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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)
)
Rulemaking To Amend Parts 1, 2, 21, and 25)
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 for Fixed Satellite Services)
)
Petitions for Further Reconsideration of the)
Denial of Applications for Waiver of the)
Commission's Common Carrier Point-to-)
Point Microwave Radio Service Rules)

CC Docket No. 92-297

THIRD ORDER ON RECONSIDERATION

Adopted: February 3, 1998

Released: February 11, 1998

By the Commission: Chairman Kennard and Commissioners Ness and Powell issuing separate statements; Commissioner Furchtgott-Roth approving in part, dissenting in part, and issuing a statement.

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I. INTRODUCTION

1. On March 11, 1997, the Commission adopted a Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking (*Second Report and Order*) (*Fifth NPRM*) in which the Commission designated the frequency band at 31.0-31.3 GHz (31 GHz band) for the Local Multipoint Distribution Service (LMDS), promulgated service rules to implement LMDS, denied petitions for reconsideration of the dismissal of 971 waiver applications, and proposed rules to implement partitioning and disaggregation of LMDS licenses.¹ LMDS is a fixed, broadband, point-to-multipoint wireless service assigned a total of 1,300 megahertz of spectrum in the 27.5-28.35 GHz, 29.1-29.25 GHz, and 31 GHz frequency bands. LMDS licensees may offer a wide array of telecommunications and video programming distribution services that could provide wireless competition to cable television systems and local exchange carriers (LECs).

¹ Rulemaking To Amend Parts 1, 2, 21, and 25 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 for Fixed Satellite Services, Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, CC Docket No. 92-297, Suite 12 Group Petition for Pioneer Preference, PP-22; Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997) (*Second Report and Order*) (*Fifth NPRM*); *appeal pending sub nom. Melcher v. F.C.C.*, Case Nos. 93-1110, *et al.* (D.C. Cir., filed Feb. 8, 1993) (*Melcher v. F.C.C.*); Order on Reconsideration, 12 FCC Rcd 6424 (1997) (*First Reconsideration*); Second Order on Reconsideration, 12 FCC Rcd 15082 (1997) (*Second Reconsideration*); Third Report and Order, FCC 97-378, released Oct. 15, 1997.

2. In this Third Order on Reconsideration, we address petitions for reconsideration and clarification of the *Second Report and Order*, except petitions for reconsideration of the competitive bidding rules adopted in the *Second Report and Order*. Those petitions were considered in the Second Order on Reconsideration in which we modified the competitive bidding rules affecting small business participation in the LMDS license auction.² The remaining petitions for reconsideration and clarification, which are identified in Appendix A,³ generally are denied, with one exception. We grant reconsideration of the decision to dismiss the pending applications that were filed under the 31 GHz service rules and were held in abeyance pending the outcome in the *Second Report and Order*. We will permit the dismissed applicants to refile applications requesting the same authorization to provide 31 GHz services, but subject to the limitations the Commission imposed on the majority of the incumbent 31 GHz licensees when the band was designated for LMDS in the *Second Report and Order*. Thus, operations authorized in response to the refiled applications will be secondary to LMDS. Such operations will not be protected from harmful interference from LMDS and may not interfere with LMDS, and they may not be expanded. We defer consideration of the comments filed in response to the *Fifth NPRM* issued in conjunction with the *Second Report and Order* to a separate Report and Order to be issued in the near future.

II. BACKGROUND

3. This proceeding was initiated when the Commission released a *First NPRM* on January 8, 1993, in response to petitions for rulemaking to redesignate the use of two gigahertz of spectrum in the 27.5-29.5 GHz frequency band (28 GHz band) from point-to-point, common carrier microwave service to local multipoint distribution service (LMDS) that includes a point-to-multipoint area-wide service and non-common carrier services.⁴ The Commission proposed licensing and operating rules to implement LMDS and provide licensees with sufficient flexibility to satisfy consumer demand for broadband services, expedite service to the public, and make more efficient use of underused spectrum. The Commission also adopted an Order denying 971 pending applications for waiver of the existing 28 GHz rules in order to provide LMDS.

² *Second Reconsideration*, 12 FCC Rcd at 15082-83 (para. 1).

³ Each petitioner is listed in Appendix A with an abbreviated name, which is used in this Order.

⁴ Rulemaking to Amend Part 1 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; Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; RM-7872, RM-7772; Suite 12 Group Petition for Pioneer's Preference; University of Texas - Pan American Petition for Reconsideration of Pioneer's Preference Request Denial; PP-22; Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd 557 (1993) (*First NPRM*), *appeal pending sub nom. Melcher v. F.C.C.*

4. The Commission requested further comment in the *Third NPRM* on a proposal to segment the two gigahertz in the 28 GHz band between LMDS and certain satellite systems.⁵ With respect to LMDS, additional comments also were sought on revised proposals for service rules and on competitive issues concerning the potential impact of the entry of existing local exchange companies (LECs) and cable companies in the new LMDS market. The Commission proposed technical rules and competitive bidding procedures to award licenses from among mutually exclusive applications that were similar to procedures adopted for other wireless services.

5. The Commission subsequently adopted the proposed band segmentation plan for the 28 GHz band in the *First Report and Order and Fourth NPRM*, and designated 1000 megahertz of spectrum for LMDS.⁶ Specifically, 850 megahertz was designated in the 27.5-28.35 GHz band for LMDS on a primary basis, while 150 megahertz was designated in the 29.1-29.25 GHz band to be shared by LMDS on a co-primary basis with certain mobile satellite service (MSS) feeder links. An additional 300 megahertz of spectrum was proposed for LMDS on a primary basis in the 31.0-31.3 GHz band (31 GHz band). The Commission sought further comment on whether to restrict the eligibility of existing LECs and cable operators to obtain LMDS licenses in the geographic areas they serve.⁷

6. The Commission next adopted the *Second Report and Order* in which it adopted the proposal to redesignate the entire 300 megahertz in the 31 GHz band for LMDS, as modified to require LMDS licensees to protect all incumbent licensees except incumbent Local Television Transmission Service (LTTS) licensees from harmful interference in the outer 150 megahertz segment of the band. The Commission also adopted the service rules to implement LMDS and govern the licensing and operations of LMDS under a flexible regulatory framework. Among the rules are provisions for the licensing of LMDS on an area-wide basis using the 493 Basic Trading Areas (BTAs) and for each BTA to be assigned two license blocks, one for 1,150 megahertz of spectrum and the other for 150 megahertz.

⁵ Rulemaking to Amend Parts 1, 2, 21, and 25 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, and To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, Suite 12 Group Petition for Pioneer Preference, PP-22; Third Notice of Proposed Rulemaking and Supplemental Tentative Decision, 11 FCC Rcd 53 (1995) (*Third NPRM*).

⁶ Rulemaking To Amend Parts 1, 2, 21, and 25 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 for Fixed Satellite Services, CC Docket No. 92-297; First Report and Order and Fourth Notice of Proposed Rulemaking, 11 FCC Rcd 19005 (1996) (*First Report and Order*) (*Fourth NPRM*).

⁷ *Id.* at 19047-58 (paras. 105-136).

7. A licensee may be authorized to provide common carrier or non-common carrier services, or both services, under a single license in order to accommodate the wide variety of telecommunications and video distribution services. The Commission adopted a three-year eligibility restriction prohibiting incumbent LECs and incumbent cable companies from having an attributable interest in the larger 1,150 megahertz LMDS license whose geographic service area significantly overlaps such incumbent's authorized or franchised service area. Competitive bidding procedures also were adopted to award licenses among applications that are mutually exclusive.

8. In addition, in the *Second Report and Order*, the Commission permitted LMDS licensees to partition or disaggregate portions of their authorizations, but issued the *Fifth NPRM* in conjunction with the Order to obtain comments on the necessary modifications to the newly adopted service rules to ensure effective implementation of partitioning and disaggregation in the new service. The Commission also adopted an Order on Reconsideration that denied the petitions for reconsideration of the Order issued in conjunction with the *First NPRM* denying 971 pending waiver applications filed under the existing 28 GHz point-to-point rules to provide LMDS. The Commission deferred a final Order on the pending pioneer preference requested by CellularVision and directed the Office of Engineering and Technology to initiate a peer review process.⁸

9. In response to the *Second Report and Order*, petitions for reconsideration of certain service rules were filed by Alliance, LBC, RTG, Sierra, and Webcel.⁹ Letters in support of Sierra's petition were filed by Commpare, CSG, Sunnyvale, Videolinx, and Westec.¹⁰ Nevada

⁸ Subsequently, the Commission adopted an Order on August 29, 1997, that terminates the Commission's pioneer's preference program and dismisses all pending pioneer's preference requests, including the request of CellularVision in this proceeding. This action was in response to the provision in the Balanced Budget Act of 1997 signed into law on August 5, 1997, that terminated on that date the Commission's authority to provide preferential treatment in its licensing procedures for pioneers. Dismissal of All Pending Pioneer's Preference Requests, CC Docket No. 92-297, RM-7872, PP-22, ET Docket No. 94-124, RM-8784, GEN Docket No. 90-314, PP-68, GEN Docket No. 90-357, PP-25, IB Docket No. 97-95, RM-8811, RM-7784, PP-23, RM-7912, PP-34 *et al.*, Review of the Pioneer's Preference Rules, ET Docket No. 93-266, Order, 12 FCC Rcd 14006 (1997). Thus, the matter of CellularVision's pioneer preference is now moot.

⁹ Public Notice, Report No. 2196, released May 15, 1997; Public Notice, Report No. 2203, released June 12, 1997.

¹⁰ The letters of Commpare, CSG, and Westec are late-filed, after the period for filing petitions for reconsideration and clarification under Section 1.429(e) of the Commission's rules had expired. 47 C.F.R. § 1.429(e). We will include the letters for consideration, inasmuch as they will not delay the proceeding and otherwise ensure a complete record. Commpare Letter of June 2, 1997; CSG Letter of June 13, 1997; Westec Letter of June 2, 1997.

DOT submitted an *ex parte* letter, and Parsons submitted a letter in support.¹¹ Letters requesting clarification were filed by Alcatel and TI. A petition for reconsideration of the Order on Reconsideration was filed by LDH.¹² Celltel Communications Corporation and CT Communications Corporation jointly filed the petition with LDH, but they subsequently filed a letter pursuant to Section 1.41 of the Commission's Rules¹³ withdrawing their request for reconsideration.¹⁴ LDH also filed a motion for stay of implementation of the Order until we review the petition.¹⁵ M3ITC filed an application for review that also seeks further reconsideration of the Order on Reconsideration. Opposition to petitions were filed by Bell Atlantic, CellularVision, RTG, and TI.

10. On July 30, 1997, the Commission issued a Public Notice announcing that the date for the LMDS auction would begin on December 10, 1997.¹⁶ On November 10, 1997, the Bureau issued a Public Notice postponing the auction until February 18, 1998, in order to "further opportunities for businesses to access additional sources of capital to further the advent of new competition in the cable television and local telephony marketplaces."¹⁷ In view of these developments, we deny the motion for stay filed by LDH, inasmuch as we consider its petition at this time before the scheduled auction. We also deny the request of Webcel to set a fixed date for commencement of the LMDS auction within six months of release of the *Second Report and Order*, because Webcel requested a delay of the December 10 auction date.¹⁸

III. DISCUSSION

¹¹ We accept these late-filed letters for consideration, and find that their consideration will not delay the proceeding and ensure that all relevant issues are considered. Nevada DOT *ex parte* Letter of May 29, 1997; Parsons Letter of May 28, 1997.

¹² Public Notice, Report No. 2196, released May 15, 1997.

¹³ 47 C.F.R. § 1.41.

¹⁴ Letter to W. Kennard, General Counsel, from Infinite Telesis, Inc. (formerly LDH International, Inc.), Celltel Communications Corporation, and CT Communications Corporation, dated Aug. 1, 1997.

¹⁵ The court proceeding initiated by LDH and other affected applicants for review of the Order dismissing the 971 waiver applications remains pending. See note 1, *supra*.

¹⁶ Public Notice, FCC Announces Upcoming Spectrum Auction Schedule, DA 97-1627, 12 FCC Rcd 11544 (1997).

¹⁷ Public Notice, Report No. AUC-97-17-C (Auction No. 17), released Nov. 10, 1997.

¹⁸ Webcel Petition at 23-24.

A. In-Region Eligibility Restriction

1. Background

11. In the *Second Report and Order*, the Commission imposed a three-year restriction on the eligibility of incumbent LECs and incumbent cable companies to hold the 1,150 megahertz LMDS license¹⁹ in the same region in which they are incumbents.²⁰ The eligibility restriction expires after three years from the date it became effective (June 30, 2000), unless the Commission determines to extend its applicability. Petitions for waiver of the restriction may be filed after the initial award of LMDS licenses, based upon a showing that the actual conditions in a particular market are sufficiently competitive and rivalrous so that the restriction is not necessary to promote competition in the telecommunications marketplace.

12. The Commission adopted the restriction based on the findings that incumbent LECs and incumbent cable companies have market power and would have the incentive to block LMDS entry into their respective geographic markets. It was noted that “the likelihood that LMDS can increase competition in either the local multichannel video or local telephone exchange markets (or both simultaneously) is high”²¹ The Commission concluded that it could maximize the opportunities for increasing competition and promote the entry of new competitors in the local exchange and cable television marketplace by temporarily restricting incumbents’ eligibility to hold in-region LMDS licenses. These are key Congressional priorities underlying the Telecommunications Act of 1996,²² which recognizes that market power carries with it the ability to act anticompetitively and the need to reduce market power by encouraging competitive entry into communications markets.²³

¹⁹ Unless otherwise specified, the term “LMDS license,” as used in Section III. A, refers to the Block A license of 1,150 megahertz established in Section 101.1005 of the Commission’s Rules, 47 C.F.R. § 101.1005.

²⁰ *Second Report and Order*, 12 FCC Rcd at 12627-34 (paras. 185-199), adopting 47 C.F.R. § 101.1003.

²¹ *Id.* at 12621 (para. 170).

²² Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

²³ *Second Report and Order*, 12 FCC Rcd at 12623-24 (paras. 176-178). See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, *First Report and Order*, 11 FCC Rcd 15499, 15505-56 (para. 3) (1996) (reciting that the principal goals established by the telephony provisions of the 1996 Act include “opening the local exchange and exchange access markets to competitive entry” and “promoting increased competition in telecommunications markets”), *aff’d in part and vacated in part sub nom.* *Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff’d in part and vacated in part sub nom.* *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utilities Board*), *reh’g granted in part and denied in part sub nom.* *Iowa Utils. Bd. v. FCC*, No. 96-3321

13. The restriction includes among its provisions the following key elements discussed in the *Second Report and Order* and incorporated in Section 101.1003 of our Rules. No incumbent LEC or incumbent cable company, or any entity owning an attributable interest in an incumbent LEC or incumbent cable company, "shall have an attributable interest in an LMDS license [defined as the 1,150 megahertz license] whose geographic service area significantly overlaps such incumbent's authorized or franchised service area."²⁴ A significant overlap of an incumbent LEC's or incumbent cable company's authorized or franchised service "occurs when at least 10 percent of the population of the LMDS licensed service area, as determined by the 1990 census figures for the counties contained in such service area, is within the authorized or franchised service area."²⁵

14. The definition of an attributable interest captures a variety of controlling and ownership interests in an incumbent LEC, incumbent cable company, or LMDS licensee, including "[p]artnership and similar ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock or outstanding voting stock of an entity."²⁶ A divestiture procedure allows incumbent LECs and incumbent cable companies to bid on, and acquire, an in-region 1,150 megahertz LMDS license at the auction, subject to divestiture of the ineligible interest or area within 90 days of the grant of the license.²⁷

et al., – F.3d –, 1997 WL 658718 (8th Cir., Oct. 14, 1997), Order on Reconsideration, 11 FCC Rcd 13042 (1996) (*Local Competition First Reconsideration Order*), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996) (*Local Competition Second Reconsideration Order*), Third Order on Reconsideration and Further Proposed Rulemaking, 12 FCC Rcd 12453 (1997) (*Local Competition Third Reconsideration Order*), further recon. pending.

²⁴ 47 C.F.R. § 101.1003(a).

²⁵ 47 C.F.R. § 101.1003(d).

²⁶ 47 C.F.R. § 101.1003(e)(2).

²⁷ 47 C.F.R. § 101.1003(f). The Commission's Rules also provide that:

If no such [divestiture] certification or application is tendered to the Commission within ninety (90) days of final grant of the initial license, the Commission may consider the short form certification and the long form divestiture statement to be material, bad faith misrepresentations and shall invoke the condition on the initial license, cancelling or rescinding it automatically, shall retain all monies paid to the Commission, and, based on the facts presented, shall take any other action it may deem appropriate.

47 C.F.R. § 101.1003(f)(6). See note 54, *infra*, and accompanying text.

2. Participation in Auction and Post-Auction Divestiture

15. In the *Second Report and Order*, the Commission found no compelling public benefit to be achieved by foreclosing incumbent LECs and incumbent cable companies from participating fully in the auction of the larger LMDS license so long as such incumbents subsequently come into compliance with the eligibility restriction and divest the overlapping interests or areas within 90 days of the grant of such license.²⁸ Webcel and LBC request reconsideration of the determination to permit incumbent LECs and incumbent cable companies to participate in the auction of the LMDS licenses for which they are ineligible under the restriction.²⁹ Bell Atlantic and RTG oppose their request and any further limitation on the ability of such incumbents to participate in the LMDS auction.³⁰

a. Public Notice and Precedent

16. Webcel argues that, by allowing participation in the auction, the Commission has created a loophole in the eligibility restriction that was never proposed in a public notice or the comment phase of this proceeding, and is procedurally infirm. We find that this argument lacks any merit. In both the *Third NPRM* and *Fourth NPRM*, the Commission sought comment on the impact incumbent LECs and incumbent cable companies would have on competition in a new LMDS market and whether any restrictions were needed to ensure competition. Thus, the extent to which incumbent LECs and incumbent cable companies would be permitted to participate in the LMDS auctions was at issue in the proceeding. In both Notices, the Commission requested comment on whether, if a restriction were warranted, it should adopt rules similar to the cross-ownership restriction it imposed on cellular and broadband Personal Communications Service (PCS) licensees, formerly in Section 24.204 of the Commission's Rules, that it found addressed similar ownership and competitive concerns.³¹

17. The broadband PCS-cellular cross-ownership rule referred to in the Notices included a provision that also allowed a similar 90-day, post-auction period for divestiture. Although by the time of the *Fourth NPRM* the Commission had deleted the cross-ownership restriction from its rules, it did so recognizing that a similar ownership cap — the

²⁸ *Second Report and Order*, 12 FCC Rcd at 12631 (paras. 193-194), adopting 47 C.F.R. § 101.1003(f).

²⁹ LBC Petition at 1-2; Webcel Petition at 12-18.

³⁰ Bell Atlantic Opposition at 2-4; RTG Opposition at 4-7.

³¹ *Third NPRM*, 11 FCC Rcd at 90-91 (para. 101), 92-93 (para. 105); *Fourth NPRM*, 11 FCC Rcd at 19056 (para. 132).

Commercial Mobile Radio Service (CMRS) spectrum cap — had been adopted for broadband PCS, cellular, and SMR licensees.³² The CMRS spectrum cap also included a 90-day post-auction divestiture provision that the Commission specifically modified to mirror the former broadband PCS rule.³³ Thus, commenters had notice of the post-auction divestiture provision that might be used if the Commission decided to adopt an eligibility restriction.

18. The post-auction divestiture provision adopted in the LMDS ownership eligibility rule promulgated in the *Second Report and Order* is consistent with the proposals in the *Third NPRM* and *Fourth NPRM* to rely on the former cellular-broadband PCS cross-ownership rule as now contained in the CMRS spectrum cap. The Commission modified the cellular-broadband PCS cross-ownership rule only as necessary to apply its provisions to incumbent LECs and incumbent cable companies in the context of the LMDS eligibility restriction. As the Commission stated in adopting other provisions of the CMRS spectrum cap rule in the context of the LMDS restriction, it is preferable to have rules for wireless spectrum that are as consistent as possible for the sake of overall simplicity, ease of compliance, and administrative efficiency.³⁴ The decision to adopt the 90-day post-auction divestiture provision furthered this goal of consistency.

19. Webcel argues that the post-auction divestiture provision is not consistent with Commission precedent reflected in the ownership restriction that was adopted for a specific auction of channels for the Direct Broadcast Satellite (DBS) service.³⁵ Webcel contends that the restriction in the *DBS Report and Order* requires licensees to divest existing interests in any other full-CONUS slots before they can acquire a new license in another full-CONUS slot being auctioned.³⁶ Webcel requests that we similarly modify the divestiture provision to allow incumbent LECs and incumbent cable operators to bid on, and acquire, in-region LMDS

³² Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7842, 7864-76 (paras. 86-107) (1996) (*PCS Remand Order*), deleting 47 C.F.R. § 24.204 and amending 47 C.F.R. § 20.6.

³³ *Id.* at 7876 (para. 107), amending 47 C.F.R. § 20.6(e).

³⁴ *Second Report and Order*, 12 FCC Rcd at 12629-30 (paras. 187-191).

³⁵ Webcel Petition at 16.

³⁶ Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168 and PP Docket No. 93-253, Report and Order, 11 FCC Rcd 9712 (1995) (*DBS Report and Order*), *aff'd sub nom.* DIRECTV v. F.C.C., 110 F.2d 816 (D.C. Cir. 1997) (*DIRECTV*). Full-CONUS is an orbital location in the geostationary orbital arc capable of providing service to the entire continental United States.

licenses only if they divest their existing telephone or cable interests before the auction or by a date certain.

20. We find Webcel's purpose in advocating reliance upon the DBS procedure is puzzling inasmuch as the divestiture process in DBS is similar to the LMDS provision to the extent it also allows a post-auction divestiture by a date certain. Specifically, the *DBS Report and Order* adopted a one-time spectrum ownership restriction to encourage competition by prohibiting a party with an attributable interest in one full-CONUS location from acquiring at the auction an additional location "without divesting its existing interest in full-CONUS channels at another location within twelve months of such acquisition."³⁷ Like DBS, the LMDS provision does not bar any applicant from participating in the auction and acquiring an interest for which it is otherwise ineligible, as long as the applicant divests to come into compliance within 90 days after grant of the license. We find that the DBS procedure further demonstrates that the LMDS procedures are consistent with Commission precedent in adopting spectrum ownership restrictions in other wireless services, both terrestrial and satellite.

b. Means of Divestiture

21. Webcel argues that the sole basis for the decision to allow incumbents to participate in the auction subject to the 90-day divestiture requirement was a proposal made by the FTC in its reply comments, and that those comments do not support the rule we adopted.³⁸ Webcel contends that the FTC comments only suggested that a company should be able to sell its own cable system to avoid the restriction. Webcel argues that there is no support in the record for the proposition that the incumbent also should be able to sell the overlapping portion of the LMDS license to come into compliance.

22. We do not find persuasive Webcel's argument that the Commission misconstrued or misapplied the comments of the FTC regarding compliance with eligibility restrictions. Moreover, we disagree with any suggestion by Webcel that our post-auction divestiture procedures and requirements must stand or fall based upon the extent to which they mirror the FTC proposal. In considering the issue of post-auction divestiture, the Commission noted the FTC's example of how such divestiture is advantageous because it would allow the incumbent who owns a cable system contained entirely within a BTA to sell its cable system and thus avoid competitive problems associated with this overlapping ownership. The Commission found that this would allow the incumbent LEC or incumbent cable company, which may otherwise be disqualified from holding an LMDS license, to obtain the license and then divest

³⁷ *Id.* at 9723 (para. 28), 9736 (para. 62), 9810 (Appendix C: One-Time Auction Spectrum Limitations).

³⁸ Webcel Petition at 15-16.

ineligible interests to the extent necessary to come into compliance.³⁹ The Commission thus agreed with the FTC that giving incumbent LECs and cable companies options for achieving compliance with eligibility restrictions *after* they have won an LMDS license is an effective means of addressing competitive problems that might arise from their holding the LMDS license.⁴⁰

23. The Commission then turned to the question of what range of divestiture options we should provide. It adopted a divestiture rule that permits an incumbent LEC or incumbent cable company to come into compliance with our requirements by (1) assigning or transferring control “of the conflicting portion of its LMDS license”;⁴¹ or (2) complying with the eligibility restrictions established in Section 101.1003(a) of the Commission’s Rules.⁴² Compliance with these eligibility restrictions can be achieved if an LMDS applicant (1) divests its attributable interest in an incumbent LEC or cable company; or (2) partitions⁴³ and divests that portion of its telephone or cable service area, or that portion of the LMDS geographic service area, that exceeds the 10 percent overlap restriction established in Section 101.1003(d) of the Commission’s Rules.⁴⁴ The Commission found that any of these actions rectifies the competitive problem posed by the incumbent LEC or incumbent cable company ownership of LMDS licenses by removing the cross-ownership interests or the in-region dominance that could result in such incumbents seeking to protect their own operations from LMDS competition.

24. Webcel points out that the FTC does not specifically address the divestiture option of shedding overlapping geographic areas. Although Webcel’s observation is correct, we do not find it to be relevant. The Commission determined in the *Second Report and Order* that partitioning and divesting a portion of the LMDS service area will serve as an effective means of eliminating one of the two sources of an incumbent’s ineligibility under the restriction. As it stated in the *Second Report and Order*, the Commission’s goal in adopting the eligibility

³⁹ *Second Report and Order*, 12 FCC Rcd at 12631 (paras. 193-194).

⁴⁰ *Id.*, citing FTC Reply Comments to *Fourth NPRM* at 11.

⁴¹ *Id.* at 12631 (para. 194).

⁴² 47 U.S.C. § 101.1003(a).

⁴³ Geographic partitioning is the assignment by the licensee of its license to serve a portion of its service area. As explained above in the text, the Commission has sought additional comment in this proceeding regarding specific rules for the partitioning of LMDS licenses. *Fifth NPRM*, 12 FCC Rcd at 12711-17 (paras. 407-424).

⁴⁴ 47 C.F.R. § 101.1003(d).

restriction is to create opportunities for new competitors in the local exchange and cable marketplaces.⁴⁵ If an incumbent divests its overlapping geographic interest, there is an opportunity for new entrants to enter the marketplace in that area. In addition, if overlapping geographic interests are divested, an incumbent will not have the opportunity to use its market power to restrict services of a competing new entrant in the divested market area.

c. Distortion of LMDS Auction

25. Webcel argues that allowing incumbent LECs and incumbent cable companies to bid on in-region licenses cannot be reconciled with the record evidence and economic analysis that the Commission found warranted imposing the eligibility restriction.⁴⁶ Webcel asserts that incumbent LECs and cable companies will manipulate the auction process to inflate the price of LMDS licenses, deter entry by potential competitors, and create additional hurdles to the task of raising capital by smaller LMDS auction participants. Webcel sets out five examples of how winning incumbents may be able to use the post-auction divestiture provision to prevent entry by a competitive LMDS provider or otherwise delay competition.

i. Waivers

26. Webcel argues that winning incumbents will file post-auction waiver applications on the putative ground that the market is competitive and use the process to delay the transfers of the overlapping areas, thereby holding onto them until the restriction expires. Webcel appears to be referring to the waiver provision the Commission adopted in Section 101.1003(a)(2), which states:⁴⁷

Upon completion of the initial award of LMDS licenses, an incumbent LEC or incumbent cable company may petition for a waiver of the restriction on eligibility based upon a showing that the petitioner no longer has market power in its authorized or franchised service area as the result of the entry of new competitors, other than an LMDS licensee, into such service area.

27. Webcel misconstrues the manner in which the waiver provision is available for use by LMDS applicants. As the rule provides, the Commission directed that waiver petitions

⁴⁵ *Second Report and Order*, 12 FCC Rcd at 12616-17 (para. 162).

⁴⁶ Webcel Petition at 13-15.

⁴⁷ *Second Report and Order*, 11 FCC Rcd at 12633-34 (para. 199), adopting 47 C.F.R. § 101.1003(a)(2).

be entertained only after the "initial award" of LMDS licenses. We clarify that the term "initial award" of LMDS licenses refers to the grant of licenses to winners in the LMDS auction that meet all of our licensing requirements. Thus, the initial award process will be completed only after the first LMDS licenses have been granted as a result of the auction and licensing process. The primary method for obtaining an LMDS license *after* the "initial award" will be through an assignment or transfer of control from an LMDS licensee to another party. The waiver provision established in Section 101.1003(a)(2) is available *only* for applicants seeking to obtain a license through assignment or transfer of control.⁴⁸ The waiver provision is *not* available in the case of the initial award of licenses through the auction process and thus cannot be used by incumbent LECs or incumbent cable companies to delay divestiture of overlapping areas.

28. Although, as Webcel suggests, unsupported claims of market competition could be advanced by an LMDS licensee seeking to use the waiver provision, we believe that the standards the Commission adopted are sufficiently detailed and stringent to discourage such claims. The Commission adopted the waiver provision to provide incumbent LECs and incumbent cable companies with the opportunity to show that actual conditions in a particular market are sufficiently competitive so that the restriction is no longer necessary to promote competition. The Commission determined to be guided by the factors set out in the *1992 Merger Guidelines* in considering the petition.⁴⁹ The Commission pointed out that, among the several factors the LMDS licensee would address, there are specific market and service analyses, such as consideration of the number and capacity of competing providers and substitutability of the services.

29. Further, if Webcel is intimating that we should abolish the waiver procedures established in the *Second Report and Order* based upon its speculation that the procedures could be abused, we believe that such a suggestion ignores the fact that the grant of waivers will advance our pro-competitive policies in cases in which petitioners make the requisite showings regarding their lack of market power. The purpose of the eligibility rule is to allow competition an opportunity to develop. We have no interest in continuing this temporary rule once competition is present. The waiver provision simply allows parties seeking to acquire licenses in the secondary market to demonstrate that the reason for the rule no longer exists in their particular geographic and "product" market.

⁴⁸ In these circumstances, the incumbent LEC or incumbent cable company would file a waiver petition with its assignment or transfer application. It may also be possible to obtain a license through reauction if the initial LMDS license is revoked or returned because the initial licensee does not comply with Commission rules.

⁴⁹ Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992), reprinted in 4 Trade Reg. Rep. (CCH) para. 13,104 (Apr. 7, 1992) (*1992 Merger Guidelines*).

30. Also, we do not intend or expect the disposition of such petitions to take such lengthy periods as Webcel contends. The factors for evaluating waiver petitions are well established and the procedures for rule waivers provide for an orderly filing. Further, we have discretion to provide for expedited disposition of waiver requests. Thus, we are not persuaded by Webcel's mere speculation regarding the duration of our waiver proceedings, nor can we agree that the standards and procedures in the waiver provision provide an incumbent LEC or incumbent cable company with the opportunity to delay or prevent the divestiture of the overlapping interests as required within 90 days of the grant of the LMDS license.

ii. Failure To Make Timely Divestitures

31. Webcel argues that winning applicants that are incumbent LECs or incumbent cable companies could fail to make the 90-day divestitures required to comply with the eligibility restriction and default on the deposit required under our rules, thereby delaying deployment of a competitive LMDS system. It asserts that default of the auction deposit is a small price to pay, particularly for monopolists with substantial financial assets, for delaying or stifling the licensing of LMDS competitors.⁵⁰

32. We find no basis for such a concern. Webcel fails to take into account all of the requirements in the divestiture provision for enforcing the 90-day requirement after the auction. At the outset, the applicant must file with its short form application a certification of compliance and, upon winning in the auction, must file with the long form application a signed statement of its plans for coming into compliance.⁵¹ The grant of the LMDS license is conditioned upon the applicant's achieving compliance within 90 days of the final grant.⁵² That is accomplished by filing an application for license assignment or transfer of control of the overlapping geographic areas or a certification of divestiture of either the attributable interest in an incumbent LEC or incumbent cable company, or of the requisite portion of such incumbent's existing authorized or franchised service area.⁵³

33. If no such application or certification is tendered within 90 days, then we may consider the short form certification and long form divestiture statement to be material, bad faith misrepresentations and will invoke the condition on the final grant of the license,

⁵⁰ Webcel Petition at 15 n.31.

⁵¹ 47 C.F.R. §§ 101.1003(f)(2), 101.1003(f)(3).

⁵² 47 C.F.R. § 101.1003(f)(4).

⁵³ 47 C.F.R. §§ 101.1003(f)(5)(i), 101.1003(f)(5)(i)(ii).

cancelling or rescinding it automatically.⁵⁴ We also will retain all monies paid to the Commission which, contrary to Webcel's assertion, includes the full amount of the winning bid.⁵⁵ Finally, based on the facts presented, we may take any other action we deem appropriate. We do not believe that incumbents will act so as to subject themselves to these remedies. They could lose the license and forfeit considerable sums, as well as face possible other action. If auction winners do default, the Commission may reactivate the licenses in an expeditious manner or award them to the next highest bidder.⁵⁶ For these reasons, contrary to Webcel's argument, winning incumbents will have substantial incentives to make timely divestitures.

iii. Divestiture to Entities That Do Not Represent Competitive Threat

34. Webcel asserts that winning incumbents could subsequently partition and sell, even at a substantial loss, to entities that do not present a risk of direct competition with the incumbents' services.⁵⁷ We find this scenario to be purely speculative and unlikely. The Commission addressed such activities in the *Second Report and Order* when it adopted the anti-collusion rules set forth in Sections 1.2105 and 1.2107 of our rules to apply to LMDS auctions.⁵⁸ The rules prevent all parties participating in the auction from agreeing in advance to bidding strategies that divide the market according to their interests and that disadvantage other bidders, by prohibiting various discussions apart from bidding consortia or other approved arrangements. In addition, we note that the attribution rules include indirect ownership interests, certain management agreements, and certain joint marketing agreements.⁵⁹

⁵⁴ 47 C.F.R. § 101.1003(f)(6).

⁵⁵ 47 C.F.R. § 101.1105(b). LMDS applicants must make an upfront payment in order to participate in the auction. Auction winners must make a down payment sufficient to bring a total deposit up to 20 percent of the winning bid within 10 business days following the release of a Public Notice announcing the close of the auction. Payment of the full balance of winning bids must be made not later than 10 business days following release of a Public Notice indicating that the Commission is prepared to award the licenses. *See id.*

⁵⁶ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 97-413, released Dec. 31, 1997, paras. 151-154, adopting 47 C.F.R. § 1.2109(c) (*Part 1 Third Report and Order*).

⁵⁷ Webcel Petition at 15.

⁵⁸ *Second Report and Order*, 12 FCC Rcd at 12685-86 (paras. 338-339).

⁵⁹ 47 C.F.R. § 103.1003(e).

These rules would limit an incumbent's ability to circumvent the divestiture rules through agreements to divest to entities who would not directly compete against the incumbent.

35. In addition, such activities may be subject to federal antitrust laws enforced by the United States Department of Justice. As pointed out in the *Second Report and Order*, we may refer other complaints of specific instances of collusion in the competitive bidding process to the Department of Justice.⁶⁰ It was noted that bidders who are found to have violated the antitrust laws or the Commission's Rules may be subject to forfeiture of their down payment or their full bid amount and revocation of their licenses, and they may be prohibited from participating in future auctions.⁶¹ Sanctions for violations of antitrust laws include treble damages, among other penalties. Furthermore, a divesting incumbent would have no control over the buyer's use of the LMDS license unless it entered into anticompetitive agreements, and such agreements violate antitrust laws. We find that these factors make it less likely that the activities Webcel describes will occur, and that Webcel has failed to address them or otherwise demonstrate why reliance upon general antitrust law would not be effective.

iv. Transfer of License to Trustee

36. Webcel argues that an incumbent winning an LMDS license could transfer the LMDS license to a trustee, as permitted as an option for divestiture in the eligibility restriction, and certify that it has been unable to find a buyer, thereby evading the 90-day cure rule altogether.⁶² Webcel contends that it will not be possible to find a buyer at the high prices incumbents will bid to retain their monopoly status. Contrary to Webcel's assertion, we do not believe the trustee provision will provide incumbents with incentives to avoid divestiture or engage in other anticompetitive activity. The provision is available only as a means of divestiture and thus must be accomplished within 90 days of a grant, so that no delay will be involved in its use. Moreover, it requires that the applicant have no interest in or control of the trustee and provides that the trustee may dispose of the license as it sees fit. Inasmuch as the trustee is independent from the incumbent and may dispose of the interest freely, we find that the trustee would have no reason to consider an incumbent's interests and could not be manipulated by the incumbent to protect its monopoly.

v. Sham Bidding

⁶⁰ *Second Report and Order*, 12 FCC Rcd at 12685-86 (para. 339).

⁶¹ 47 C.F.R. § 101.1003(f)(6).

⁶² 47 C.F.R. § 101.1003(f)(1)(C).

37. Webcel argues that incumbents participating in the auction also could engage in sham bidding for licenses within their territories solely to drive up prices above competitive levels and increase network capital costs for their LMDS competitors beyond levels at which it is economically feasible for new competitors to enter a market. Bell Atlantic argues in opposition that these activities are fully addressed in the Commission's existing auction rules, which have been developed to limit participation to those parties who intend to develop the licenses they purchase.⁶³ Bell Atlantic argues that Webcel's contentions in this respect, as well as its other claims about distorting the auction, are speculative and unsupported. RTG also argues that Webcel's claims that parties would purposefully default on an auction payment or violate our rules by engaging in the other strategies are without any basis in fact, particularly insofar as rural telephone companies are concerned.⁶⁴

38. We agree with Bell Atlantic and RTG that there is no evidence that sham bidding, or other anticompetitive activities, would occur in the LMDS auction as a result of our allowing incumbent LECs and incumbent cable companies to participate fully in the auction and bid on in-region licenses, subject to divestiture. In adopting auction procedures for LMDS, the Commission specifically adopted in Section 101.1105 the same requirements for submission of payments that we impose in all auctions to ensure that only serious, qualified bidders participate in auctions and that sufficient funds are available to satisfy any bid withdrawal or default payments that may be incurred.⁶⁵ Under the terms of the rule, participants are required to tender a substantial upfront payment. Moreover, winning bidders must submit a down payment to bring their total deposits up to 20 percent of the winning bid and then pay the full balance within certain 10-day periods.

39. The Commission also adopted rules that impose payments on bidders who withdraw high bids, default on payments due after an auction, or who are disqualified.⁶⁶ Moreover, we may declare an applicant that engages in gross misconduct, misrepresentation, or bad faith to be ineligible to bid in future auctions or to take any other action we deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant.⁶⁷ We believe that these requirements and sanctions are sufficient to deter sham bidding. Webcel does not demonstrate why these provisions would not deter incumbents in the LMDS auction from either the sham bidding or other anticompetitive activities.

⁶³ Bell Atlantic Opposition at 2-3.

⁶⁴ RTG Opposition at 6.

⁶⁵ *Second Report and Order*, 12 FCC Rcd at 121681-85 (paras. 327-336), adopting 47 C.F.R. § 101.1105.

⁶⁶ *Id.*, adopting 47 C.F.R. § 101.1103(f).

⁶⁷ *Id.* at 12684-85 (para. 336).

d. Absence of Benefits from Auction Participation

40. Webcel argues that nothing in the *Second Report and Order* weighs in favor of allowing incumbent LECs or incumbent cable companies to participate in the auction of in-region licenses in light of the competitive concerns on which the Commission based the eligibility restriction. Webcel contends that any interest they may have in entering the LMDS market can be achieved by seeking partitioned licenses from LMDS auction winners. Webcel argues that the Commission has stated in other proceedings that geographic partitioning adequately meets the needs of small firms that cannot afford to participate in auctions and it should likewise be sufficient for ineligible LECs and cable companies in the face of the Commission's compelling competitive concerns about their holding in-region LMDS licenses.⁶⁸

41. In opposition, Bell Atlantic argues that Webcel's position that the Commission should exclude incumbent LECs from bidding for LMDS licenses would contradict the Commission's efforts to promote a robust market for LMDS. Bell Atlantic contends that the rule changes Webcel requests would simply restrain bidding competition at the auction and allow Webcel to obtain below-market bargains.⁶⁹ RTG, which opposes the eligibility restriction overall as it applies to rural telephone companies, opposes any further limitations on the ability of a rural telephone company to participate in the auction for a BTA that significantly overlaps its telephone service area.⁷⁰ RTG argues that Webcel's proposal that LECs be required to divest their overlapping telephone operations in order to participate in the auction would effectively eliminate rural telephone company participation in LMDS contrary to several provisions in the Communications Act and contrary to Commission policy. RTG further argues that partitioning alone would not provide rural telephone companies with a sufficient opportunity to acquire LMDS spectrum.⁷¹

42. We disagree with Webcel. We believe there is an obvious and direct benefit to be gained by permitting incumbent LECs and cable operators to compete for LMDS licenses, subject to the divestiture requirements we have established. Competition thrives in circumstances in which as many players as possible are given an opportunity to make business decisions regarding the development of new technologies, the entry into new markets, and the design and provision of new or enhanced services to consumers. Our pro-competitive policies

⁶⁸ Webcel Petition at 3, 16-17.

⁶⁹ Bell Atlantic Opposition at 1, 4.

⁷⁰ RTG Opposition at 5.

⁷¹ *Id.* at 6-7.

would not be well served by unwarranted regulatory barriers that would stifle these business decisions. Our LMDS licensing rules foster competition — for the benefit of consumers and the national economy — by permitting incumbent LECs and incumbent cable operators to make these business decisions. They can compete for in-region LMDS licenses and then, based upon the results of the auction, make informed business decisions concerning the best way to compete against other service providers in the LMDS, local exchange, and cable marketplaces. We believe that rules that extend this opportunity to a wide array of competitors, subject to divestiture requirements that will guard against anticompetitive practices, are superior to any exclusionary rules that would completely prohibit participation in LMDS markets by a substantial number of experienced providers of communications services.

43. The approach we have taken is consistent with the Commission's overall goal in adopting the eligibility restriction, which is to maximize the opportunity for competition in those markets that are not fully competitive.⁷² Its purpose is to increase competition by awarding licenses to firms whose activities are likely to increase the level of competition in the marketplace. However, the Commission recognized that restrictions may prevent incumbents from experimenting with certain technology and market combinations and might foreclose or delay desirable entry by incumbents into new markets.⁷³ The Commission determined to structure the restriction as flexibly as possible to minimize these potential adverse limitations on incumbents. The rule was designed in the least intrusive manner consistent with the overall goal of promoting competition.

44. Accordingly, the Commission found no compelling public benefit to be achieved by foreclosing incumbent LECs and incumbent cable companies from participating fully in the auction of LMDS licenses, including the auction of in-region licenses, subject to the post-auction divestiture requirement.⁷⁴ By permitting the incumbent to divest the ineligible interests or areas after the auction, it is possible for the incumbent to enter the LMDS market by bidding on large LMDS licenses that may include both areas that it is eligible to serve and areas that it is not. Once the incumbent determines whether it has been successful in obtaining an auctioned license, it will be able to make an informed business decision to transfer the overlapping LMDS, cable, or telephone service area or divest its attributable interest in an incumbent LEC or cable company.

⁷² *Second Report and Order*, 12 FCC Rcd at 12622 (para. 172).

⁷³ *Id.* at 12624 (para. 177).

⁷⁴ *Id.* at 12631 (para. 193).

45. In sum, the divestiture provision in Section 101.1003(f) is consistent with the CMRS spectrum cap, as well as with other ownership restrictions that also permit post-auction divestiture. There is no evidence that permitting incumbents to participate in the LMDS auction, subject to the divestiture requirement, will undermine the goals of the ownership restriction. We also have found no basis for Webcel's claims that the auction process would be distorted by anticompetitive activities. In the absence of any apparent harm from such participation, there is no basis to preclude incumbents participating in the LMDS auction, which instead is consistent with our overall goal to increase competition.

3. Definition of Attributable Interest

a. 20 Percent or More Ownership Interest

46. The Commission adopted a threshold level of 20 percent, rather the 10 percent proposed in the *Fourth NPRM*, in deciding whether an ownership or stock interest in either an incumbent LEC or incumbent cable company, or in an LMDS licensee, qualifies as an attributable interest that triggers the eligibility restriction.⁷⁵ Webcel requests reconsideration of the 20 percent attribution level and the rejection of the proposal to use a lower threshold level of 10 percent or higher, which Webcel argues is a more competitively prudent level that would more strictly enforce the eligibility restriction.⁷⁶ Webcel contends that the *Second Report and Order* relies on conclusory justifications in support of the decision, fails to explain why the 10 percent standard was rejected, and fails to take into account the differences between the LMDS eligibility restriction and the CMRS spectrum cap on which the Commission relied. Bell Atlantic opposes Webcel and any further reduction in the ability of incumbent LECs to hold an in-region LMDS license.⁷⁷ We consider the arguments more fully below.

47. Webcel argues that, in an effort to support the 20 percent rule, the *Second Report and Order* proffered a number of conclusory justifications that cannot withstand serious scrutiny.⁷⁸ Webcel points out that the Commission concluded that a 20 percent level provided the proper balance between encouraging capital investment and business opportunities in LMDS while guarding against potential competitive harms associated with the exercise of undue influence by incumbent LECs and incumbent cable companies in connection with the

⁷⁵ *Id.* at 12630 (paras. 189-191), adopting 47 C.F.R. § 101.1003(e)(2).

⁷⁶ Webcel Petition at 18-23.

⁷⁷ Bell Atlantic Opposition at 4.

⁷⁸ Webcel Petition at 18-19 n.36.

operations of LMDS licenses.⁷⁹ Yet, Webcel argues, the Commission did not explain why a 10 percent level is not appropriate and did not address the effect of a 10 percent ownership level on LMDS capital formation. Webcel asserts that the 20 percent standard cannot be reconciled with the competitive risks from incumbents' ownership of LMDS licenses in their service areas.

48. We conclude that Webcel has failed to present any probative evidence or convincing arguments that setting the attribution level at 20 percent will not serve the objectives and goals of this proceeding. We believe that any decision at this juncture to modify the standard adopted in the *Second Report and Order* must be based upon an affirmative and convincing showing that the standard will not be effective in achieving the public interest objectives embodied in the eligibility restrictions. Based upon the reasons we discuss in the following paragraphs, we conclude that Webcel has not provided this showing. We thus find no reason to revise the original decision selecting 20 percent as the threshold level for attributable interests.

49. We acknowledge that establishing a "bright line" attribution test is always subject to the criticism that the line should be repositioned. We find no basis in the record to warrant reconsideration of the 20 percent "bright line." Nevertheless, we note that the Commission traditionally has addressed issues relating to ownership attribution in the context of different rulemakings.⁸⁰ The Commission concluded in each of these instances that the attribution standard it adopted would best fit the particular circumstances involved, and would best serve the particular objectives of the rulemaking. However, the Commission's policies regarding marketplace competition, ownership diversity, and the prevention of anticompetitive behavior may benefit from a comprehensive evaluation of the criteria used in establishing ownership restrictions (including cross-ownership, multiple-ownership, cross-interest,

⁷⁹ *Second Report and Order*, 12 FCC Rcd at 12630 (para. 190).

⁸⁰ For a brief overview of some of the Commission's various attribution rules, see *Review of the Commission's Regulations Governing Attribution of Broadcast Interests and Policies Affecting Investment in the Broadcast Industry*, *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, and *Reconsideration of the Commission's Cross-Interest Policy*, MM Docket Nos. 94-150, 92-51, 87-154, Notice of Proposed Rulemaking, 10 FCC Rcd 3606, 3614-16 (paras. 26-36) (1995) (*Attribution Notice*); *PCS Remand Order*, 11 FCC Rcd at 7880-81 (paras. 117-119). See also *Cincinnati Bell v. F.C.C.*, 69 F.3d 752 (6th Cir. 1995) (reversing and remanding the Commission's cellular broadband PCS ownership and attribution rules in part for insufficient supporting rationale). The Commission currently is reviewing its broadcast attribution rules in the ongoing rulemaking proceeding initiated in the *Attribution Notice* and a subsequently issued Further Notice of Proposed Rulemaking, 11 FCC 19895 (1996) (*Attribution Further Notice*). The Commission also is examining specific attribution rules in *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 96-85, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5937, 5963-64, 5970 (paras. 74-77, 95) (1996).

“spectrum cap,” and other limits) for different services, along with their accompanying ownership attribution standards, and the role these standards can play in the furtherance of the Commission’s policies. For these reasons, we plan to initiate a proceeding later this year to examine these issues. We note further that, to the extent that such a proceeding results in changes to our LMDS ownership rules, such changes will be applied prospectively only. Accordingly, the prospect of such a review should not affect current or near-term business plans or strategies of LMDS applicants.

i. Justification for 20 Percent Standard

50. We believe that the 20 percent threshold will serve our competitive goals with regard to LMDS, for the following reasons.⁸¹ First, there are safeguards in the LMDS attribution rules that make incumbent LECs and incumbent cable companies ineligible to hold a *controlling* interest in an LMDS licensee, even if their attributable *ownership* interest is less than 20 percent. We recognize that an ownership attribution level that is set too high could afford incumbent LECs and incumbent cable companies an opportunity to engage in the types of anticompetitive conduct the eligibility restriction was designed to prevent. We are also aware that some economists have argued that investors with less than a 20 percent ownership interest may be able to exert control over the entity in which they have invested.⁸² Our objective, however, is to ensure that incumbent LECs and incumbent cable companies are prevented from controlling the operation of an in-region LMDS license, because such control could result in anti-competitive conduct. We believe the eligibility restriction prohibiting an incumbent LEC or incumbent cable company from holding a controlling interest in an LMDS

⁸¹ Although we believe the 20 percent threshold level will not have deleterious effects, we acknowledge that the economic literature contains arguments that partial equity interests among rival firms in a relatively concentrated industry may reduce competition. Reynolds and Snapp, for example, find that in markets where entry is difficult, even relatively small partial ownership interests among rivals can lead to lower output and higher prices. This is because these ownership arrangements link the profits of competing firms in such a way that the incentive of each firm to compete is reduced. R. Reynolds & B. Snapp, *The Competitive Effects of Partial Equity Interests and Joint Ventures*, 4 *International Journal of Industrial Organization* 141-53 (1986). See also J. Farrell & C. Shapiro, *Asset Ownership and Market Structure in Oligopoly*, 21 *Rand Journal of Economics* 275-92 (1990).

⁸² See, e.g., D. Leech, *Corporate Ownership and Control: A New Look at the Evidence of Berle and Means*, OXFORD ECONOMIC PAPERS, (Sept. 1987) at 534-51; D. Leech, *Ownership Concentration and the Theory of the Firm: A Simple Game Theoretic Approach*, JOURNAL OF INDUSTRIAL ECONOMICS (Mar. 1987) at 225-40; F. Scherer, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 31-34 (1980); R.J. Lerner, *Ownership and Control in the 200 Largest Non-Financial Corporations*, AMERICAN ECONOMIC REVIEW 777-87 (1966); P. Burch, *THE MANAGERIAL REVOLUTION* (1972).

licensee,⁸³ when considered in conjunction with the general attribution standard for *de facto* control, serves as an effective tool to accomplish this objective.

51. Second, the Commission specifically found that a 20 percent attribution level was appropriate to meet the objectives in adopting the LMDS eligibility restriction for the same reasons that we found the 20 percent level appropriate in the CMRS spectrum cap in the *PCS Remand Order*.⁸⁴ There, as here, the Commission considered proposals for lower ownership levels, including a 10 percent level, and concluded that the higher benchmark of 20 percent should be maintained because it allowed a wider variety of players to enter the marketplace, including the CMRS providers subject to the restriction, while still preventing anticompetitive practices that would have harmful effects on consumers.⁸⁵

52. Third, the Commission conducted a detailed analysis of competition in the incumbent LEC and incumbent cable company marketplaces with attention to the degree of market power presently held by incumbents and the potential for LMDS as a new source of competition.⁸⁶ The Commission made predictive judgments based on its experience, economic theory, and the market analysis “that open eligibility will impede substantially the pro-competitive benefits of licensing LMDS.”⁸⁷ The Commission balanced its competing objectives to maximize the opportunity for competition in the telephone and cable markets with the desire to encourage and facilitate the entry of LMDS providers. It determined that a lower attribution threshold would compromise the Commission’s goals to encourage all potential LMDS providers to enter the market, while a higher threshold would permit the type of anticompetitive activities from monopolist incumbents that it sought to prevent. In our judgment, the 20 percent level is reasonable based upon our analysis of these factors. We disagree with Webcel that the 20 percent level, in light of all these considerations, will undermine the eligibility restriction.

53. Fourth, as with the CMRS spectrum cap, the Commission found that the 20 percent attribution standard would encourage capital investment and business opportunities in LMDS, increase the flexibility afforded to LMDS providers to meet customer demand, and promote the competitive delivery of wireless services. Webcel argues that these findings are not dispositive in the context of an eligibility restriction that is adopted to keep incumbents

⁸³ 47 C.F.R. § 101.1003(e)(1).

⁸⁴ *Second Report and Order*, 12 FCC Rcd at 12630 (paras. 190-191).

⁸⁵ *PCS Remand Order*, 11 FCC Rcd at 7880-81 (paras. 118-119).

⁸⁶ *Second Report and Order*, 12 FCC Rcd at 12610-12 (paras. 157-161).

⁸⁷ *Id.* at 12612 (para. 161).