

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
HYPERION COMMUNICATIONS)
LONG HAUL, L.P.)
)
Request for Waiver of Section 101.1003(a) of the)
Commission's Rules Establishing Eligibility)
Restrictions on Incumbent LECs and Cable)
Operators in the Local Multipoint Distribution)
Service)

ORDER

Adopted: February 1, 2000

Released: February 2, 2000

Before the Deputy Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. This *Order* addresses a request for waiver filed on December 9, 1999, by Hyperion Communications Long Haul, L.P. (Hyperion).¹ Hyperion seeks a waiver of the Commission's Rule which imposes an eligibility restriction on incumbent local exchange carriers (LEC) and incumbent cable operators that own or seek to own a Local Multipoint Distribution Service (LMDS) license in their current service areas.² For the reasons discussed below we deny the above-captioned waiver request and require Hyperion to begin divestiture proceedings within ninety days following the release date of this *Order*.

II. BACKGROUND

2. Pursuant to Section 101.1003 of the Commission Rules, an incumbent LEC or cable operator is prohibited from possessing an attributable interest in an LMDS A Block license if the LMDS license's geographic service area significantly overlaps the incumbent's authorized or franchised service

¹ Hyperion Communications Long Haul, L.P. Request for Waiver of Section 101.1003(a) of the Commission's Rules (filed Dec. 9, 1999) (Waiver Request). On January 28, 2000, Hyperion supplemented this request by including a copy of comments filed in response to the *Sixth Notice of Proposed Rulemaking* (CC Docket No. 92-297) (Hyperion Supplement).

² 47 C.F.R. § 101.1003(a).

area.³ Significant overlap occurs when at least ten percent or more of the population of the LMDS Basic Trading Area (BTA), as determined by 1990 census figures for the counties contained in that service area, is located within the incumbent's authorized or franchised LEC or cable service area. Where such an overlap occurs, a LMDS licensee must partition and divest either the portion of its authorized or franchised service area that exceeds the overlap restriction, or the portion of its LMDS service area that exceeds the overlap restriction.⁴ The divestiture process must occur within ninety days following the final grant of an LMDS license or, as in this case, the incidence of a significant overlap.⁵

3. Section 101.1003 was adopted to encourage competition in the local telephone and multichannel video distribution (MVPD) markets.⁶ In the *Second Report and Order*, the Commission indicated that, although there are several potential and actual sources of competition to LECs and cable operators, none of these technologies has yet posed a "a significant competitive antidote to the incumbents' market power."⁷ The Commission concluded that LMDS, because of its spectrum capacity and potential to offer fixed video, voice, and data services, could serve as a vehicle of competition to both the MVPD and local telephone markets.⁸ The Commission further recognized, however, that an in-region LMDS license would be particularly valuable to incumbents as it would not only allow them to provide increased or additional services, but would also preserve excess profits that an independent LMDS competitor could erode.⁹

4. After reviewing the record compiled in the LMDS proceeding, the Commission decided to impose a temporary restriction on incumbent LECs and cable operators from obtaining full ownership of LMDS A block licenses that significantly overlapped with their service areas.¹⁰ The Commission explained that this method of eligibility restriction would allow incumbent LECs and cable operators to participate in the LMDS auction and provide LMDS service, but would also guarantee the entry of new LMDS operators who could provide competition.¹¹ Nevertheless, the Commission did recognize that during the restriction period, some incumbent LECs and cable operators might be able to demonstrate that conditions in a

³ 47 C.F.R. § 101.1003(a).

⁴ 47 C.F.R. § 101.1003(f)(1)(ii)(A)-(B).

⁵ 47 C.F.R. § 101.1003(f)(4)-(6). If an incumbent is unable to find a buyer in that time period, then divestiture may be made to an interim trustee provided the incumbent has no interest in or control of the trustee, and the trustee may dispose of the divested portion of the license as it sees fit. 47 C.F.R. § 101.1003(f)(1)(iii).

⁶ 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, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, FCC 97-82, 12 FCC Rcd 12545, 12625, ¶ 179 (1997) (*Second Report and Order*).

⁷ *Id.* at 12618, ¶ 164.

⁸ *Id.* at 12610, ¶ 149, 12618-9, ¶ 165 and 12621 ¶ 170.

⁹ *Id.* at 12617, ¶ 163.

¹⁰ *Id.*

¹¹ *Id.* at 12633, ¶ 199.

particular market were sufficiently competitive to remove the restriction.¹² Thus, the Commission provided that following the initial grant of LMDS licenses, an incumbent LEC or cable operator could obtain a waiver of the eligibility restriction upon demonstrating that the petitioner no longer had market power in its authorized or franchised service area due to the entry of a new competitor, other than an LMDS licensee, into such service area.¹³ The restriction, which was meant to be temporary, is currently due to terminate on June 30, 2000, but can be extended if the Commission deems an extension necessary in order to further promote competition in the local exchange and MVPD markets.¹⁴ The Commission recently released a *Sixth Notice of Proposed Rulemaking* seeking comment on whether to allow the eligibility restriction to sunset on June 30th of this year.¹⁵

5. Hyperion,¹⁶ is a subsidiary of Adelphia Business Solutions (ABS), a publicly traded company that provides facilities based competitive local exchange carrier (CLEC) services in seventy-five markets in the United States.¹⁷ ABS is, in turn, wholly controlled by Adelphia Communications Corporation (Adelphia). Adelphia provides cable television services to approximately five million subscribers throughout the United States.¹⁸ When Hyperion acquired its A Block licenses in LMDS Auction No. 17, there were no instances of significant overlap between any of Hyperion's A Block licenses and Adelphia's cable franchise areas.¹⁹ However, on October 1, 1999, an overlap occurred when Adelphia acquired two cable television companies, Century Communications Corp. and FrontierVision Partners, L.P.²⁰ Specifically, this acquisition created a significant overlap to occur between Hyperion's BTA 359 (Portsmouth, Ohio) and BTA 363 (Presque Isle, Maine) and certain franchise areas held by Century and FrontierVision.²¹ Hyperion submitted its waiver request on December 9, 1999, requesting a permanent

¹² *Id.* at 12633, ¶ 199.

¹³ *Id.* See also 47 C.F.R. § 101.1003(a)(2). The Commission has indicated that waiver pursuant to this section is available only to entities seeking to obtain an LMDS license through assignments or transfers of control. See 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, *Third Order on Reconsideration*, 13 FCC Rcd 4856, 4871, ¶ 27 (1998).

¹⁴ *Id.* at 12616, ¶ 160.

¹⁵ See 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 Rule Making*, FCC 99-379, released Dec. 13, 1999, 64 Fed. Reg. 71373, Dec. 21, 1999.

¹⁶ Hyperion's predecessor, Baker Creek Communications (Baker Creek), L.P. originally acquired the licenses at auction. Hyperion, a Baker Creek affiliate, acquired the licenses from Baker Creek through an assignment of authorization. See FCC File No. 0000006086.

¹⁷ Waiver Request at 2.

¹⁸ *Id.*

¹⁹ *Id.* at 4.

²⁰ *Id.* at Exhibit 4.

²¹ Hyperion concluded, based on 1990 census figures, that the population overlap for BTA 363 was 39 % and that the overlap for BTA 359 was 84 %. See Waiver Request at Exhibit 1.

waiver of the LMDS eligibility restriction or, in the alternative, a waiver pending the outcome of the *Sixth Notice of Proposed Rulemaking*.

III. DISCUSSION

6. *Permanent Waiver Request*. The Commission's Rules allow for waiver of specific rule requirements upon certain showings. Section 1.925 of the Commission's Rules requires a petitioner to demonstrate either that (a) the underlying purpose of the rule will not be served, or would be frustrated by application to the instant case, and that a grant of the waiver is otherwise in the public interest; or (b) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or otherwise contrary to the public interest.²² For the reasons discussed below, we conclude that Hyperion has failed to meet either of the showings required for grant of a waiver.

7. First, Hyperion argues that requiring it to begin divestiture proceedings would frustrate the intent of the eligibility restriction and be contrary to the public interest. Hyperion contends that the LMDS marketplace has moved away from multichannel video offerings, and instead is focused more on providing high speed data and related telecommunications purposes.²³ Hyperion asserts that by requiring it to divest its overlap interest in BTA 359 and BTA 363 will not advance MVPD competition.²⁴ Furthermore, Hyperion argues that compelling it to divest would, in fact, further undermine the purpose of the eligibility restriction by forestalling the efforts of ABS and Hyperion to provide local exchange competition.²⁵

8. Given the nascent LMDS deployment, Hyperion's reliance on the LMDS market's current position regarding MVPD deployment does not specifically demonstrate how the application of the LMDS eligibility restriction would frustrate the underlying purpose of the rule, or why grant of a waiver is in the public interest in this instance. It is still possible that the marketplace will support an MVPD offering and Hyperion offers no compelling information indicative of a different conclusion. For that reason, the Commission's primary objective to encourage competition in the telephony and MVPD markets is very much applicable to the Hyperion overlap situation. During the LMDS rulemaking proceeding, the Commission requested and considered an extensive number of comments before imposing an eligibility restriction on incumbents²⁶ and, as discussed above, the Commission fully explained its rationale for the eligibility restriction in the *Second Report and Order*.²⁷ Moreover, the validity of the eligibility restriction both generally and as it applied to rural telephone companies has recently been upheld by the D.C. Circuit Court in *Melcher*.²⁸ Additionally, the Wireless Telecommunications Bureau

²² 47 C.F.R. § 1.925(b)(3).

²³ Waiver Request at 7; *see also* Hyperion Supplement at 6-9.

²⁴ *Id.* at 8.

²⁵ *Id.* at 7-9. Hyperion states that "ABS is a proven CLEC competitor. . . about to dramatically expand its nationwide footprint. . ." *Id.* at 9.

²⁶ *See e.g., Second Report and Order*, 12 FCC Rcd at 12608-11 ¶ 146-151.

²⁷ *See supra* ¶ 3-4.

²⁸ *See Melcher v. FCC*, 134 F.3d 1143 (D.C. Cir. 1998).

(Bureau) has denied similar LMDS eligibility restriction waiver requests in the past.²⁹ In the *Rural Telco Order*, the Bureau denied requests for waiver of LMDS eligibility restriction filed by several rural telephone companies finding that petitioners' status as rural telephone companies was not sufficient to warrant a waiver grant.³⁰

9. Hyperion states that the circumstances surrounding its overlap are unique and materially distinguishable from the situation presented in the *Rural Telco Order*. Hyperion argues that the circumstances giving rise to its overlap occurred inadvertently some time following the auction and "was not an effort . . . to acquire the license for anticompetitive purposes."³¹ Additionally, Hyperion contends that its position as a CLEC competitor and the unlikelihood of potential cable competition being foreclosed by Hyperion's use of the spectrum set its situation apart and warrants a grant of its waiver request.³² We disagree that Hyperion's situation is distinguishable from that of the rural telephone companies in the *Rural Telco Order*, because Hyperion attempts to base the necessity of its waiver request on its status as a competitive LEC without offering additional information to bolster its argument. Hyperion's reliance on status alone does not demonstrate unique facts that render the eligibility restriction inequitable, unduly burdensome, or otherwise contrary to the public interest. Hyperion's status as a Competitive LEC does not negate the Commission's obligation to also promote competition in the MVPD marketplace. Moreover, Hyperion's statement regarding the improbability of potential cable competition in BTAs 359 and 363 is not supported by any additional information. The Bureau can not base the grant of a waiver request on Hyperion's unsupported assertions or predictions.

10. Finally, the issues raised by Hyperion, particularly those dealing with the restriction as it pertains to MVPD, do not present a unique or unusual circumstance such that merits a waiver request, but rather introduces questions about the effectiveness of the eligibility restriction. These issues are best addressed through the instant rulemaking proceeding implemented by the *Sixth Notice of Proposed Rulemaking*.³³ Accordingly, as it has offered no additional information in support of its waiver request, Hyperion's request for a permanent waiver of Section 101.1003 of the Commission's Rules is denied.

²⁹ See Requests for Waiver of the Commission's Rules Establishing Eligibility Restrictions on Incumbent LECs and Cable Operators in the Local Multipoint Distribution Service, *Order*, 13 FCC Rcd 18694 (1998) (*Rural Telco Order*), *aff'd*, Requests for Waiver of the Commission's Rules Establishing Eligibility Restrictions on Incumbent LECs and Cable Operators in the Local Multipoint Distribution Service, *Memorandum Opinion and Order*, 14 FCC Rcd 13477 (1999).

³⁰ *Rural Telco Order*, 13 FCC Rcd at 18701-2, ¶ 11-12.

³¹ Waiver Request at 9.

³² *Id.*

³³ See *Stockholders of Renaissance Communications Corp. and Tribune Corp.*, 12 FCC Rcd 11866, 11887-88 ¶ 50 (1997).

11. Divestiture Extension. In the alternative, Hyperion has requested that the Bureau extend its divestiture date until after the Commission concludes the eligibility restriction sunset proceeding.³⁴ Hyperion asserts that requiring it to divest prior to the completion of the rulemaking would be inequitable, burdensome and contrary to the public interest.³⁵ Hyperion compares its situation to the CMRS spectrum cap cases, wherein the Commercial Wireless Division granted divestiture extensions to various parties due to the Commission's reexamination of the spectrum cap rules.³⁶

12. Based on the record before us, we reach a different outcome here. The Commission's rules explicitly require LMDS applicants and licensees to divest any overlap interest within ninety days.³⁷ Thus, if we were to grant Hyperion an indefinite extension, then the Bureau would be acting in a manner inconsistent with a policy established by the Commission.³⁸ We reject Hyperion's attempt to liken its situation to the CMRS spectrum cap cases. In those cases, the Commercial Wireless Division granted an extension of the parties compliance date, because the Commission, as part of its biennial review, was considering eliminating the rule with respect to the 45 MHz spectrum cap.³⁹ Conversely, in this case, the LMDS rule in question sunsets on June 30, 2000 and the Commission is considering potentially extending the rule's termination date.⁴⁰ We believe that in light of the current proceeding enforcement of the restriction is appropriate in the interim. Moreover, Hyperion was familiar with the restriction and should have been particularly vigilant of overlap issues given Adelphia's large cable holdings. Finally, as discussed above, Hyperion has some flexibility with respect to its divestiture of the overlap interest in that it may partition either the overlap portion of the franchised service area, the LMDS BTA or to a trustee in the event that a buyer is not available.⁴¹ Consequently, Hyperion is directed to come into compliance with Section 101.1003(f) of the Commission's Rules within ninety days following release of this *Order*.

³⁴ Waiver Request at 9. *See supra* para. 4, n.15 (discussing Commission's recent request for comment on extending termination date for Section 101.1003).

³⁵ *Id.* at 9-10.

³⁶ *See e.g., Western Wireless PCS III*, 11 FCC Rcd 14487 (CWD 1996) (*Western Wireless III*) (Commercial Wireless Division granted licensee a waiver until completion of PCS partitioning and disaggregation proceeding to come into compliance with CMRS spectrum aggregation limit); *see also Pioneer Telephone Association, Inc.*, DA 99-1823, 1999 WL 694140 (CWD 1999) (Commercial Wireless Division granted petitioners waiver to exceed 45 MHz CMRS spectrum cap until conclusion of spectrum cap proceeding).

³⁷ 47 C.F.R. § 101.1003(f)(4).

³⁸ *See Jelks v. FCC*, 146 F.3d 878, 881 (1998) (a subordinate body like the Division cannot alter a policy set by the Commission), *cert den.* 119 S.Ct 1045 (1999); *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990) (even if internal inconsistency at a subordinate level were shown, the Commission itself would not be acting inconsistently) *citing Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987).

³⁹ *See* 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket 98-205, *Notice of Proposed Rulemaking*, 13 FCC Rcd 25132 (1998).; *see also* 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket 98-205, *Report and Order*, FCC 99-244 (released Sept. 22, 1999).

⁴⁰ *See Sixth Notice of Proposed Rulemaking*, FCC 99-379, ¶ 40.

⁴¹ *See supra* para 2.

IV. ORDERING CLAUSES

13. For the reasons set forth above, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the Request for Waiver of Section 101.1003(a) filed by Hyperion Communications Long Haul, L.P., on December 9, 1999, is HEREBY DENIED.

14. This action is taken pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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