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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA"), by its attorneys, submits the following reply comments in response to certain of the comments submitted in the above-captioned proceeding.

INTRODUCTION

In its comments, NCTA emphasized that the goal of multichannel video competition has been realized by multichannel services offered by DBS, MMDS, telephone companies and SMATVs. In contrast to only a few years ago, today virtually every consumer may choose between cable and two DBS options, and may have other alternatives. Moreover, the steady decline in cable's share of multichannel video subscribers demonstrates that consumers recognize the viability of these alternatives.

The Commission's 1997 decision to prohibit cable companies from bidding for LMDS frequencies had nothing to do with this increase in competition and has not itself resulted in any new competition. Indeed, despite the Commission's high hopes (and the aggressive claims of

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potential competitors), three years after the fact the LMDS frequencies are not being used for video. There is no evidence this situation is about to change.

The comments submitted in this proceeding focus almost entirely on the issue of whether ILECs should be barred from using LMDS frequencies. Only MCI Worldcom – without support or explanation – recommends that the "substantial market power" standard should continue to be applied to cable systems. Based upon this record, there is no basis for continuing to apply the "substantial market power" standard to cable systems.

I. THE COMMISSION SHOULD REJECT MCI WORLDCOM'S CALL TO APPLY THE "SUBSTANTIAL MARKET POWER" TEST TO THE OFFERING OF VIDEO SERVICES BY CABLE COMPANIES OVER LMDS FREQUENCIES

In its comments, NCTA urged the Commission to reexamine the standard it applies to evaluate the eligibility of cable operators to compete for LMDS frequencies. Three years ago, the application of the "substantial market power" test led to cable's exclusion from LMDS. MCI Worldcom, without a shred of support or explanation, calls for continuing the application of that standard to the use by cable companies of LMDS frequencies, and by implication continuing cable's exclusion from LMDS.

It is no longer appropriate to use the "substantial market power" test because even if cable had such market power – which, as we showed in our initial comments and discuss in Part II, *infra,* it does not – its acquisition of LMDS spectrum would not adversely affect competition in the video marketplace (or in any other marketplace.) The speculative fears that led the Commission to impose the competitive bar – principally that permitting cable entry into LMDS would eliminate a unique opportunity to add a major new multichannel video competitor in virtually all local markets – are no longer valid. In particular, during the time while the bar has been in effect, it has become increasingly apparent that nobody intends to use LMDS to compete in the provision of multichannel video programming service. In these circumstances, the

Commission should adopt the approach suggested in Commissioner Powell's Dissenting Statement in which if competitive concerns are used to justify entry restrictions, a sunset should be incorporated into the regulatory scheme to cap speculation and to introduce certainty to the marketplace.

The Commission should also resist attempts to ferret out other strained excuses for maintaining an LMDS video restriction. The "warehousing" and "broadband Internet access" rationales for excluding cable companies from LMDS, put forth in the Notice, do not withstand even cursory analysis. NCTA's comments noted that cable companies are expending massive capital, technical and operational resources to make their systems capable of delivering advanced digital video, Internet access and other services, and it would be counterproductive to divert resources from this effort to the warehousing of nonperforming spectrum assets. NCTA also explained that it would be a truly pointless regulatory step to restrict cable companies from LMDS on the grounds that these frequencies might be usable to deliver broadband Internet access. The nascent broadband Internet access market is already competitive, and there is no reason to suspect that LMDS will in any way be necessary – or will be used – to ensure competition in that market.

The Commission should adopt the standard, supported by Commissioner Powell, under which a cable company will be allowed to compete for LMDS frequencies unless, without a restriction, there is "a significant likelihood of substantial competitive harm" and an entry restriction is "an effective way to address that harm." The Commission adopted the "significant likelihood of substantial competitive harm" entry standard in the 39 GHz Proceeding.[1] After three years in which LMDS frequencies have not been used to compete with multichannel video

[1] Amendment of the Commission's Rules Regarding 37.0 – 38.6 GHz and 38.6 – 40.0 GHz Bands, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd 18600 (1997) (39 GHz Proceeding)

services, the Commission should apply this different, more flexible and competitively realistic standard to assess whether there is any basis for excluding cable companies from competing for these frequencies.

II. THE INCREASING COMPETITIVENESS OF THE MVPD MARKETPLACE SUPPORTS THE CONCLUSION THAT CABLE COMPANIES DO NOT HAVE SUBSTANTIAL MARKET POWER

Even under the existing "substantial market power" standard, the crossownership restriction should sunset as planned. The conditions existing when the Commission restricted cable entry into LMDS are no longer present. Several months prior to that decision, in its Third Annual Report assessing the state of multichannel video competition, the Commission found "... the structural conditions of markets for the delivery of video programming are conducive to the exercise of market power by cable operators."[2]

MCI Worldcom fails to acknowledge the profound changes in the multichannel video marketplace over the past three years. NCTA's comments demonstrated these changed circumstances, showing, most tellingly, that the number of DBS subscribers had nearly quadrupled in less than three years, from 2.995 million to 11.40 million. When other competitive multichannel service customers are added to DBS subscribers, there are more than 14 million, which translates to nearly one in five non-cable MVPD customers. This trend appears to be continuing.

The number of subscribers with choices among multichannel video service providers is equally or more crucial to any assessment of the state of multichannel competition. If consumers have choices, MVPDs will be compelled to compete. While the exact number of subscribers

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[2] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Third Annual Report), 12 FCC Rcd 4358, 4423 (1997) ("Third Annual Report").

with choices is not known, it is clear as a general matter that the vast majority may choose from among at least a franchised cable operator and two DBS providers.

The Commission's Sixth Annual Report on the Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, released less than a month ago, confirms these changed circumstances.[3] The Sixth Annual Report finds that "Overall ... competitive alternatives and consumer choices continue to develop."[4] And even though "Cable television is still the dominant technology for delivery of video programming to consumers in the MVPD marketplace, ... its market share continues to decline."[5]

The Commission recognized the increasing competitiveness of the multichannel video marketplace in the Third Report and Order in the Horizontal Ownership Limits proceeding. In that proceeding, it acknowledged that "... non-cable MVPDs have a growing impact on the marketplace. Inclusion of both cable and non-cable MVPD subscribers in the denominator [of the total of cable and non-cable subscribers] will reflect the dynamic nature of the marketplace *and the diminishing market power of cable operators as non-cable MVPDs increase their subscribership.*"[6] This is a far cry from the Commission's assessment three years ago. It found then that even though "the continuing expansion of DBS, MMDS and overbuilding [was] beginning to create an alternative to cable," it was nevertheless "difficult to precisely ascertain the impact DBS may be having on cable prices, programming offerings and services in a particular local market."[7]

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[3] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Sixth Annual Report, FCC 99-418, rel. Jan. 14, 2000 ("Sixth Annual Report").

[4] Id. at para. 5.

[5] Id.

[6] Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act, Horizontal Ownership Limits, FCC 99-289, rel. Oct. 20, 1999, at para. 30 (emphasis supplied).

[7] Third Annual Report, 12 FCC Rcd at 4423.

Since the Commission has concluded that the MVPD marketplace is "dynamic" and cable's market power continues to decline, MCI Worldcom's implicit claim that nothing has changed in the past three years has no legitimacy. The changed competitive landscape no longer permits the Commission to reflexively continue to classify cable companies as entities possessing "substantial market power."

CONCLUSION

For the reasons stated in NCTA's Comments and in these Reply Comments, the Commission should permit cable companies to seek LMDS frequencies.

Respectfully submitted,

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