

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

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
Hyperion Communications Long Haul, L.P.
Application for Expedited Review
CC Docket No. 92-297

Third Report and Order and Memorandum Opinion and Order

Adopted: June 20, 2000

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By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

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## I. INTRODUCTION

1. In this Third Report and Order, we complete our review of the Local Multipoint Distribution Service (LMDS) eligibility restriction. That restriction prohibits incumbent local exchange carriers (LECs) and cable companies from having an attributable interest in the LMDS A block license that overlaps with ten percent or more of the population in their service areas.<sup>1</sup> As a result of that review, we decide to allow the scheduled sunset of that restriction to occur as of June 30, 2000. Specifically, we conclude that the standard for determining whether to sunset the eligibility restriction should be whether open eligibility poses a significant likelihood of substantial competitive harm in specific markets, and, if so, whether eligibility restrictions are an effective way to address that harm.<sup>2</sup> We conclude that the record does not support a conclusion that open eligibility poses such a significant threat of substantial competitive harm in specific markets; indeed, open eligibility may improve the availability of services, especially in rural areas. Accordingly, we allow the restriction to expire. We also dismiss as moot the request for waiver of the LMDS eligibility restriction filed by Hyperion.

## II. BACKGROUND

2. On March 13, 1997, we allocated 1,300 megahertz of spectrum per basic trading area for

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<sup>1</sup> See *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 No. 92-297, Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12556 (1997)(*Second Report and Order*).

<sup>2</sup> 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 Rulemaking, 14 FCC Rcd 21520, 21536 (1999) (*Sixth Notice*).

LMDS.<sup>3</sup> In the *Second Report and Order* in that proceeding, we adopted an eligibility restriction which provides that no incumbent LEC or incumbent cable company, nor any entity owning an attributable interest in an incumbent LEC or incumbent cable company, shall have an attributable interest in an LMDS license whose geographic service area significantly overlaps such incumbent's authorized or franchised service area.<sup>4</sup> The restriction was subject to an expiration date of June 30, 2000. We specifically noted, however, that we would undertake a review of the restriction prior to its sunset. Specifically, our rule stipulates the restriction shall terminate "unless the Commission extends its applicability based on a determination that the incumbent LECs or incumbent cable companies continue to have substantial market power in the provision of local telephony or cable television services."<sup>5</sup>

3. In establishing the LMDS eligibility restriction, we considered four factors. First, we found that LMDS was a likely vehicle for the provision of local telephony, MVPD service, or both. Second, we found that the incumbent LECs and incumbent cable companies were dominant in their respective markets, would have a strong incentive to obtain a LMDS license in order to prevent a new entrant from obtaining the license and competing directly in the incumbent's current market, and would have no incentive to use the LMDS spectrum to offer services that would compete with their own services. Third, we determined that a short-term eligibility restriction, with an opportunity for review, would be the best means to increase competition in the local telephony and MVPD markets, in light of our belief that there would be sufficient entry and increases in competition to permit sunset within three years. Fourth, we found that efficiencies arising from ownership of a LMDS system by an incumbent LEC or incumbent cable provider had not been shown.<sup>6</sup> We emphasized that the LMDS spectrum allocation "provided the Commission with a rare opportunity to enable the creation of a facilities-based provider of local exchange services, MVPD services, broadband data services, or all of the above."<sup>7</sup>

4. On December 13, 1999, we released the *Sixth Notice* for the purpose of inquiring whether the eligibility restriction should be extended. In the *Sixth Notice*, we first analyzed the state of competition in the local exchange telephone and MVPD markets, concluding that, while competition has increased in both of these markets, the incumbent LECs and incumbent cable companies continue to hold dominant positions.<sup>8</sup> We sought comment on whether the substantial market power test or an alternative standard should be applied in determining whether the eligibility restriction should be extended. We then sought comment on a variety of other issues, including what services are likely to be provided on LMDS; the extent and robustness of demand for broadband services; whether the incumbents would have an incentive to acquire LMDS spectrum to forestall its use by another provider of broadband services; and whether the broadband offerings of the incumbents justify the extension of the restriction.<sup>9</sup> Fourteen parties filed

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<sup>3</sup> *Second Report and Order*, 12 FCC Rcd at 12556.

<sup>4</sup> 47 C.F.R. § 101.1003(a). The eligibility restriction was not made applicable to the 3.1-3.1075 GHz and the 3.1225-3.13 GHz B-bands because we found that this 150 megahertz of spectrum provides inadequate capacity to enable the provision of attractive multi-channel video distribution (MVPD) service, and that the incumbent LECs will not have a meaningful incentive to acquire the 150 megahertz license to preempt entry into local exchange service. *Second Report and Order*, 12 FCC Rcd at 12626.

<sup>5</sup> 47 C.F.R. § 101.1003(a) (1).

<sup>6</sup> *See Sixth Notice*, 14 FCC Rcd at 21522-23.

<sup>7</sup> *See id.* at 21521.

<sup>8</sup> *Id.* at 21525-35.

<sup>9</sup> *Id.* at 21536-38.

comments and eight parties filed reply comments in response to the *Sixth Notice*.<sup>10</sup> Most parties urged the Commission to allow the LMDS eligibility restriction to sunset, based on the lack of success of the restriction in developing competition for local exchange and MVPD services, the need for new entrants to fully develop the use of the LMDS spectrum, or the need of rural communities for broadband services.<sup>11</sup> However, a few parties claimed that sunset at this time would be premature.<sup>12</sup>

5. On February 2, 2000, the Wireless Telecommunications Bureau issued an Order denying Hyperion's request for a waiver of the divestiture provision of the LMDS eligibility restriction.<sup>13</sup> Hyperion filed an application for expedited review of the denial of its request for an extension of the divestiture requirement pending the outcome of the sunset proceeding in this Docket, together with a request for an emergency stay until the Commission acts on the application for review.<sup>14</sup> The Wireless Telecommunications Bureau granted a stay until ninety days following Commission action in either the eligibility restriction proceeding or on Hyperion's application for review, whichever is earlier.<sup>15</sup>

### III. DISCUSSION

#### A. Appropriate Standard

6. Background. The *Sixth Notice* requested comment generally on what standard should be applied in determining if the eligibility restriction should be extended. The *Sixth Notice* sought comment on three specific alternative standards: (1) whether the incumbent LECs or cable companies continue to have substantial market power in the provision of local telephone or cable television services, the test that was used in the *Second Report and Order*; (2) whether the incumbent companies possess the incentive and ability to purchase the LMDS block to prevent entry of a competitor; or (3) whether the 39 GHz standard should be the appropriate test, *i.e.*, there is a significant likelihood of substantial competitive harm in specific markets, and, if so, eligibility restrictions are an effective way to address that harm.<sup>16</sup> While most commenters supported the sunset of the LMDS restriction, not all commented on the appropriate standard. Nearly all of those who did so urged that the Commission adopt the 39 GHz standard,<sup>17</sup> or at least reject the

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<sup>10</sup> A list of the commenters is set forth in Appendix A.

<sup>11</sup> Comments of US West at 2; Comments of NCTA at 3; Comments of Independent Alliance at 2; Comments of PCIA at 2; Comments of RTG at 1; Comments of OPASTCO at 2; Comments of Sully Buttes at 1; Comments of CTTC at 1; Comments of USTA at 3; Comments of Hyperion at 1; Comments of NTCA at 2; Reply Comments of NextLink at 2; Reply Comments of CPI at 3; Reply Comments of Horry at 2.

<sup>12</sup> Comments of MCI at 1; Comments of Gateway at 1.

<sup>13</sup> *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, DA 00-184 (rel. Feb. 2000)(*Waiver Order*).

<sup>14</sup> Application of Hyperion Communications Long Haul, L.P. for Expedited Review (Mar. 3, 2000); Request of Hyperion Communications Long Haul, L.P. for Emergency Stay (Mar. 3, 2000).

<sup>15</sup> *Hyperion Communications Long Haul, L.P.*, Order, DA 00-787 (rel. Apr. 11, 2000).

<sup>16</sup> *Sixth Notice*, 14 FCC Rcd at 21536.

<sup>17</sup> See Comments of Hyperion at 4; Comments of RTG at 14; Comments of NTCA at 6-7; Comments of CTTC at 3; Comments of National Cable TV Association at 8.

“substantial market power” standard.<sup>18</sup>

7. Discussion. We adopt the 39 GHz test as the appropriate standard to use in making this determination. We find that the 39 GHz test is a better test for addressing the key issues to be determined, *i.e.*, whether, despite the substantial market power of incumbents in the local exchange telephone and cable markets, restrictions on eligibility to use LMDS spectrum are an effective way to induce competitive entry in those markets, and whether the incumbents are likely to cause substantial competitive harm in the markets where LMDS technology is likely to be used. For the reasons discussed below, we find that the test of substantial market power in the local exchange and MVPD markets is not the appropriate standard to use in determining whether the eligibility restriction should be allowed to sunset.<sup>19</sup>

8. We find that the 39 GHz test is the appropriate standard to apply in determining whether the LMDS eligibility restriction should sunset. We concur with Hyperion, RTG, NTCA, CTTC and NCTA<sup>20</sup> that the 39 GHz test is consistent with the 1996 Act’s<sup>21</sup> mandate to stimulate competition in telecommunications markets with a minimum of regulatory interference. A core objective of the 1996 Act was to establish “a pro-competitive de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”<sup>22</sup> The standard demands that this regulatory restriction be imposed on LMDS only when there is a significant likelihood of substantial harm to competition in specific markets and when the restriction will be effective in eliminating that harm.<sup>23</sup>

9. Specifically, the 39 GHz test is a more discerning standard than the substantial market power standard. The 39 GHz test entails examining other relevant market facts and circumstances: economic incentives, entry barriers, and potential competition. The 39 GHz standard will allow the Commission to focus on the issues it needs to decide—whether the incumbents are likely to use their market power to cause substantial competitive harm by preventing the use of LMDS spectrum for services that would otherwise be provided by LMDS licensees, such as broadband, and whether the restrictions will prevent such actions—rather than on whether the incumbents have market power in markets that LMDS licensees appear not to be entering.<sup>24</sup>

10. We disagree with the comments of MCI Worldcom and Gateway who urge that we should use

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<sup>18</sup> See Comments of Teligent at 5; Comments of Sully Buttes at 2; Comments of OPASTCO at 4.

<sup>19</sup> We note that no party addressed Alternative 1, *i.e.*, that the incumbent companies possess the incentive and ability to purchase the LMDS block to prevent entry of a competitor, which is merely a more explicit version of the market dominance test.

<sup>20</sup> See Comments of Hyperion at 4; Comments of RTG at 14; Comments of NTCA at 6-7; Comments of CTTC at 3; Comments of NCTA at 8.

<sup>21</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>22</sup> H.R. Rep. 104-458, 104<sup>th</sup> Cong. 2d Sess. 1996.

<sup>23</sup> This standard was adopted in *Amendment of The Commission’s Rules Regarding The 37.0-38.6 GHz Bands and Implementation of Section 309(j) of the Communications Act—Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz*, ET Docket No. 95-183, RM-8553 and PP Docket No. 93-253, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd 18600, 18619 (1997).

<sup>24</sup> See Comments of NTCA at 7.

the substantial market power test to decide whether the eligibility restriction should sunset.<sup>25</sup> As we found in the *Sixth Notice*, commenters who support retaining the eligibility restriction assert that incumbent LECs and cable companies remain dominant in their respective markets.<sup>26</sup> These commenters argue that as of 1999 incumbent LECs held a 93% national market share and incumbent cable companies held a 82.45% market share, while competing carriers had made only modest competitive inroads.<sup>27</sup> As further evidence of ongoing ILEC dominance, MCI Worldcom points to the rejection of five Bell operating company section 271 applications prior to Bell Atlantic's application being granted on December 22, 1999.<sup>28</sup>

11. We agree, however, with the majority of commenters that we need to consider more in deciding whether to sunset the restriction than whether the incumbent LECs and incumbent cable companies possess substantial market power in the local exchange and cable markets.<sup>29</sup> Moreover, unlike the 39 GHz test discussed above, the substantial market power standard does not fully take into account market complexities and evolution. The substantial market power test does not consider whether incumbents are likely to use their market power to cause substantial competitive harm in the markets which LMDS licensees would otherwise enter, and whether the restriction will prevent such actions.

12. In sum, we find that the 39 GHz test is the appropriate standard to apply in determining whether the LMDS restriction should sunset. The 39 GHz test is the most informed standard. It not only considers the broadest set of market facts and circumstances, but it also includes analyses of incumbents' market power and incumbents' incentive and ability to preclude competition by LMDS licensees.

## **B. Application of the 39 GHz Standard**

### **1. Services Provided on LMDS**

13. Background. The *Sixth Notice* sought comment on a number of issues that would aid the Commission in determining whether the LMDS eligibility restriction should be extended. These issues included what services are likely to be provided on LMDS systems.<sup>30</sup> Most of the parties who addressed this issue contend that the LMDS licensees provide or are expected to provide broadband services, instead of local telephone or cable services.<sup>31</sup>

14. Discussion. We agree with commenters that the LMDS A block is not being used primarily to provide local exchange or MVPD services. LMDS spectrum has been used primarily for broadband data services.<sup>32</sup> Most deployments use LMDS for broadband service or some bundle containing broadband

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<sup>25</sup> See, e.g., Comments of MCI Worldcom at 6.

<sup>26</sup> Comments of Gateway Telecom, LLC at 1-2; Comments of MCI Worldcom at 4.

<sup>27</sup> Comments of Gateway Telecom, LLC at 1-2; Comments of MCI Worldcom at 4.

<sup>28</sup> Comments of MCI Worldcom at 4.

<sup>29</sup> See Comments of Hyperion at 4; Comments of RTG at 14; Comments of NTCA at 6-7; Comments of CTTC at 3; Comments of NCTA at 8; Comments of Teligent at 5; Comments of Sully Buttes at 2; Comments of OPASTCO at 4.

<sup>30</sup> *Sixth Notice* at 21536-37.

<sup>31</sup> See Comments of US West at 5-6; Comments of Hyperion at 3-4; Comments of NTCA at 4.

<sup>32</sup> See Comments of US West at 10-11; Comments of Hyperion at 3-4; Comments of NTCA at 4.

service to the narrower business market.<sup>33</sup> NextLink, the largest holder of LMDS licenses, is deploying LMDS as part of its strategy to expedite buildout of broadband service to businesses.<sup>34</sup> Prime Companies' subsidiary, LMDS Communications, is field-testing LMDS for small- and medium-size business access.<sup>35</sup> As Hyperion states, virtually all LMDS spectrum is licensed to entities with data and related telecommunications objectives, rather than to entities with local exchange telephone or cable service objectives.<sup>36</sup>

15. The substantial market power test reflected the assumption that it would maximize the opportunity for new facilities-based providers to offer competitive local exchange services and MVPD services.<sup>37</sup> In fact, the LMDS A block is not being used to provide services which are primarily local exchange or MVPD.<sup>38</sup> We do not believe we should continue the LMDS restriction based on possible competitive effects in markets that LMDS licensees are not entering.

16. Thus, contrary to our original expectations, experience has demonstrated that the LMDS restriction has not resulted in non-incumbents making competitive incursions into local exchange and MVPD services.<sup>39</sup> Based on the above circumstances, we conclude that it is unlikely that the possible use of LMDS spectrum by incumbents will result in the blocking of entry into those services.

## 2. Broadband Competition

17. Background. The *Sixth Notice* also sought comment on (1) the extent and robustness of demand for broadband services; (2) whether the incumbents would have an incentive to acquire LMDS spectrum to forestall its use by another provider of broadband services; and (3) whether the broadband offerings of the incumbents justify the extension of the restriction. Commenters generally contend that the broadband market is robust and competitive, and that incumbent cable companies and incumbent LECs

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<sup>33</sup> Appendix B. See *LMDS Rollouts Slow, But Future Looks Bright*, ISP BUSINESS NEWS, January 10, 2000, at 1-2; *Nextlink Selects Nortel BWA Solution*, Hilary Smith, RCR Radio Communications Report, March 20, 2000, at 1; *Prime Candidate*, Carl Weinschenk, TELE.COM, April 3, 2000; *Touch America Launches Wireless, High-speed Broadband LMDS Service in Butte, Montana*, PR NEWSWIRE, November 5, 1999; *Touch America Launches Wireless, High-Speed Broadband LMDS Commercial Service Using Nortel Networks Equipment*, CAMBRIDGE TELECOM REPORT, September 27, 1999, at 1-2; *SPEEDUS.COM Agrees to Acquire CT&T*, PR NEWSWIRE, March 30, 2000; *Virginia Tech and Wavtrace Announce Results of LMDS Trial; First of Its Kind*, BUSINESS WIRE, September 8, 1999, at 1,3; *Bosch Telecom and Frazier/King Media Deploy Multimedia LMDS Network; Showcase Reveals Industry's First Advanced Real-life LMDS applications*, BUSINESS WIRE, April 6, 1998; *Newbridge Makes Hit in US LMDS Market*, ELECTRONICS COMMUNICATOR, May 6, 1999.

<sup>34</sup> *A Tree Grows in Phoenix*, Karen J. Bannan, INTERACTIVE WEEK FROM ZDWIRE, at 2. LMDS appears to be a stop-gap for fiber deployment. Next Link claims, however, that it will provide local exchange services to customers in the future but has not done so to date. Reply Comments of NextLink at 2.

<sup>35</sup> *Alcatel and Prime Companies to Conduct Field Trials of National LMDS Broadband Wireless Network in March 2000*, BUSINESS WIRE VIA NEWS EDGE CORPORATION, March 9, 2000 at 1.

<sup>36</sup> Hyperion Comments at 3-4.; see also NTCA Comments at 4; US West Comments at 6.

<sup>37</sup> *Second Report and Order* at 12615.

<sup>38</sup> See Comments of US West at 6; Comments of Sully Buttes at 3; Comments of NTCA at 5; Comments of Hyperion at 4.

<sup>39</sup> See Comments of US West at 11; Comments of Sully Buttes at 3.

could not use LMDS spectrum to dominate the broadband market.<sup>40</sup>

18. Discussion. An increasing number of broadband firms and technologies are providing growing competition to incumbent LECs and incumbent cable companies, apparently limiting the threat that they will be able to preclude competition in the provision of broadband services. Both competitive LECs and incumbent LECs are expanding their use of DSL service, cable modem providers are providing substantial competition to DSL offerings, and satellite companies are offering one-way nationwide broadband service.<sup>41</sup> Moreover, emerging broadband providers are likely to furnish even more choices.<sup>42</sup> High speed Internet access is being offered by major companies such as Sprint and AT&T, which are offering such services on a trial basis.<sup>43</sup> Satellite broadband services are being offered by a variety of companies, and fixed wireless companies are using LMDS, 39 GHz and 24 GHz spectrum to provide broadband services.<sup>44</sup> Further, MCI and Sprint have acquired MMDS licenses to transmit broadband, and

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<sup>40</sup> See Comments of US West at 11-17; Comments of USTA at 5-6; Comments of NTCA at 7-8. The Commission has previously defined "full broadband" services synonymously with "advanced telecommunications capability" as those having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, "bandwidth") in excess of 200 kilobits per second (kbps) in the last mile. See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, CC Docket No. 98-146, 14 FCC Rcd 2398, 2406 (1999) (*Section 706 Proceeding*). See also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, FCC 00-57, CC Docket No. 98-146 (rel. Feb. 18, 2000) and *Local Competition and Broadband Reporting*, Report and Order, CC Docket No. 99-301, FCC 00-114 (rel. Mar. 30, 2000) (*Data Gathering Report*). In the *Second Advanced Telecommunications NOI*, the Commission explained that the *NOI* used the term "broadband services" to refer to a larger set of services that end users can access which may have asymmetric capabilities and speeds less than 200 kbps, but are generally considered high speed. See *Second Advanced Telecommunications NOI*, n.2; *Data Gathering Report*, n. 8

<sup>41</sup> See Telechoice, xDSL.com, Deployment and Projections, [http://www.xdsl.com/content/resources/deployment\\_info.asp](http://www.xdsl.com/content/resources/deployment_info.asp); DSL Prime, [www.dslprime.com/News\\_Articles/Availability/availability.html](http://www.dslprime.com/News_Articles/Availability/availability.html); [www.covad.com/covad\\_overview.cfm](http://www.covad.com/covad_overview.cfm), March 13, 2000; [www.rhythms.com](http://www.rhythms.com), March 13, 2000; [www.northpointcom.com/pressroom/2000](http://www.northpointcom.com/pressroom/2000), March 13, 2000; *DSL holesalers race to the hinterlands*, Tom Davey, REDHERRING.COM, January 21, 2000; *Let It Ride*, Rebecca Cantwell, INTERACTIVE WEEK FROM ZDWIRE, March 6, 2000, at 9; *Fiber Optics to the Home*, Jeff Hecht, MIT TECHNOLOGY REVIEW, volume 103, issue 2, at 3; *Business Models Duel in the Race to the Broadband Frontier*, Paul Clark and Mark Sheehan, ISP BUSINESS NEWS, January 10, 2000; *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, CS Docket No. 99-230, FCC 99-418 (rel. Jan. 14, 2000) at Para. 44; *MSN, Gilat Unveil 2-Way satellite broadband*, Dick Kelsy, NEWSBYTES NEWS NETWORK, February 16, 2000; *Satellite Based Television Merges Computer Technologies*, DALLAS MORNING NEWS, December 31, 1999, at 2; *Why Wait for DSL, Cable Modem When There's Wireless?*, Todd Wallack, SAN FRANCISCO CHRONICLE, March 28, 2000; *Dishing Out Data*, Peter Spiegel, FORBES, January 24, 2000; CONSUMER ELECTRONICS, January 24, 2000, vol. 40, issue 4; *High Speed Surfing*, Fred Langa, WINDOWS MAGAZINE, February 1, 1999; *SoftNet Systems, Inc. Reports First Quarter Fiscal 2000 Results*, PR NEWswire, February 7, 2000.

<sup>42</sup> See Comments of US West at 14-15; Comments of RTG at 5-7; Comments of NTCA at 7-8.

<sup>43</sup> See *Sprint's ION Launches Hit Cable, Telcos*, Fred Dawson, MULTICHANNEL NEWS, November 29, 1999, at 1; *AT&T Launches Fixed Wireless in Fort Worth*, Andrea Ahles, FORT WORTH STAR-TELEGRAM, March 23, 2000.



other companies are providing broadband through the use of unlicensed spectrum.<sup>45</sup>

19. The record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies—xDSL, cable modems, satellite, fixed wireless, and mobile wireless, suggests that no group of firms or technology will likely be able to dominate the provision of broadband services.<sup>46</sup> Moreover, we are inclined to intervene only if there is market failure or anti-competitive conduct, and the record does not show that either of these factors exist with respect to LMDS.

20. Price reductions on xDSL and cable modem services, particularly in highly competitive local markets like San Francisco, support the growth of competition in these local markets. SBC initially priced its DSL service, inaugurated in California, at \$89 per month with \$299 of additional equipment costs.<sup>47</sup> After AT&T dropped its Bay Area price of [Excite@Home](#) cable modem service to \$30 per month with modem purchase, SBC's Pacific Bell responded with a limited-time DSL promotional price of \$39.95 per month with free modem.<sup>48</sup> Other instances of price competition include Covad reducing the price of its monthly service to as low as \$40 per month.<sup>49</sup> Additionally, free DSL service offerings have commenced in Spring 2000. Beginning in April 2000, Broadband Digital Group has provided free DSL service to subscribers willing to accept advertising via FreeDSL's "browser assistant" always-on top bar.<sup>50</sup> To date over 400,000 have signed up to receive Broadband Digital Group's FreeDSL.<sup>51</sup> Smart World Technologies

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<sup>44</sup> *MSN and Gilat Offering First 2-Way Internet Service*, COMMUNICATIONS DAILY, vol. 20, No. 33, at 5-6; *EchoStar to Add Internet Access*, Eric Hubler, DENVER POST, February 24, 2000, at 1; *Wireless High-speed Access for Everyone*, Robert Lemos, ZDNET NEWS FROM ZDWIRE, January 13, 2000, at 1; *Arianespace to Fund iSky*, INTERSPACE, February 9, 2000, Issue 686; *R&D Swords into Dow Shares*, Neil Weinberg, FORBES, March 6, 2000; *Broadband Via Satellite-Where are We?*, Marc Crossman and Ahn Steninger, VIA SATELLITE, November 10, 1999; *Why Wait for DSL, Cable Modem When There's Wireless?*, Todd Wallack, SAN FRANCISCO CHRONICLE, March 28, 2000; *Carriers-News Briefs*, NETWORK NEWS, March 22, 2000; *Business Briefs*, DESERET NEWS, March 6, 2000; *Wireless Enters the CLEC Market*, WIRELESS DATA NEWS, vol. 8, issue 3, at 2; *A Tree Grows in Phoenix*, Karen J. Bannan, INTERACTIVE WEEK FROM ZDWIRE, August 30, 1999, at 2; *Atlanta Tech: The High-speed Building Chase*, Michael E. Kanell, THE ATLANTA CONSTITUTION, February 16, 2000, at 3-4; CAMBRIDGE TELECOM REPORT, March 13, 2000, at 3-4.

<sup>45</sup> *Cisco's Wireless Net Act*, Richard Tedesco, BROADCASTING & CABLE, vol. 129, issue 50, at 2; *MCI Worldcom Launches Fixed Wireless Trials*, Mary Mosquera, CMP TECHWEB, March 7, 2000, at 1-2; *MCI Worldcom Plans Wireless Test*, Peter Goodman, WASHINGTON POST, March 28, 2000; *Fuzion Wireless Communications the First to Commercially Deploy Wireless Broadband Internet Service*, BUSINESS WIRE, November 22, 1999; *AT&T Exec Trades Prosperity for Uncertainty*, Elizabeth Douglas, LOS ANGELES TIMES, March 13, 2000, at 2.

<sup>46</sup> *See On Location With the Digital Divide*, Rebecca Cantwell, INTERACTIVE WEEK FROM ZDWIRE, April 3, 2000; Comments of US West at 11-15.

<sup>47</sup> *SBC Communications Cuts Prices to Stimulate DSL Demand*, Jonathan Burns, February 15, 2000, DOW JONES NEWS SERVICE at 3.

<sup>48</sup> *Increased Competition Drives Down Prices of High-Speed Internet Access*, Chris O'Brien, KNIGHT-RIDDER TRIBUNE NEWS at 2.

<sup>49</sup> *Id.*

<sup>50</sup> [www.freedsl.com](http://www.freedsl.com).

<sup>51</sup> *Id.*

announced it will offer its own free DSL service, freexDSL, over Smart World's own network, which covers 95 percent of the U.S.<sup>52</sup> The prices of the new technologies coming on line are already lower than the prices of some existing broadband technologies. MCI Worldcom has priced its trial Warp310 residential MMDS broadband service offering at \$39.95 per month.<sup>53</sup> AT&T has announced a monthly \$34.95 starting price for its 1.9 GHz residential broadband service.<sup>54</sup>

21. The arguments of commenters that fixed broadband-suitable spectrum is difficult to monopolize to forestall competing broadband entry are also persuasive in the current marketplace. As RTG contends, to control all fixed broadband capable wireless spectrum, a firm would have to acquire nearly 3,700 MHz: 36 MHz UHF; 400 MHz at 24 GHz; 1,300 MHz at LMDS; 1,400 MHz at 39 GHz; 186 MHz MMDS; and the 202 MHz proposed in the Commission's *Spectrum Policy Statement*.<sup>55</sup> This total is perhaps an underestimate as it excludes satellite frequencies, the Industrial Scientific and Medical (ISM) bands, and the Unlicensed National Information Infrastructure (U-NII). We conclude that foreclosing broadband competition via all of these avenues under these market conditions is fairly remote and does not pose a significant likelihood of substantial competitive harm. As commenters point out, even if the regulatory authorities were to permit all of the required license acquisitions, the purchases would prove prohibitively expensive.<sup>56</sup> Under these circumstances, we find that the concerns expressed in the *Sixth Notice* that the incumbent LECs or incumbent cable companies have the incentive to warehouse LMDS licenses in order to protect their control of these markets from competition are not supported by the record.<sup>57</sup> Moreover, LMDS licensees are subject to specific construction requirements, requiring them to make a showing of substantial service in their license area within ten years of being licensed.<sup>58</sup> Failure to meet the requirement will result in the forfeiture of the license and the licensee will be unable to regain it. Nonetheless, we will not hesitate to act aggressively to eliminate warehousing of the spectrum if such activity comes to our attention.<sup>59</sup>

### 3. Benefits of Sunsetting the LMDS Eligibility Restriction

22. The *Sixth Notice* sought comment on a number of other issues which would help the Commission decide whether the eligibility restriction should be extended. These included: (1) whether the net benefits of extending the restriction are greater than the net benefits of eliminating it; (2) the effect of cost and line-of-sight limitations of LMDS; (3) whether other services are substitutable for LMDS; (4) whether the restriction should be extended to allow the market more time to reveal how LMDS and competing media will be deployed; and (5) how the the extension will affect LMDS licensees' access to

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<sup>52</sup> [www.freexdsl.com](http://www.freexdsl.com).

<sup>53</sup> *MCI WorldCom Launches Fixed-Wireless Trials*, Mary Mosquera, CMP TECHWEB, March 7, 2000.

<sup>54</sup> *AT&T Cuts The Cord In Fort Worth For Voice & Data*, Steve Gold, NEWSBYTES NEWS NETWORK, March 23, 2000.

<sup>55</sup> *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millenium*, Policy Statement (rel. Nov. 22, 1999); Comments of RTG at 10-11.

<sup>56</sup> Comments of RTG at 10.

<sup>57</sup> See *Sixth Notice*, 14 FCC Rcd at 21536 (para. 41); Comments at NCTA at 7; Comments of RTG at 4; Reply Comments of CPI at 11; Reply Comments of Sully Buttes at 5.

<sup>58</sup> 47 C.F.R. § 101.1011.

<sup>59</sup> See Comments of US West at 17.

capital.<sup>60</sup> Most commenters contend that the benefits of allowing the restriction to sunset outweigh any detriments, recognize that cost and line-of-sight limitations would restrict the ability of LMDS licensees to implement service, argue that various services were substitutable for LMDS, and contend that only by removing the restriction would LMDS licensees be able to have adequate access to capital.<sup>61</sup> Most commenters contend that the LMDS eligibility restrictions should be allowed to sunset because LMDS services have been and will continue to be provided in the competitive broadband market, that the entry of incumbent LECs will help develop the LMDS broadband market, that the restriction has not helped the LMDS licensees to penetrate the local telephone or cable markets, and that the broadband markets are so competitive that they are unlikely to be dominated by the incumbent LECs or incumbent cable operators.<sup>62</sup> On the other hand, MCI argues that terminating the restriction now would be premature.<sup>63</sup>

23. Discussion. We find that the benefits of allowing the eligibility restriction to expire outweigh any benefits of extending it. As shown above, the restriction has not resulted in LMDS entry into the local telephone or MVPD markets. Moreover, the competitive nature of the broadband market supports allowing the eligibility restriction to sunset. Thus, the number of consumer broadband options within the various broadband technologies, including DSL, cable modems, satellite, and fixed wireless, together with the active price competition and price reductions in that market, convinces us that the incumbent carriers will not be able to use LMDS spectrum to dominate the market.<sup>64</sup> Consequently, under the *39 GHz* test, we conclude that there is no significant likelihood that open eligibility will enable these companies to cause substantial competitive harm in any market, or that the eligibility restriction has been or will be an effective way to address any such harm to competition. Moreover, as explained in more detail below, removal of the eligibility restriction will result in consistent treatment of wireless services and may well result in access to capital resources to more fully develop LMDS. In addition, it may speed the availability of broadband services to rural areas.

24. We reject MCI's contention that it is premature to terminate the restriction because the first LMDS products are just becoming available in the United States due to delays caused by the lack of roof-top access, lack of equipment, and line-of-sight issues.<sup>65</sup> We are considering roof-top access issues in the *Competitive Networks* proceeding.<sup>66</sup> While our action in the *Competitive Networks* proceeding may enable the LMDS providers to gain roof-top access, they have other significant obstacles, including equipment, line-of-sight limitations, and costs that may impact their ability to successfully compete in the local exchange and residential cable markets, as well as in the broadband market.<sup>67</sup> Some of these obstacles may

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<sup>60</sup> *Sixth Notice*, 14 FCC Rcd at 21537-39 (paras. 42-49).

<sup>61</sup> See Comments of Independent Alliance at 4; Comments of RTG at 5, 7; Comments of NTCA at 7-8; Comments of Sully Buttes at 3; Comments of Teligent at 4; Comments of USTA at 4; Comments of PCIA at 3; Comments of CTTC at 3.

<sup>62</sup> See, e.g., Comments of US West at 11-12; Comments of PCIA at 4; Comments of Hyperion at 3-5, Comments of National Cable TV Association at 12-18.

<sup>63</sup> Comments of MCI at 5-6.

<sup>64</sup> See Comments of US West at 11-15; Comments of Hyperion at 8-9.

<sup>65</sup> *Id.*

<sup>66</sup> *Promotion of Competitive Networks in Local Telecommunications Markets*, 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, WT Docket No. 99-217 and CC Docket No. 96-98, FCC 99-141 (rel. July 9, 1999).

<sup>67</sup> See Comments of PCIA at 4.

be overcome by the sunset of the restriction. Thus, LMDS equipment is available, but the equipment necessary to overcome line-of-sight and other obstacles is expensive, and requires large infusions of capital.<sup>68</sup> The market research firm Analysys contends, “Because the price of consumer terminals is high, LMDS will not be used to connect individual small business or residential users in the near future, although it can be used to serve clusters of users, for example in office buildings.”<sup>69</sup> Frost & Sullivan’s *World LMDS Equipment and Service Markets* report found that “project financing is among the most important issues affecting the growth of the industry.”<sup>70</sup> The LMDS carrier pool is dominated by new entities with little telecommunications experience whom investors may be hesitant to back in head-to-head competition with incumbents.<sup>71</sup> We conclude that allowing sunset of the eligibility restriction may speed LMDS deployment for all firms, including small and rural carrier LMDS carriers, who may be able to partner with larger firms.

25. As stated above, the available evidence confirms commenters’ assertions that LMDS, MMDS, 24 GHz, 39 GHz, and other fixed wireless media are extremely competitive with one another.<sup>72</sup> All of these spectrum bands are presently being deployed to provide broadband or bundled broadband services to some market segment, particularly to business subscribers. The number of competing alternatives suggests permitting the LMDS eligibility restriction to sunset will not significantly diminish competition among fixed wireless providers, and will allow LMDS to more fairly compete with other substitutable services.

26. Moreover, we find no reason here to treat LMDS differently from other substitutable spectrum. First, we are persuaded by commenters’ arguments that LMDS is not unique for broadband service provision. We agree with RTG’s assertion that LMDS is neither a “specific” service nor a specific technology.<sup>73</sup> RTG further points out that LMDS is merely four bands of high frequency spectrum that, in theory, can be used to provide, or to assist in the provision of consumer services such as video, voice, data, and broadband telecommunications services generally as well as backbone facilities and wireless fiber. Other technologies can span the last mile to deliver broadband telecommunications services.<sup>74</sup> Satellites, cable modems, xDSL, MMDS spectrum, and optical lasers are other technologies deploying or being market tested to deploy broadband or bundled broadband services.<sup>75</sup> The evidence demonstrates that LMDS, MMDS, 24 GHz, 39 GHz, and other fixed wireless services are virtually indistinguishable not only to consumers, but also in their capability to provide services.<sup>76</sup>

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<sup>68</sup> See Appendix B; Comments of US West at 7, n. 19.

<sup>69</sup> *Id.*

<sup>70</sup> *Racing for the Last Mile*, John Williamson, GLOBAL TELEPHONY, February 28, 2000 (quoting Frost & Sullivan’s *World LMDS Equipment and Service Markets*).

<sup>71</sup> *Id.*

<sup>72</sup> Comments of Teligent at 4; Comments of US West; Comments of NTCA at 7-8; Comments of Sully Buttes at 4.

<sup>73</sup> Comments of RTG at 5.

<sup>74</sup> *Id.*

<sup>75</sup> See Comments of RTG at 5-7; Comments of NTCA at 7; Comments of USTA at 5; Comments of Sully Buttes at 4; Comments of US West at 12-15; Comments of Hyperion at 7-8.

<sup>76</sup> Comments of Teligent at 4; Comments of US West at 13-14; Comments of NTCA at 7-8; Comments of Sully Buttes at 4.

27. Second, there is no particular advantage conferred by the large size of the LMDS A block. A licensee in another spectrum band can aggregate fixed wireless spectrum in excess of 1,150 MHz, the size of the LMDS A block. For example, acquiring all of the 39 GHz licenses in a given geographic area would leave one firm with 1,400 MHz of spectrum.<sup>77</sup> Although advantageous, a large block of spectrum may not be essential: a licensee can offer competitive local exchange or broadband services with much less spectrum.<sup>78</sup> MCI WorldCom, Sprint, and other MMDS licensees with 200 MHz of spectrum may have an approximately equal amount of effective bandwidth as LMDS licensees with more than 1,000 MHz because the MMDS lower frequencies support higher modulation levels, hence greater bits per hertz.<sup>79</sup> LMDS has disadvantages compared with other technologies. Because LMDS has a smaller transmission radius than MMDS, LMDS requires more transmission towers to cover a given area, increasing LMDS deployment cost.<sup>80</sup> An elevated MMDS transmission tower can cover a 35-mile radius,<sup>81</sup> while an LMDS transmitter has a broadcast radius of just over 24 miles.<sup>82</sup> Moreover, LMDS requires cellularization to limit rain attenuation,<sup>83</sup> and the cells are small—five kilometers (3 miles) or less in radius.<sup>84</sup> LMDS is no longer unencumbered. All LMDS licenses have been auctioned, meaning incumbents now occupy the spectrum.

28. We conclude that allowing the eligibility restriction to sunset also will remove possible impediments to small and rural carrier LMDS deployment. Rural commenters allege the LMDS in-region eligibility restriction imposes several disadvantages on small, rural telecommunications carriers.<sup>85</sup> First, the restriction prevents the formation of alliances, partnerships, and joint ventures that may facilitate LMDS deployment. Second, the eligibility restriction limits access to capital. Third, the eligibility restriction frustrates leveraging existing network infrastructure to achieve minimum cost.

29. Although we have always recognized the need to ensure that rural markets were served adequately, we initially imposed the restriction on rural markets because we believed that it could stimulate competition to local exchange carriers in these markets. However, in view of the fact that this has not occurred, the benefits of LMDS for rural markets furnish another reason to terminate the restriction. We find that, because of longer copper loops, rural areas may be less able to receive DSL, and therefore may be more reliant on wireless technologies like LMDS. Forty percent to fifty percent of local lines in the

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<sup>77</sup> Comments of RTG at 7.

<sup>78</sup> *Id.*

<sup>79</sup> *Broadband Wireless: The Big Hertz*, Fred Dawson, INTERACTIVE WEEK FOR ZDDWIRE, May 17, 1999 (quoting George Harter, Chief Technology Officer, Hardin & Associates).

<sup>80</sup> *TeleCommunications Providers Tap Wireless Internet Access for Local Loop*, Matt Hicks, PC WEEK, August 2, 1999, vol. 16, issue 31.

<sup>81</sup> *Id.*

<sup>82</sup> *Wired for Speed*, Cynthia Morgan, WINDOWS MAGAZINE, December 1, 1997.

<sup>83</sup> *Will LMDS Develop into a New Video Competitor?*, Richard Bergen, MULTICHANNEL NEWS, January 12, 1999. MMDS may also use cellularization, but it is not required to. See *Fixed Broadband on Verge of Boom*, WCA INTERNATIONAL, James Careless.

<sup>84</sup> *Id.* Taking into account the city's terrain and rainfall, Cisco/Bosch and AAPT are deploying in Sydney, Australia an LMDS system with an effective cell radius of 2.7 kilometers (1.67 miles).

<sup>85</sup> Comments of Sully Buttes at 5; Comments of RTG at 11; Comments of Independent Alliance at 6; Comments of OPASTCO at 5; Comments of CTTC at 5.

National Exchange Carrier Association pools exceed three miles,<sup>86</sup> at or beyond DSL's practical limit of 3.4 miles, which can be shortened by the age and condition of the copper lines and the type of DSL used.<sup>87</sup> Facilitating the availability of alternative broadband technologies, like LMDS, takes on added urgency for rural customers unable to receive DSL.

30. Additionally, LMDS equipment vendors may be reluctant to provide reasonably priced equipment until LMDS carriers can deliver a critical mass of subscribers.<sup>88</sup> The LMDS eligibility restriction frustrates the formation of coalitions by excluding incumbent local exchange telephone and incumbent cable television companies whose service areas overlap the LMDS market area.<sup>89</sup> The pool of eligible partners is made smaller in rural areas where there is already a scarcity of telecommunications firms.

31. The promise of LMDS may be uneconomically slowed by prohibiting incumbent LECs and incumbent cable operators from holding this spectrum and bringing their financial and technical resources to bear on deployment of LMDS spectrum.<sup>90</sup> Given its high equipment cost and line-of-sight and rain-fade limitations, LMDS should be deployed where topography and structural design facilitate signal transmission.<sup>91</sup> The eligibility restriction precludes incumbent local exchange and cable operators from using LMDS to extend their geographic coverage to areas where LMDS would be ideal, and transmission by cable or wire might be prohibitively expensive.<sup>92</sup> Incumbents so precluded may either fail to launch service in certain areas or do so at greater than optimal cost. One consequence is that prompt and efficient utilization of advanced technologies may be inhibited.<sup>93</sup> Another consequence is that small and rural carriers are less able to enhance service offerings to respond competitively to emerging wireless broadband service offerings priced and packaged to compete directly with local exchange carrier service.<sup>94</sup>

32. From the consumers' perspective, small and rural subscribers who would get video, voice, or broadband service absent the eligibility restriction might fail to receive these services or may get them from fewer firms with the restriction. Allowing the sunset to expedite service deployment is consistent with section 706 of the 1996 Telecommunications Act, which calls upon the FCC to encourage the deployment of advanced services in rural areas.<sup>95</sup>

33. The inability to obtain LMDS A-block spectrum may also impede some competitive LECs in whom cable incumbents have attributable interests. Other competing local exchange carriers not subject to the LMDS eligibility restriction can use an optimum mix of wired and wireless facilities—among them

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<sup>86</sup> David Cohen, USTA, in an April 12, 2000 *ex parte* meeting with Commission staff.

<sup>87</sup> Older and damaged copper loops have a shorter range. HDSL and symmetric DSL have a 12,000-foot limit.

<sup>88</sup> See Comments of Sully Buttes at 6-7.

<sup>89</sup> See Comments of PCIA at 3; Comments of Sully Buttes at 7.

<sup>90</sup> See Comments of US West at 16-17.

<sup>91</sup> See Comments of OPASTCO at 5; Comments of RTG at 5.

<sup>92</sup> See Comments of OPASTCO at 5.

<sup>93</sup> See Comments of OPASTCO at 6; Comments of CTTC at 4; Comments of RTG at 14.

<sup>94</sup> *Id.*

<sup>95</sup> Comments of OPASTCO.

LMDS—to travel the last mile to subscribers.<sup>96</sup> Both the incumbents and the other competitive LECs enjoy a cost advantage that might impair the viability or dissuade the entry of a competitive LEC constrained by the eligibility restriction. The possible reduction in the number of competing firms is also at odds with the 1996 Act's broader mandate to the Commission to increase competition in telecommunications market. The additional competition that these competitive LECs will be able to provide, on the other hand, is likely to improve services and reduce rates for consumers, which is consistent with the Act's purposes.<sup>97</sup>

#### IV. CONCLUSION

34. We conclude that the LMDS eligibility restriction should be allowed to sunset because open eligibility (1) will not pose a significant likelihood of substantial competitive harm in any market; (2) is likely to provide access to additional capital to fully develop LMDS; (3) will treat LMDS similarly to substitutable spectrum; and (4) should help make services more available in rural areas.

#### V. HYPERION'S WAIVER REQUEST

35. Hyperion filed a request for a waiver of the divestiture provision of the LMDS eligibility restriction.<sup>98</sup> Hyperion sought the waiver so that it would not be required to divest of an overlap in service areas created when its parent, Adelphia Communications Corp., acquired two incumbent cable companies with franchise areas significantly overlapping two of Hyperion's LMDS service areas. Upon denial of its request, Hyperion then filed an application for expedited review of the denial of its request for an extension of the divestiture requirement, pending the outcome of the sunset proceeding in this Docket; Hyperion also requested an emergency stay until the Commission acts on the application for review.<sup>99</sup> The Wireless Telecommunications Bureau granted a stay until ninety days following Commission action in either the eligibility restriction proceeding or on Hyperion's application for review, whichever is earlier.<sup>100</sup>

36. Our action allowing the LMDS eligibility restriction to sunset terminates the requirement that Hyperion divest itself of an overlap in service areas. Hyperion will not be required to divest of the overlapping interest. Accordingly, we find that the Hyperion request for a waiver of the LMDS eligibility restriction is moot and dismiss it for that reason.

#### VI. PROCEDURAL MATTERS

##### A. Paperwork Reduction Act

37. The Third Report and Order contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13, and contains no new or modified information collections subject to Office of Management and Budget review.

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<sup>96</sup> *Id.*

<sup>97</sup> *See* 47 U.S.C. § 160.

<sup>98</sup> *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, DA 00-184 (rel. Feb. 2000)(*Waiver Order*).

<sup>99</sup> Application of Hyperion Communications Long Haul, L.P. for Expedited Review (Mar. 3, 2000); Request of Hyperion Communications Long Haul, L.P. for Emergency Stay (Mar. 3, 2000).

<sup>100</sup> *Hyperion Communications Long Haul, L.P.*, Order, DA 00-787 (rel. Apr. 11, 2000).

**B. Final Regulatory Flexibility Act Analysis**

38. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared a Final Regulatory Flexibility Analysis of the expected impact on small entities of the changes adopted in

39. this Third Report and Order. The analysis is set forth in Appendix F.

**C. Authority**

40. This action is taken pursuant to sections 1, 2, 4, 7, 303(r), 314 and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 303(r), 314 and 332 of the Communications Act of 1934, as amended.

**D. Further Information**

41. For further information regarding this Order, contact Stacey Jordan or Peter Wolfe, Wireless Telecommunications Bureau, Policy Division, at (202) 418-1310.

**VI. ORDERING CLAUSES**

42. Accordingly, IT IS ORDERED, that 47 C.F.R. §101.1003 is eliminated, as set forth in Appendix E. This modification shall become effective on June 30, 2000.<sup>101</sup>

43. IT IS FURTHER ORDERED that the application for expedited review filed by Hyperion Communications Long Haul, L.P. is dismissed as moot.

44. IT IS FURTHER ORDERED that The Commission's Office of Public Affairs, Reference Operations Division SHALL SEND a copy of this Third Report and Order and Memorandum Opinion and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

## FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

**APPENDIX A  
List of Commenters****Comments:**

Central Texas Telephone Cooperative (CTTC)

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<sup>101</sup> This rule modification may become effective on less than 30 days' notice because it relieves a restriction. *See* 5 U.S.C. Section 553(d)(1). Moreover, we find good cause to make this modification effective on less than 30 days' notice because the restriction in the previous rule terminates on June 30, 2000. *See* 5 U.S.C. Section 553(d)(3).



Gateway Telecom, LLC (Gateway)  
Hyperion Communications Long Haul, L.P. (Hyperion)  
The Independent Alliance (Independent)  
MCI WorldCom, Inc. (MCI)  
National Cable Television Association (NCTA)  
National Telephone Cooperative Association (NTCA)  
Organization for the Promotion and Advancement of Small Telephone Companies (OPASTCO)  
Personal Communications Industry Association (PCIA)  
Rural Telecom Group (RTG)  
Sully Buttes Telephone Cooperative, Inc. and Golden West Telecommunications  
Cooperative, Inc. (Sully Buttes)  
Teligent, Inc. (Teligent)  
United States Telecom Association (USTA)  
U S West, Inc.(US West)

**Reply Comments:**

Competition Policy Institute (CPI)  
Horry Telephone Cooperative, Inc. (Horry)  
Independent Alliance  
NCTA  
Nextlink  
Sully Buttes  
Teligent  
USTA

## APPENDIX B

LMDS Launches<sup>102</sup>

II. CARRIER	III. SERVICE LOCATION	IV. EQUIPMENT VENDOR	V. TYPE OF SERVICE
NextLink	Dallas, Los Angeles	Ericsson (Mini-Link Broad Access system), SpectraPoint Wireless, Wavetrace, Digital Microwave	Launched commercial service after field tests
Winstar	Holds 9 LMDS A-block licenses, including the San Francisco-Oakland BTA	Wavetrace	LMDS service rollout scheduled for 2000.
South Central Telecom	Medicine Lodge, KS	Newbridge Networks	Telemedicine, distance learning, and leased line services
Formus Communications	Denver	Wavetrace	Testing LMDS equipment for deployment in Europe, Latin America, New Zealand
Virginia Tech University	Blacksburg, VA	Wavetrace	Acquired 4 LMDS licenses at auction. Use LMDS to provide two-way high-speed data, voice, and video from an on-campus to three off-campus office buildings
Touch America (telecom subsidiary of Montana Power)	Billings, Butte, MT	Nortel Networks	Full voice and data service to business and government
SpeedUS.com (formerly CellularVision)	New York metro	SpeedUS.com developed its LMDS network from CellularVision's patented technology	Facilities-based high-speed Internet service

<sup>102</sup> <sup>102</sup> See *LMDS Rollouts Slow, But Future Looks Bright*, ISP BUSINESS NEWS, January 10, 2000, at 1-2; *Nextlink Selects Nortel BWA Solution*, Hilary Smith, RCR Radio Communications Report, March 20, 2000, at 1; *Prime Candidate*, Carl Weinschenk, TELE.COM, April 3, 2000; *Touch America Launches Wireless, High-speed Broadband LMDS Service in Butte, Montana*, PR NEWSWIRE, November 5, 1999; *Touch America Launches Wireless, High-Speed Broadband LMDS Commercial Service Using Nortel Networks Equipment*, CAMBRIDGE TELECOM REPORT, September 27, 1999, at 1-2; *SPEEDUS.COM Agrees to Acquire CT&T*, PR NEWSWIRE, March 30, 2000; *Virginia Tech and Wavetrace Announce Results of LMDS Trial; First of Its Kind*, BUSINESS WIRE, September 8, 1999, at 1,3; *Bosch Telecom and Frazier/King Media Deploy Multimedia LMDS Network; Showcase Reveals Industry's First Advanced Real-Life LMDS applications*, BUSINESS WIRE, April 6, 1998; *Newbridge Makes Hit in US LMDS Market*, ELECTRONICS COMMUNICATOR, May 6, 1999.

Central Texas Communications	San Angelo, Brownwood, Goldthwaite, TX	Newbridge Networks	LMDS system is functioning, but has no customers. Scheduled to launch service by year-end 2000
PVT Networks, subsidiary of Penasco Valley Telephone	Artesia, N.M.		Testing LMDS. Scheduled to launch commercial service by end of second quarter 2000
US Unwired	Lake Charles, LA	SpectraPoint Wireless	LMDS voice and data trials
Liberty Cellular	Salinas, KS		Trial service started in mid-1999.
Home Telephone, Inc.	Charleston, SC	Newbridge Networks	LMDS trials
HighSpeed.Com	Walla Walla, WA	Spectrapoint Wireless	CLEC voice and data
Prime	New Castle, PA	Alcatel USA	Market test
Frazier/King Media	Irving, TX	Spectrapoint Wireless	LMDS demonstration to deliver voice, data, and video services to residences and businesses

**APPENDIX C**  
**Rule Change**

Title 47, Part 101 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 101 continues to read as follows:

Authority: 47 U.S.C. 154, 303

2. Section 101.1003 is removed.

**APPENDIX D****FINAL REGULATORY FLEXIBILITY ANALYSIS (FRFA)**

45. In order to ensure compliance with the requirements contained in the Regulatory Flexibility Act (RFA),<sup>103</sup> and to alert all affected entities of the repercussions of the Commission's action an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in Appendix B of the Sixth Notice of Proposed Rulemaking (Sixth NPRM) in this proceeding. Additionally, a Final Regulatory Flexibility Analysis was included in Appendix D of the Second Report and Order (Second R&O) in this proceeding.<sup>104</sup> The Commission sought written public comment on the proposals in Fifth NPRM, including comment on the IRFA. The comments received in response to the IRFA and the Final Regulatory Flexibility Analysis contained in the Second R&O are discussed below. The present Final Regulatory Flexibility Analysis (FRFA), contained in the Third Report and Order and Memorandum Opinion and Order (Third R&O), conforms to the RFA.<sup>105</sup>

**NEED FOR, AND OBJECTIVES OF, THE THIRD R&O**

46. The Commission allows to sunset the Local Multipoint Distribution Service (LMDS) eligibility restriction which prohibits incumbent local exchange carriers (ILECs) and cable companies from having an attributable interest in the LMDS A-block license that overlaps with ten percent or more of the population in their service areas. This restriction was initially imposed because of concern the ILECs and the cable companies would use LMDS spectrum to eliminate the threat of competitive entry in the local exchange telephone and cable markets, in which they are dominant. The Third R&O finds that the LMDS A-block eligibility restriction is no longer necessary to protect LMDS as a source of competition with ILECs and incumbent cable companies, and that the benefits of removing the restriction outweigh any benefits of the restriction.

**SUMMARY OF SIGNIFICANT ISSUES RAISED BY PUBLIC COMMENTS IN RESPONSE TO THE IRFA OR THE FRFA**

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<sup>103</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the

CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>104</sup> The IFRA may be found in the Appendix B of the Sixth NPRM (FCC 99-379, released December 13, 1999, and the Final Regulatory Flexibility Analysis may be found in the Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, [at 12 FCC Rcd ~~at 12768.~~—12545, 12768 \(1997\).](#)

<sup>105</sup> See 5 U.S.C. § 604, ~~12545.~~

47. The central issue in this proceeding is the continued need for the eligibility restriction. The restriction was adopted subject to an expiration date of June 30, 2000. The expiration date, like the other issues in this proceeding, was the result of notice and comment procedures.<sup>106</sup> The Commission adopted the expiration date to allow time for a review of the continued effectiveness and need for an eligibility restriction to ensure that our rules remain current with constantly changing technological developments and market trends. Also, as described below, the Sixth NPRM sought comment on several topics critical to the Commission's determination of the continued relevance of the eligibility rule. The Commission received fourteen comments and eight reply comments in response to the Sixth NPRM. No comments were received directly regarding the IRFA or the FRFA contained in the Second R&O.

48. First, the Sixth NPRM sought comment on whether the standard for determining whether the restriction is extended should be that the incumbent LECs or cable companies continue to have substantial market power in the provision of local telephone or cable television services, or if a different standard should be used. As discussed in paragraphs 6-7 of the Third R&O, the Sixth NPRM also suggested two alternative standards. Although most of the commenters support allowing the eligibility rule to sunset, those who comment on the standard are somewhat divided.

49. Several commenters argue in favor of using the market dominance standard to decide whether the eligibility should sunset. These commenters maintain that ILECS and cable companies remain dominant in their respective markets. Those who support continuing the LMDS eligibility restriction offer data which appears to reinforce their arguments regarding market dominance and point to the rejection of five Bell Company section 271 applications prior to Bell Atlantic's application being granted on December 22, 1999.

50. The Commission agrees with the majority of parties who comment on the standard issue, and either urge the Commission to adopt the 39 GHz standard or at least to reject the "substantial market power" standard. Therefore, the Commission adopts the 39 GHz standard, *i.e.*, there is a significant likelihood of substantial competitive harm in specific markets, and, if so, eligibility restrictions are an effective way to address that harm. In paragraphs 8-9 of the Third R&O, the Commission details the rationale for selecting the 39 GHz test as the appropriate standard to apply in determining whether the LMDS restriction should sunset.

51. Second, the Sixth NPRM sought comment on a number of issues that would aid the Commission in determining whether the LMDS eligibility restriction should be extended. For example, the Sixth NPRM asked what services are likely to be provided on LMDS. The Commission agrees with the majority of commenters on this issue who contend that the LMDS A block licensees provide or are expected to provide broadband services, instead of local telephone or cable services. Because the Commission believes that the LMDS A block is not being used to provide services which are primarily local exchange or multi-channel video distribution (MVPD),

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<sup>106</sup> See Fourth Notice of Proposed Rulemaking in this proceeding, 11 FCC Rcd 19005 (1996).

the Third R&O concludes that it is unlikely that the possible use of LMDS spectrum by incumbents will result in the blocking of entry into those services, and thus allows the restriction to lapse. Commenters also generally contend that the broadband market is robust and competitive, and that incumbent cable companies and incumbent LECs could not use LMDS spectrum to dominate the broadband market. The Commission finds that an increasing number of broadband firms and technologies providing growing competition to incumbent LECs and cable companies, apparently limiting the threat that they will be able to preclude competition in the provision of broadband services. and also finds no evidence that the incumbent LECs or incumbent cable companies have the incentive to warehouse LMDS licenses in order to protect their control of these markets from competition. These issues are discussed at paragraphs 14 through 21 in the Third R&O.

52. As indicated above, the majority of commenters favor the sunset of LMDS eligibility restrictions. However, some commenters argue that it is premature to terminate the restriction because the first LMDS products are just becoming available in the United States. Paragraphs 23-33 in the Third R&O explain the Commission's rationale for rejecting this contention. The Commission finds that the benefits of allowing the eligibility restriction to expire outweigh any benefits of extending it. Briefly, the Third R&O sunsets the LMDS eligibility restriction because open eligibility (1) will not pose a significant likelihood of substantial competitive harm in any market; (2) is likely to provide access to additional capital to fully develop LMDS; (3) will treat LMDS similarly to substitutable spectrum; and (4) should help make services more available in rural areas. Paragraphs 14 through 21 find that the record does not support a conclusion that open eligibility poses a significant threat of substantial competitive harm in specific markets, LEC or multi-channel video program distribution (MVPD), or that eligibility restrictions are an effective way of addressing potential competitive harm. Paragraph 24 discusses how removal of the restriction may well result in access to capital resources to more fully develop LMDS. Paragraphs 26 and 27 detail why LMDS should be treated no differently from other substitutable spectrum.

53. Paragraphs 28-29 discuss allegations by rural commenters that the LMDS in-region eligibility restriction imposes several disadvantages on small, rural telecommunications carriers. Specifically, these commenters maintain that the restriction prevents the formation of alliances, partnerships, and joint ventures that may facilitate LMDS deployment, limits access to capital, and frustrates leveraging existing network infrastructure to achieve minimal cost. The Third R&O, while recognizing that the eligibility restriction was initially imposed on rural markets because the Commission believed that it could stimulate competition to LEC's in these markets, finds that this has not occurred, and, based in part on such rural commenters, now finds that allowing the eligibility restriction to sunset will remove possible impediments to small and rural carrier LMDS deployment. The negative effects of the eligibility restriction on small and rural entities and consumers, are discussed more fully in paragraphs 28-32 of the Third R&O.

#### **Description and Estimate of the Number of Small Entities To Which Rules Will Apply.**

54. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the actions taken in this Third R&O, if adopted.<sup>107</sup> The RFA generally defines the term "small entity" as having the same meaning as the

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<sup>107</sup> 5 U.S.C. § 603(b)(3).

terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>108</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>109</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>110</sup> A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>111</sup> Nationwide, as of 1992, there were approximately 275,801 small organizations.<sup>112</sup> Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the actions taken in this Third R&O.

**55. Common Carrier Services and Related Entities.** The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be data the Commission publishes in its *Carrier Locator Interstate Service Providers* report.<sup>113</sup> According to data in the most recent report, there are 3,528 interstate carriers.<sup>114</sup> These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

56. The SBA has defined establishments engaged in providing “Radiotelephone Communications” and “Telephone Communications, Except Radiotelephone” to be small businesses when they have no more than 1,500 employees.<sup>115</sup> Below, we discuss the total estimated number of telephone companies falling within the two categories and the number of small businesses in each, and we then attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

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<sup>108</sup> *Id.* § 601(6).

<sup>109</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>110</sup> Small Business Act, 15 U.S.C. § 632 (1996).

<sup>111</sup> 5 U.S.C. § 601(4).

<sup>112</sup> U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1992 ECONOMIC CENSUS, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

<sup>113</sup> FCC, Common Carrier Bureau, Industry Analysis Division, *Carrier Locator Interstate Service Providers*, Figure 1 (January 2000).

<sup>114</sup> *Id.*

<sup>115</sup> 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) codes 4812 and 4813. *See also* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987).



57. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>116</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>117</sup>

58. **Total Number of Telephone Companies Affected.** The U.S. Bureau of the Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.<sup>118</sup> This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, covered specialized mobile radio providers, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities or small ILECs because they are not “independently owned and operated.”<sup>119</sup> For example, a reseller that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small ILECs that may be affected by the actions taken in this Third R&O.

59. **Wireline Carriers and Service Providers.** The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.<sup>120</sup> According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.<sup>121</sup> All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small ILECs. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 small telephone communications companies other than radiotelephone companies are small entities or small ILECs that may be affected by the actions taken in this Third R&O.

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<sup>116</sup> 5 U.S.C. § 601(3).

<sup>117</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA to William E. Kennard,

<sup>118</sup> U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS, AND UTILITIES: ESTABLISHMENT AND FIRM SIZE, at Firm Size 1-123 (1995) (*1992 Census*).

<sup>119</sup> See generally 15 U.S.C. § 632(a)(1).

<sup>120</sup> *1992 Census*, at Firm Size 1-123.

<sup>121</sup> 13 C.F.R. § 121.201, SIC code 4813.

**60. Local Exchange Carriers, Competitive Access Providers, Competitive Local Exchange Carriers.** Neither the Commission nor the SBA has developed a definition for small providers of local exchange service, competitive access providers, or competitive local exchange carriers. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>122</sup> According to the most recent telecommunications industry revenue data, 1,348 carriers reported that they were engaged in the provision of incumbent local exchange services, and 212 carriers reported that they were providing competitive access or competitive local exchange services.<sup>123</sup> We do not have data specifying the number of these carriers that are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,560 providers of local exchange service, or of competitive access or competitive local exchange services are small entities or small entities that may be affected by the actions taken in this Third R&O.

**61. A-Block LMDS Providers.** The total number of A-block LMDS licenses is limited to 493, one for each Basic Trading Area.<sup>124</sup> The Commission has held auctions for all 493 licenses, in which it defined "very small business" (average gross revenues for the three preceding years of not more than \$15 million), "small business" (more than \$15 million but not more than \$40 million), and "entrepreneur" (more than \$40 but not more than \$75 million) bidders.<sup>125</sup> There have been 99 winning bidders that qualified in these categories in these auctions all of which may be affected by the actions taken in this Sixth NPRM.

**62. Cable Services or Systems.** The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating \$11 million or less in revenue annually.<sup>126</sup> This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services and 1,423 had less than \$11 million in revenue.

**63.** The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>127</sup> Based on our most recent information, we

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<sup>122</sup> *Id.*

<sup>123</sup> *Carrier Locator Interstate Service Providers*, Figure 1 (January 2000).

<sup>124</sup> 47 CFR 101.1005, 101.1007.

<sup>125</sup> 47 CFR 101.1107(a)-(c), 101.1112.

<sup>126</sup> 13 CFR 121.201, SIC 4841.

<sup>127</sup> 47 CFR 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. Implementation of (continued....)

estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators.

64. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>128</sup> The Commission has determined that there are 66 million subscribers in the United States. Therefore, we found that an operator serving fewer than 660,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.<sup>129</sup> Based on available data, we find that the number of cable operators serving 660,000 subscribers or less totals 1,450. We do not request nor do we collect information concerning whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, and thus are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act. It should be further noted that recent industry estimates project that there will be a total of 66 million subscribers.

(Continued from previous page) \_\_\_\_\_  
Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995), 60 FR 10,534 (Feb. 27, 1995).

<sup>128</sup> 47 U.S.C. 543(m)(2).

<sup>129</sup> 47 U.S.C. 76.1403(b).

## Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.

65. The actions taken in the Third R&O entail no new or revised reporting, recordkeeping or other compliance requirements.

## Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

66. Although the Commission LMDS eligibility restriction was initially intended to stimulate competition between all sorts of entities, including small entities, only two of the 19 comments that were filed ask that the restriction be retained. The restriction was adopted with a June 30, 2000, sunset date to allow sufficient time for the Commission to conduct a thorough review of the effectiveness of the restriction. The Commission first adopts the 39 GHz approach to determine if the restriction should be extended. In that regard, the Sixth NPRM offered two alternative standards. The first option allows that the incumbent LECs or cable companies continue to have substantial market power in the provision of local telephone or cable television services. Two commenters urge the Commission to retain the restriction using the market dominance standard and arguing that LCDs and cable companies remain dominant in their respective markets. As discussed previously in this FRFA, and in paragraphs 10-11 of the Third R&O, the Commission rejects continued use of the market power standard, because the substantial market power test does not address whether the incumbents are able to preclude competition in other markets which LMDS licensees wish to enter. No comments were submitted in support of the second option that would provide that the incumbent companies possess the incentive and ability to purchase the LMDS block to prevent entry of a competitor.

67. Thus, the Commission, in the Third R&O concludes that the 39 GHz test is the appropriate standard to apply in determining whether the LMDS eligibility should sunset.<sup>130</sup> The 39 GHz test is a more discerning standard than the standard market power test in that it not only considers the broadest set of market facts and circumstances, but it also will allow the Commission to focus on the issues it needs to decide —whether the incumbents are likely to use their market power to cause substantial competitive harm by preventing the use of LMDS spectrum for services that would otherwise be provided by LMDS licensees, such as broadband, and whether the restrictions will prevent such actions.

68. Finally, the Commission has considered the benefits of allowing the eligibility restriction to expire as opposed to the benefits of extending it, and determines, with the support of the large majority of commenters, that allowing the restriction to sunset offers the most benefit to the most parties.<sup>131</sup> Small businesses in particular stand to benefit from removal of the eligibility restriction. Paragraphs 28-32 of the Third MO&O, for example, discuss the effect of the LMDS eligibility restriction on small and rural carrier LMDS deployment, finding that the restriction

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<sup>130</sup> See paragraphs 8-9 [above of the Third R&O](#) for a complete discussion of the benefits of the 39 GHz standard.

<sup>131</sup> See paragraphs 22-33 [above of the Third R&O](#).

causes undue hardship for rural carriers, of which many are small entities, possibly in violation of the Telecommunications Act of 1996. Commenters who argue against retaining the restriction contend that application of the restriction to rural telephone companies imposes significant economic and social costs, that communities served by rural ILEC's are often not sufficiently lucrative markets to attract other providers, that competitive concerns are not applicable in a rural market, and that rural carriers lack the resources to warehouse spectrum. For these reasons, the Commission believes that small businesses will benefit from allowing the LMDS eligibility restriction to sunset rather than to retain the restriction.

69. Report to Congress: The Commission will send a copy of this Third Report and Order and Memorandum Opinion and Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the Third Report and Order and Memorandum Opinion and Order and this FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

## 70. CONCURRING STATEMENT OF

## VI. COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re 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 Report and Order and Memorandum Opinion and Order, CC Docket No. 92-297 (rel. June 26, 2000)*

Finally, the end.

Today the Commission will finally allow the LMDS ownership restrictions on LECs and cable operators to sunset. After years of wrangling, after countless filings, and after virtually no offering of service, the Commission is willing to let the LMDS eligibility restriction fade into the sunset on June 30, 2000. On July 1, 2000 I am happy to report, the American people will finally have their first opportunity to see the full potential of the LMDS market. After years of fighting to have these restrictions lifted, I welcome today's decision as a hopeful sign that such ownership rules will be relegated to the dustbin of history.

All of this, unfortunately, occurs far too late.

Three and a half years ago, the Commission adopted these ownership restrictions over the strong and prescient dissent of my colleague, Commissioner Chong. As she wrote, "by precluding the participation of incumbent LEC and cable operators, competition in those markets may well be harmed by arbitrarily denying some of the strongest potential competitors the ability to branch out into new markets."<sup>132</sup> She described the majority as subscribing to the belief that "government must second guess the marketplace and impose heavy regulatory restrictions on the basis of sheer conjecture."<sup>133</sup>

Two and a half years ago, when the majority decided to initiate this proceeding to determine whether or not the eligibility restrictions should sunset, I dissented as well. In doing so, I stated my view that "[e]ligibility restrictions on an innovative new service are a draconian measure; such bans on competition should be used only to prevent a substantial competitive harm to a specific market. Here, the eligibility restrictions are imposed not to prevent a specific harm, but in an attempt to enhance the mere possibility of

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<sup>132</sup> *Statement of Commissioner Rachelle B. Chong, Dissenting in Part, Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297 (March 11, 1997).*

<sup>133</sup> *Id.*

competition.”<sup>134</sup> Six months ago, as the Commission issued its Sixth Notice of Proposed Rulemaking, I once again called attention to the speculative basis and lack of record support for these ownership restrictions.<sup>135</sup>

Today’s Order comes to the same conclusions that Commissioner Chong and I have been advocating. Most fundamentally, today’s Order employs a different standard of review for these regulatory limitations. The original restriction was based on a substantial market power test, and allowed the speculative competitive fears of the majority to withstand scrutiny. Today’s Order evaluates the eligibility restriction based on the far more reasonable question of whether “open eligibility poses a significant likelihood of substantial competitive harm in specific markets, and, if so, whether eligibility restrictions are an effective way to address this harm.”<sup>136</sup> This standard reflects my reluctance to impose these types of restrictions.

Two other fundamental principles of Commissioner Chong’s and my dissents were (1) the flexibility afforded LMDS licensees undercut the need for predictive service-specific ownership limitations, and (2) the availability of other fixed wireless spectrum made it extremely difficult, if not impossible, for any provider to monopolize the market. Years later, today’s Order reaches the same conclusions. LMDS is “not being primarily used to provide local exchange or MVPD services” – the original theory for the imposition of the ownership rules. Therefore, the Order reaches the now obvious conclusion that “[w]e do not believe we should continue the LMDS restriction based on possible competitive effects in markets that LMDS licensees are not entering.”<sup>137</sup>

Second, the Order also notes that there is “no reason here to treat LMDS differently from other substitutable spectrum”, like MMDS, 24 GHz, 39 GHz and other fixed wireless services.<sup>138</sup> The Order comes to the well-documented and widely accepted conclusion that “no group of firms or technology will likely be able to dominate the provision of broadband services” and that the possibility of monopolizing all of the spectrum available for broadband is “fairly remote.”<sup>139</sup> Moreover, the Order cites to a number of potential benefits of sunsetting the rule – benefits also outlined by the dissenting

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<sup>134</sup> *Separate Statement of Commissioner Harold Furchtgott-Roth*, in Third Order on Reconsideration, CC Docket 92-297 (Feb. 3, 1998); see also *Separate Statement of Commissioner Michael Powell*, in Third Order on Reconsideration, CC Docket 92-297 (raising some of the same concerns).

<sup>135</sup> Commissioner Powell raised similar concerns. See *Dissenting Statement of Commissioner Michael Powell* in Third Order on Reconsideration, Sixth Notice of Proposed Rulemaking, CC Docket 92-297 (Dec. 13, 1999).

<sup>136</sup> **Third Report and Order and Memorandum Opinion and Order, CC Docket No. 92-297 (rel. June 23, 2000), at ¶ 1.**

<sup>137</sup> *Id.* at ¶ 15.

<sup>138</sup> See *id.* at ¶ 26.

<sup>139</sup> *Id.* at ¶¶ 19, 21.

statements of the past three years: increased access to capital, more rapid deployment, better equipment availability, etc.<sup>140</sup>

In short, while I endorse much of the reasoning of today's order, I only lament that it did not hold sway with my colleagues sooner.

It is not clear whether the lackluster performance of LMDS to date is the result of the marketplace or our restrictive rules. That is one of the core problems with intrusive regulation – one never knows whether a service has failed or government policy has failed. But with today's decision, we can finally be sure that LMDS will rise or fall on its own merits – not based on government fiat.

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<sup>140</sup> See *Dissenting Statement of Commissioner Harold Furchtgott-Roth*, in Third Order on Reconsideration, Sixth Notice of Proposed Rulemaking, CC Docket 92-297 (Dec. 13, 1999); *Statement of Commissioner Rachelle B. Chong, Dissenting in Part*, Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297 (March 11, 1997).