

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEB 11 2000

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

**REPLY COMMENTS OF SULLY BUTTES TELEPHONE COOPERATIVE, INC.
AND GOLDEN WEST TELECOMMUNICATIONS COOPERATIVE, INC.**

Sully Buttes Telephone Cooperative, Inc. ("Sully Buttes") and Golden West
Telecommunications Cooperative, Inc. ("Golden West") (collectively, the "Joint Commentors"),
by their attorneys, hereby submit their reply comments in the above captioned proceeding.¹ In
brief, a consensus of commentors believe that the Local Multipoint Distribution Service
("LMDS") eligibility restriction² should be allowed to sunset as scheduled on June 30, 2000. No
commentors believe that the LMDS eligibility restriction should be extended to rural and
underserved areas, and a majority of commentors believe that the LMDS eligibility restriction
has contributed (if not caused) an unfortunate delay in the development of the service. The
Commission can remedy this delay, and promote competition in the market for a whole range of
broadband services (including voice, video, high speed data and Internet access services), if it
focuses on the very real benefits of allowing rural telephone companies and cooperatives to

¹ Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 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 92-297, *Sixth Notice of Proposed Rule
Making*, FCC 99-379 (rel. Dec. 13, 1999) ("*Sixth NPRM*").

² 47 C.F.R. § 101.1003.

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employ LMDS (and other technologies) freely throughout their incumbent service area, rather than speculating about the potential for anti-competitive harm. Now that all of the LMDS licenses have been distributed to non-incumbents, the Commission can protect the market from any realistic anti-competitive threats on a case-by-case basis through its authority to approve any transfer of control or assignment of license. If the Commission should nevertheless decide to extend the LMDS eligibility restriction, the Joint Commentors respectfully submit that there exists *no rational justification* for extending the rule as to rural and underserved markets. The public interest would be served by allowing rural telephone companies and cooperatives to provide LMDS throughout their local exchange service areas.

I. A CONSENSUS OF COMMENTORS BELIEVE THE LMDS ELIGIBILITY RESTRICTION SHOULD SUNSET ON JUNE 30, 2000.

Upon review of the comments filed in this proceeding, it is evident that a consensus of commentors support allowing the LMDS eligibility restriction for incumbent local exchange carriers and cable television operators to sunset, as scheduled, on June 30, 2000.³ These commentors have demonstrated that in the years since LMDS licenses were first issued, all of the Commission's reasons for adopting the eligibility restriction have either proved to be incorrect or are no longer applicable. The Commission must recognize that its predictions – while no doubt well-intentioned – were wrong. As a result, the Commission is left with no plausible rationale for extending the restriction.

³ See Joint Comments of Sully Buttes Telephone Cooperative, Inc. and Golden West Telecommunications Cooperative, Inc. ("Joint Comments") at p. 1; Comments of National Telephone Cooperative Association ("NTCA") at p. 2; Comments of Rural Telecommunications Group ("RTG") at p. 1; Comments of Central Texas Telephone Cooperative, Inc. ("CTTC") at p. 1; Comments of Independent Alliance ("Alliance") at p. 1; Comments of the United States Telecom Association ("USTA") at p. 3; Comments of U.S. West, Inc. ("USWest") at p. 2; Comments of Personal Communications Industry Association ("PCIA") at p. 2; Comments of Hyperion Communications Long Haul L.P. ("Hyperion") at p. 1.

When the Commission adopted its eligibility restriction for LMDS in 1997, it had the greatest of ambitions for the service. It saw LMDS as a “holy grail” for competitive markets – a service that would permit a license holder to instantly become a facilities-based provider of local exchange services, MVPD services or both.⁴ However, as the Joint Commentors and others have pointed out, the failure of LMDS to develop over the past two years into a competitor in these markets only demonstrates that all assumptions about the LMDS marketplace have changed.⁵ In this regard, the Joint Commentors agree with commentors who believe that LMDS will be “one tool among many” for carriers seeking to deliver both basic and broadband services.⁶ As noted in their comments, the Joint Commentors and rural carriers such as CTTI plan on using LMDS as a wireless component to their networks, that can be deployed quickly and used in situations where the technology is a “best fit” solution.⁷ Even the Commission itself has recognized that the propagation characteristics of LMDS spectrum make it unlikely that it will be used in stand-alone networks.⁸ Therefore, any ability for LMDS to develop into a viable and competitive broadband service will be largely dependent on the ability of licensees to leverage existing network infrastructure. Nowhere is this more true than in rural markets, where the economic realities are starkly different than densely populated urban areas. Rural markets are often the last places for competing carriers to introduce service. Yet experience has shown that that incumbent rural telephone companies and cooperatives are still motivated to provide to

⁴ *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 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 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking* 12 FCC Rcd 12545 (1997) (*Second Report*) at 12610 (para. 149), 12618-9 (para. 165), and 12621 (para. 170).

⁵ Joint Comments at p. 3; USWest at 1-2; RTG at p. 4; NTCA at p. 4.

⁶ RTG at p.4

⁷ Joint Comments at p. 6; CTTI at p. 6.

⁸ *Sixth NPRM* at para. 33.

provide rural customers with access to advanced telecommunications services because of their dedication to community service. By permitting the LMDS eligibility restriction to sunset on June 30, 2000, the Commission will provide LMDS licensees the ability to form the partnerships and strategic alliances that will be necessary to make rural LMDS even possible.

Just two commentors favor extending the LMDS eligibility restriction. In particular, Gateway Telecom believes that the Commission should extend the LMDS eligibility restriction for at least another two years.⁹ Yet Gateway provides no evidence of anti-competitive harm to back up its protectionist argument. However, in a curious nod toward regulatory parity, Gateway advocates extension of the LMDS eligibility restriction as to incumbent local exchange carriers participating in 39 GHz and 24 GHz services.¹⁰ The Commission has no choice but to dismiss these protectionist and pro-regulatory arguments, which are unsupported by any evidence.

MCI WorldCom argues that the Commission should extend its LMDS eligibility restriction for at least another three years “in order to maximize the opportunity for new facilities-based providers to compete against the ILECs.”¹¹ Not surprisingly, MCI relies on an outdated “substantial market power” analysis which fails to recognize the convergence of telecommunications services, and other fundamental changes in the market for broadband. MCI merely recites the four factors which the Commission considered when it adopted the LMDS eligibility restriction, and never questions the assumptions underlying those factors. Commentors in this proceeding have demonstrated the following to the Commission: (1) that the most likely use for LMDS will be *broadband*, not simply the provision of local exchange

⁹ Comments of Gateway Telecom, LLC (“Gateway”) at p. 2.

¹⁰ *Id.*

¹¹ Comments of MCI WorldCom, Inc. (“MCI”) at p. 1.

services and MVPD services; (2) that competitive forces at work in both the local exchange and MVPD services eliminate any likelihood that an incumbent will obtain LMDS licenses to forestall competition; (3) that a blanket eligibility restriction is *not* the best means to promote competition, and (4) a myriad of efficiencies will be forfeited if incumbent local exchange and cable operators are prohibited from participating fully in LMDS in their existing markets.

Moreover, MCI's assertions that incumbent local exchange carriers have an incentive to forestall competition are not applicable to rural telephone companies and cooperatives. Like Gateway, MCI has provided *no evidence* that allowing LMDS market entry by rural incumbents poses any realistic threat of anti-competitive harm..

II. PRINCIPLES OF REGULATORY PARITY DICTATE THAT SIMILAR SERVICES MUST BE REGULATED IN SIMILAR FASHION

In the nearly three years since the LMDS eligibility rule was first promulgated by the Commission, nobody could have predicted how competitive forces, advances in technology, and bundled service offerings could have impacted on the market for fixed wireless services. LMDS has admittedly gotten off to a slow start, which many view as due, at least in part, to the existence of the LMDS eligibility restriction.¹² However, in even just the last year, other broadband wireless technologies have emerged and the industry is flourishing. WinStar (at 39 GHz) and Teligent (at 24 GHz) are ramping up their competitive local exchange, long distance and internet access service offerings in larger markets. As USWest and RTG note, even Sprint and MCI WorldCom are entering this robust broadband marketplace with newly acquired MMDS channels.¹³ Yet none of these other wireless services, which compete head-to-head with LMDS, is subject to the same eligibility restriction. The Commission must now recognize that

¹² Joint Comments at p.1; Alliance at p. 2; CTTC at p. 4; RTG at p. 11; USWest at p. 2; USTA at p. 1.

¹³ USWest at p. 14-13; RTG at p. 7.

its primary rationale for promulgating the eligibility restriction in the first place – because of the “unique circumstances” surrounding the allocation of this spectrum – has become largely irrelevant in light of developments in the broadband industry. Principles of regulatory parity and simple fairness dictate that the Commission allow the LMDS eligibility rule to sunset. A majority of commentors addressing this subject supported this notion of regulatory parity, which should direct the Commission to allow the LMDS eligibility restriction to sunset on June 30, 2000.¹⁴

In a policy statement that was issued less than three months ago, the Commission set forth principles that would guide its spectrum management decisions into the new millennium.¹⁵ As PCIA notes, the Commission therein identified the promotion of efficiency in spectrum markets as one of its primary goals.¹⁶ The Commission also underscored the importance of regulatory neutrality in achieving this goal and in fostering effective competition.¹⁷ The Joint Commentors concur wholeheartedly with these principles and the Commission’s goal of harmonizing rules for like services. The current eligibility restriction hinders LMDS licensees, as compared to other broadband service providers. In their efforts to form partnerships and alliances, gaining access to capital, and in leveraging existing network infrastructure. 24 GHz, 39 GHz and MDS licensees are not subject so such a restriction and thereby enjoy a great advantage. This disadvantage hits small and rural LMDS carriers disproportionately hard. Even

¹⁴ RTG at p. 8; USTA at p. 3; NTCA at 7; PCIA at p.2; Hyperion at 9. The Joint Commentors note that Teligent, which did not clearly come out for or against sunset, nevertheless strongly supported the notion of regulatory parity for *all* fixed wireless carriers. Comments of Teligent, Inc. (“Teligent”) at p. 3-6

¹⁵ Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, *Policy Statement*, FCC 99-354 (*rel.* November 22, 1999) (“*Policy Statement*”).

¹⁶ PCIA at p. 4.

¹⁷ *Policy Statement* at Para. 9.

Nextlink, which views itself as the “800-pound gorilla” of the LMDS industry,¹⁸ is well positioned to incorporate LMDS into its existing digital SMR network. As a wealthy publicly traded company it enjoys ready access to vast amounts of capital that just isn’t available for small and cooperatively-owned LMDS licensees. If only for the sake of these smaller licensees, the Commission should allow the eligibility restriction to sunset at its earliest opportunities for the markets they have dedicated to serve.

III. THE COMMISSION SHOULD ADOPT A FRAMEWORK FOR MARKET ANALYSIS THAT PROMOTES FAIRNESS AND MARKET ENTRY

Given the significant changes that have turned the broadband wireless industry into one of the most competitive telecommunications market sectors, the Joint Commentors agree with Commissioner Powell and commentors who believe that the Commission must adopt a new analytical framework to determine whether it is appropriate to extend the LMDS eligibility restriction. In particular, Commissioner Powell advocated extension of the LMDS eligibility restriction only if it can be shown, by convincing evidence that lifting the restriction poses a significant likelihood of competitive harm, and that imposing an eligibility restriction is an effective way to address that harm.¹⁹

Of those addressing this issue, most would agree that Commissioner Powell’s proposed analytical framework goes much further in promoting fairness and competition than the “substantial market power” test that was used to justify the eligibility restriction back in 1997, when the broadband market was largely limited to local exchange carriers and cable operators.²⁰

¹⁸ See, USWest at p. 6, citing Clark, “NEXTLINK to Make Two Acquisitions For \$833 Million,” *Wall Street Journal* (January 15, 1999).

¹⁹ Separate Statement of Commissioner Powell, at p. 1.

²⁰ See, e.g., USTA at p. 6; Comments of National Cable Television Association (“NCTA”) at pps. 4-6; CTTC at pps. 3-4; USWest at p. 4;

Today's broadband market is extremely competitive, including xDSL, cable modems and direct satellite broadcast, not to mention a host of fixed and mobile wireless services and even unlicensed operators in the ISM band. Since no one of these technologies is ideal in *all* situations and for *all* applications, no one of these technologies represents a magic "third pipe."²¹ Rather, the Joint Commentors would submit that all wireless technologies *taken together* represent a *collective* "third pipe." In order for the "collective third pipe" to develop into a force that can compete with the other two pipes, these technologies must be allowed to develop in an environment that is free from regulatory disparities and other market distortions. Moreover, and as Teligent and PCIA correctly note, the Commission must take further affirmative steps to ensure that markets develop free from these unnecessary costs.²²

IV. IF THE COMMISSION CONCLUDES THAT IT MUST EXTEND THE LMDS ELIGIBILITY RESTRICTION IN ANY MARKETS, IT SHOULD EXEMPT RURAL MARKETS FROM FURTHER APPLICATION OF THE RULE

If the Commission concludes that it must extend the LMDS eligibility restriction in any markets, despite all the evidence provided by commentors regarding the competitiveness of broadband services, it should exempt rural telephone companies and cooperatives and allowing the rule to sunset as to rural markets on June 30, 2000. As rural telephone industry commentors has noted, the anti-competitive concerns which formed the basis for promulgating the LMDS eligibility restriction in the first place are not applicable in markets that are served by rural telephone companies and member-owned telephone cooperatives.²³ In this regard, the Joint Commentors find it significant that *no commentors* argued that the eligibility rule was necessary to protect rural consumers.

²¹ Separate Statement of Commissioner Furchtgott-Roth, at p. 2.

²² Teligent at p. 2-3; PCIA at p. 2.

²³ Joint Comments at pps. 5, 8; RTG at pps. 1, 4, 10; CTTC at pps 5-6.

V. SUNSET OF THE LMDS ELIGIBILITY RESTRICTION FOR RURAL CARRIERS IS CONSISTENT WITH THE COMMISSION'S STATUTORY OBLIGATION TO ENCOURAGE THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY

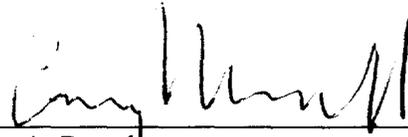
Finally, the Joint Commentors and other rural telephone industry representatives have provided the Commission with abundant evidence that permitting this rule to sunset on April 30, 2000 as to rural carriers will eliminate regulatory barriers and encourage broadband deployment consistent with the intent of Congress. These entities have explained how the LMDS eligibility restriction is currently acting as a regulatory barrier which prevents them from entering into the most logical business arrangements for the provision of advanced telecommunications services. Once again, no commentor has provided evidence that would suggest (much less compel) the Commission to conclude that it is in the public interest to extend the eligibility restriction beyond its current sunset date in rural markets.

The Joint Commentors continue to urge the Commission to recognize that the near-term availability of an LMDS service offering in rural areas *will depend entirely on whether rural telephone companies and cooperatives can participate freely in the service*. As shown by rural commentors, the LMDS eligibility restriction has hampered the ability of these entities to enter into the business relationships that are necessary to make this advanced telecommunications capability available in rural America. Therefore, consistent with its obligation under Section 706 of the 1996 Act, the Commission should allow the eligibility restriction to expire as scheduled for rural areas. Any further delay in this regard will only result in harm to rural citizens and the squandering of a valuable resource that should be available to rural carriers and the customers they are dedicated to serve.

WHEREFORE, good cause being shown, the Joint Commentors respectfully request that the Commission allow the LMDS eligibility restriction to sunset, as scheduled, on April 30, 2000. In the alternative, the Joint Commentors request that Commission allow the LMDS eligibility restriction sunset on this date for rural telephone companies and cooperatives.

Respectfully Submitted,

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