

from acquiring in-region LMDS licenses and that does not limit their ability to acquire out-of-region LMDS licenses. We disagree. In relying on these factors in the *PCS Remand Order* to support the 20 percent attribution level in connection with the 45 megahertz CMRS spectrum cap placed on certain CMRS licensees, the Commission stated that cellular providers should be given ample opportunity to compete in the CMRS market, particularly given the accelerated changes and growth in technology and services, and to seek business opportunities and capital investment in CMRS.⁸⁸ Maintaining a 20 percent attribution level was found to allow a wide variety of players, including broadband PCS and cellular providers, to enter the marketplace, while still preventing anticompetitive practices that could harm consumers. As there, we do not want to bar incumbent LECs and incumbent cable companies altogether from acquiring LMDS licenses, but rather to prevent anticompetitive practices.

54. Fifth, setting the threshold attribution level at 20 percent is consistent with our overall objective in the *Second Report and Order* — to design a short-term LMDS eligibility restriction on in-region, incumbent LECs and in-region, incumbent cable companies that will maximize competition.⁸⁹ The restriction was structured as flexibly as possible to minimize adverse consequences of such restrictions. The Commission recognized that restrictions may prevent incumbents from experimenting with certain technology or market combinations and might unnecessarily foreclose or delay desirable entry by incumbents into new markets.

55. Thus, the Commission determined that the restrictions should be temporary, ending when the likelihood of anticompetitive behavior has abated. Similarly, the 20 percent attribution level is designed to afford maximum flexibility for incumbents to provide financing and the benefits of their technological experience to LMDS licensees without controlling the LMDS system. For example, a 20 percent threshold is more likely than the 10 percent threshold suggested by Webcel to increase the availability of financing for new LMDS services because incumbents will have greater latitude to provide financing. We also recognize that the factual circumstances and policy considerations that may prevail in other markets and with respect to other products and services may justify different attribution thresholds. We intend to examine these issues in greater detail in our comprehensive review of ownership restrictions and attribution standards.⁹⁰

56. Finally, a primary concern considered in adopting an overall regulatory framework for LMDS was to make this service as flexible as possible and to avoid erecting unnecessary barriers to marketplace entry. LMDS has significant potential in offering a broad range of

⁸⁸ *PCS Remand Order*, 11 FCC Rcd at 7881 (para. 119).

⁸⁹ *Second Report and Order*, 12 FCC Rcd at 12624 (para. 177).

⁹⁰ See para. 49, *supra*.

one-way and two-way voice, video, and data service capabilities, and a substantial amount of capacity that is larger than currently available wireless services.⁹¹ The goal was to maintain an open and flexible approach in implementing LMDS that would allow the business judgments of individual LMDS applicants and licensees to shape the nature and components of the services to be offered.⁹² Thus, a particular concern is that the Commission not take regulatory action that would prevent LMDS licensees from obtaining the financing required to acquire an LMDS license and to establish the technology needed to offer service to the public. Although the Commission was compelled to place some restrictions on LMDS license holdings by in-region LECs and cable companies in the interests of increasing competition in the telephony and video distribution services, it narrowly tailored the restriction because it recognized the potential for adverse impacts on implementation of LMDS.

57. Thus, in balancing the integrity of the eligibility restriction against our desire to increase the likelihood that licensees could satisfy their capital requirements, we seek to be as liberal as possible in setting the permissible ownership interest of incumbent LECs or cable companies. In adopting the provisions of the rule, the Commission decided that, as a threshold matter, if less than 10 percent of the population of the LMDS licensed service is within the incumbent's authorized or franchised service area, there would no eligibility restriction on the incumbent LEC or incumbent cable company.⁹³ That is, if the population overlap is less than 10 percent, the incumbent LEC or incumbent cable company could own as much as 100 percent of the LMDS license for that area. On the other hand, if the population overlap is 10 percent or higher, we then look to the ownership structure of the involved entities. The Commission decided to establish an attribution level of 20 percent, rather than 10 percent, so as not to unduly constrict the flow of capital to LMDS licensees. As we discuss above, although there is nothing in the current record that convinces us that this balancing of factors and objectives should be revisited in this case, we also believe that it is appropriate for us to examine what steps may be necessary to ensure that this analysis is done in a consistent, integrated fashion in the context of different markets, products, and services. This belief has prompted our decision to initiate a more comprehensive proceeding later this year.

58. In sum, we believe that the 20 percent attribution level and the prohibition against an incumbent LEC or incumbent cable company holding a controlling interest in a licensee, taken in combination, provide an effective barrier against anticompetitive conduct. While we

⁹¹ *Second Report and Order*, 12 FCC Rcd at 12621 (para. 170).

⁹² *Id.* at 12643 (para. 221).

⁹³ *Id.* at 12628-29 (paras. 186-188), adopting 47 C.F.R. § 101.1003(d), as modified in *First Erratum*, released Apr. 7, 1997.

have affirmed the 20 percent attribution level based on the weighing and balancing of all of the competing interests we have discussed, we cannot predict with certainty that the level is an absolute bar to the anticompetitive conduct that the rule is designed to prevent. That is not what we reasonably can seek to achieve in relying on a bright line standard as we do here. Instead, we believe that the 20 percent level is reasonably based to promote the objectives we seek to achieve and that no other level is established in the record to be any better.

59. Webcel attacks the policy of flexibility by arguing that, with a 20 percent attribution limit, incumbent LECs and incumbent cable operators will have unlimited flexibility to pursue competitive foreclosure strategies by forming bidding consortia and other ventures to bid on LMDS licenses. Webcel submits as an example the possibility that the five Regional Bell Operating Companies (RBOCs) may form a wholly-owned joint venture for LMDS and be the high bidders for the LMDS licenses in the members' markets, solely for the purpose of foreclosing competition in each RBOC's region.⁹⁴ Bell Atlantic, in reply, argues that such concerns are theoretical and unsupported and that the Commission's rules already proscribe any anticompetitive auction tactics.

60. We agree with Bell Atlantic. We rejected earlier in this Order similar claims of Webcel that participation by incumbent LECs or incumbent cable operators in the LMDS auction will result in anticompetitive activities to prevent entry from new competitors.⁹⁵ We discussed the auction rules that proscribe such activities and we agreed with Bell Atlantic that there is no need for additional rules. We point out that the anti-collusion rules permit license applicants to enter into partnerships, joint ventures, and consortia for the purpose of pursuing a license at auction, but prohibit the kind of collusion Webcel describes.⁹⁶

ii. Attribution Levels and 1996 Act

61. Webcel further argues that the Commission's decision to reject the 10 percent level is inconsistent with the 1996 Act and the proposal in the *Fourth NPRM* to track the use of that level in Section 652 of the Act.⁹⁷ In addition, Webcel asserts that Congress defined ownership and affiliates in Section 3(1) of the Act⁹⁸ to mean an interest of 10 percent or

⁹⁴ Webcel Petition at 19.

⁹⁵ See paras. 25-39, *supra*.

⁹⁶ *Second Report and Order*, 12 FCC Rcd at 12685-86 (paras. 338-339), adopting 47 C.F.R. § 1.2105.

⁹⁷ Webcel Petition at 21; see Section 652 of the Communications Act, 47 U.S.C. § 572.

⁹⁸ 47 U.S.C. § 153(1).

greater based on similar concerns about the same types of competitive incentives at issue here. Webcel argues that the 20 percent level is not defensible on this basis alone. We disagree.

62. There is no statutory provision that governs the percentage of an ownership interest in an incumbent LEC or incumbent cable system, or in an LMDS licensee, which we must follow for purposes of imposing the LMDS eligibility restriction on such incumbents. The Commission rejected a similar argument when it affirmed the 20 percent level for the CMRS spectrum cap.⁹⁹ As stated there, we find that the various statutory ownership attribution criteria do not directly apply to LMDS ownership attribution. On the contrary, the decision of Congress to set an ownership attribution level for specific uses indicates that Congress did not intend that these attribution levels be followed automatically in all cases. Commission rules impose a variety of ownership attribution levels for different services and Congress did not attempt to dictate one attribution level for all radio services or all purposes.¹⁰⁰

63. As Webcel acknowledges, Section 652 prohibits in-region LECs and cable companies from acquiring attributable interests in each other. The *Fourth NPRM* sought comment generally on what should constitute an attributable interest and pointed out that the Commission has used several different formulations in different contexts.¹⁰¹ Thus, although the Commission stated that it would consider the 10 percent level used in Section 652, it neither relied exclusively on the statute nor otherwise indicated that its deliberations in adopting a final rule would be somehow limited to that proposal. Although the general goals may be the same in seeking to achieve competition by imposing ownership limitations on potentially dominant entities, we sought in the *Second Report and Order* to establish a new broad service to be implemented as soon as possible. Thus, the Commission sought to avoid establishing an attribution standard that would forestall desirable financial interests in LMDS licenses. In contrast, Section 652 is a prohibition on acquisition of cross interests in established businesses, so there is little danger that use of a lower attribution level in that context will deprive nascent services and technologies of needed capital.

iii. Reliance on CMRS Spectrum Cap

64. Webcel argues that the *Second Report and Order* should not have relied on the 20 percent attribution level in the CMRS spectrum cap to the same extent it also relied on the

⁹⁹ *PCS Remand Order*, 11 FCC Rcd at 7880-81 (para. 118), 7882-83 (para. 122).

¹⁰⁰ *Id.* at 7882-83 (para. 122). The Commission pointed out that similar rules, such as those in the broadcast services, attribute ownership interests of as little as 5 percent.

¹⁰¹ *Fourth NPRM*, 11 FCC Rcd at 19056-57 (para. 133).

definition of a significant geographic overlap, as that definition is used for purposes of the CMRS spectrum cap.¹⁰² Although the Commission stated that there are good reasons to adopt LMDS rules that are consistent with existing rules governing wireless services,¹⁰³ Webcel argues that the Commission sacrificed competition in the name of administrative expediency without taking into account the different contexts in which the attribution levels for LMDS and CMRS were developed. Webcel identifies two factors that it claims distinguish LMDS from CMRS and demonstrate that the 20 percent standard is too liberal in allowing incumbent LECs or incumbent cable companies to hold in-region LMDS licenses.

65. First, Webcel argues that the competitive situations for LMDS and CMRS generally are different, as are the goals for the LMDS and CMRS ownership restrictions. Webcel asserts that the LMDS rule is imposed on incumbent LECs and incumbent cable operations that the Commission has recognized as having market power, while the CMRS rule concerns a market that the Commission found to be relatively competitive in the *Second CMRS Competition Report*.¹⁰⁴

66. We disagree with Webcel that the goals in adopting the respective CMRS and LMDS ownership restrictions were different. In the *Fourth NPRM*, the Commission proposed to use the former broadband PCS-cellular cross-ownership rule now included in the CMRS spectrum cap because we found it involved similar competitive concerns.¹⁰⁵ Like LMDS, these rules were adopted to achieve the same goals of promoting competition and preventing the concentration of spectrum among entities with the incentive and ability to prevent competition. The Commission imposed the spectrum cap on broadband PCS, cellular, and SMR providers because it found they have the potential to limit entry by other broadband service providers and undermine Congressional goals such as the avoidance of excessive concentration of licenses.¹⁰⁶ The goal was to ensure competition in the provision of such services and ensure opportunity for new providers. Similarly, the Commission imposed the LMDS ownership restriction on incumbent LECs and incumbent cable companies to prevent their limiting the entry of new LMDS providers in their own regions where such incumbents hold market power. The goal also was to maximize competition by prohibiting such in-region

¹⁰² Webcel Petition at 20-21.

¹⁰³ *Second Report and Order*, 12 FCC Rcd at 12630 (para. 191).

¹⁰⁴ *Second Annual Report: Competition in the Commercial Mobile Radio Services*, FCC 97-75, 12 FCC Rcd 11267 (1997) (*Second CMRS Competition Report*).

¹⁰⁵ *Fourth NPRM*, 11 FCC Rcd at 19056 (para. 132).

¹⁰⁶ *CMRS Third Report and Order*, 9 FCC Rcd at 8108-10 (paras. 258-264).

operators from having an LMDS license, which the Commission noted was similar to the cap on CMRS licensees.¹⁰⁷

67. Webcel fails to demonstrate how a change, if any, in the degree of competition in the LMDS and CMRS markets would undermine our reliance on the use of similar rules to address similar competitive concerns. Contrary to Webcel's claims, we do not find that the *Second CMRS Competition Report* reached conclusions about the level of competition in the CMRS marketplace. Rather, the Report found that, after two years of implementing new service rules in various CMRS services, competition is emerging and developing.¹⁰⁸ Moreover, even if there were differences in the degree of competition in the LMDS and CMRS markets, it is not clear how that requires us to change the 20 percent ownership attribution level we adopted in the LMDS rule, inasmuch as the 20 percent level was adopted to achieve the same competitive goals for CMRS and LMDS. In any event, the Commission thoroughly discussed the applicability of the 20 percent attribution standard in the LMDS rule.

68. Second, Webcel argues that the LMDS competitive landscape is similar to the heightened competitive concerns that led the Commission to adopt a 5 percent attribution rule in the context of the DBS auction. Webcel contends that the Commission adopted the DBS rule to ensure that new licensees would be sufficiently independent from incumbents and could provide vigorous competition, and that we should do the same in the case of the LMDS ownership restriction.¹⁰⁹

69. We disagree with the comparative arguments advanced by Webcel. As we have discussed, the Commission found the 20 percent level consistent with our goals to promote investment and competition in the new LMDS market while preventing the anticompetitive activities that could occur. Furthermore, Webcel disregards the circumstances under which the 5 percent attribution level was adopted in the ownership restriction we imposed on DBS providers in the *DBS Report and Order*. The Commission adopted the restriction, which limited the acquisition of an attributable interest in DBS channels at the 110° orbital location, to serve a different purpose in a different context than the eligibility restriction imposed on the acquisition by incumbent LECs and incumbent cable companies of an attributable interest in an LMDS licensee.

70. The DBS proceeding was initiated after DBS was implemented. The Commission sought to modify the licensing rules by adopting competitive bidding procedures to reassign

¹⁰⁷ *Second Report and Order*, 12 FCC Rcd at 12622 (para. 172), 12624 (para. 178).

¹⁰⁸ *Second CMRS Competition Report*, 12 FCC Rcd at 11268-69.

¹⁰⁹ Webcel Petition at 21, citing *DBS Report and Order*, 11 FCC Rcd at 9746 (para. 88).

from a recovered permit the full-CONUS DBS spectrum at the 110° location.¹¹⁰ In adopting the one-time auction rule for this purpose, the Commission noted the scarcity of full-CONUS DBS spectrum at other orbital locations. It concluded that a restriction on acquisition at the auction was necessary to reduce concentration of full-CONUS DBS resources and ensure competition among video services from the additional full-CONUS DBS system. Accordingly, the Commission prohibited an entity already holding an attributable interest at the other full-CONUS locations from acquiring an attributable interest in the additional 28 channels to be reassigned in the auction, unless the entity that won at the auction subsequently divested the existing locations.¹¹¹

71. Thus, the DBS restriction was directed at existing DBS operators to prevent their acquiring at the one-time auction any additional competitive channels. The restriction did not apply to incumbent cable operators, except to the extent they had an attributable interest in an existing DBS licensee. In deciding not to restrict cable ownership in the available DBS license, the Commission relied on the presence of existing DBS licensees that were unaffiliated with cable operators and the Commission's ability to monitor the effect of later acquisition of DBS licenses when an unaffiliated full-CONUS DBS operator would seek to assign or transfer control of its license to a cable-affiliated entity.¹¹²

72. In contrast, the LMDS eligibility restriction is directed at incumbent cable operators and incumbent LECs during the three-year implementation period of a new service. As a consequence, our consideration in adopting the respective attribution rules and an appropriate cut-off level for determining an attributable ownership level were different. The Commission found more conservative attribution rules were warranted in the DBS context in order to achieve its goal that no party hold interests at more than one full-CONUS location. The Commission determined that a 5 percent ownership attribution level was not too restrictive in its impact on the DBS industry because the restriction was limited to sharing the new DBS location among existing DBS operators and preventing their influence in new DBS providers.¹¹³

73. There was no comparable need to be so restrictive in adopting the appropriate attribution level in the LMDS eligibility rule. No entity subject to the LMDS restriction

¹¹⁰ *DBS Report and Order*, 11 FCC Rcd at 9713 (para. 2). In *DIRECTV*, the court affirmed this Order on appeal.

¹¹¹ *Id.* at 9723-24 (paras. 28-31).

¹¹² *Id.* at 9740-41 (paras. 73-76).

¹¹³ *Id.* at 9747-48 (paras. 92-95).

already holds an LMDS authorization, and our incentive to bar existing DBS providers from the opportunity to acquire a second authorization was not the same as the incentives in restricting the entry of incumbent cable companies and incumbent LECs in the new LMDS marketplace. As we have stated, the 20 percent attribution level in the LMDS rule strikes the proper balance in encouraging the development of technology and the flow of capital into this nascent service while preventing the anticompetitive activities from incumbent LECs and incumbent cable companies that the restriction addressed.

b. Treatment of Interests with Rights of Conversion to Equity Interests

74. The LMDS attribution rules provide that “debt and interests such as warrants and convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not constitute attributable interests unless and until conversion is effected.”¹¹⁴ Webcel argues that the treatment of such warrants and interests in the attribution rule is inconsistent with the treatment accorded them in the auction rules also adopted in the *Second Report and Order*.¹¹⁵ The auction rules concerning small business qualifications treat these rights as though they had been exercised. Webcel asserts that allowing incumbent LECs and incumbent cable operators to freely hold warrants and other convertible instruments in in-region LMDS licenses will undermine the eligibility restriction and allow incumbents to engage in a number of anticompetitive activities that are contrary to the goals of the restriction. Bell Atlantic opposes the petition, arguing that Webcel’s request is contrary to well-established Commission policy.¹¹⁶

75. As Webcel notes, the LMDS rules treat warrants and similar convertible interests differently for purposes of determining attributable interests subject to the eligibility restriction on ownership of an in-region LMDS license than the size standards for auction participation by small businesses. Webcel, however, fails to address the differences in the purposes of the two rules and why this different treatment is problematic or why we should modify the ownership attribution rule to mirror the small business size standard. As noted above, the ownership attribution rules attendant to the LMDS short term eligibility restriction are

¹¹⁴ *Second Report and Order*, 12 FCC Rcd at 12630-31 (para. 192), adopting 47 C.F.R. § 101.1003(e)(5).

¹¹⁵ Webcel Petition at 22 n.48, citing 47 C.F.R. § 101.1112(d)(5).

¹¹⁶ Bell Atlantic Opposition at 5-6. Bell Atlantic also argues that Webcel’s request is procedurally defective because Webcel failed to raise this issue in the comments to the *Fourth NPRM* and cannot at this late date raise the matter for the first time, citing 47 C.F.R. § 1.429(b). We disagree. We find it unnecessary to reach the merits of Bell Atlantic’s factual claim regarding Webcel’s prior pleadings because we conclude that the public interest is best served by our consideration of the facts and arguments raised by Webcel. See para. 82, *infra*. See also 47 C.F.R. § 1.429(b)(3).

designed to prevent anticompetitive activities, while the auction rule is based on statutory provisions to encourage designated entities to participate in Commission auctions and to receive specific benefits, such as bidding credits. As we stated in considering different percentage levels in establishing ownership levels in our rules, our consideration of convertible debt and equity interests depends on the context of the specific goals to be achieved.

76. The different manner in which warrants and convertible interests are treated under the ownership eligibility and auction rules is consistent with their treatment in other wireless services. For example, the treatment of warrants and convertible interests under the ownership eligibility restriction is consistent with the CMRS spectrum cap attribution rule.¹¹⁷ Similarly, the designated entity auction rule is consistent with existing designated entity auction rules for other services,¹¹⁸ and with the general auction procedures set forth in Part 1, Subpart Q, of the Commission's Rules.¹¹⁹ The Commission previously recognized the different treatment of warrants and other convertible interests under its ownership eligibility and auction rules in the CMRS spectrum cap rules.¹²⁰ Webcel has presented no persuasive arguments for why we should depart from existing precedent or why maintaining the different treatments of convertible securities for purposes of ownership restrictions and auction rules is otherwise unreasonable.

77. Bell Atlantic argues that, within the ownership restrictions in other services, the Commission consistently has not attributed warrants and other convertible securities until they are actually exercised or converted. Bell Atlantic contends that this was the case with the cable television and multi-channel multipoint distribution service (MMDS) cross-ownership restriction contained in Section 21.912 of the Commission's Rules and with the DBS

¹¹⁷ *Second Report and Order*, 12 FCC Rcd at 12630-31 (paras. 191-192).

¹¹⁸ *Id.* at 12691-92 (para. 352).

¹¹⁹ 47 C.F.R. § 101.1101; 47 C.F.R. § 1.2110(a)(4).

¹²⁰ 47 C.F.R. § 20.6(d)(5), which states (emphasis added):

[D]ebt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until conversion is effected, *except that this provision does not apply in determining whether an entity is a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in § 1.2110 of this chapter or other related provisions of the Commission's rules.*

ownership rule.¹²¹ Bell Atlantic is correct that the treatment of warrants and other convertible interests in the attribution rule in the LMDS ownership restriction is consistent with existing treatment of warrants and convertible interests under other ownership and eligibility restrictions. We have noted that the Commission found good reasons, when it adopted attribution rules and the 20 percent level in the ownership eligibility restriction, to adopt rules that are consistent with existing rules governing wireless service licensees.¹²² Webcel fails to present support for its claim that the same treatment of warrants and other convertible securities in the LMDS ownership restriction would undermine the restriction or to present any good reason why such treatment otherwise should be different for LMDS than for other wireless services.

78. We disagree with Webcel that potential anticompetitive activities by incumbent LECs or incumbent cable companies require that we treat warrants and convertible interests differently for purposes of LMDS ownership eligibility than in the CMRS spectrum cap and other ownership rules. Webcel argues that an LMDS licensee with a substantial percentage of convertible instruments from in-region cable or telephone entities has no incentive to compete, is restricted by covenants commonly used with such interests, and can manipulate the bidding process in the auction to acquire licenses at any price. We discuss above similar arguments made by Webcel with respect to the participation of incumbents in the auction.¹²³ Whether warrants or other convertible interests in general suppress competition as Webcel alleges is debatable. Although the Commission has sought comment on their impact in the mass media context, it has not, to date,¹²⁴ modified the rule that treats convertible interests as nonattributable until conversion is effected.¹²⁵ Webcel does not demonstrate how anticompetitive activities have occurred under the identical provisions in the CMRS spectrum cap and the other ownership eligibility restrictions. While we acknowledge that these interests might, in certain contexts, raise competition concerns, there is no basis to conclude that, in

¹²¹ Bell Atlantic Opposition at 5-6, nn.10-11, citing 47 C.F.R. § 21.912 and *DBS Report and Order*, 11 FCC Rcd at 9811, Appendix C, Attribution Rules (para. 5).

¹²² *Second Report and Order*, 12 FCC Rcd at 12630 (para. 191).

¹²³ See paras. 11-39, *supra*.

¹²⁴ The Commission has sought comment on whether certain types of business interrelationships, such as combinations of debtholding and business relationships, ought to be included in the attribution rules of ownership restrictions in the context of broadcast attribution rules. *Attribution Notice*, 10 FCC Rcd at 3651-52 (paras. 96-99). The Commission subsequently sought further comment on a specific proposal to attribute debt interests or other nonattributable equity interests above a specified benchmark that are held by a program supplier or same market media entity. *Attribution Further Notice*, 11 FCC Rcd at 19899-19908 (paras. 8-25).

¹²⁵ 47 C.F.R. § 73.3555, note (f).

this instance, the relevant incumbents would act differently so as to require a different treatment for warrants and other convertibles in attributing interests under the LMDS eligibility rules.

79. Although we conclude that Webcel has failed to provide a sufficient basis for any revision to the LMDS convertible interest rule, we intend to make use of the safeguards and requirements in our current rules in order to ensure that the anticompetitive conduct feared by Webcel does not materialize and that the integrity of the eligibility restrictions is maintained. We also emphasize that parties may raise these issues in the context of petitions to deny particular license applications. In the recently adopted *Part 1 Third Report and Order*, the Commission adopted new ownership disclosure requirements for short-form and long-form applications.¹²⁶ The new Section 1.2112(a) requires that each application for a license or authorization must disclose fully the real party or parties in interest and must include the following information in an exhibit:

- (1) A list of any Commission-regulated business 10 percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, attributable stockholder, or key management personnel of the applicant. This list must include a description of each such business's principal business and a description of each such business's relationship to the applicant.
- (2) A list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest.
- (3) A list of any party holding a 10 percent or greater interest in any entity holding or applying for any Commission-regulated business in which a 10 percent or more interest is held by another party which holds a 10 percent or more interest in the applicant.
- (4) A list of the names, addresses, and citizenship of any party holding 10 percent or more of each class of stock, warrants, options, or debt securities together with the amount and percentage held.
- (5) A list of the names, addresses, and citizenship of all controlling interests of the applicants.
- (6) In the case of a general partnership, the name, address, and citizenship of each partner, and the share or interest participation in the partnership.

¹²⁶ *Part 1 Third Report and Order*, at paras. 71-78, adopting 47 C.F.R. § 1.2112(a).

- (7) In the case of a limited partnership, the name, address, and citizenship of each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses).
- (8) In the case of a limited liability corporation, the name, address, and citizenship of each of its members.
- (9) A list of all parties holding indirect ownership interests in the applicant, as determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, that equals 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated and reported as if it were a 100 percent interest.

Although this rule was not in effect before the filing of LMDS short-form license applications, the rule will be in effect by the time the long-form applications must be filed and all auction winners will be required to fully and completely comply with these required disclosures.

80. In addition, each applicant for an LMDS license claiming status as a small business is required to supply the Commission with a variety of ownership information pursuant to Section 1.2112(b) of the Commission's Rules.¹²⁷ This information includes:

- (1) Gross revenues for each of the following: the applicant and its affiliates; the applicant's attributable investors; affiliates of the applicant's attributable investors; and, if the applicant is a consortium of small businesses, the members of the consortium.
- (2) A list and summary of agreements or instruments that support the applicant's eligibility as a small business, including the establishment of *de facto* or *de jure* control.¹²⁸

¹²⁷ 47 C.F.R. § 2112(b), as added by the *Part 1 Third Report and Order*. See also Public Notice, Wireless Telecommunications Bureau Responds to Questions About the Local Multipoint Distribution Service Auction, DA 98-37, released Jan. 9, 1998, at 2.

¹²⁸ These agreements or instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written. See 47 C.F.R. § 2112(b)(2).

- (3) A list and summary of any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, rights to hire and fire employees, and rights to appoint members to boards of directors or management committees.

81. The information described in the preceding two paragraphs will be publicly available for each applicant and provides an effective means to determine whether particular business arrangements would potentially violate the LMDS eligibility restrictions. We believe this information will ensure that the letter and spirit of the eligibility restrictions are satisfied.

82. We also emphasize that we are cognizant of the competitive concerns that have caused Webcel to seek a further examination of the soundness of the convertible interest rule promulgated in Section 101.1003(e)(5) of the Commission's Rules.¹²⁹ We conclude, however, that our treatment of convertible interests in our ownership attribution rules would benefit from a more comprehensive examination. The examination should include an evaluation of the criteria for implementing such rules in the context of competitive and other relevant factors in different communications markets. For this reason, we intend to undertake such an examination as part of a more comprehensive proceeding that will address the Commission's various ownership restrictions and attribution standards.

83. Finally, Webcel requests clarification regarding why "warrants" are not identified in the LMDS auction rule, inasmuch as they are specifically included in the same auction rule for the PCS C and F block auctions.¹³⁰ Webcel asks whether the omission of warrants from the LMDS auction provision is an oversight or whether warrants will not be attributable in determining an affiliate in that rule. The omission is not oversight. We specifically adopted the LMDS auction rules based on our general auction rules contained in Part 1, Subpart Q, which also do not identify warrants in the definition of affiliated interest.¹³¹ We will treat warrants to the same extent they have been considered to be "stock options, convertible debentures, and agreements to merge" in the existing rule.¹³²

4. Treatment of Rural Telephone Companies

84. Alliance and RTG argue that the Commission erred when it failed to exclude rural telephone companies from the eligibility restriction imposed on the ownership of LMDS

¹²⁹ 47 C.F.R. § 101.1003(e)(5).

¹³⁰ Webcel Petition at 22 n.48, citing 47 C.F.R. § 24.709(b)(7).

¹³¹ *Second Report and Order*, 12 FCC Rcd at 12676 (para. 311); 47 C.F.R. Part 1, Subpart Q.

¹³² 47 C.F.R. § 1.2110(a)(4).

licenses by incumbent LECs and incumbent cable companies.¹³³ In the *Second Report and Order*, the Commission considered and rejected the arguments of commenters on behalf of rural telephone interests, including Alliance and RTG, that rural telephone companies should be exempt from any restriction on LEC ownership of LMDS licenses.¹³⁴ Alliance and RTG argue that the Commission misconstrued or ignored several things, including the obligations to rural LECs under Section 309(j) of the Communications Act, the impact of the restriction and the definition of significant overlap, the limited usefulness of partitioning and other alternatives to spectrum access, and Congressional directives in the 1996 Act.

a. Section 309(j) Requirements

85. Alliance and RTG argue that Section 309(j) imposes specific obligations on the Commission to provide opportunities for rural LECs to participate in the provision of spectrum-based services such as LMDS and ensure rapid deployment of these new services to rural Americans.¹³⁵ They argue that Section 309(j)(3) requires the Commission to design competitive bidding systems to further these specific goals, and that Section 309(j)(4) requires the Commission to prescribe regulations ensuring economic opportunity for rural telephone companies and the prompt delivery of service to rural areas.¹³⁶ Petitioners argue that, despite these directives, the Commission adopted no special provisions to ensure participation by rural telephone companies, but rather misconstrued the statute by creating hurdles to their ability to provide LMDS to rural areas. RTG argues that, when the Commission did assess the propriety of eligibility restrictions under Section 309(j), it failed to take into account the status of rural LECs as designated entities and conduct a market analysis of rural areas to ensure that the analysis of competition is accurate.¹³⁷

86. We find that the *Second Report and Order* fully considered the statutory requirements of Sections 309(j)(3) and 309(j)(4) in determining whether to restrict the opportunity of any class of service providers to obtain and use spectrum to provide LMDS, including rural LECs. The Commission noted at the outset that it is well established that Section 309(j)(3) specifically authorizes it to specify eligibility and other characteristics of a

¹³³ Alliance Petition; RTG Petition at 2-11.

¹³⁴ *Second Report and Order*, 12 FCC Rcd at 12625-26 (paras. 179-181).

¹³⁵ Alliance Petition at 3-6; RTG Petition at 3-5.

¹³⁶ 47 U.S.C. §§ 309(j)(3)(A), 309(j)(4)(C)-(D).

¹³⁷ RTG Petition at 4-5.

license, based on a series of objectives.¹³⁸ In considering the basis for an eligibility restriction on incumbent LECs and incumbent cable companies, the Commission recognized the objectives in Section 309(j)(3)(B) that we promote economic opportunity and competition by avoiding excessive concentration of licenses and by distributing licenses among a wide variety of applicants. The Commission did not ignore the identification of rural telephone companies as applicants to be included in achieving those competitive goals, as petitioners claim. Indeed, rural companies have been granted special advantages under the bidding rules as small businesses in their acquiring a license.

87. Nor did the Commission misconstrue or otherwise disregard the requirement in Section 309(j)(3)(A) that objectives of the statute include the development and rapid deployment of new services for the benefit of the public that includes those residing in rural areas, as petitioners claim. The *Second Report and Order* reflects the serious consideration of these service objectives in several aspects of the rules. The entire regulatory framework for LMDS is structured to promote competition and enhance service for every consumer by easing entry requirements, as well as the operating and technical requirements, on licensees to ensure their flexibility in meeting any service needs. Nothing suggests that the framework will not achieve these goals in meeting rural service needs.

88. Moreover, the Commission proposed and adopted the eligibility restriction to make sure that monopolists that would be subject to competition from LMDS in their own regions do not bar the entry of new LMDS services seeking to initiate lower cost alternatives or service in underserved areas, which will benefit rural, as well as urban, areas. The Commission has an obligation under Section 309(j)(3) to consider safeguards to protect the public interest in the use of the spectrum, and it met this obligation by promoting competition in all areas, including rural areas. Section 309(j)(4) directs that our regulations ensure prompt delivery of service to rural areas and provide opportunities for rural telephone companies, among the other designated entities. We believe the LMDS regulations will help rural areas and rural telephone companies by taking into account the benefits of competition and establishing safeguards to ensure the success of LMDS.

89. The Commission weighed and balanced all of the several competing statutory policy objectives in considering the eligibility restriction and whether incumbent LECs and incumbent cable companies would impede substantially the pro-competitive benefits of licensing LMDS.¹³⁹ Contrary to petitioners' assertions, none of the objectives guarantees licenses for rural LECs. Instead, the Commission concluded that the primary goal of the statutory scheme is to encourage efficient competition in the telephony and video distribution

¹³⁸ *Second Report and Order*, 12 FCC Rcd at 12614-15 (paras. 157-158); 47 U.S.C. § 309(j)(3)(A)-(D).

¹³⁹ *Second Report and Order*, 12 FCC Rcd at 12614-16 (paras. 157-159).

markets while providing opportunities for smaller operators. The Commission undertook an extensive analysis of the market and competition in the local telephony and cable markets and, based on the record evidence of comments and economic testimony, as well as our own predictive judgment, concluded that all incumbent LECs and incumbent cable companies would have incentives to attempt to foreclose competitive entry in their respective markets.¹⁴⁰ The Commission specifically found that this could result in inefficient use of the spectrum and a failure to promote competition, which are two factors we are required to assess under Sections 309(j)(3)(B) and 309(j)(3)(D).

90. The Commission determined that the incentive for in-region LECs and cable companies to attempt to prevent competition is particularly strong because of the unusually large amount of spectrum to be licensed for LMDS. It also determined that the eligibility restriction would foster competition by reserving the license for entrants without market power in either the local telephony or cable markets.¹⁴¹ The Commission balanced all of the various policy objectives promoted by Section 309(j) before determining that allowing incumbent monopolists in the telephone and cable markets to participate without restriction in the new LMDS market would inhibit the development and deployment of the LMDS spectrum.

91. In addition to taking all of the factors in Section 309(j) into account in considering the eligibility restriction, the Commission similarly balanced those factors in establishing LMDS bidding rules.¹⁴² It concluded that the auction rules would foster economic opportunity and the distribution of licenses among a wide variety of applicants, including small businesses, consistent with the statutory requirements. Contrary to RTG's assertions, the Commission considered the treatment of those designated entities, including rural LECs, identified in the statute in pursuing our objectives of promoting competition and economic opportunity. Special provisions were adopted for small businesses to participate in the auction that would further the objectives of Section 309(j).¹⁴³ The Commission specifically found no basis for special provisions, apart from the small business provisions, to ensure the participation of rural LECs, whose interests were found to be adequately addressed.¹⁴⁴

¹⁴⁰ *Id.* at 12621-23 (paras. 170-175).

¹⁴¹ *Id.* at 12622 (para. 173).

¹⁴² *Id.* at 12672-74 (paras. 302-305).

¹⁴³ *Id.* at 12686-88 (paras. 340-343).

¹⁴⁴ *Id.* at 12695-96 (paras. 362-363).

92. Furthermore, the Commission specifically considered whether to apply the eligibility restriction to rural LECs. Contrary to petitioners' assertions, the Commission specifically balanced the factors identified in Section 309(j) concerning rural LECs with the remaining objectives before rejecting petitioners' arguments that they should not be excluded.¹⁴⁵ The Commission did not misconstrue or adopt new standards under Section 309(j) when it stated that rural LECs had not made the case that they are the only entities to provide LMDS in their service territories. Instead, the Commission was addressing the arguments in their comments that, unless rural LECs are exempt from the restriction and can participate freely in acquiring LMDS licenses, the rural areas they serve would not receive LMDS services. While the Commission agreed that the provision of LMDS service to rural consumers should not be impaired, it concluded that the eligibility restriction imposed generally on all LECs would not hinder the introduction of LMDS in rural areas and instead is consistent with our goal to promote competitive entry.

93. There was no basis to find that rural LECs would not have the same opportunities and incentives for anticompetitive use of LMDS licenses as other incumbent LECs and, accordingly, the Commission determined to treat them no differently from other monopoly providers of telephone service in order to achieve the goals of economic opportunity and competition set forth in Section 309(j). Contrary to petitioners' claims, the Commission was not requiring rural LECs to show that they are the only entities that can provide LMDS to rural areas, but only rejecting their suggestion that no competitors were interested in rural service. It is precisely to promote the entry of other competitors that the Commission adopted the restriction and a licensing framework for LMDS that promotes competition.

94. Alliance argues that we should reconsider what it claims is the Commission's disregard in previous decisions of the Section 309(j) mandate on behalf of rural telephone companies. Alliance also contends that the Commission should stop relying on precedent with respect to rural telephone company eligibility, including, most recently, the *PCS Partitioning Order*.¹⁴⁶ Alliance is correct that the *Second Report and Order* is entirely consistent with the determination in similar wireless proceedings to deny similar requests for special treatment by rural telephone companies that were based on claims under Section 309(j).¹⁴⁷ Alliance does

¹⁴⁵ *Id.* at 12625 (para. 179).

¹⁴⁶ Alliance Petition at 3-4, citing *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-148, 11 FCC Rcd 21831 (1997) (*PCS Partitioning Order*).

¹⁴⁷ The Commission recently exempted rural LECs and companies serving fewer than 2 percent of the Nation's subscriber lines from the requirement that incumbent LECs may only provide CMRS through a separate corporation that meets structural separation requirements. That exemption, however, was based on the exemption accorded these entities in Section 251(f) of the Communications Act, as added by the 1996 Act, from similar

not demonstrate why the determinations for LMDS should be different. As Alliance points out, the *PCS Partitioning Order* considered the provisions of Section 309(j)(3) and found that they direct the Commission to further the rapid deployment of new technologies for the benefit of the public, including those residing in rural areas, to promote economic opportunity and competition and to ensure the efficient use of spectrum. The Commission found that, although encouraging the participation of rural LECs in the subject service is an important element in meeting these goals, Congress did not dictate that licensing rural LECs to provide spectrum-based services should be the sole method of ensuring the rapid deployment of service in rural areas.¹⁴⁸

b. Impact of the Restriction and the Criteria for Significant Overlap

95. Alliance and RTG request reconsideration of the application of the eligibility restriction to rural LECs, contending the Commission failed to consider its impact on them.¹⁴⁹ They argue that the Commission erred in concluding that, because rural LECs are generally small, they are unlikely to have the degree of overlap with BTAs necessary to trigger the eligibility restriction.¹⁵⁰ They assert that the size of the LEC is irrelevant in triggering the overlap determination and that it is more likely a small rural LEC would be disqualified under the definition. Additionally, RTG argues that the Commission erred in finding that partitioning is a method by which rural LECs can acquire LMDS spectrum.¹⁵¹ RTG contends that the overlap restriction renders partitioning useless for rural LECs.

obligations imposed on other LECs. The Commission found that, in this instance, the exemption of rural LECs also promotes the goals of Section 309(j)(3) by forgoing a requirement that imposed operational burdens resulting in additional costs and reporting requirements that Congress sought to reduce on rural LECs in Section 251(f). Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services and Implementation of Section 601(d) of the Telecommunications Act of 1996, WT Docket No. 96-162, Report and Order, 12 FCC Rcd 15608, 15709-10 (paras. 69-75) (1997), citing 47 U.S.C. §§ 251(b), 251(c).

¹⁴⁸ *PCS Partitioning Order*, 11 FCC Rcd at 21843-44 (para. 15). The Commission recently stated that the CMRS spectrum cap was one of the most effective mechanisms the Commission could employ to achieve the goals of Section 309(j) to avoid excessive concentration of licenses and distribute them among a wide variety of applicants, even though rural LECs are not exempt from its requirements. *PCS Remand Order*, 11 FCC Rcd at 7873-74 (para. 102), 7884 (para. 125).

¹⁴⁹ Alliance Petition at 6-7; RTG Petition at 5-7.

¹⁵⁰ *Second Report and Order*, 12 FCC Rcd at 12625-26 (para. 180).

¹⁵¹ *Id.* at 12625-26 (para. 180), 12695 (para. 362).

96. At the outset, we disagree that consideration of the impact of the definition of a significant overlap and the availability of partitioning of licenses, which were discussed elsewhere in the *Second Report and Order*, were used as the basis for including rural LECs within the eligibility restriction. The Commission adopted the eligibility restriction to promote competition in the new LMDS market based on its conclusion that incumbent LECs and incumbent cable companies might well attempt to foreclose competition in their respective markets. The anticompetitive activities that were described could involve any incumbent LEC. As discussed above, there is no basis either in the statute, Commission policy, or the record to exclude rural LECs from the eligibility restriction. The purpose in discussing the extent of overlapping interests, the availability of partitioning, and other issues was to address the impact of the restriction on rural LECs and alternative ways of acquiring LMDS spectrum in response to concerns raised in the comments.

97. We also disagree with the arguments of Alliance and RTG that the Commission miscalculated the importance of the definition of a significant geographic overlap to rural LECs and that rural LECs will be subject to greater disqualification under its terms than other incumbent LECs. The eligibility restriction prohibits an incumbent LEC or incumbent cable company from having an attributable interest in an LMDS license whose geographic service area significantly overlaps such incumbent's authorized or franchised service area. A significant overlap is defined in Section 101.1003(d) as follows:¹⁵²

(d) Significant overlap with authorized or franchised service area. For purposes of paragraph (a) of this section, a significant overlap of an incumbent LEC's or incumbent cable company's authorized or franchised service area 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.

98. Alliance and RTG are correct that determination of a significant overlap of the geographic areas is not based on the size of the respective areas or the size of the companies, but rather on the size of the population in the LMDS license area that is within the service area of the incumbent LEC or incumbent cable company. In adopting the 10 percent threshold, the Commission concluded that an overlap of less than 10 percent of the population is sufficiently small that the potential for exercise of undue market power by the incumbent

¹⁵² *Id.* at 12628-29 (paras. 186-188), adopting 47 C.F.R. § 101.1003(d), as modified in the *First Erratum*, released Apr. 7, 1997.

LEC or incumbent cable company is slight.¹⁵³ As RTG states, even a small rural LEC may not hold an LMDS license if 10 percent or more of the population of the LMDS license area is within the rural LEC's telephone service area.

99. The Commission did not apply a different definition of significant overlap or imply it was somehow disregarding the definition, to which it specifically referred, when it characterized rural LECs as small in considering the impact of the overlap definition on their operations. In their comments, the rural LECs characterized their operations as smaller LECs that serve rural consumers rather than urban consumers. The Commission specifically addressed their argument that they should be exempt from the eligibility restriction because consumers in rural areas would not be served unless rural LECs are able to participate in the new market. Thus, it was not unreasonable to conclude that, because rural LECs are generally small, they are less likely than other LECs to have the degree of overlap with LMDS licensed areas that triggers the eligibility restriction. This is logical, since the population center of an LMDS service area is more likely to be within the territory of an urban LEC than a rural LEC and it is less likely that 10 percent of the population in the LMDS service area would be within the rural LEC territory than the urban LEC territory.¹⁵⁴

100. Nevertheless, the Commission was merely observing that the impact of the eligibility restriction may not be as harsh as the rural LECs anticipated for a variety reasons, one of which is the likelihood of a population overlap given their own claims of their rural locations and sizes. However, even if the supposition were found to be incorrect and rural LECs were affected to the same extent as other LECs, we still would have subjected rural LECs to the eligibility restriction. The Commission found no reason why incumbent rural LECs would not have the same opportunities and incentives for anticompetitive use of LMDS licenses as other incumbent LECs. The Commission concluded that they should be treated no differently in order to ensure the success of the eligibility restriction in achieving the goal of competition in the new LMDS marketplace.¹⁵⁵

101. In addition, if rural LECs are prevented by the overlap definition from holding a specific LMDS license, as petitioners claim, they are not barred from providing LMDS altogether and have available meaningful opportunities for service. First, they can acquire

¹⁵³ *Id.* at 12629 (para. 188).

¹⁵⁴ Typically, a BTA includes a population center or centers, such as a large city or town, and the surrounding rural area. BTA boundaries are based on county lines because most statistical information relevant to marketing is published in terms of counties. *Second Report and Order*, 12 FCC Rcd at 12605 (para. 136 n.197). Thus, the populations of BTAs are not evenly distributed, so that it is not unlikely that rural LECs serve smaller populations in the rural areas.

¹⁵⁵ See paras. 86-91, *supra*.

LMDS licenses outside their local exchange service areas. Second, as discussed in the *Second Report and Order* and below, they can acquire spectrum through partitioning of the 1,150 megahertz license. Third, the eligibility restriction does not apply to the 150 megahertz license.¹⁵⁶ In addition, the divestiture provision permits any LEC to obtain an LMDS license and then divest any overlapping area or attributable interest to the extent necessary to come into compliance, thereby enabling the LEC to provide LMDS in the remaining in-region areas. Thus, a rural incumbent LEC may hold an LMDS license in its own service areas as long as it does not provide telephone service to more than 10 percent of the population of the LMDS licensed area or maintain an attributable interest in the LMDS licensee.

102. Incumbent rural LECs also may find it attractive to expand into areas adjacent to their own service areas in order to provide LMDS. Unlike the LEC's existing wireline operations, which involve an extensive wired infrastructure in its service area, LMDS is a wireless service that can be established without incurring the expense of building a new wired infrastructure. The absence of large start-up costs for LMDS should open opportunities for expansion into new regions by rural LECs, even those that are relatively small companies with limited capital.

103. We disagree with RTG's assertion that geographic partitioning is not a useful method for rural LECs to acquire LMDS spectrum and is rendered useless by the overlap definition. RTG asserts that it repeatedly has argued in wireless proceedings adopting new service rules, such as the *Competitive Bidding Fifth Report and Order*¹⁵⁷ and the *PCS Partitioning Order*, that partitioning does not satisfy the mandate of Section 309(j). Yet we specifically considered the many benefits to rural areas and rural LECs that would accrue from partitioning.¹⁵⁸ In adopting partitioning and disaggregation for LMDS licenses to encourage the efficient and effective use of LMDS spectrum, the Commission noted that geographic partitioning should be a method for entities with local concerns or limited capital to serve a portion of a BTA and for rural areas to be served sooner than otherwise would be possible. The nature of the LMDS cell structure makes partitioning useful in delivering services to isolated areas, such as rural towns that do not lie within major market areas. In adopting the LMDS auction rules and rejecting the claims of rural LECs for special auction provisions, the Commission found that partitioning of an LMDS license provides flexibility in the use of the spectrum that should assist in satisfying the spectrum needs of rural LECs at

¹⁵⁶ *Second Report and Order*, 12 FCC Rcd at 12625-26 (para. 180).

¹⁵⁷ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5597-99 (paras. 148-153) (1994) (*Competitive Bidding Fifth Report and Order*).

¹⁵⁸ *Second Report and Order*, 12 FCC Rcd at 12607-08 (paras. 141-145).

low cost.¹⁵⁹ As RTG acknowledges, the Commission consistently has found that allowing licenses in other services to be geographically partitioned from larger service areas provides rural LECs with enhanced opportunity to participate in the provision of new services and is thus in the public interest.¹⁶⁰

104. In arguing that partitioning is nevertheless useless for rural LECs, RTG contends that the telephone service area of a rural LEC will almost always exceed 10 percent of any partitioned LMDS service area. RTG argues that this is because the rural LEC lacks the wherewithal to compete in markets geographically distant from its base of operations and that, therefore, it realistically is limited to serving that portion of partitioned markets that encompass its wireline service areas and adjacent markets.

105. RTG is correct that the eligibility restriction applies to LMDS licensed areas that are partitioned, as well as to the entire BTA. Although in the *Fifth NPRM* issued in conjunction with the *Second Report and Order* the Commission proposed modifications to the LMDS service rules to implement its decision to permit partitioning and disaggregation of LMDS licenses, the Commission proposed no modifications concerning the application of the eligibility restriction to partitioned licenses.¹⁶¹ As we have stated, the means of divestiture in the rule include partitioning of the geographic area of the LMDS licensed area that exceeds the overlap restriction.¹⁶² This is consistent with the determination to allow partitioning of PCS licenses and to apply the CMRS spectrum cap to partitioned licensed areas and disaggregated spectrum.¹⁶³ Compliance with the terms of the cap are based on the post-partitioning populations of each licensee's partitioned market; neither the partitioner nor the partitionee can count the population in the other party's portion of the market in determining its own compliance with the spectrum cap.

106. RTG, however, is not correct that the application of this rule will always result in the rural LEC exceeding 10 percent and never being able to acquire a partitioned licensed area. RTG's argument rests on the rural LEC deciding, as a marketing matter, to seek only those partitioned LMDS licenses covering their own wireline service areas. As the Commission has stated, the same competitive concerns that persuaded it to impose the eligibility restriction on incumbent LECs to prevent anticompetitive activities also persuaded it

¹⁵⁹ *Id.* at 12695 (para. 362).

¹⁶⁰ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5598 (paras. 150-151).

¹⁶¹ *Second Report and Order*, 12 FCC Rcd at 12716-17 (paras. 423-424).

¹⁶² 47 C.F.R. § 101.1003(f)(1)(ii).

¹⁶³ *PCS Partitioning Order*, 11 FCC Rcd at 21868 (para. 72).

to apply the restriction to incumbent rural LECs. In adopting the definition of a significant overlap in the *Second Report and Order*, the Commission relied on the definition adopted for the CMRS spectrum cap and found that it applied equally to the goals the Commission sought to achieve in adopting the LMDS eligibility restriction.¹⁶⁴ Unless the overlap restriction applies equally to rural incumbent LECs, the objectives to promote the effective entry of new competitors in the LMDS marketplace and enhance competition with monopolist incumbent LECs and incumbent cable companies may not be achieved. RTG does not refute the proposition that incumbent rural LECs would have the same incentive and ability as non-rural incumbents to acquire an LMDS license to foreclose entry by competitive LMDS providers in their own service areas. Thus, the fact that rural LECs may prefer to provide LMDS in their own service areas does not mean the public interest in competitive services would be served by permitting them to do so.

107. As a final matter, RTG argues that the availability of the 150 megahertz LMDS license, which is not subject to the eligibility restriction, is not a reasonable alternative and does not justify denying rural LECs access to the 1,150 megahertz license. Contrary to RTG's assertion, the Commission did not rely on the availability of the 150 megahertz license to justify including rural LECs in the eligibility restriction. Rather, it identified the availability of the 150 megahertz license as one of several alternative means by which rural LECs can provide LMDS.¹⁶⁵ As RTG acknowledges, the smaller license provides spectrum for a niche service and may be an alternative for entry into the LMDS marketplace.

c. Congressional Directives in Telecommunications Act of 1996

108. Alliance and RTG argue that the Commission failed to balance the competition goals of the Telecommunications Act of 1996 with its other important national goals reflected in the Communications Act of 1934, such as universal service.¹⁶⁶ Alliance asserts that the universal service requirements of Sections 214(e)(2) and 254, as well as the equal access requirements of Section 251(f), in the statute recognize the vital participation of rural LECs.¹⁶⁷ RTG argues that, as reflected in the Commission's recent *Universal Service Order*, the definition of what services must be included in universal service is continually changing.¹⁶⁸

¹⁶⁴ *Second Report and Order*, 12 FCC Rcd at 12629-30 (para. 188).

¹⁶⁵ *Id.* at 12625-26 (para. 180).

¹⁶⁶ Alliance Petition at 6-9; RTG Petition at 8, 11.

¹⁶⁷ Alliance Petition at 8, citing 47 U.S.C. §§ 214(e)(2), 251(f), 254(c)(1).

¹⁶⁸ RTG Petition at 11, citing Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (*Universal Service Order*).

RTG argues that many of the service offerings contemplated for LMDS may be included in the definition of universal service. Alliance and RTG argue that the statute provides that rural LECs are the sole telecommunications carriers eligible within their service areas to receive support for providing universal service. Therefore, they assert, adopting rules that deny rural LECs the ability to provide LMDS would hinder service to high cost rural areas and is thus contrary to the universal service goals.

109. In the *Second Report and Order*, the Commission considered several arguments from LECs and cable operators that any restrictions on LECs or cable companies would be inconsistent with the 1996 Act.¹⁶⁹ The Commission found that these arguments were rebutted by several provisions in the statute. Those provisions include Section 10 of the Communications Act, which recognizes the need to reduce market power by encouraging competitive entry into communications markets. The Commission also noted that specific sections of the Communications Act, such as Section 613(c), provide authority to prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications, such as LMDS, that operate in the same community. Alliance and RTG do not demonstrate that the Commission erred in considering such sections.

110. Although the Commission did not specifically address the universal service provisions in Section 254, the decision to adopt the eligibility restriction and apply it to rural LECs is consistent with our universal service goals. Section 254 of the Communications Act, added by the 1996 Act, states that, in seeking to promote the Congressional goal of universal service, the Commission should ensure that consumers from all parts of the Nation, including rural areas, have access to telecommunications and information services that are comparable to service in other more urban areas and at rates that are comparable to the rates available in urban areas. As we have stated, granting rural LECs an exemption from the eligibility restriction would be contrary to our goals in adopting the restriction of preventing incumbent LECs and incumbent cable companies with market power from foreclosing the entry of new competitors in their regions. The decision not to exempt rural LECs from the restriction will, we believe, result in increased, competitive LMDS service to rural areas at reasonable rates. The Commission always has had universal service as its mission, and preserving the LMDS spectrum for new entrants without market power in their regions is consistent with that mission.

5. Other Matters

a. Study Regarding Termination of Eligibility Restrictions

¹⁶⁹ *Second Report and Order*, 12 FCC Rcd at 12624-25 (para. 178), citing 47 U.S.C. §§ 160, 533(c).

111. Before leaving our discussion of issues raised in this reconsideration proceeding regarding the in-region eligibility restriction, we clarify two aspects of the *Second Report and Order* that relate to the eligibility restrictions and the underlying competitive concerns that prompted those restrictions.

112. First, in adopting the provision that terminates the eligibility restrictions on June 30, 2000,¹⁷⁰ the Commission stated that “the restrictions may be extended if, upon review prior to the end of this period, we determine that maintaining the restriction would further promote competition in the local exchange or MVPD [multichannel video programming distribution] market, or both.”¹⁷¹ The Commission also noted in the *Second Report and Order* that it would undertake its review of the eligibility restrictions in 2000, in conjunction with its obligation under Section 11 of the Communications Act “to determine whether competition has increased sufficiently to make these regulations unnecessary.”¹⁷² Upon further consideration, however, we have concluded that it will be necessary to begin this review prior to 2000 and to provide a framework for the use of the Commission’s resources in carrying out the review.

113. In light of this, we instruct the Chief Economist, the Chief of the Cable Services Bureau, the Chief of the Common Carrier Bureau, the Chief of the Mass Media Bureau, the Chief of the International Bureau, the General Counsel, and the Chief of the Wireless Telecommunications Bureau to prepare jointly a study examining whether “there [has been] sufficient entry and increases in competition in the markets at issue . . . for us to be able to sunset the restrictions on incumbent LECs and cable companies”¹⁷³ The results of this study, together with a joint recommendation, shall be submitted to the Commission not later than June 30, 1999. Based upon this report and recommendation, as well as other reports (*e.g.*, annual video competition report to Congress)¹⁷⁴ and Commission actions (*e.g.*, Section

¹⁷⁰ The sunset date is calculated pursuant to Section 101.1003(a)(1) of the Commission’s Rules, 47 C.F.R. § 101.1003(a)(1), which provides, *inter alia*, that the eligibility restriction shall terminate three years after the effective date of Section 101.1003.

¹⁷¹ *Id.* at 12616 (para. 160).

¹⁷² *Id.* at 12632-33 (para. 198), citing 47 U.S.C. § 161.

¹⁷³ *Second Report and Order*, 12 FCC Rcd at 12633 (para. 198).

¹⁷⁴ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, released Jan. 13, 1998.