

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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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)

CC Docket No. 92-297

COMMENTS OF TELIGENT, INC.

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COMMENTS OF TELIGENT, INC.

Teligent, Inc. ("Teligent") hereby submits its comments in the above-captioned proceeding.¹

I. INTRODUCTION

In this proceeding, the Commission seeks comment as to whether it should retain the ILEC LMDS eligibility restriction which was initially imposed by the Commission in 1997 and expected to remain in place until June 30, 2000, unless otherwise extended. Teligent is pleased that the Notice acknowledges issues that LMDS licensees face in building their broadband networks -- issues that are not faced by ILECs and thus provide them with a competitive advantage over new facilities-based entrants. Teligent urges the Commission to recognize that

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, CC Docket No. 92-297, *Sixth Notice of Proposed Rulemaking*, FCC 99-379 (rel. Dec. 13, 1999) ("Notice").

these issues are faced by all new entrants regardless of technology, and those entry hurdles that LMDS licensees face because of their technology are similarly faced by other fixed wireless licensees. Teligent respectfully submits, therefore, that the Commission's focus solely on the relationship between ILECs and LMDS spectrum is insufficient to determine the full impact on local service competition. Rather, a more appropriate goal would be the adoption of a regulatory regime that promotes competition for all fixed wireless carriers while avoiding the imposition of any unnecessary cost or the creation of inadvertent distortions between and among substitutable technologies and services.²

Underlying the initial imposition of an LMDS eligibility restriction was the Commission's concern that ILECs would engage in exercises of market power to maintain their monopoly status.³ The Notice expresses concern that if the LMDS restriction is permitted to sunset, and ILECs are permitted unfettered entry into LMDS, competition may be impaired. In doing so, the Commission correctly recognizes that the ILECs do indeed have market advantages that exist today which may be used to impair competition. This concern is sufficiently important to warrant careful consideration.

² See Notice at ¶¶ 40-41 (requesting comment on the appropriate standard for determining whether to maintain the LMDS eligibility restriction).

³ Id. at ¶ 7 (noting that "incumbent LECs and cable companies were dominant operators in their respective markets [t]hus, they 'would have a strong incentive to obtain an LMDS license in order to prevent a new entrant from obtaining the license and competing directly in the incumbent's current market.'" (quoting 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 Service, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, at ¶ 169 (1997)).

The ILEC eligibility restriction on LMDS fixed wireless spectrum does not extend to other fixed wireless spectrum used to provide similar services. Given the basis for the LMDS restriction -- ILEC power in the local exchange market -- there is no reason for different eligibility criteria for LMDS than for other substitutable fixed wireless services. Accordingly, the better regulatory course would be to adopt uniform eligibility criteria for all fixed wireless services.⁴

In general, consumer welfare will benefit from uniform fixed wireless eligibility policies. Anything short of that is inherently inequitable, and will not fully protect against the ILECs' use of their market power to stifle the growth of competitive fixed wireless services. As explained below, artificial regulatory disparities among similar services can impair market development by inflicting unnecessary costs. In nascent services such as competitive local exchange service, the avoidance of unnecessary costs is essential and a fortiori when the target market is occupied by a deeply entrenched firm. Disparate regulation adopted on the basis of the technology deployed or the spectrum band utilized threatens to raise costs. It also creates distortions in terms of input choices.

II. THE COMMISSION SHOULD STRIVE TO CREATE REGULATORY PARITY FOR ALL FIXED WIRELESS LOCAL EXCHANGE SERVICE PROVIDERS, REGARDLESS OF THE SPECTRUM BAND THEY MAY UTILIZE.

The Notice focuses on the ability of ILECs to foreclose local exchange competition utilizing LMDS frequencies as the basis for reevaluating the LMDS eligibility restriction sunset.⁵ The termination or retention of the LMDS sunset should not, however, focus solely on the LMDS

⁴ The same principle applies to other services and technologies that produce substitutable services from a demand-side perspective.

⁵ Notice at ¶¶ 40-41.

band. That is not to say that ILEC market power -- an indisputable fact in the contemporary telecommunications sector -- is an inappropriate consideration in adopting eligibility restrictions. Rather, the Commission should take a broader view of the fixed wireless marketplace, and use this opportunity to address ILEC market power in a manner that facilitates and enhances, generally, local competition for all competitive fixed wireless local service providers. Only then will the Commission's objectives in this area be realized. Indeed, the Notice suggests that the Commission shares a similar view. ILEC spectrum eligibility restrictions should either be adopted for all fixed wireless services, or not at all. A comprehensive -- as opposed to a piecemeal -- approach to fixed wireless spectrum regulation should be the norm. As the Commission has recognized in fashioning rules for other services, disparities within a given regulatory regime can impede the growth and development of burgeoning services. Uniform regulatory treatment, on the other hand, ensures that similarly situated carriers are free to succeed or fail in the marketplace on the basis of factors more intrinsic than regulatory artifact.

To wit, the Commission has sought comment in the Notice "about the extent to which LMDS, MMDS, 24 GHz, 39 GHz, and other media . . . are substitutable."⁶ The Commission correctly recognized that they are when it stated in the context of the 24 GHz licensing proceeding that "other wireless providers such as LMDS and 39 GHz licensees may provide competition in the local telephony markets."⁷ Indeed, the services offered at these different frequencies are extremely competitive with one another.

⁶ Notice at ¶ 46.

⁷ Amendments to Parts 1, 2, and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Notice of Proposed Rulemaking*, FCC 99-333, at ¶ 21 (rel. Nov. 10, 1999) ("DEMS NPRM").

The proposal to extend the sunset of the ILEC LMDS eligibility restriction is therefore inconsistent with the Commission's conclusion in the DEMS NPRM, as well as the 39 GHz auction, to permit ILECs to acquire initial 24 GHz band and 39 GHz licenses at auction. In the DEMS NPRM, the Commission concluded that "other facilities-based, wireline entrants such as interexchange carriers and competitive LECs, and non-facilities based wireline entrants . . . may provide competition in these markets as well."⁸ In fact, the Commission's tentative conclusion in the DEMS NPRM that "an incumbent strategy of trying to forestall competition in local telephony by buying 24 GHz licenses cannot succeed because there are several other sources of actual and potential competition," appears inconsistent with maintaining the restriction for LMDS.⁹ If there are other sources of actual and potential competition for local service provided in the 24 GHz band, then it necessarily follows that there are sources of competition for LMDS local service competition. If the Commission believes that local competition has not taken root sufficiently to prevent ILECs from acquiring the ability to participate in this market at this time, through the LMDS fixed-wireless spectrum, then this belief should apply equally to other fixed wireless services, including 24 GHz, as well. The Commission must consistently resolve whether the ILECs' market power should preclude them from securing licenses in any fixed wireless service rather than in one such service among many.

The Commission's decision not to impose an ILEC bidding restriction on 24 GHz (and 39 GHz spectrum), yet potentially maintain the LMDS eligibility restriction in this Notice is irreconcilable. This inconsistency will lead to regulatory discord among similar yet competing

⁸ DEMS NPRM at ¶ 21.

⁹ Id.

services, while failing to address the critical issue necessary to promote competitive local service, i.e., ILEC's ubiquitous access to multi-tenant environments. Fundamental principles of fairness dictate the need for regulatory symmetry.

III. ENSURING NONDISCRIMINATORY TELECOMMUNICATIONS CARRIER ACCESS TO MULTI-TENANT BUILDINGS IS CRITICAL TO THE FULL REALIZATION OF COMPETITION TO INCUMBENT LECs THAT ALL FIXED WIRELESS CARRIERS WILL PROVIDE.

In the Notice, the Commission makes a passing reference to some of the difficulties it believes LMDS operators are encountering in deploying their networks. Specifically, it notes that

LMDS licensees are encountering difficulties negotiating roof right-of-way agreements and overcoming inside-wiring issues. It has been argued . . . that building owners view their buildings as bottlenecks to exploit for financial gain. Estimates of the time to negotiate roof right-of-way terms range from a few months to two years, and some building owners are requesting roof right-of-way fees ranging from \$20,000 to \$50,000 per year.¹⁰

These "difficulties" should not be underestimated or understated. Access to building rooftops is critical to the ability of all fixed wireless local service providers to offer consumers competitively priced local exchange service, it is not unique to the LMDS license holders. To the extent the Commission permits ILECs to participate in any of the fixed wireless bands, the ILECs will be in a unique position to leverage their current in-building presence to obtain a significant competitive advantage.

As the Commission is aware, the ILECs currently have almost 100 percent access to multi-tenant buildings (within their service territories) for free. This access gives them a competitive advantage using wireline technology to serve the tenants in those buildings, and it can be leveraged to advantage them in the use of fixed wireless bands. ILECs can use their

¹⁰ Notice at ¶ 36 (citations omitted).

ubiquitous monopoly-derived access to buildings to disadvantage fixed wireless competitors. To prevent them from using this market power for one fixed wireless service by continuing to prevent them from being able to acquire only LMDS licenses, will only serve to further disadvantage those fixed wireless licenses that will be forced to compete with them, not only for customers, but for access to the buildings to serve those customers in the first place.

Teligent urges the Commission to be cognizant of this fact and to address potential ILEC market power in a manner that yields the maximum benefit to local competition -- and facilitates competitive entry for the greatest number of fixed wireless providers. Just as it is critical that LMDS fixed wireless licensees find a level playing field with respect to other fixed wireless licensees using different frequency bands, e.g., 24 GHz and 39 GHz, it is equally critical that a level playing field, to the extent possible, exist among competitive service providers for the same service, e.g., competitive local exchange service providers, regardless of technology used to provide such services. The Commission has the ability and the means to make this possible through the adoption of a non-discriminatory building access requirement for all competitive local service providers. Through this means, the ILECs' dominant position is somewhat mitigated, and all fixed wireless carriers, including LMDS providers, will be in a better position to compete.

The Communications Act directs the Commission to protect the public interest and meet the statutory goals when specifying eligibility and other characteristics of such licenses.¹¹ This necessarily includes the manner in which ILECs would operate their fixed wireless licenses. As Teligent and other competitive local exchange carriers have discussed with the Commission on numerous occasions, access to multi-tenant buildings is a primary impediment to the full

¹¹ See 47 U.S.C. § 309(j)(3).

development of local service competition. The ILECs alone are the sole entities that do not face this hurdle. Although building owners could, of course, provide competitive carriers with access to their buildings (at a minimum, as a service to their tenants), experience has shown that building owners are not interested in doing so, even when requested by tenants, and that they have little or no economic incentive to do so. The building owners' control over bottleneck facilities, their desire to exact monopoly rents for access to their buildings, and the unique relationship that ILECs maintain with building owners requires the Commission to act in the Competitive Networks proceeding and grant nondiscriminatory building access rights to all competitive carriers.¹² If the Commission truly intends to promote local service competition it must dismantle the vestigial benefits of monopolies and at a minimum afford all competing local exchange carriers equal access to buildings.

Because of their history and continued dominant position in the local services market, ILECs have the incentive and ability to obtain building access, particularly rooftop access for their fixed wireless antennas, while simultaneously influencing building owners to deny other fixed wireless competitors rooftop and other building facility access for their own equipment. To the extent building owners seek to enter the telecommunications business, they too would share the benefits the ILECs currently enjoy of having no building access hurdles to overcome. These facts emphasize the critical importance of implementing policies and rules to secure nondiscriminatory

¹² Promotion of Competitive Networks in Local Telecommunications Markets; et al., WT Docket No. 99-217; CC Docket No. 96-98, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, FCC 99-141 (rel. July 7, 1999).

telecommunications carrier access to multi-tenant buildings in the Commission's Competitive Networks rulemaking so that this strategy cannot be successfully accomplished.

The ILEC incentive for hindering competitive carriers' access to rooftops through their current relationship with building owners, as discussed in more detail below, is self-evident: while operating in any fixed wireless band, ILECs can simultaneously prevent or delay implementation of competing wireless local loop strategies by raising the costs in time and money of competitive carriers' access to the necessary rooftop and other building facilities. Even if the Commission were to retain the ILEC eligibility restriction on ownership of LMDS licenses, arguably, the ILECs could prevent LMDS operators from gaining building access through their current in-building wireline presence or the subsequent rooftop access they may gain through other fixed wireless licenses such as 24 or 39 GHz, to name just a few. ILECs alone possess the pervasive ability to act on these incentives successfully under today's current building access regime, where they enjoy a wireline presence, at minimum, in virtually every multi-tenant building in their regions.

In the Competitive Networks rulemaking, real estate interests described in detail the manner in which ILECs wield market power to dictate the terms of building access to building owners. One coalition of real estate interests explained that:

ILECs demand access to buildings, but refuse to sign agreements with building owners, pay license fees, or otherwise accept the terms and conditions the building owner has set for access by *all* TSPs, often threatening to withhold service from tenants. Given the tremendous market power of the ILECs and the tenant demand

for their service, an owner can do little in these circumstances but give in to their demands.¹³

Another real estate commenter explained that "most owners would be willing to propose [CLEC-suggested] restrictions on the incumbent LEC immediately. However, we fear that taking this course of action would risk the incumbent LEC pitting the building tenants against the owner."¹⁴

The Real Access Alliance also noted the absence of a property owner's negotiating leverage vis-à-vis the ILEC.¹⁵ A real estate industry coalition stated that

[b]uilding owners' attempts to treat all TSPs equally in today's competitive world by requiring agreements or fees from the ILECs are complicated and often thwarted by the ILECs' abuse of their significant market power.¹⁶

These comments strongly suggest that ILECs possess the ability to dictate the terms of their presence in the building to the building owner and can obtain rooftop access in their regions at far more favorable conditions than other fixed wireless local service competitors. Most importantly these comments demonstrate that ILECs can exert their market power over building owners by persuading the building owner not to permit competing fixed wireless carriers using any spectrum from installing rooftop antennas on the building.

¹³ Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *Comments of Cornerstone Properties, et al.*, at 13 (filed Aug. 27, 1999) (emphasis added).

¹⁴ Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *Comments of Apex Site Management, Inc.*, at 8 (filed Aug. 27, 1999).

¹⁵ Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *Comments of Real Access Alliance*, at 32-33 (filed Aug. 27, 1999).

¹⁶ Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *Reply Comments of Cornerstone Properties, et al.*, at 5 (filed Sep. 27, 1999).

A requirement that all telecommunications carriers receive nondiscriminatory access to multi-tenant buildings would effectively prevent ILECs from successfully implementing these strategies. The Commission must recognize that ILEC participation in any fixed wireless service only increases the need for a nondiscriminatory access requirement. Through this measure, at least, the Commission can ensure that the ILECs will not exercise market power with respect to building access.

Similarly, to prevent business strategies designed to hinder the widespread construction of competing fixed wireless networks or other types of competing networks -- and again, as considered in the Competitive Networks rulemaking -- the Commission must prohibit any telecommunications carrier -- whether that carrier is an ILEC or CLEC -- from entering into or maintaining a contract with a building owner or manager that provides for that carrier's exclusive access to a multi-tenant building. In this manner, the Commission can ensure that telecommunications carriers do not engage in strategies designed to lock-up buildings from competitors and can maximize the abilities of fixed wireless and other competitors to make full use of their licenses through rapid and widespread network construction. This rule not only will promote the development of local exchange telephone competition from fixed wireless services but will also promote the statutory objective of allowing the rapid deployment of new technologies and services.¹⁷

¹⁷ 47 U.S.C. § 309(j)(3)(A).

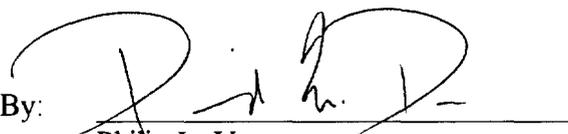
IV. CONCLUSION

The Commission should adopt policies that avoid the imposition of unnecessary cost or the creation of inadvertent distortions between and among substitutable technologies and services. Whether the Commission elects to retain the ILEC eligibility restriction in LMDS, or permits it to sunset, the Commission must be sure that the same policy is adopted for comparable services such as 24 GHz and 39 GHz fixed wireless services. Regardless of the Commission's final conclusion, concerns over ILEC market power cannot end with this determination. Ultimately, competition in the local exchange market will develop most rapidly when the Commission adopts a nondiscriminatory building access requirement that truly limits the ability of ILECs to exercise their market power.

Respectfully submitted,

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Dated: January 21, 2000

CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 21st of January, 2000, copies of the attached document were served by hand-delivery on the following parties:

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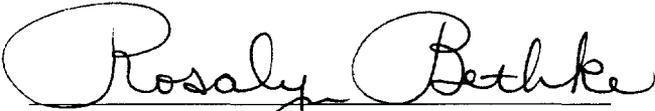
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