

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

In the Matter of)
)
Assessment and Collection) **MD Docket No. 01-76**
of Regulatory Fees for)
Fiscal Year 2001)

To: The Commission

**PETITION FOR RECONSIDERATION OF
BENNET & BENNET, PLLC ON BEHALF OF ITS LMDS CLIENTS**

Bennet & Bennet, PLLC (“Bennet & Bennet”), on behalf of its Local Multipoint Distribution Service (“LMDS”) clients and pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission (“FCC” or “Commission”), hereby respectfully requests that the Commission reconsider its July 2, 2001 *Report and Order*¹ in the above captioned proceeding revising its Schedule of Regulatory Fees for Fiscal Year (FY) 2001. Specifically, Bennet & Bennet requests that the Commission reconsider its decision to exclude LMDS from the microwave category and to continue to include LMDS in the Multipoint Distribution Service (“MDS”) category for assessing regulatory fees. Bennet & Bennet also requests that the Commission reconsider its decision to increase the applicable MDS/LMDS fee from \$275 in fiscal year (“FY”) 2000 to \$450 in FY 2001.

**I. THE COMMISSION SHOULD INCLUDE LMDS IN THE MICROWAVE
CATEGORY FOR REGULATORY FEE ASSESSMENTS**

The FCC should include LMDS in the microwave category rather than the MDS category for fee assessment purposes. Classifying LMDS with MDS, rather than with other fixed microwave services such as the 24 GHz and 39 GHz services, places LMDS at a competitive disadvantage without a rational basis for doing so. As the Commission recognized in its recent

¹ *In re Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, Report and Order, MD Docket No. 01-76, FCC 01-196 (rel. July 2, 2001) (“*Report and Order*”).

Fixed Wireless Report,² operators provide fixed wireless service using a number of different bands, licensed (or unlicensed) in a number of different services. Because of the various similarities or differences of the various services, in the *Fixed Wireless Report*, the Commission divided these operators into two categories: lowerband providers (800 MHz to 5.8 GHz) and upperband providers (24 GHz to 39 GHz, including LMDS at 28 and 31 GHz). The Commission noted that the lower and upperband services have significantly different propagation characteristics and “generally serve two distinct markets.”³

As discussed below, although LMDS and MDS share some similarities, LMDS and MDS are regulated in significantly different manners and LMDS is more operationally, functionally and legally similar to the 39 GHz service and the 24 GHz service than to MDS. For example, the Commission regulates the upperband services (24 GHz, 39 GHz and LMDS) as microwave services under Part 101 of the rules and through its Wireless Telecommunications Bureau (“WTB”). The upperband services utilize the same equipment in similar network configurations. The upperband services also suffer from similar limitations on spectrum propagation. Most importantly, LMDS, 24 GHz and 39 GHz carriers compete against each other in the same target markets.

Because of the similarities of the upperband services, the Commission should strive for regulatory parity and competitive neutrality in its regulations. Unfortunately, the Commission’s regulatory fee scheme unjustifiably places LMDS at a competitive disadvantage. The 24 GHz and 39 GHz services are included in the microwave regulatory fee category and pay only a nominal regulatory fee at the time of licensing or license renewal. By including LMDS in the

² *Fixed Wireless Voice and Data Services*, Appendix A to *Sixth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*; FCC 01-192 (released July 17, 2001) (“*Fixed Wireless Report*”).

³ *Id.* at A-4 (upperband operators providing very high speed services to business customers, mainly in urban areas; lowerband offering high-speed Internet to residential and small office/home office in a range of areas including rural and underserved).

MDS category, the Commission requires LMDS licensees to pay significant annual regulatory fees.

For example, microwave licensees pay only \$5 a year in regulatory fees per license⁴ while LMDS licensees must now pay \$450 per license per year. Accordingly, over a ten-year license term, a 39 GHz licensee may pay \$50 while an LMDS licensee will pay \$4,500, a difference of \$4,450. Multiple this difference by numerous licenses and the gross inequity is compounded.

Because LMDS and the other fixed microwave services are regulated in a like manner, operate in an identical manner and compete in the same market, there is no justifiable basis to distinguish LMDS from its sister “upperband” fixed microwave services for the purpose of regulatory fees.

LMDS and MDS, by contrast are regulated in significantly different manners by different bureaus, generally target different markets, and should not be combined in the same category for the purpose of collecting regulatory fees. The Video Services Division of the Mass Media Bureau regulates and licenses MDS. By contrast, the Public Safety and Private Wireless Division of the WTB regulates and licenses LMDS. That two different bureaus handle the regulation of MDS and LMDS is not surprising given how different the regulation of the two services is. MDS is regulated under Part 21 of the Commission’s rules (public fixed radio services) and LMDS—like the other microwave services discussed above—is regulated under Part 101 (fixed microwave services) of the Commission’s rules.

LMDS is a geographically based service auctioned on the basis of Basic Trading Areas that were not encumbered by incumbent licensees. LMDS auction winners received green field-licenses. Although some MDS licenses were auctioned on a BTA-basis, most MDS licenses

⁴ Because the fee is so small, the entire fee is paid at the time of licensing or renewal.

were site-based licenses awarded on an individual channel-basis⁵ prior to the MDS auction. Accordingly, MDS is primarily a site-based service. The incumbent operators are entitled to protection from interference within their 35 mile circular Protected Service Areas (“PSAs”). These PSAs may, and often do, encumber more than one BTA.

Moreover, MDS licensees must individually license response station hub sites as well as main transmit sites. In LMDS, individual hub sites need be separately licensed only in rare instances, such as when construction of a hub would cause a significant environmental impact.⁶ In the normal course, and subject to coordination with adjacent BTA holders, the holder of an LMDS BTA license is free to construct and operate anywhere within the BTA without a separate license.

In addition, MDS originated as a one-way video delivery system, and most of the operating systems still operate on this basis. Although the Commission now allows two-way transmissions, licensees must seek and obtain FCC authority for such two-way transmission on a *site specific-basis*. LMDS licensees by contrast, may conduct two-way communications without having to first modify their licenses.

The heavily encumbered nature of MDS and the requirements to individually license each hub and main transmit site require extensive agency review and action. MDS by its nature and history requires significant administrative action. MDS spectrum is also the subject of a major rulemaking to determine the availability of spectrum for advanced wireless services and third-generation (“3G”) mobile systems.⁷ This proceeding requires substantial Commission resources.

⁵ MDS is licensed on the basis of channel groups E and F and channels H1, H2, H3, MDS-1 and MDS-2A. These channels are often utilized in conjunction with Instructional Television Fixed Service (“ITFS”) channel groups A, B, C, D, and G.

⁶ See, 47 C.F.R. ? 101.61.

⁷ See, *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems; Petition for Rulemaking of the Cellular*

In contrast, the regulation of LMDS requires virtually no administrative resources. Aside from the odd *pro forma* transfer or assignment of an LMDS license, there is virtually no licensing activity or rulemaking activity involving LMDS. This is also not surprising because LMDS equipment is still in development and most licensees have not yet deployed service.⁸ As noted above, however, even when licensees do initiate service, no additional licensing action is necessary on the part of the Commission.

In rejecting a request of Winstar Communications, Inc. (“Winstar”) to reclassify LMDS to the microwave fee category, the Commission concluded that LMDS and MDS were “operationally similar.”⁹ As noted above, however, the two services are only marginally similar. In reality, LMDS is more operationally, competitively, and legally similar to other fixed microwave services. Accordingly, The Commission should reclassify LMDS and combine it with other Part 101 microwave services for the purpose of regulatory fees, rather than continue to combine LMDS with MDS. It is irrelevant that the Commission has combined the two services in the past. Now is the time for the Commission to correct the regulatory misclassification.¹⁰

II. THE LMDS REGULATORY FEE IS TOO HIGH IN RELATION TO THE COMMISSION’S REGULATORY FUNCTIONS

No matter what action the Commission takes with respect to reclassifying LMDS for fee assessment purposes, it should reduce the applicable regulatory fee as discussed below. The

Telecommunications Industry Association Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT-2000; Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690 MHz Frequency Bands for the Mobile-Satellite Service, Notice of Proposed Rulemaking and Order in ET Docket No. 00-258, RM-9920, RM-9911, FCC 00-455, 16 FCC Rcd 596 (January 5, 2001) (“3G NPRM”).

⁸ See, *Fixed Wireless Report* at A-21.

⁹ *Report and Order* at ¶ 22.

¹⁰ The Commission may wish to explore grouping all similar fixed wireless services in one category and assessing a fair and equal fee on all similar services. The Commission, however, has not undertaken this action to date and there is simply no basis for assessing a greater fee on LMDS than the Commission assesses on 39 GHz and other fixed microwave services. This lack of parity is not sustainable under the Act.

increase is unfair to both LMDS and MDS licensees alike, but it is especially critical for the Commission to reduce the fee if the Commission is unwilling to reclassify LMDS as a microwave service.

The FCC should reconsider the LMDS regulatory fee increase because it is excessive and not rationally related to an increase in the Commission's regulatory costs for LMDS. A 64% increase from \$275 in FY 2000 to \$450 in FY 2001 represents a significant and burdensome increase, particularly for a fledgling service struggling to gain a position in the marketplace.¹¹ The Commission's decision to almost double the regulatory fee for LMDS does not correlate with an almost doubling of regulatory action relating to LMDS over the past year. As noted above, there is virtually no rulemaking or regulatory action involving LMDS. The FCC therefore should reduce the regulatory fee of LMDS.

Section 9 of the Communications Act of 1934, as amended (the "Act"), requires the Commission to consider adjustments to regulatory fees based on issues related to the payer of the fees and the public interest.¹² The increase in the LMDS regulatory fee is the second largest increase for any category this year.¹³ The Commission did not increase its regulatory functions for LMDS at all, much less enough to justify an increase from \$275 to \$450. The regulatory fee increase, therefore, was not based on the cost of regulating LMDS, nor was it based on issues related to the payer of the fee. Accordingly, the Commission should reduce the regulatory fee applicable to LMDS to comply with Section 9 of the Act.

III. CONCLUSION

The FCC should reconsider its decision to exclude LMDS from the microwave category and to continue to classify LMDS in the MDS regulatory fee category. The current scheme is

¹¹ See, e.g., *Fixed Wireless Report* at A-14 (discussing bankruptcies of upperband operators).

¹² 47 U.S.C. § 159(a).

¹³ See WorldCom, Inc. Comments at 4.

not competitively neutral and violates fundamental principles of regulatory parity. For these reasons, and the reasons outlined above, the Commission should reclassify LMDS as a fixed microwave service. Alternatively, the FCC should reduce the LMDS regulatory fee. An increase from \$275 to \$450 is not justified based on an increase in cost of the Commission's regulation of LMDS.

Respectfully Submitted,

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