel Multipoint Distribution Service. Section 11(a)(2) also grandfathers cable ownership of MMDS facilities as of the date of enactment, again indicating that the provision was directed at the existing MMDS.

The legislative history reinforces the conclusion that only MMDS was contemplated by Section 11. In the Conference Report, it is explained that the Senate bill's MMDS cross-ownership provision is adopted in the 1992 Cable Act. The Senate bill is explained as prohibiting "a cable operator from owning a multichannel multipoint distribution service (MMDS) . . . in the same areas in which it holds a franchise for a cable system." See H.R. Conf. Rep. No. 862, 102 Cong. 2d Sess. 81. The Conference Report also explains that the DBS cross-ownership restrictions contained in the Senate bill are deleted. Id. at 82. This demonstrates clearly that Congress carefully crafted any cross-ownership restrictions on a service by service basis.

Congress was well aware of the numerous alternative multichannel video providers in drafting the 1992 Cable Act.

Section 2(c) of the Act specifically provides a definition of the term "multichannel video programming distributor" that identifies cable television, MMDS, DBS and TVRO. Clearly, when Congress created the cable cross-ownership restriction in Section 11, it intended only to affect MMDS.

This conclusion is further supported by the fact that the proposed LMDS service has been under active (and very public) consideration since at least 1991. As explained in the NPRM, the Commission authorized Suite 12's service in 1991, and thereafter, over 970 similar applications were received from applicants around the country. NPRM 8 FCC Rcd. at 558. Despite this, Congress clearly identified the MMDS as the sole subject of the Section 11 restriction.

CONCLUSION

No legitimate policy or statutory basis exists for imposing any cable television cross-ownership restrictions on the Local Multipoint Distribution Service. Cable television access to LMDS spectrum will enhance competition in the provision of video and non-video telecommunications services. Accordingly, CRB urges the Commission to adopt its tentative proposal to allow cable television companies to be licensed for and to operate LMDS facilities without geographic restrictions.

- 8 -

Respectfully submitted,

By: 
James F. Ireland, III
Theresa A. Zeterberg

Cole, Raywid & Braverman
1919 Pennsylvania Avenue
Suite 200
Washington, D.C. 20006
(202) 659-9750

March 16, 1993