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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF
COLE, RAYWID & BRAVERMAN

The law firm of Cole, Raywid & Braverman ("CR&B") submits these Reply Comments in the referenced proceeding. Specifically, CR&B addresses the cable television/LMDS cross-ownership issue.

The Commission is urged by several commenters to reverse its tentative conclusion not to impose any cross-ownership restrictions on the cable industry when licensing LMDS.[1/] CR&B will address the specifics of these comments in turn. However, as a preliminary matter CR&B notes that none of the commenters has justified the need for the extraordinary action advocated. WCAI, Suite 12 and the Coalition ask the Commission to exclude an entire industry from participating in a dynamic, new, multi-faceted service to advance those parties' own

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1/ See Comments of Wireless Cable Association International, Inc. ("WCAI"), Suite 12 Group ("Suite 12"), and The Coalition For Wireless Cable ("Coalition").

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parochial economic interests. Such exclusion is not only bad policy, but is not supported by the Cable Act of 1992, the Commission's rules or precedent, or the evolving state of the Nation's video entertainment and telecommunications industries.

1. THE CABLE ACT OF 1992 DOES NOT IMPOSE A CABLE/LMDS CROSS-OWNERSHIP BAR

WCAI, Suite 12 and the Coalition all argue that the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act of 1992") bars cable operators from serving as LMDS licensees in their franchise areas. WCAI Comments at 11-12, Suite 12 Comments at 13-14, Coalition Comments at 37-39. Specifically, the commenters contend that when Congress drafted Section 11 of the Cable Act of 1992 to preclude common ownership

licensees of 2.5 GHz band Multichannel Multipoint Distribution Service facilities." WCAI Comments at 12.

These comments misconstrue both the statute and its legislative history, and are patently wrong. In its Comments, CR&B explained that Section 11 of the Cable Act of 1992 does not impose a statutory cable/LMDS cross-ownership restriction. First, the statute specifically refers to MMDS and SMATV only. Second, Section 11(a)(2) specifically was included to provide a grandfathering provision for existing cable ownership of MMDS systems only. Third, despite WCAI's assertion to the contrary, the legislative history does indeed establish that Congress only intended MMDS and SMATV to be covered under Section 11. The Conference Report notes that the Senate bill's cross-ownership provisions were adopted in Section 11. And, the Conference Report specifically explains that the relevant prohibition bars a cable operator from owning ". . . MMDS or SMATV systems in the same areas where it holds a franchise for a cable system." See H.R. Conf. Rep. No. 862, 102 Cong. 2d Sess. 81. (Emphasis added). Finally, proposed cable/DBS cross-ownership restrictions

Act of 1992. Section 2(c)(6) of the statute defines the term "multichannel video programming distributor" and identifies a number of technologies competitive with cable. Yet, Section 11 clearly identifies only MMDS as warranting the extraordinary protection of a cross-ownership restriction. For the Commission to extend that restriction to LMDS, which involves a completely different technology and service (interactive voice, data and video) would clearly contravene the will of Congress.

2. IMPOSING A CROSS-OWNERSHIP RESTRICTION WILL UNDERMINE COMPETITION

WCAI, Suite 12 and the Coalition all make similar, self serving policy arguments to support their cable/LMDS cross-ownership prohibition proposal.[3/] These arguments posit that cable will enter LMDS to monopolize the video programming market, or to preempt competition. WCAI Comments at 12; Suite 12 Comments at 38-39; Coalition Comments at 12-13. As a preliminary

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3/ It should be noted that these commenters' view of "competition" involves the discredited notion that wireless cable operators should be entitled to one LMDS license in their markets. There is absolutely no support for such a government give away program. The wireline set-aside for cellular was only justified by the extraordinary history and investment of the telephone industry in this country's voice communications network. Even with that, the set-aside was controversial and a very close call on policy grounds. In this regard, the Commission has not proposed to grant such a telco set aside for PCS. Clearly, a special LMDS give away for wireless cable would not survive legal scrutiny. Moreover, LMDS' more valuable role in the telecommunications marketplace may well be voice and data communications. At this stage, committing one such license in each market to wireless cable would be short sighted, bad public policy.

matter, at this point in the licensing process, it is not at all clear that video programming will be the primary service offered over LMDS. In fact, one of the early players in this industry, Video/Phone Systems, Inc. primarily has advocated hybrid telecommunications uses for LMDS, such as video conferencing and tele-medicine. See Notice of Proposed Rulemaking, 8 FCC Rcd. 557, 561 (1993). Unquestionably, a cable operator is not capable of having any competitive effect on the provision of telecommunications services in its franchise area.

Furthermore, the Commission has proposed licensing two LMDS providers in each market area. See NPRM, 8 FCC Rcd. at 564. Given that cable will be competing with the wireless cable, DBS and TVRO industries, and with video-dialtone providers by the time LMDS providers are licensed and operational, and that there will likely be at least two LMDS licenses in each market, the imposition of a cross ownership restriction on cable will not enhance competition in the multichannel video marketplace. More importantly, such a restriction would seriously reduce the prospects for competition to local exchange telephone companies by excluding the cable television industry from providing a wireless alternative (voice and video) to the local exchange network.

Finally, the Commission can turn to current, analogous Commission proceedings for guidance in resolving this issue. For

example, in the Personal Communications Service ("PCS") rulemaking, the Commission tentatively concluded not to impose Local Exchange Carrier/PCS cross-ownership restrictions, even though PCS providers clearly will be providing telecommunications service competitive with LEC services. The Commission reasoned that allowing LECs to provide PCS within their service areas would promote development of a more efficient network structure. Notice of Proposed Rule Making and Tentative Decision in Gen. Docket 90-314, 7 FCC Rcd. 5676, 5705-06 (1992). Such reasoning applies to cable's role in LMDS.

CONCLUSION

None of the commenters have raised any legitimate statutory or policy rationale for imposing a cable television/LMDS cross-ownership restriction. Accordingly, the Commission should adopt its tentative proposal to allow cable television companies to apply for and operate LMDS systems within their franchise service areas.

Respectfully submitted,

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