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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Rulemaking to Amend Parts 1, 2, 21, and 25	)	CC Docket No. 92-297
of the Commission's Rules to Redesignate	)	
the 27.5-29.5 GHz Frequency Band, to	)	
Reallocate the 29.5-30.0 GHz Frequency	)	
Band, to Establish Rules and Policies for	)	
Local Multipoint Distribution Service and	)	DOCKET FILE COPY ORIGINAL
for Fixed Satellite Services	)	

Reply Comments
of the
Competition Policy Institute

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Summary

CPI believes that the Commission must take action to preclude incumbent local exchange carriers (ILECs) and incumbent cable operators (ICOs) from acquiring the single license for Local Multipoint Distribution Service (LMDS). If the Commission fails to take any action, the ILEC and ICO could jointly acquire the LMDS license, a result that would be harmful to consumers and competition.

The arguments raised by the ILECs and ICOs against eligibility restrictions are unpersuasive. First, the Telecommunications Act of 1996 was silent on the issue of LMDS licensing and does not mandate any particular result. Second, the ILECs and ICOs have failed to prove that they would provide LMDS more efficiently than other providers. In any case, noone can predict who can provide LMDS most efficiently at this point, particularly when the technology is so new. Third, the Commission is not permitted by legislation to consider potential auction revenues in making its licensing decisions. Fourth, there are numerous precedents for imposing eligibility restrictions where, as here, LMDS could compete directly with the service provided by ILECs and ICOs. Fifth, CPI agrees with the ILECs and ICOs that eligibility should depend upon the amount of competition they face in their local markets.

CPI suggests that ILECs and ICOs should be precluded from acquiring the LMDS license where they have facilities to serve any customers in a BTA. If the Commission adopts a threshold, it should be no more than 5% of the consumers in a BTA. CPI believes the needs of consumers served by rural telephone companies and ICOs can be served by allowing the LMDS licensee to enter contractual arrangements with the rural ILEC or rural ICO.

REPLY COMMENTS OF THE
COMPETITION POLICY INSTITUTE
CONCERNING ELIGIBILITY RESTRICTIONS
FOR LMDS LICENSES

CC DOCKET NO. 92-297

The Competition Policy Institute (CPI) submits these reply comments in response to the Commission's Fourth Notice of Proposed Rulemaking in CC Docket No. 92-297 concerning eligibility restrictions for licenses for Local Multipoint Distribution Service (LMDS) providers.

CPI is a non-profit organization that advocates state and federal regulatory policies to bring competition to energy and communications markets in ways that benefit consumers. CPI believes that competition will lead to reduced regulations, new technologies, higher service quality, and lower prices for consumers.

I. Introduction and Summary

After reviewing the initial comments filed earlier in this proceeding, CPI continues to believe that the incumbent local exchange carriers (ILECs) and the incumbent cable operators (ICOs) should not be allowed to acquire the license to provide LMDS in the market where they provide dominant local exchange telephone service or cable service. The arguments made by those who support allowing the ILECs and ICOs to obtain LMDS licenses in their service areas do not overcome the central problem discussed by CPI in its comments -- that the ILECs and ICOs will have strong incentives not to use LMDS to provide services that compete with their existing telecommunications or video services. In these reply comments, CPI responds to the arguments made by the ILEC and ICO representatives and clarifies a few remaining issues.

II. The Commission must act to prevent ILECs and ICOs from jointly acquiring the LMDS license.

Before responding to the specific arguments, CPI would like to emphasize the need for eligibility restrictions by drawing the Commission's attention to a "worst-case scenario" that has not been discussed in the comments to date. **If the Commission fails to adopt any eligibility restrictions on LMDS licenses, the incumbent cable operator and the local telephone company could combine efforts to acquire the LMDS license in a joint venture or other similar arrangement.** CPI is not aware of any regulation or law that would prohibit the ILEC or ICO from jointly purchasing the license for LMDS in a particular BTA, unless the Commission adopts such a rule in this proceeding.[1]

As CPI pointed out in its initial comments, local exchange carriers would have incentives not to use LMDS to provide telephony services, while the cable operator would have incentives not to provide video services. If the ILEC and the ICO jointly acquire the LMDS license, the owner[s] would have incentives not to deploy either telephony or video services. This hypothetical situation, if permitted by the FCC, would effectively neuter LMDS as an independent provider of services, and would deprive consumers of the new services and the competitive alternatives that LMDS could provide. To allow this scenario would truly be a nightmare for consumers and competition.

III. The Arguments of the ILECs and ICOs against eligibility restrictions are unpersuasive.

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[1] Sections 652(a) and (b) prohibit a local exchange carrier, or an affiliate, from acquiring more than a 10 percent financial interest in a cable operator providing cable service, and prohibits a cable operator, or an affiliate, from acquiring more than a 10 percent financial interest in a local exchange carrier providing local exchange service. These provisions do not appear to bar an affiliate of a local exchange company from acquiring more than 10% of an affiliate of a cable operator, and vice versa. In other words, Section 652 does not appear to prohibit joint ventures between an ILEC affiliate and an ICO affiliate for the provision of LMDS.

The representatives of the ILECs and the ICOs that filed comments against eligibility limitations for LMDS licenses fail to make their case. The following discussion responds to each of the arguments against eligibility restrictions suggested by the ILECs and ICOs.

A. The Telecommunications Act of 1996 does not preclude the Commission from adopting eligibility rules.

Some of the ILECs indicated that the Telecommunications Act of 1996 ("the Act") requires the Commission to adopt an open entry policy for LMDS licenses.[2] This is not accurate. The Telecommunications Act simply does not address the issue of licensing policies for LMDS. In passing the Act, Congress eliminated some cross-ownership restrictions (such as the cable-telephone cross-ownership restriction) and retained others (such as the cable-MMDS cross-ownership restriction and the newspaper-broadcast rule). In other words, Congress determined which rules to retain and which to eliminate on a case-by-case basis based upon its determination of the public interest. The Act leaves the decision concerning eligibility for LMDS licenses to the Commission, based upon its view of the public interest in this particular proceeding.

B. The ILECs and ICOs have not made the case that efficiencies of providing LMDS with ILEC or ICO services are relevant to this decision.

In the Notice, the Commission asked if there were any inherent cost advantages possessed by incumbent LECs or incumbent cable operators in holding LMDS licenses to provide service

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[2] See, e.g., Joint Comments of Bell Atlantic Corporation and SBC Communications Inc, p. 7 ("The Act clearly supports open entry generally, and entry of LECs into video services such as LMDS in particular."); Comments of United States Telephone Association, p. 5 ("Any effort to prohibit LECs from participating in auctions for LMDS licenses in their geographic regions would be contrary to Congressional intent.")

within their geographic services areas.[3] The evidence submitted in the initial round of comments on this issue is scant and conflicting. Some of the ILECs allege that there are efficiencies in allowing ILECs to provide LMDS but provide no evidence to back up their assertions.[4] Supporters of eligibility restrictions allege that no such efficiencies exist.[5] Further confusing the record on this issue, one ILEC states that there are no efficiencies,[6] while a supporter of eligibility restrictions argues that the ILECs do have efficiencies.[7]

CPI again urges the Commission not to base its decision concerning eligibility on speculations about whether the ILECs or ICOs have efficiencies. Noone can make predictive judgments about how LMDS technology can be deployed most efficiently with any assurance of accuracy. This is especially true given the dynamic nature of LMDS technology. It is highly

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[3] First Report and Order and Fourth Notice of Proposed Rulemaking (Fourth Notice), CC Docket No. 92-297, July 22, 1996, para 127.

[4] See, e.g., Comments of USTA, p. 4 ("LECs should be given the opportunity to participate in the LMDS auctions because . . . they have the resources, expertise, and commitment necessary to deploy LMDS and integrate LMDS into their operations."); USWest, Inc. Comments, p. 3 ("These incumbents have the efficiencies of scale and scope and the necessary expertise, capital, existing infrastructure, and experience to promote the early development of LMDS.")

[5] See, e.g., MCI Comments, p. 3 ("As a broadband wireless service, moreover, *LMDS has no efficiencies or economies of scope in common with wireline telephone or cable television service.*"); Economic Report of Kenneth Baseman, appended to Comments of WebCel Communications, Inc., p. 5 ("There are No Plausible Efficiencies from MSO or LEC Control of LMDS Spectrum.").

[6] See, Comments of Pioneer Telephone Association, Inc., p.3. ("Pioneer, and other rural LECs, will not hold an inherent advantage in providing LMDS service. This technology is not currently widely deployed and we and others would need to develop the required expertise in the LMDS markets.")

[7] See, Comments of ComTech Associates, Inc., pp. 13-14.

likely that LMDS licensees will decide to deploy their technology differently in different markets, and that the most efficient technology will change over time as the services mature.

C. Considerations of Potential Auction Revenues are Irrelevant to the Commission's decision.

Some commenters suggest that the Commission must permit ILECs and ICOs to acquire the LMDS license in their markets in order to increase the potential auction revenues.[8] This argument conveniently ignores Section 309(j)(7)(A) of the Communications Act of 1934, which precludes the Commission from basing a public interest finding on the expectation of Federal revenues from auctions.

Furthermore, it is not at all clear that limiting the eligibility of the ILECs and ICOs from the auction will diminish auction revenues. Under CPI's proposal, only the ILEC and ICO in that BTA would be precluded from bidding in the auction. All other ILECs and ICOs that provide service outside of the BTA, as well as any other party, may bid in the auction. In other words, eligible bidders would continue to include out-of-region Regional Bell Operating Companies, other out-of-region ILECs, out-of-region ICOs, long distance companies, equipment manufacturers, and many other well-capitalized companies. Precluding the ILECs and ICOs in that service area may even encourage bidders to participate in the auction who might otherwise believe that participating in the auction would be fruitless.

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[8] See, Joint Comments of Bell Atlantic and SBC, p., 6 ("Open eligibility encourages maximum participation in auctions, thereby encouraging a bidding process which recovers full value from licensing the spectrum."); Comments of USTA, p. 7 ("Suggestions by MCI and WebCel to restrict incumbent LECs from participating in the auctions for LMDS licenses in their markets will have the unfortunate effect of limiting potential revenues, which clearly would not be in the public interest.")

Finally, even if the Commission believes that participation by the ILECs and ICOs would bring in additional revenues in an auction, the additional revenues would be collected only because the ILECs and ICOs are trying to protect their monopoly or oligopoly rents from their existing services. This is hardly the basis on which public policy decisions should be made.

D. The Commission's rules on other services tend to support eligibility restrictions for LMDS.

Some ILECs argue that, since the Commission did not restrict entry for other wireless services, it should not restrict eligibility for LMDS. The ILECs cite the Commission's rules for Personal Communications Services (PCS), MultiChannel, MultiPoint Distribution Service (MMDS), General Wireless Communications Service (GWCS), Direct Broadcast Satellite (DBS) service, and Mobile Satellite Service (MSS) as examples of how the Commission has allowed the ILECs to acquire licenses of other wireless services. In fact, when analyzed properly, these examples tend to support eligibility restrictions in cases such as LMDS.

The biggest difference between LMDS and these other wireless licenses is that the Commission is only planning to issue a single LMDS license in each market. In each of these other cases cited by the ILECs, the Commission permits several licensees to provide service, and in most cases, the Commission allowed the ILECs to acquire some, but not all of the licenses. As long as the Commission is issuing only one LMDS license in each market, the Commission should take special care that its decisions concerning LMDS eligibility help to promote competition as much as possible.

As a practical matter, if the Commission allows LMDS licenses to be given to the ILEC or ICO in a market, and the incumbent fails to develop the service to its fullest, the Commission

will have tremendous difficulty in requiring the licensee to relinquish the license. If, on the other hand, the Commission precludes ILECs and ICOs from acquiring the LMDS license, and the service fails to develop to its fullest, the Commission can always change its rules to allow ILECs and ICOs to acquire the licenses in the secondary market. Furthermore, the wireless licenses discussed by the ILECs have not been used to provide service directly in competition with the service of the ILECs. PCS, cellular, MMDS, GWCS, and DBS do not compete directly with wireline local exchange service, the predominant business of the ILECs.

By contrast, LMDS has the potential to compete directly with wireline service because it is a "fixed", not a mobile, service. In cases where a service competes directly with the service of an incumbent, the Commission or Congress has adopted eligibility restrictions. The Commission, for instance, limited the eligibility of cellular carriers for competitive PCS licenses in the same market, and Congress limited the eligibility of ICOs for competitive MMDS licenses in the same market. As CPI discussed in its initial comments, there is a long history of precedents for rules limiting eligibility in cases where a new technology could compete with an incumbent.

E. The ILECs and ICOs accurately point out that the issue of eligibility for LMDS licenses should depend upon the competitiveness of the market.

Some commenters argue that they should not be precluded from acquiring LMDS licenses because of the competition they already face. For instance, USTA says "[i]t is also important to note that there are many competitors currently providing, or planning to provide,

voice and video services in every conceivable manner."[9] The first argument raised by the National Cable Television Association (NCTA) for its eligibility is that "cable operators face significant and increasing competition in the market for the delivery of multichannel video services to residential customers." NCTA further points out that "[t]he cable industry will be far too busy responding to competition from these other sources to devote scarce capital to warehousing." [10]

CPI agrees with these incumbents that the competitiveness of the markets for local exchange telephone service and cable service should determine whether the ILECs and ICOs should be eligible for LMDS licenses. As CPI suggested in its initial comments, once the Commission finds that a market for local exchange service or cable service is competitive, the Commission should remove the eligibility restriction. Until the Commission is able to make that finding for a particular market, however, the Commission should preclude the ILEC or ICO from acquiring that license.

IV. The Commission should preclude any ILEC or ICO from acquiring an LMDS license if it has facilities passing any consumers in a BTA, or no more than 5%.

In the Fourth Notice, the Commission asks when an ILEC or ICO should be considered "in-region", and suggests that an ILEC or ICO should be considered "in-region" if 20 percent or more of the population of a BTA is within a LEC's telephone service area or a cable company's

[9] Comments of USTA, p. 7.

[10] Comments of the National Cable Television Association, Inc., pp. 3-4.

franchised service area.[11] CPI believes that the 20 percent threshold is too high. CPI believes that an ILEC or an ICO that does not face real competition is unlikely to develop the full potential of the LMDS service where it has invested in wireline facilities. If an incumbent's facilities pass 20 percent of the consumers in a BTA, the incumbent would have incentives not to deploy the full range of LMDS services to those 20 percent. CPI believes that a strong argument could be made that incumbents should be precluded if they serve 1 customer in a BTA, so as to ensure that every single customer obtains the benefit of the full range of LMDS services. If the Commission, nevertheless decides to adopt a threshold percentage of customers in a BTA, CPI urges the Commission to adopt as low a threshold as possible, and no greater than 5 percent.

V. The needs of rural telephone companies can be met through contractual arrangements.

The Commission also asks for comment on whether it should allow partitioning and disaggregation of the LMDS license to ILECs or ICOs. Several rural telephone companies argue that they should not be precluded from acquiring LMDS licenses in order to encourage deployment of LMDS in rural areas.

CPI appreciates the special concerns that apply in rural markets and shares the concern that rural consumers should receive access to LMDS services. Of course, to the extent that a rural telephone company serves less than 5 percent of the consumers in a BTA, the rural telephone companies would not be precluded from acquiring the LMDS license under CPI's approach. As a practical matter, however, it is unlikely that rural telephone companies, or rural cable operators for that matter, will succeed in the bidding for LMDS licenses.

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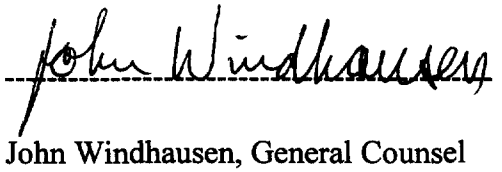
[11] Para. 132.

CPI believes that the needs of rural telephone companies and rural cable operators can be met by allowing the LMDS licensee to enter contractual arrangements with the rural ILEC or rural ICO to provide LMDS to customers in the market it serves. Under this approach, the principal LMDS licensee would continue to be responsible for the development of the service throughout the BTA, including the area served by the rural ILEC or ICO. Allowing these types of contractual arrangements, however, could allow rural customers to obtain the benefits of the technology while the licensee concentrates its initial attention on the urban and suburban markets.

VI. Conclusion

CPI urges the Commission to take the approach that maximizes the opportunities for competition to develop for telephone exchange service and video service. If the FCC fails to take any action in this proceeding, nothing will prevent the ILECs and ICOs from jointly acquiring the single LMDS license in each market, a result that could be the death knell for this new, innovative technology.

Respectfully Submitted,



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