

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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
Petitions for Further Reconsideration of the
Denial of Applications for Waiver of the
Commission's Common Carrier Point-to-
Point Microwave Radio Service Rules
CC Docket No. 92-297

THIRD ORDER ON RECONSIDERATION

Adopted: February 3, 1998

Released: February 11, 1998

By the Commission: Chairman Kennard and Commissioners Ness and Powell issuing separate
statements; Commissioner Furchtgott-Roth approving in part, dissenting in part, and issuing a
statement.

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I. INTRODUCTION

1. On March 11, 1997, the Commission adopted a Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking (*Second Report and Order*) (*Fifth NPRM*) in which the Commission designated the frequency band at 31.0-31.3 GHz (31 GHz band) for the Local Multipoint Distribution Service (LMDS), promulgated service rules to implement LMDS, denied petitions for reconsideration of the dismissal of 971 waiver applications, and proposed rules to implement partitioning and disaggregation of LMDS licenses.¹ LMDS is a fixed, broadband, point-to-multipoint wireless service assigned a total of 1,300 megahertz of spectrum in the 27.5-28.35 GHz, 29.1-29.25 GHz, and 31 GHz frequency bands. LMDS licensees may offer a wide array of telecommunications and video programming

¹ 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, Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, CC Docket No. 92-297, Suite 12 Group Petition for Pioneer Preference, PP-22; Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997) (*Second Report and Order*) (*Fifth NPRM*); *appeal pending sub nom.* Melcher v. F.C.C., Case Nos. 93-1110, *et al.* (D.C. Cir., filed Feb. 8, 1993) (*Melcher v. F.C.C.*); Order on Reconsideration, 12 FCC Rcd 6424 (1997) (*First Reconsideration*); Second Order on Reconsideration, 12 FCC Rcd 15082 (1997) (*Second Reconsideration*); Third Report and Order, FCC 97-378, released Oct. 15, 1997.

distribution services that could provide wireless competition to cable television systems and local exchange carriers (LECs).

2. In this Third Order on Reconsideration, we address petitions for reconsideration and clarification of the *Second Report and Order*, except petitions for reconsideration of the competitive bidding rules adopted in the *Second Report and Order*. Those petitions were considered in the Second Order on Reconsideration in which we modified the competitive bidding rules affecting small business participation in the LMDS license auction.² The remaining petitions for reconsideration and clarification, which are identified in Appendix A,³ generally are denied, with one exception. We grant reconsideration of the decision to dismiss the pending applications that were filed under the 31 GHz service rules and were held in abeyance pending the outcome in the *Second Report and Order*. We will permit the dismissed applicants to refile applications requesting the same authorization to provide 31 GHz services, but subject to the limitations the Commission imposed on the majority of the incumbent 31 GHz licensees when the band was designated for LMDS in the *Second Report and Order*. Thus, operations authorized in response to the refiled applications will be secondary to LMDS. Such operations will not be protected from harmful interference from LMDS and may not interfere with LMDS, and they may not be expanded. We defer consideration of the comments filed in response to the *Fifth NPRM* issued in conjunction with the *Second Report and Order* to a separate Report and Order to be issued in the near future.

II. BACKGROUND

3. This proceeding was initiated when the Commission released a *First NPRM* on January 8, 1993, in response to petitions for rulemaking to redesignate the use of two gigahertz of spectrum in the 27.5-29.5 GHz frequency band (28 GHz band) from point-to-point, common carrier microwave service to local multipoint distribution service (LMDS) that includes a point-to-multipoint area-wide service and non-common carrier services.⁴ The Commission proposed licensing and operating rules to implement LMDS and provide licensees with sufficient flexibility

² *Second Reconsideration*, 12 FCC Rcd at 15082-83 (para. 1).

³ Each petitioner is listed in Appendix A with an abbreviated name, which is used in this Order.

⁴ Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service; Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; RM-7872, RM-7772; Suite 12 Group Petition for Pioneer's Preference; University of Texas - Pan American Petition for Reconsideration of Pioneer's Preference Request Denial; PP-22; Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd 557 (1993) (*First NPRM*), *appeal pending sub nom. Melcher v. F.C.C.*

to satisfy consumer demand for broadband services, expedite service to the public, and make more efficient use of underused spectrum. The Commission also adopted an Order denying 971 pending applications for waiver of the existing 28 GHz rules in order to provide LMDS.

4. The Commission requested further comment in the *Third NPRM* on a proposal to segment the two gigahertz in the 28 GHz band between LMDS and certain satellite systems.⁵ With respect to LMDS, additional comments also were sought on revised proposals for service rules and on competitive issues concerning the potential impact of the entry of existing local exchange companies (LECs) and cable companies in the new LMDS market. The Commission proposed technical rules and competitive bidding procedures to award licenses from among mutually exclusive applications that were similar to procedures adopted for other wireless services.

5. The Commission subsequently adopted the proposed band segmentation plan for the 28 GHz band in the *First Report and Order and Fourth NPRM*, and designated 1000 megahertz of spectrum for LMDS.⁶ Specifically, 850 megahertz was designated in the 27.5-28.35 GHz band for LMDS on a primary basis, while 150 megahertz was designated in the 29.1-29.25 GHz band to be shared by LMDS on a co-primary basis with certain mobile satellite service (MSS) feeder links. An additional 300 megahertz of spectrum was proposed for LMDS on a primary basis in the 31.0-31.3 GHz band (31 GHz band). The Commission sought further comment on whether to restrict the eligibility of existing LECs and cable operators to obtain LMDS licenses in the geographic areas they serve.⁷

6. The Commission next adopted the *Second Report and Order* in which it adopted the proposal to redesignate the entire 300 megahertz in the 31 GHz band for LMDS, as modified to require LMDS licensees to protect all incumbent licensees except incumbent Local Television Transmission Service (LTTS) licensees from harmful interference in the outer 150 megahertz segment of the band. The Commission also adopted the service rules to implement LMDS and govern the licensing and operations of LMDS under a flexible regulatory framework. Among the

⁵ 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, and To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, Suite 12 Group Petition for Pioneer Preference, PP-22; Third Notice of Proposed Rulemaking and Supplemental Tentative Decision, 11 FCC Rcd 53 (1995) (*Third NPRM*).

⁶ Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules To Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297; First Report and Order and Fourth Notice of Proposed Rulemaking, 11 FCC Rcd 19005 (1996) (*First Report and Order*) (*Fourth NPRM*).

⁷ *Id.* at 19047-58 (paras. 105-136).

rules are provisions for the licensing of LMDS on an area-wide basis using the 493 Basic Trading Areas (BTAs) and for each BTA to be assigned two license blocks, one for 1,150 megahertz of spectrum and the other for 150 megahertz.

7. A licensee may be authorized to provide common carrier or non-common carrier services, or both services, under a single license in order to accommodate the wide variety of telecommunications and video distribution services. The Commission adopted a three-year eligibility restriction prohibiting incumbent LECs and incumbent cable companies from having an attributable interest in the larger 1,150 megahertz LMDS license whose geographic service area significantly overlaps such incumbent's authorized or franchised service area. Competitive bidding procedures also were adopted to award licenses among applications that are mutually exclusive.

8. In addition, in the *Second Report and Order*, the Commission permitted LMDS licensees to partition or disaggregate portions of their authorizations, but issued the *Fifth NPRM* in conjunction with the Order to obtain comments on the necessary modifications to the newly adopted service rules to ensure effective implementation of partitioning and disaggregation in the new service. The Commission also adopted an Order on Reconsideration that denied the petitions for reconsideration of the Order issued in conjunction with the *First NPRM* denying 971 pending waiver applications filed under the existing 28 GHz point-to-point rules to provide LMDS. The Commission deferred a final Order on the pending pioneer preference requested by CellularVision and directed the Office of Engineering and Technology to initiate a peer review process.⁸

9. In response to the *Second Report and Order*, petitions for reconsideration of certain service rules were filed by Alliance, LBC, RTG, Sierra, and Webcel.⁹ Letters in support of Sierra's petition were filed by Commpare, CSG, Sunnyvale, Videolinx, and Westec.¹⁰ Nevada

⁸ Subsequently, the Commission adopted an Order on August 29, 1997, that terminates the Commission's pioneer's preference program and dismisses all pending pioneer's preference requests, including the request of CellularVision in this proceeding. This action was in response to the provision in the Balanced Budget Act of 1997 signed into law on August 5, 1997, that terminated on that date the Commission's authority to provide preferential treatment in its licensing procedures for pioneers. Dismissal of All Pending Pioneer's Preference Requests, CC Docket No. 92-297, RM-7872, PP-22, ET Docket No. 94-124, RM-8784, GEN Docket No. 90-314, PP-68, GEN Docket No. 90-357, PP-25, IB Docket No. 97-95, RM-8811, RM-7784, PP-23, RM-7912, PP-34 *et al.*, Review of the Pioneer's Preference Rules, ET Docket No. 93-266, Order, 12 FCC Rcd 14006 (1997). Thus, the matter of CellularVision's pioneer preference is now moot.

⁹ Public Notice, Report No. 2196, released May 15, 1997; Public Notice, Report No. 2203, released June 12, 1997.

¹⁰ The letters of Commpare, CSG, and Westec are late-filed, after the period for filing petitions for reconsideration and clarification under Section 1.429(e) of the Commission's rules had expired. 47 C.F.R. §

DOT submitted an *ex parte* letter, and Parsons submitted a letter in support.¹¹ Letters requesting clarification were filed by Alcatel and TI. A petition for reconsideration of the Order on Reconsideration was filed by LDH.¹² Celltel Communications Corporation and CT Communications Corporation jointly filed the petition with LDH, but they subsequently filed a letter pursuant to Section 1.41 of the Commission's Rules¹³ withdrawing their request for reconsideration.¹⁴ LDH also filed a motion for stay of implementation of the Order until we review the petition.¹⁵ M3ITC filed an application for review that also seeks further reconsideration of the Order on Reconsideration. Opposition to petitions were filed by Bell Atlantic, CellularVision, RTG, and TI.

10. On July 30, 1997, the Commission issued a Public Notice announcing that the date for the LMDS auction would begin on December 10, 1997.¹⁶ On November 10, 1997, the Bureau issued a Public Notice postponing the auction until February 18, 1998, in order to "further opportunities for businesses to access additional sources of capital to further the advent of new competition in the cable television and local telephony marketplaces."¹⁷ In view of these developments, we deny the motion for stay filed by LDH, inasmuch as we consider its petition at this time before the scheduled auction. We also deny the request of Webcel to set a fixed date for

1.429(e). We will include the letters for consideration, inasmuch as they will not delay the proceeding and otherwise ensure a complete record. Compare Letter of June 2, 1997; CSG Letter of June 13, 1997; Westec Letter of June 2, 1997.

¹¹ We accept these late-filed letters for consideration, and find that their consideration will not delay the proceeding and ensure that all relevant issues are considered. Nevada DOT *ex parte* Letter of May 29, 1997; Parsons Letter of May 28, 1997.

¹² Public Notice, Report No. 2196, released May 15, 1997.

¹³ 47 C.F.R. § 1.41.

¹⁴ Letter to W. Kennard, General Counsel, from Infinite Telesis, Inc. (formerly LDH International, Inc.), Celltel Communications Corporation, and CT Communications Corporation, dated Aug. 1, 1997.

¹⁵ The court proceeding initiated by LDH and other affected applicants for review of the Order dismissing the 971 waiver applications remains pending. *See* note 1, *supra*.

¹⁶ Public Notice, FCC Announces Upcoming Spectrum Auction Schedule, DA 97-1627, 12 FCC Rcd 11544 (1997).

¹⁷ Public Notice, Report No. AUC-97-17-C (Auction No. 17), released Nov. 10, 1997.

commencement of the LMDS auction within six months of release of the *Second Report and Order*, because Webcel requested a delay of the December 10 auction date.¹⁸

III. DISCUSSION

A. In-Region Eligibility Restriction

1. Background

11. In the *Second Report and Order*, the Commission imposed a three-year restriction on the eligibility of incumbent LECs and incumbent cable companies to hold the 1,150 megahertz LMDS license¹⁹ in the same region in which they are incumbents.²⁰ The eligibility restriction expires after three years from the date it became effective (June 30, 2000), unless the Commission determines to extend its applicability. Petitions for waiver of the restriction may be filed after the initial award of LMDS licenses, based upon a showing that the actual conditions in a particular market are sufficiently competitive and rivalrous so that the restriction is not necessary to promote competition in the telecommunications marketplace.

12. The Commission adopted the restriction based on the findings that incumbent LECs and incumbent cable companies have market power and would have the incentive to block LMDS entry into their respective geographic markets. It was noted that "the likelihood that LMDS can increase competition in either the local multichannel video or local telephone exchange markets (or both simultaneously) is high"²¹ The Commission concluded that it could maximize the opportunities for increasing competition and promote the entry of new competitors in the local exchange and cable television marketplace by temporarily restricting incumbents' eligibility to hold in-region LMDS licenses. These are key Congressional priorities underlying the Telecommunications Act of 1996,²² which recognizes that market power carries with it the ability

¹⁸ Webcel Petition at 23-24.

¹⁹ Unless otherwise specified, the term "LMDS license," as used in Section III. A, refers to the Block A license of 1,150 megahertz established in Section 101.1005 of the Commission's Rules, 47 C.F.R. § 101.1005.

²⁰ *Second Report and Order*, 12 FCC Rcd at 12627-34 (paras. 185-199), adopting 47 C.F.R. § 101.1003.

²¹ *Id.* at 12621 (para. 170).

²² Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

to act anticompetitively and the need to reduce market power by encouraging competitive entry into communications markets.²³

13. The restriction includes among its provisions the following key elements discussed in the *Second Report and Order* and incorporated in Section 101.1003 of our Rules. No incumbent LEC or incumbent cable company, or any entity owning an attributable interest in an incumbent LEC or incumbent cable company, ``shall have an attributable interest in an LMDS license [defined as the 1,150 megahertz license] whose geographic service area significantly overlaps such incumbent's authorized or franchised service area."²⁴ A significant overlap of an incumbent LEC's or incumbent cable company's authorized or franchised service ``occurs when at least 10 percent of the population of the LMDS licensed service area, as determined by the 1990 census figures for the counties contained in such service area, is within the authorized or franchised service area."²⁵

14. The definition of an attributable interest captures a variety of controlling and ownership interests in an incumbent LEC, incumbent cable company, or LMDS licensee, including ``[p]artnership and similar ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock or outstanding voting stock of an entity."²⁶ A divestiture procedure allows incumbent LECs and incumbent cable companies to bid on, and acquire, an in-

²³ *Second Report and Order*, 12 FCC Rcd at 12623-24 (paras. 176-178). See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd 15499, 15505-56 (para. 3) (1996) (reciting that the principal goals established by the telephony provisions of the 1996 Act include ``opening the local exchange and exchange access markets to competitive entry" and ``promoting increased competition in telecommunications markets"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utilities Board*), *reh'g granted in part and denied in part sub nom. Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.*, - F.3d -, 1997 WL 658718 (8th Cir., Oct. 14, 1997), Order on Reconsideration, 11 FCC Rcd 13042 (1996) (*Local Competition First Reconsideration Order*), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996) (*Local Competition Second Reconsideration Order*), Third Order on Reconsideration and Further Proposed Rulemaking, 12 FCC Rcd 12453 (1997) (*Local Competition Third Reconsideration Order*), *further recon. pending*.

²⁴ 47 C.F.R. § 101.1003(a).

²⁵ 47 C.F.R. § 101.1003(d).

²⁶ 47 C.F.R. § 101.1003(e)(2).

region 1,150 megahertz LMDS license at the auction, subject to divestiture of the ineligible interest or area within 90 days of the grant of the license.²⁷

2. Participation in Auction and Post-Auction Divestiture

15. In the *Second Report and Order*, the Commission found no compelling public benefit to be achieved by foreclosing incumbent LECs and incumbent cable companies from participating fully in the auction of the larger LMDS license so long as such incumbents subsequently come into compliance with the eligibility restriction and divest the overlapping interests or areas within 90 days of the grant of such license.²⁸ Webcel and LBC request reconsideration of the determination to permit incumbent LECs and incumbent cable companies to participate in the auction of the LMDS licenses for which they are ineligible under the restriction.²⁹ Bell Atlantic and RTG oppose their request and any further limitation on the ability of such incumbents to participate in the LMDS auction.³⁰

a. Public Notice and Precedent

16. Webcel argues that, by allowing participation in the auction, the Commission has created a loophole in the eligibility restriction that was never proposed in a public notice or the comment phase of this proceeding, and is procedurally infirm. We find that this argument lacks any merit. In both the *Third NPRM* and *Fourth NPRM*, the Commission sought comment on the impact incumbent LECs and incumbent cable companies would have on competition in a new LMDS market and whether any restrictions were needed to ensure competition. Thus, the extent to which incumbent LECs and incumbent cable companies would be permitted to participate in the LMDS auctions was at issue in the proceeding. In both Notices, the Commission requested

²⁷ 47 C.F.R. § 101.1003(f). The Commission's Rules also provide that:

If no such [divestiture] certification or application is tendered to the Commission within ninety (90) days of final grant of the initial license, the Commission may consider the short form certification and the long form divestiture statement to be material, bad faith misrepresentations and shall invoke the condition on the initial license, cancelling or rescinding it automatically, shall retain all monies paid to the Commission, and, based on the facts presented, shall take any other action it may deem appropriate.

47 C.F.R. § 101.1003(f)(6). See note 54, *infra*, and accompanying text.

²⁸ *Second Report and Order*, 12 FCC Rcd at 12631 (paras. 193-194), adopting 47 C.F.R. § 101.1003(f).

²⁹ LBC Petition at 1-2; Webcel Petition at 12-18.

³⁰ Bell Atlantic Opposition at 2-4; RTG Opposition at 4-7.

comment on whether, if a restriction were warranted, it should adopt rules similar to the cross-ownership restriction it imposed on cellular and broadband Personal Communications Service (PCS) licensees, formerly in Section 24.204 of the Commission's Rules, that it found addressed similar ownership and competitive concerns.³¹

17. The broadband PCS-cellular cross-ownership rule referred to in the Notices included a provision that also allowed a similar 90-day, post-auction period for divestiture. Although by the time of the *Fourth NPRM* the Commission had deleted the cross-ownership restriction from its rules, it did so recognizing that a similar ownership cap — the Commercial Mobile Radio Service (CMRS) spectrum cap — had been adopted for broadband PCS, cellular, and SMR licensees.³² The CMRS spectrum cap also included a 90-day post-auction divestiture provision that the Commission specifically modified to mirror the former broadband PCS rule.³³ Thus, commenters had notice of the post-auction divestiture provision that might be used if the Commission decided to adopt an eligibility restriction.

18. The post-auction divestiture provision adopted in the LMDS ownership eligibility rule promulgated in the *Second Report and Order* is consistent with the proposals in the *Third NPRM* and *Fourth NPRM* to rely on the former cellular-broadband PCS cross-ownership rule as now contained in the CMRS spectrum cap. The Commission modified the cellular-broadband PCS cross-ownership rule only as necessary to apply its provisions to incumbent LECs and incumbent cable companies in the context of the LMDS eligibility restriction. As the Commission stated in adopting other provisions of the CMRS spectrum cap rule in the context of the LMDS restriction, it is preferable to have rules for wireless spectrum that are as consistent as possible for the sake of overall simplicity, ease of compliance, and administrative efficiency.³⁴ The decision to adopt the 90-day post-auction divestiture provision furthered this goal of consistency.

19. Webcel argues that the post-auction divestiture provision is not consistent with Commission precedent reflected in the ownership restriction that was adopted for a specific

³¹ *Third NPRM*, 11 FCC Rcd at 90-91 (para. 101), 92-93 (para. 105); *Fourth NPRM*, 11 FCC Rcd at 19056 (para. 132).

³² Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7842, 7864-76 (paras. 86-107) (1996) (*PCS Remand Order*), deleting 47 C.F.R. § 24.204 and amending 47 C.F.R. § 20.6.

³³ *Id.* at 7876 (para. 107), amending 47 C.F.R. § 20.6(e).

³⁴ *Second Report and Order*, 12 FCC Rcd at 12629-30 (paras. 187-191).

auction of channels for the Direct Broadcast Satellite (DBS) service.³⁵ Webcel contends that the restriction in the *DBS Report and Order* requires licensees to divest existing interests in any other full-CONUS slots before they can acquire a new license in another full-CONUS slot being auctioned.³⁶ Webcel requests that we similarly modify the divestiture provision to allow incumbent LECs and incumbent cable operators to bid on, and acquire, in-region LMDS licenses only if they divest their existing telephone or cable interests before the auction or by a date certain.

20. We find Webcel's purpose in advocating reliance upon the DBS procedure is puzzling inasmuch as the divestiture process in DBS is similar to the LMDS provision to the extent it also allows a post-auction divestiture by a date certain. Specifically, the *DBS Report and Order* adopted a one-time spectrum ownership restriction to encourage competition by prohibiting a party with an attributable interest in one full-CONUS location from acquiring at the auction an additional location without divesting its existing interest in full-CONUS channels at another location within twelve months of such acquisition.³⁷ Like DBS, the LMDS provision does not bar any applicant from participating in the auction and acquiring an interest for which it is otherwise ineligible, as long as the applicant divests to come into compliance within 90 days after grant of the license. We find that the DBS procedure further demonstrates that the LMDS procedures are consistent with Commission precedent in adopting spectrum ownership restrictions in other wireless services, both terrestrial and satellite.

b. Means of Divestiture

21. Webcel argues that the sole basis for the decision to allow incumbents to participate in the auction subject to the 90-day divestiture requirement was a proposal made by the FTC in its reply comments, and that those comments do not support the rule we adopted.³⁸ Webcel contends that the FTC comments only suggested that a company should be able to sell its own cable system to avoid the restriction. Webcel argues that there is no support in the record for the proposition that the incumbent also should be able to sell the overlapping portion of the LMDS license to come into compliance.

³⁵ Webcel Petition at 16.

³⁶ Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168 and PP Docket No. 93-253, Report and Order, 11 FCC Rcd 9712 (1995) (*DBS Report and Order*), *aff'd sub nom. DIRECTV v. F.C.C.*, 110 F.2d 816 (D.C. Cir. 1997) (*DIRECTV*). Full-CONUS is an orbital location in the geostationary orbital arc capable of providing service to the entire continental United States.

³⁷ *Id.* at 9723 (para. 28), 9736 (para. 62), 9810 (Appendix C: One-Time Auction Spectrum Limitations).

³⁸ Webcel Petition at 15-16.

22. We do not find persuasive Webcel's argument that the Commission misconstrued or misapplied the comments of the FTC regarding compliance with eligibility restrictions. Moreover, we disagree with any suggestion by Webcel that our post-auction divestiture procedures and requirements must stand or fall based upon the extent to which they mirror the FTC proposal. In considering the issue of post-auction divestiture, the Commission noted the FTC's example of how such divestiture is advantageous because it would allow the incumbent who owns a cable system contained entirely within a BTA to sell its cable system and thus avoid competitive problems associated with this overlapping ownership. The Commission found that this would allow the incumbent LEC or incumbent cable company, which may otherwise be disqualified from holding an LMDS license, to obtain the license and then divest ineligible interests to the extent necessary to come into compliance.³⁹ The Commission thus agreed with the FTC that giving incumbent LECs and cable companies options for achieving compliance with eligibility restrictions *after* they have won an LMDS license is an effective means of addressing competitive problems that might arise from their holding the LMDS license.⁴⁰

23. The Commission then turned to the question of what range of divestiture options we should provide. It adopted a divestiture rule that permits an incumbent LEC or incumbent cable company to come into compliance with our requirements by (1) assigning or transferring control ``of the conflicting portion of its LMDS license",⁴¹ or (2) complying with the eligibility restrictions established in Section 101.1003(a) of the Commission's Rules.⁴² Compliance with these eligibility restrictions can be achieved if an LMDS applicant (1) divests its attributable interest in an incumbent LEC or cable company; or (2) partitions⁴³ and divests that portion of its telephone or cable service area, or that portion of the LMDS geographic service area, that exceeds the 10 percent overlap restriction established in Section 101.1003(d) of the Commission's Rules.⁴⁴ The Commission found that any of these actions rectifies the competitive problem posed by the incumbent LEC or incumbent cable company ownership of LMDS licenses by removing the cross-ownership interests or the in-region dominance that could result in such incumbents seeking to protect their own operations from LMDS competition.

³⁹ *Second Report and Order*, 12 FCC Rcd at 12631 (paras. 193-194).

⁴⁰ *Id.*, citing FTC Reply Comments to *Fourth NPRM* at 11.

⁴¹ *Id.* at 12631 (para. 194).

⁴² 47 U.S.C. § 101.1003(a).

⁴³ Geographic partitioning is the assignment by the licensee of its license to serve a portion of its service area. As explained above in the text, the Commission has sought additional comment in this proceeding regarding specific rules for the partitioning of LMDS licenses. *Fifth NPRM*, 12 FCC Rcd at 12711-17 (paras. 407-424).

⁴⁴ 47 C.F.R. § 101.1003(d).

24. Webcel points out that the FTC does not specifically address the divestiture option of shedding overlapping geographic areas. Although Webcel's observation is correct, we do not find it to be relevant. The Commission determined in the *Second Report and Order* that partitioning and divesting a portion of the LMDS service area will serve as an effective means of eliminating one of the two sources of an incumbent's ineligibility under the restriction. As it stated in the *Second Report and Order*, the Commission's goal in adopting the eligibility restriction is to create opportunities for new competitors in the local exchange and cable marketplaces.⁴⁵ If an incumbent divests its overlapping geographic interest, there is an opportunity for new entrants to enter the marketplace in that area. In addition, if overlapping geographic interests are divested, an incumbent will not have the opportunity to use its market power to restrict services of a competing new entrant in the divested market area.

c. Distortion of LMDS Auction

25. Webcel argues that allowing incumbent LECs and incumbent cable companies to bid on in-region licenses cannot be reconciled with the record evidence and economic analysis that the Commission found warranted imposing the eligibility restriction.⁴⁶ Webcel asserts that incumbent LECs and cable companies will manipulate the auction process to inflate the price of LMDS licenses, deter entry by potential competitors, and create additional hurdles to the task of raising capital by smaller LMDS auction participants. Webcel sets out five examples of how winning incumbents may be able to use the post-auction divestiture provision to prevent entry by a competitive LMDS provider or otherwise delay competition.

i. Waivers

26. Webcel argues that winning incumbents will file post-auction waiver applications on the putative ground that the market is competitive and use the process to delay the transfers of the overlapping areas, thereby holding onto them until the restriction expires. Webcel appears to be referring to the waiver provision the Commission adopted in Section 101.1003(a)(2), which states:⁴⁷

Upon completion of the initial award of LMDS licenses, an incumbent LEC or incumbent cable company may petition for a waiver of the restriction on eligibility based upon a showing that the petitioner no longer has market power in its authorized or

⁴⁵ *Second Report and Order*, 12 FCC Rcd at 12616-17 (para. 162).

⁴⁶ Webcel Petition at 13-15.

⁴⁷ *Second Report and Order*, 11 FCC Rcd at 12633-34 (para. 199), adopting 47 C.F.R. § 101.1003(a)(2).

franchised service area as the result of the entry of new competitors, other than an LMDS licensee, into such service area.

27. Webcel misconstrues the manner in which the waiver provision is available for use by LMDS applicants. As the rule provides, the Commission directed that waiver petitions be entertained only after the "initial award" of LMDS licenses. We clarify that the term "initial award" of LMDS licenses refers to the grant of licenses to winners in the LMDS auction that meet all of our licensing requirements. Thus, the initial award process will be completed only after the first LMDS licenses have been granted as a result of the auction and licensing process. The primary method for obtaining an LMDS license *after* the "initial award" will be through an assignment or transfer of control from an LMDS licensee to another party. The waiver provision established in Section 101.1003(a)(2) is available *only* for applicants seeking to obtain a license through assignment or transfer of control.⁴⁸ The waiver provision is *not* available in the case of the initial award of licenses through the auction process and thus cannot be used by incumbent LECs or incumbent cable companies to delay divestiture of overlapping areas.

28. Although, as Webcel suggests, unsupported claims of market competition could be advanced by an LMDS licensee seeking to use the waiver provision, we believe that the standards the Commission adopted are sufficiently detailed and stringent to discourage such claims. The Commission adopted the waiver provision to provide incumbent LECs and incumbent cable companies with the opportunity to show that actual conditions in a particular market are sufficiently competitive so that the restriction is no longer necessary to promote competition. The Commission determined to be guided by the factors set out in the *1992 Merger Guidelines* in considering the petition.⁴⁹ The Commission pointed out that, among the several factors the LMDS licensee would address, there are specific market and service analyses, such as consideration of the number and capacity of competing providers and substitutability of the services.

29. Further, if Webcel is intimating that we should abolish the waiver procedures established in the *Second Report and Order* based upon its speculation that the procedures could be abused, we believe that such a suggestion ignores the fact that the grant of waivers will advance our pro-competitive policies in cases in which petitioners make the requisite showings regarding their lack of market power. The purpose of the eligibility rule is to allow competition an opportunity to develop. We have no interest in continuing this temporary rule once

⁴⁸ In these circumstances, the incumbent LEC or incumbent cable company would file a waiver petition with its assignment or transfer application. It may also be possible to obtain a license through reacquisition if the initial LMDS license is revoked or returned because the initial licensee does not comply with Commission rules.

⁴⁹ Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992), reprinted in 4 Trade Reg. Rep. (CCH) para. 13,104 (Apr. 7, 1992) (*1992 Merger Guidelines*).

competition is present. The waiver provision simply allows parties seeking to acquire licenses in the secondary market to demonstrate that the reason for the rule no longer exists in their particular geographic and ``product" market.

30. Also, we do not intend or expect the disposition of such petitions to take such lengthy periods as Webcel contends. The factors for evaluating waiver petitions are well established and the procedures for rule waivers provide for an orderly filing. Further, we have discretion to provide for expedited disposition of waiver requests. Thus, we are not persuaded by Webcel's mere speculation regarding the duration of our waiver proceedings, nor can we agree that the standards and procedures in the waiver provision provide an incumbent LEC or incumbent cable company with the opportunity to delay or prevent the divestiture of the overlapping interests as required within 90 days of the grant of the LMDS license.

ii. Failure To Make Timely Divestitures

31. Webcel argues that winning applicants that are incumbent LECs or incumbent cable companies could fail to make the 90-day divestitures required to comply with the eligibility restriction and default on the deposit required under our rules, thereby delaying deployment of a competitive LMDS system. It asserts that default of the auction deposit is a small price to pay, particularly for monopolists with substantial financial assets, for delaying or stifling the licensing of LMDS competitors.⁵⁰

32. We find no basis for such a concern. Webcel fails to take into account all of the requirements in the divestiture provision for enforcing the 90-day requirement after the auction. At the outset, the applicant must file with its short form application a certification of compliance and, upon winning in the auction, must file with the long form application a signed statement of its plans for coming into compliance.⁵¹ The grant of the LMDS license is conditioned upon the applicant's achieving compliance within 90 days of the final grant.⁵² That is accomplished by filing an application for license assignment or transfer of control of the overlapping geographic areas or a certification of divestiture of either the attributable interest in an incumbent LEC or incumbent cable company, or of the requisite portion of such incumbent's existing authorized or franchised service area.⁵³

⁵⁰ Webcel Petition at 15 n.31.

⁵¹ 47 C.F.R. §§ 101.1003((f)(2), 101.1003(f)(3).

⁵² 47 C.F.R. § 101.1003(f)(4).

⁵³ 47 C.F.R. §§ 101.1003(f)(5)(i), 101.1003(f)(5)(i)(ii).

33. If no such application or certification is tendered within 90 days, then we may consider the short form certification and long form divestiture statement to be material, bad faith misrepresentations and will invoke the condition on the final grant of the license, cancelling or rescinding it automatically.⁵⁴ We also will retain all monies paid to the Commission which, contrary to Webcel's assertion, includes the full amount of the winning bid.⁵⁵ Finally, based on the facts presented, we may take any other action we deem appropriate. We do not believe that incumbents will act so as to subject themselves to these remedies. They could lose the license and forfeit considerable sums, as well as face possible other action. If auction winners do default, the Commission may reaucton the licenses in an expeditious manner or award them to the next highest bidder.⁵⁶ For these reasons, contrary to Webcel's argument, winning incumbents will have substantial incentives to make timely divestitures.

iii. Divestiture to Entities That Do Not Represent Competitive Threat

34. Webcel asserts that winning incumbents could subsequently partition and sell, even at a substantial loss, to entities that do not present a risk of direct competition with the incumbents' services.⁵⁷ We find this scenario to be purely speculative and unlikely. The Commission addressed such activities in the *Second Report and Order* when it adopted the anti-collusion rules set forth in Sections 1.2105 and 1.2107 of our rules to apply to LMDS auctions.⁵⁸ The rules prevent all parties participating in the auction from agreeing in advance to bidding strategies that divide the market according to their interests and that disadvantage other bidders, by prohibiting various discussions apart from bidding consortia or other approved arrangements. In addition, we note that the attribution rules include indirect ownership interests, certain management

⁵⁴ 47 C.F.R. § 101.1003(f)(6).

⁵⁵ 47 C.F.R. § 101.1105(b). LMDS applicants must make an upfront payment in order to participate in the auction. Auction winners must make a down payment sufficient to bring a total deposit up to 20 percent of the winning bid within 10 business days following the release of a Public Notice announcing the close of the auction. Payment of the full balance of winning bids must be made not later than 10 business days following release of a Public Notice indicating that the Commission is prepared to award the licenses. *See id.*

⁵⁶ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 97-413, released Dec. 31, 1997, paras. 151-154, adopting 47 C.F.R. § 1.2109(c) (*Part 1 Third Report and Order*).

⁵⁷ Webcel Petition at 15.

⁵⁸ *Second Report and Order*, 12 FCC Rcd at 12685-86 (paras. 338-339).

agreements, and certain joint marketing agreements.⁵⁹ These rules would limit an incumbent's ability to circumvent the divestiture rules through agreements to divest to entities who would not directly compete against the incumbent.

35. In addition, such activities may be subject to federal antitrust laws enforced by the United States Department of Justice. As pointed out in the *Second Report and Order*, we may refer other complaints of specific instances of collusion in the competitive bidding process to the Department of Justice.⁶⁰ It was noted that bidders who are found to have violated the antitrust laws or the Commission's Rules may be subject to forfeiture of their down payment or their full bid amount and revocation of their licenses, and they may be prohibited from participating in future auctions.⁶¹ Sanctions for violations of antitrust laws include treble damages, among other penalties. Furthermore, a divesting incumbent would have no control over the buyer's use of the LMDS license unless it entered into anticompetitive agreements, and such agreements violate antitrust laws. We find that these factors make it less likely that the activities Webcel describes will occur, and that Webcel has failed to address them or otherwise demonstrate why reliance upon general antitrust law would not be effective.

iv. Transfer of License to Trustee

36. Webcel argues that an incumbent winning an LMDS license could transfer the LMDS license to a trustee, as permitted as an option for divestiture in the eligibility restriction, and certify that it has been unable to find a buyer, thereby evading the 90-day cure rule altogether.⁶² Webcel contends that it will not be possible to find a buyer at the high prices incumbents will bid to retain their monopoly status. Contrary to Webcel's assertion, we do not believe the trustee provision will provide incumbents with incentives to avoid divestiture or engage in other anticompetitive activity. The provision is available only as a means of divestiture and thus must be accomplished within 90 days of a grant, so that no delay will be involved in its use. Moreover, it requires that the applicant have no interest in or control of the trustee and provides that the trustee may dispose of the license as it sees fit. Inasmuch as the trustee is independent from the incumbent and may dispose of the interest freely, we find that the trustee would have no reason to consider an incumbent's interests and could not be manipulated by the incumbent to protect its monopoly.

⁵⁹ 47 C.F.R. § 103.1003(e).

⁶⁰ *Second Report and Order*, 12 FCC Rcd at 12685-86 (para. 339).

⁶¹ 47 C.F.R. § 101.1003(f)(6).

⁶² 47 C.F.R. § 101.1003(f)(1)(C).

v. Sham Bidding

37. Webcel argues that incumbents participating in the auction also could engage in sham bidding for licenses within their territories solely to drive up prices above competitive levels and increase network capital costs for their LMDS competitors beyond levels at which it is economically feasible for new competitors to enter a market. Bell Atlantic argues in opposition that these activities are fully addressed in the Commission's existing auction rules, which have been developed to limit participation to those parties who intend to develop the licenses they purchase.⁶³ Bell Atlantic argues that Webcel's contentions in this respect, as well as its other claims about distorting the auction, are speculative and unsupported. RTG also argues that Webcel's claims that parties would purposefully default on an auction payment or violate our rules by engaging in the other strategies are without any basis in fact, particularly insofar as rural telephone companies are concerned.⁶⁴

38. We agree with Bell Atlantic and RTG that there is no evidence that sham bidding, or other anticompetitive activities, would occur in the LMDS auction as a result of our allowing incumbent LECs and incumbent cable companies to participate fully in the auction and bid on in-region licenses, subject to divestiture. In adopting auction procedures for LMDS, the Commission specifically adopted in Section 101.1105 the same requirements for submission of payments that we impose in all auctions to ensure that only serious, qualified bidders participate in auctions and that sufficient funds are available to satisfy any bid withdrawal or default payments that may be incurred.⁶⁵ Under the terms of the rule, participants are required to tender a substantial upfront payment. Moreover, winning bidders must submit a down payment to bring their total deposits up to 20 percent of the winning bid and then pay the full balance within certain 10-day periods.

39. The Commission also adopted rules that impose payments on bidders who withdraw high bids, default on payments due after an auction, or who are disqualified.⁶⁶ Moreover, we may declare an applicant that engages in gross misconduct, misrepresentation, or bad faith to be ineligible to bid in future auctions or to take any other action we deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant.⁶⁷ We believe that

⁶³ Bell Atlantic Opposition at 2-3.

⁶⁴ RTG Opposition at 6.

⁶⁵ *Second Report and Order*, 12 FCC Rcd at 121681-85 (paras. 327-336), adopting 47 C.F.R. § 101.1105.

⁶⁶ *Id.*, adopting 47 C.F.R. § 101.1103(f).

⁶⁷ *Id.* at 12684-85 (para. 336).

these requirements and sanctions are sufficient to deter sham bidding. Webcel does not demonstrate why these provisions would not deter incumbents in the LMDS auction from either the sham bidding or other anticompetitive activities.

d. Absence of Benefits from Auction Participation

40. Webcel argues that nothing in the *Second Report and Order* weighs in favor of allowing incumbent LECs or incumbent cable companies to participate in the auction of in-region licenses in light of the competitive concerns on which the Commission based the eligibility restriction. Webcel contends that any interest they may have in entering the LMDS market can be achieved by seeking partitioned licenses from LMDS auction winners. Webcel argues that the Commission has stated in other proceedings that geographic partitioning adequately meets the needs of small firms that cannot afford to participate in auctions and it should likewise be sufficient for ineligible LECs and cable companies in the face of the Commission's compelling competitive concerns about their holding in-region LMDS licenses.⁶⁸

41. In opposition, Bell Atlantic argues that Webcel's position that the Commission should exclude incumbent LECs from bidding for LMDS licenses would contradict the Commission's efforts to promote a robust market for LMDS. Bell Atlantic contends that the rule changes Webcel requests would simply restrain bidding competition at the auction and allow Webcel to obtain below-market bargains.⁶⁹ RTG, which opposes the eligibility restriction overall as it applies to rural telephone companies, opposes any further limitations on the ability of a rural telephone company to participate in the auction for a BTA that significantly overlaps its telephone service area.⁷⁰ RTG argues that Webcel's proposal that LECs be required to divest their overlapping telephone operations in order to participate in the auction would effectively eliminate rural telephone company participation in LMDS contrary to several provisions in the Communications Act and contrary to Commission policy. RTG further argues that partitioning alone would not provide rural telephone companies with a sufficient opportunity to acquire LMDS spectrum.⁷¹

42. We disagree with Webcel. We believe there is an obvious and direct benefit to be gained by permitting incumbent LECs and cable operators to compete for LMDS licenses, subject to the divestiture requirements we have established. Competition thrives in circumstances in

⁶⁸ Webcel Petition at 3, 16-17.

⁶⁹ Bell Atlantic Opposition at 1, 4.

⁷⁰ RTG Opposition at 5.

⁷¹ *Id.* at 6-7.

which as many players as possible are given an opportunity to make business decisions regarding the development of new technologies, the entry into new markets, and the design and provision of new or enhanced services to consumers. Our pro-competitive policies would not be well served by unwarranted regulatory barriers that would stifle these business decisions. Our LMDS licensing rules foster competition — for the benefit of consumers and the national economy — by permitting incumbent LECs and incumbent cable operators to make these business decisions. They can compete for in-region LMDS licenses and then, based upon the results of the auction, make informed business decisions concerning the best way to compete against other service providers in the LMDS, local exchange, and cable marketplaces. We believe that rules that extend this opportunity to a wide array of competitors, subject to divestiture requirements that will guard against anticompetitive practices, are superior to any exclusionary rules that would completely prohibit participation in LMDS markets by a substantial number of experienced providers of communications services.

43. The approach we have taken is consistent with the Commission's overall goal in adopting the eligibility restriction, which is to maximize the opportunity for competition in those markets that are not fully competitive.⁷² Its purpose is to increase competition by awarding licenses to firms whose activities are likely to increase the level of competition in the marketplace. However, the Commission recognized that restrictions may prevent incumbents from experimenting with certain technology and market combinations and might foreclose or delay desirable entry by incumbents into new markets.⁷³ The Commission determined to structure the restriction as flexibly as possible to minimize these potential adverse limitations on incumbents. The rule was designed in the least intrusive manner consistent with the overall goal of promoting competition.

44. Accordingly, the Commission found no compelling public benefit to be achieved by foreclosing incumbent LECs and incumbent cable companies from participating fully in the auction of LMDS licenses, including the auction of in-region licenses, subject to the post-auction divestiture requirement.⁷⁴ By permitting the incumbent to divest the ineligible interests or areas after the auction, it is possible for the incumbent to enter the LMDS market by bidding on large LMDS licenses that may include both areas that it is eligible to serve and areas that it is not. Once the incumbent determines whether it has been successful in obtaining an auctioned license, it will be able to make an informed business decision to transfer the overlapping LMDS, cable, or telephone service area or divest its attributable interest in an incumbent LEC or cable company.

⁷² *Second Report and Order*, 12 FCC Rcd at 12622 (para. 172).

⁷³ *Id.* at 12624 (para. 177).

⁷⁴ *Id.* at 12631 (para. 193).

45. In sum, the divestiture provision in Section 101.1003(f) is consistent with the CMRS spectrum cap, as well as with other ownership restrictions that also permit post-auction divestiture. There is no evidence that permitting incumbents to participate in the LMDS auction, subject to the divestiture requirement, will undermine the goals of the ownership restriction. We also have found no basis for Webcel's claims that the auction process would be distorted by anticompetitive activities. In the absence of any apparent harm from such participation, there is no basis to preclude incumbents participating in the LMDS auction, which instead is consistent with our overall goal to increase competition.

3. Definition of Attributable Interest

a. 20 Percent or More Ownership Interest

46. The Commission adopted a threshold level of 20 percent, rather the 10 percent proposed in the *Fourth NPRM*, in deciding whether an ownership or stock interest in either an incumbent LEC or incumbent cable company, or in an LMDS licensee, qualifies as an attributable interest that triggers the eligibility restriction.⁷⁵ Webcel requests reconsideration of the 20 percent attribution level and the rejection of the proposal to use a lower threshold level of 10 percent or higher, which Webcel argues is a more competitively prudent level that would more strictly enforce the eligibility restriction.⁷⁶ Webcel contends that the *Second Report and Order* relies on conclusory justifications in support of the decision, fails to explain why the 10 percent standard was rejected, and fails to take into account the differences between the LMDS eligibility restriction and the CMRS spectrum cap on which the Commission relied. Bell Atlantic opposes Webcel and any further reduction in the ability of incumbent LECs to hold an in-region LMDS license.⁷⁷ We consider the arguments more fully below.

47. Webcel argues that, in an effort to support the 20 percent rule, the *Second Report and Order* proffered a number of conclusory justifications that cannot withstand serious scrutiny.⁷⁸ Webcel points out that the Commission concluded that a 20 percent level provided the proper balance between encouraging capital investment and business opportunities in LMDS while guarding against potential competitive harms associated with the exercise of undue influence by incumbent LECs and incumbent cable companies in connection with the operations of LMDS

⁷⁵ *Id.* at 12630 (paras. 189-191), adopting 47 C.F.R. § 101.1003(e)(2).

⁷⁶ Webcel Petition at 18-23.

⁷⁷ Bell Atlantic Opposition at 4.

⁷⁸ Webcel Petition at 18-19 n.36.

licenses.⁷⁹ Yet, Webcel argues, the Commission did not explain why a 10 percent level is not appropriate and did not address the effect of a 10 percent ownership level on LMDS capital formation. Webcel asserts that the 20 percent standard cannot be reconciled with the competitive risks from incumbents' ownership of LMDS licenses in their service areas.

48. We conclude that Webcel has failed to present any probative evidence or convincing arguments that setting the attribution level at 20 percent will not serve the objectives and goals of this proceeding. We believe that any decision at this juncture to modify the standard adopted in the *Second Report and Order* must be based upon an affirmative and convincing showing that the standard will not be effective in achieving the public interest objectives embodied in the eligibility restrictions. Based upon the reasons we discuss in the following paragraphs, we conclude that Webcel has not provided this showing. We thus find no reason to revise the original decision selecting 20 percent as the threshold level for attributable interests.

49. We acknowledge that establishing a "bright line" attribution test is always subject to the criticism that the line should be repositioned. We find no basis in the record to warrant reconsideration of the 20 percent "bright line." Nevertheless, we note that the Commission traditionally has addressed issues relating to ownership attribution in the context of different rulemakings.⁸⁰ The Commission concluded in each of these instances that the attribution standard it adopted would best fit the particular circumstances involved, and would best serve the particular objectives of the rulemaking. However, the Commission's policies regarding marketplace competition, ownership diversity, and the prevention of anticompetitive behavior may benefit from a comprehensive evaluation of the criteria used in establishing ownership restrictions (including cross-ownership, multiple-ownership, cross-interest, "spectrum cap," and other limits) for different services, along with their accompanying ownership attribution standards, and the role these standards can play in the furtherance of the Commission's policies. For these reasons, we

⁷⁹ *Second Report and Order*, 12 FCC Rcd at 12630 (para. 190).

⁸⁰ For a brief overview of some of the Commission's various attribution rules, see *Review of the Commission's Regulations Governing Attribution of Broadcast Interests and Policies Affecting Investment in the Broadcast Industry*, *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, and *Reconsideration of the Commission's Cross-Interest Policy*, MM Docket Nos. 94-150, 92-51, 87-154, Notice of Proposed Rulemaking, 10 FCC Rcd 3606, 3614-16 (paras. 26-36) (1995) (*Attribution Notice*); *PCS Remand Order*, 11 FCC Rcd at 7880-81 (paras. 117-119). See also *Cincinnati Bell v. F.C.C.*, 69 F.3d 752 (6th Cir. 1995) (reversing and remanding the Commission's cellular broadband PCS ownership and attribution rules in part for insufficient supporting rationale). The Commission currently is reviewing its broadcast attribution rules in the ongoing rulemaking proceeding initiated in the *Attribution Notice* and a subsequently issued Further Notice of Proposed Rulemaking, 11 FCC 19895 (1996) (*Attribution Further Notice*). The Commission also is examining specific attribution rules in *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 96-85, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5937, 5963-64, 5970 (paras. 74-77, 95) (1996).

plan to initiate a proceeding later this year to examine these issues. We note further that, to the extent that such a proceeding results in changes to our LMDS ownership rules, such changes will be applied prospectively only. Accordingly, the prospect of such a review should not affect current or near-term business plans or strategies of LMDS applicants.

i. Justification for 20 Percent Standard

50. We believe that the 20 percent threshold will serve our competitive goals with regard to LMDS, for the following reasons.⁸¹ First, there are safeguards in the LMDS attribution rules that make incumbent LECs and incumbent cable companies ineligible to hold a *controlling* interest in an LMDS licensee, even if their attributable *ownership* interest is less than 20 percent. We recognize that an ownership attribution level that is set too high could afford incumbent LECs and incumbent cable companies an opportunity to engage in the types of anticompetitive conduct the eligibility restriction was designed to prevent. We are also aware that some economists have argued that investors with less than a 20 percent ownership interest may be able to exert control over the entity in which they have invested.⁸² Our objective, however, is to ensure that incumbent LECs and incumbent cable companies are prevented from controlling the operation of an in-region LMDS license, because such control could result in anti-competitive conduct. We believe the eligibility restriction prohibiting an incumbent LEC or incumbent cable company from holding a controlling interest in an LMDS licensee,⁸³ when considered in conjunction with the general attribution standard for *de facto* control, serves as an effective tool to accomplish this objective.

51. Second, the Commission specifically found that a 20 percent attribution level was appropriate to meet the objectives in adopting the LMDS eligibility restriction for the same

⁸¹ Although we believe the 20 percent threshold level will not have deleterious effects, we acknowledge that the economic literature contains arguments that partial equity interests among rival firms in a relatively concentrated industry may reduce competition. Reynolds and Snapp, for example, find that in markets where entry is difficult, even relatively small partial ownership interests among rivals can lead to lower output and higher prices. This is because these ownership arrangements link the profits of competing firms in such a way that the incentive of each firm to compete is reduced. R. Reynolds & B. Snapp, *The Competitive Effects of Partial Equity Interests and Joint Ventures*, 4 International Journal of Industrial Organization 141-53 (1986). See also J. Farrell & C. Shapiro, *Asset Ownership and Market Structure in Oligopoly*, 21 Rand Journal of Economics 275-92 (1990).

⁸² See, e.g., D. Leech, *Corporate Ownership and Control: A New Look at the Evidence of Berle and Means*, OXFORD ECONOMIC PAPERS, (Sept. 1987) at 534-51; D. Leech, *Ownership Concentration and the Theory of the Firm: A Simple Game Theoretic Approach*, JOURNAL OF INDUSTRIAL ECONOMICS (Mar. 1987) at 225-40; F. Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 31-34 (1980); R.J. Larner, *Ownership and Control in the 200 Largest Non-Financial Corporations*, AMERICAN ECONOMIC REVIEW 777-87 (1966); P. Burch, THE MANAGERIAL REVOLUTION (1972).

⁸³ 47 C.F.R. § 101.1003(e)(1).

reasons that we found the 20 percent level appropriate in the CMRS spectrum cap in the *PCS Remand Order*.⁸⁴ There, as here, the Commission considered proposals for lower ownership levels, including a 10 percent level, and concluded that the higher benchmark of 20 percent should be maintained because it allowed a wider variety of players to enter the marketplace, including the CMRS providers subject to the restriction, while still preventing anticompetitive practices that would have harmful effects on consumers.⁸⁵

52. Third, the Commission conducted a detailed analysis of competition in the incumbent LEC and incumbent cable company marketplaces with attention to the degree of market power presently held by incumbents and the potential for LMDS as a new source of competition.⁸⁶ The Commission made predictive judgments based on its experience, economic theory, and the market analysis that open eligibility will impede substantially the pro-competitive benefits of licensing LMDS.⁸⁷ The Commission balanced its competing objectives to maximize the opportunity for competition in the telephone and cable markets with the desire to encourage and facilitate the entry of LMDS providers. It determined that a lower attribution threshold would compromise the Commission's goals to encourage all potential LMDS providers to enter the market, while a higher threshold would permit the type of anticompetitive activities from monopolist incumbents that it sought to prevent. In our judgment, the 20 percent level is reasonable based upon our analysis of these factors. We disagree with Webcel that the 20 percent level, in light of all these considerations, will undermine the eligibility restriction.

53. Fourth, as with the CMRS spectrum cap, the Commission found that the 20 percent attribution standard would encourage capital investment and business opportunities in LMDS, increase the flexibility afforded to LMDS providers to meet customer demand, and promote the competitive delivery of wireless services. Webcel argues that these findings are not dispositive in the context of an eligibility restriction that is adopted to keep incumbents from acquiring in-region LMDS licenses and that does not limit their ability to acquire out-of-region LMDS licenses. We disagree. In relying on these factors in the *PCS Remand Order* to support the 20 percent attribution level in connection with the 45 megahertz CMRS spectrum cap placed on certain CMRS licensees, the Commission stated that cellular providers should be given ample opportunity to compete in the CMRS market, particularly given the accelerated changes and growth in

⁸⁴ *Second Report and Order*, 12 FCC Rcd at 12630 (paras. 190-191).

⁸⁵ *PCS Remand Order*, 11 FCC Rcd at 7880-81 (paras. 118-119).

⁸⁶ *Second Report and Order*, 12 FCC Rcd at 12610-12 (paras. 157-161).

⁸⁷ *Id.* at 12612 (para. 161).

technology and services, and to seek business opportunities and capital investment in CMRS.⁸⁸ Maintaining a 20 percent attribution level was found to allow a wide variety of players, including broadband PCS and cellular providers, to enter the marketplace, while still preventing anticompetitive practices that could harm consumers. As there, we do not want to bar incumbent LECs and incumbent cable companies altogether from acquiring LMDS licenses, but rather to prevent anticompetitive practices.

54. Fifth, setting the threshold attribution level at 20 percent is consistent with our overall objective in the *Second Report and Order* — to design a short-term LMDS eligibility restriction on in-region, incumbent LECs and in-region, incumbent cable companies that will maximize competition.⁸⁹ The restriction was structured as flexibly as possible to minimize adverse consequences of such restrictions. The Commission recognized that restrictions may prevent incumbents from experimenting with certain technology or market combinations and might unnecessarily foreclose or delay desirable entry by incumbents into new markets.

55. Thus, the Commission determined that the restrictions should be temporary, ending when the likelihood of anticompetitive behavior has abated. Similarly, the 20 percent attribution level is designed to afford maximum flexibility for incumbents to provide financing and the benefits of their technological experience to LMDS licensees without controlling the LMDS system. For example, a 20 percent threshold is more likely than the 10 percent threshold suggested by Webcel to increase the availability of financing for new LMDS services because incumbents will have greater latitude to provide financing. We also recognize that the factual circumstances and policy considerations that may prevail in other markets and with respect to other products and services may justify different attribution thresholds. We intend to examine these issues in greater detail in our comprehensive review of ownership restrictions and attribution standards.⁹⁰

56. Finally, a primary concern considered in adopting an overall regulatory framework for LMDS was to make this service as flexible as possible and to avoid erecting unnecessary barriers to marketplace entry. LMDS has significant potential in offering a broad range of one-way and two-way voice, video, and data service capabilities, and a substantial amount of capacity that is larger than currently available wireless services.⁹¹ The goal was to maintain an open and flexible approach in implementing LMDS that would allow the business judgments of individual LMDS

⁸⁸ *PCS Remand Order*, 11 FCC Rcd at 7881 (para. 119).

⁸⁹ *Second Report and Order*, 12 FCC Rcd at 12624 (para. 177).

⁹⁰ *See* para. 49, *supra*.

⁹¹ *Second Report and Order*, 12 FCC Rcd at 12621 (para. 170).

applicants and licensees to shape the nature and components of the services to be offered.⁹² Thus, a particular concern is that the Commission not take regulatory action that would prevent LMDS licensees from obtaining the financing required to acquire an LMDS license and to establish the technology needed to offer service to the public. Although the Commission was compelled to place some restrictions on LMDS license holdings by in-region LECs and cable companies in the interests of increasing competition in the telephony and video distribution services, it narrowly tailored the restriction because it recognized the potential for adverse impacts on implementation of LMDS.

57. Thus, in balancing the integrity of the eligibility restriction against our desire to increase the likelihood that licensees could satisfy their capital requirements, we seek to be as liberal as possible in setting the permissible ownership interest of incumbent LECs or cable companies. In adopting the provisions of the rule, the Commission decided that, as a threshold matter, if less than 10 percent of the population of the LMDS licensed service is within the incumbent's authorized or franchised service area, there would no eligibility restriction on the incumbent LEC or incumbent cable company.⁹³ That is, if the population overlap is less than 10 percent, the incumbent LEC or incumbent cable company could own as much as 100 percent of the LMDS license for that area. On the other hand, if the population overlap is 10 percent or higher, we then look to the ownership structure of the involved entities. The Commission decided to establish an attribution level of 20 percent, rather than 10 percent, so as not to unduly constrict the flow of capital to LMDS licensees. As we discuss above, although there is nothing in the current record that convinces us that this balancing of factors and objectives should be revisited in this case, we also believe that it is appropriate for us to examine what steps may be necessary to ensure that this analysis is done in a consistent, integrated fashion in the context of different markets, products, and services. This belief has prompted our decision to initiate a more comprehensive proceeding later this year.

58. In sum, we believe that the 20 percent attribution level and the prohibition against an incumbent LEC or incumbent cable company holding a controlling interest in a licensee, taken in combination, provide an effective barrier against anticompetitive conduct. While we have affirmed the 20 percent attribution level based on the weighing and balancing of all of the competing interests we have discussed, we cannot predict with certainty that the level is an absolute bar to the anticompetitive conduct that the rule is designed to prevent. That is not what we reasonably can seek to achieve in relying on a bright line standard as we do here. Instead, we

⁹² *Id.* at 12643 (para. 221).

⁹³ *Id.* at 12628-29 (paras. 186-188), adopting 47 C.F.R. § 101.1003(d), as modified in *First Erratum*, released Apr. 7, 1997.

believe that the 20 percent level is reasonably based to promote the objectives we seek to achieve and that no other level is established in the record to be any better.

59. Webcel attacks the policy of flexibility by arguing that, with a 20 percent attribution limit, incumbent LECs and incumbent cable operators will have unlimited flexibility to pursue competitive foreclosure strategies by forming bidding consortia and other ventures to bid on LMDS licenses. Webcel submits as an example the possibility that the five Regional Bell Operating Companies (RBOCs) may form a wholly-owned joint venture for LMDS and be the high bidders for the LMDS licenses in the members' markets, solely for the purpose of foreclosing competition in each RBOC's region.⁹⁴ Bell Atlantic, in reply, argues that such concerns are theoretical and unsupported and that the Commission's rules already proscribe any anticompetitive auction tactics.

60. We agree with Bell Atlantic. We rejected earlier in this Order similar claims of Webcel that participation by incumbent LECs or incumbent cable operators in the LMDS auction will result in anticompetitive activities to prevent entry from new competitors.⁹⁵ We discussed the auction rules that proscribe such activities and we agreed with Bell Atlantic that there is no need for additional rules. We point out that the anti-collusion rules permit license applicants to enter into partnerships, joint ventures, and consortia for the purpose of pursuing a license at auction, but prohibit the kind of collusion Webcel describes.⁹⁶

ii. Attribution Levels and 1996 Act

61. Webcel further argues that the Commission's decision to reject the 10 percent level is inconsistent with the 1996 Act and the proposal in the *Fourth NPRM* to track the use of that level in Section 652 of the Act.⁹⁷ In addition, Webcel asserts that Congress defined ownership and affiliates in Section 3(1) of the Act⁹⁸ to mean an interest of 10 percent or greater based on similar concerns about the same types of competitive incentives at issue here. Webcel argues that the 20 percent level is not defensible on this basis alone. We disagree.

⁹⁴ Webcel Petition at 19.

⁹⁵ See paras. 25-39, *supra*.

⁹⁶ *Second Report and Order*, 12 FCC Rcd at 12685-86 (paras. 338-339), adopting 47 C.F.R. § 1.2105.

⁹⁷ Webcel Petition at 21; see Section 652 of the Communications Act, 47 U.S.C. § 572.

⁹⁸ 47 U.S.C. § 153(1).

62. There is no statutory provision that governs the percentage of an ownership interest in an incumbent LEC or incumbent cable system, or in an LMDS licensee, which we must follow for purposes of imposing the LMDS eligibility restriction on such incumbents. The Commission rejected a similar argument when it affirmed the 20 percent level for the CMRS spectrum cap.⁹⁹ As stated there, we find that the various statutory ownership attribution criteria do not directly apply to LMDS ownership attribution. On the contrary, the decision of Congress to set an ownership attribution level for specific uses indicates that Congress did not intend that these attribution levels be followed automatically in all cases. Commission rules impose a variety of ownership attribution levels for different services and Congress did not attempt to dictate one attribution level for all radio services or all purposes.¹⁰⁰

63. As Webcel acknowledges, Section 652 prohibits in-region LECs and cable companies from acquiring attributable interests in each other. The *Fourth NPRM* sought comment generally on what should constitute an attributable interest and pointed out that the Commission has used several different formulations in different contexts.¹⁰¹ Thus, although the Commission stated that it would consider the 10 percent level used in Section 652, it neither relied exclusively on the statute nor otherwise indicated that its deliberations in adopting a final rule would be somehow limited to that proposal. Although the general goals may be the same in seeking to achieve competition by imposing ownership limitations on potentially dominant entities, we sought in the *Second Report and Order* to establish a new broad service to be implemented as soon as possible. Thus, the Commission sought to avoid establishing an attribution standard that would forestall desirable financial interests in LMDS licenses. In contrast, Section 652 is a prohibition on acquisition of cross interests in established businesses, so there is little danger that use of a lower attribution level in that context will deprive nascent services and technologies of needed capital.

iii. Reliance on CMRS Spectrum Cap

64. Webcel argues that the *Second Report and Order* should not have relied on the 20 percent attribution level in the CMRS spectrum cap to the same extent it also relied on the definition of a significant geographic overlap, as that definition is used for purposes of the CMRS spectrum cap.¹⁰² Although the Commission stated that there are good reasons to adopt LMDS

⁹⁹ *PCS Remand Order*, 11 FCC Rcd at 7880-81 (para. 118), 7882-83 (para. 122).

¹⁰⁰ *Id.* at 7882-83 (para. 122). The Commission pointed out that similar rules, such as those in the broadcast services, attribute ownership interests of as little as 5 percent.

¹⁰¹ *Fourth NPRM*, 11 FCC Rcd at 19056-57 (para. 133).

¹⁰² Webcel Petition at 20-21.

rules that are consistent with existing rules governing wireless services,¹⁰³ Webcel argues that the Commission sacrificed competition in the name of administrative expediency without taking into account the different contexts in which the attribution levels for LMDS and CMRS were developed. Webcel identifies two factors that it claims distinguish LMDS from CMRS and demonstrate that the 20 percent standard is too liberal in allowing incumbent LECs or incumbent cable companies to hold in-region LMDS licenses.

65. First, Webcel argues that the competitive situations for LMDS and CMRS generally are different, as are the goals for the LMDS and CMRS ownership restrictions. Webcel asserts that the LMDS rule is imposed on incumbent LECs and incumbent cable operations that the Commission has recognized as having market power, while the CMRS rule concerns a market that the Commission found to be relatively competitive in the *Second CMRS Competition Report*.¹⁰⁴

66. We disagree with Webcel that the goals in adopting the respective CMRS and LMDS ownership restrictions were different. In the *Fourth NPRM*, the Commission proposed to use the former broadband PCS-cellular cross-ownership rule now included in the CMRS spectrum cap because we found it involved similar competitive concerns.¹⁰⁵ Like LMDS, these rules were adopted to achieve the same goals of promoting competition and preventing the concentration of spectrum among entities with the incentive and ability to prevent competition. The Commission imposed the spectrum cap on broadband PCS, cellular, and SMR providers because it found they have the potential to limit entry by other broadband service providers and undermine Congressional goals such as the avoidance of excessive concentration of licenses.¹⁰⁶ The goal was to ensure competition in the provision of such services and ensure opportunity for new providers. Similarly, the Commission imposed the LMDS ownership restriction on incumbent LECs and incumbent cable companies to prevent their limiting the entry of new LMDS providers in their own regions where such incumbents hold market power. The goal also was to maximize competition by prohibiting such in-region operators from having an LMDS license, which the Commission noted was similar to the cap on CMRS licensees.¹⁰⁷

¹⁰³ *Second Report and Order*, 12 FCC Rcd at 12630 (para. 191).

¹⁰⁴ Second Annual Report: Competition in the Commercial Mobile Radio Services, FCC 97-75, 12 FCC Rcd 11267 (1997) (*Second CMRS Competition Report*).

¹⁰⁵ *Fourth NPRM*, 11 FCC Rcd at 19056 (para. 132).

¹⁰⁶ *CMRS Third Report and Order*, 9 FCC Rcd at 8108-10 (paras. 258-264).

¹⁰⁷ *Second Report and Order*, 12 FCC Rcd at 12622 (para. 172), 12624 (para. 178).

67. Webcel fails to demonstrate how a change, if any, in the degree of competition in the LMDS and CMRS markets would undermine our reliance on the use of similar rules to address similar competitive concerns. Contrary to Webcel's claims, we do not find that the *Second CMRS Competition Report* reached conclusions about the level of competition in the CMRS marketplace. Rather, the Report found that, after two years of implementing new service rules in various CMRS services, competition is emerging and developing.¹⁰⁸ Moreover, even if there were differences in the degree of competition in the LMDS and CMRS markets, it is not clear how that requires us to change the 20 percent ownership attribution level we adopted in the LMDS rule, inasmuch as the 20 percent level was adopted to achieve the same competitive goals for CMRS and LMDS. In any event, the Commission thoroughly discussed the applicability of the 20 percent attribution standard in the LMDS rule.

68. Second, Webcel argues that the LMDS competitive landscape is similar to the heightened competitive concerns that led the Commission to adopt a 5 percent attribution rule in the context of the DBS auction. Webcel contends that the Commission adopted the DBS rule to ensure that new licensees would be sufficiently independent from incumbents and could provide vigorous competition, and that we should do the same in the case of the LMDS ownership restriction.¹⁰⁹

69. We disagree with the comparative arguments advanced by Webcel. As we have discussed, the Commission found the 20 percent level consistent with our goals to promote investment and competition in the new LMDS market while preventing the anticompetitive activities that could occur. Furthermore, Webcel disregards the circumstances under which the 5 percent attribution level was adopted in the ownership restriction we imposed on DBS providers in the *DBS Report and Order*. The Commission adopted the restriction, which limited the acquisition of an attributable interest in DBS channels at the 110° orbital location, to serve a different purpose in a different context than the eligibility restriction imposed on the acquisition by incumbent LECs and incumbent cable companies of an attributable interest in an LMDS licensee.

70. The DBS proceeding was initiated after DBS was implemented. The Commission sought to modify the licensing rules by adopting competitive bidding procedures to reassign from a recovered permit the full-CONUS DBS spectrum at the 110° location.¹¹⁰ In adopting the one-time auction rule for this purpose, the Commission noted the scarcity of full-CONUS DBS spectrum at other orbital locations. It concluded that a restriction on acquisition at the auction

¹⁰⁸ *Second CMRS Competition Report*, 12 FCC Rcd at 11268-69.

¹⁰⁹ Webcel Petition at 21, citing *DBS Report and Order*, 11 FCC Rcd at 9746 (para. 88).

¹¹⁰ *DBS Report and Order*, 11 FCC Rcd at 9713 (para. 2). In *DIRECTV*, the court affirmed this Order on appeal.

was necessary to reduce concentration of full-CONUS DBS resources and ensure competition among video services from the additional full-CONUS DBS system. Accordingly, the Commission prohibited an entity already holding an attributable interest at the other full-CONUS locations from acquiring an attributable interest in the additional 28 channels to be reassigned in the auction, unless the entity that won at the auction subsequently divested the existing locations.¹¹¹

71. Thus, the DBS restriction was directed at existing DBS operators to prevent their acquiring at the one-time auction any additional competitive channels. The restriction did not apply to incumbent cable operators, except to the extent they had an attributable interest in an existing DBS licensee. In deciding not to restrict cable ownership in the available DBS license, the Commission relied on the presence of existing DBS licensees that were unaffiliated with cable operators and the Commission's ability to monitor the effect of later acquisition of DBS licenses when an unaffiliated full-CONUS DBS operator would seek to assign or transfer control of its license to a cable-affiliated entity.¹¹²

72. In contrast, the LMDS eligibility restriction is directed at incumbent cable operators and incumbent LECs during the three-year implementation period of a new service. As a consequence, our consideration in adopting the respective attribution rules and an appropriate cut-off level for determining an attributable ownership level were different. The Commission found more conservative attribution rules were warranted in the DBS context in order to achieve its goal that no party hold interests at more than one full-CONUS location. The Commission determined that a 5 percent ownership attribution level was not too restrictive in its impact on the DBS industry because the restriction was limited to sharing the new DBS location among existing DBS operators and preventing their influence in new DBS providers.¹¹³

73. There was no comparable need to be so restrictive in adopting the appropriate attribution level in the LMDS eligibility rule. No entity subject to the LMDS restriction already holds an LMDS authorization, and our incentive to bar existing DBS providers from the opportunity to acquire a second authorization was not the same as the incentives in restricting the entry of incumbent cable companies and incumbent LECs in the new LMDS marketplace. As we have stated, the 20 percent attribution level in the LMDS rule strikes the proper balance in encouraging the development of technology and the flow of capital into this nascent service while preventing the anticompetitive activities from incumbent LECs and incumbent cable companies that the restriction addressed.

¹¹¹ *Id.* at 9723-24 (paras. 28-31).

¹¹² *Id.* at 9740-41 (paras. 73-76).

¹¹³ *Id.* at 9747-48 (paras. 92-95).

b. Treatment of Interests with Rights of Conversion to Equity Interests

74. The LMDS attribution rules provide that ``debt and interests such as warrants and convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not constitute attributable interests unless and until conversion is effected."¹¹⁴ Webcel argues that the treatment of such warrants and interests in the attribution rule is inconsistent with the treatment accorded them in the auction rules also adopted in the *Second Report and Order*.¹¹⁵ The auction rules concerning small business qualifications treat these rights as though they had been exercised. Webcel asserts that allowing incumbent LECs and incumbent cable operators to freely hold warrants and other convertible instruments in in-region LMDS licenses will undermine the eligibility restriction and allow incumbents to engage in a number of anticompetitive activities that are contrary to the goals of the restriction. Bell Atlantic opposes the petition, arguing that Webcel's request is contrary to well-established Commission policy.¹¹⁶

75. As Webcel notes, the LMDS rules treat warrants and similar convertible interests differently for purposes of determining attributable interests subject to the eligibility restriction on ownership of an in-region LMDS license than the size standards for auction participation by small businesses. Webcel, however, fails to address the differences in the purposes of the two rules and why this different treatment is problematic or why we should modify the ownership attribution rule to mirror the small business size standard. As noted above, the ownership attribution rules attendant to the LMDS short term eligibility restriction are designed to prevent anticompetitive activities, while the auction rule is based on statutory provisions to encourage designated entities to participate in Commission auctions and to receive specific benefits, such as bidding credits. As we stated in considering different percentage levels in establishing ownership levels in our rules, our consideration of convertible debt and equity interests depends on the context of the specific goals to be achieved.

¹¹⁴ *Second Report and Order*, 12 FCC Rcd at 12630-31 (para. 192), adopting 47 C.F.R. § 101.1003(e)(5).

¹¹⁵ Webcel Petition at 22 n.48, citing 47 C.F.R. § 101.1112(d)(5).

¹¹⁶ Bell Atlantic Opposition at 5-6. Bell Atlantic also argues that Webcel's request is procedurally defective because Webcel failed to raise this issue in the comments to the *Fourth NPRM* and cannot at this late date raise the matter for the first time, citing 47 C.F.R. § 1.429(b). We disagree. We find it unnecessary to reach the merits of Bell Atlantic's factual claim regarding Webcel's prior pleadings because we conclude that the public interest is best served by our consideration of the facts and arguments raised by Webcel. See para. 82, *infra*. See also 47 C.F.R. § 1.429(b)(3).

76. The different manner in which warrants and convertible interests are treated under the ownership eligibility and auction rules is consistent with their treatment in other wireless services. For example, the treatment of warrants and convertible interests under the ownership eligibility restriction is consistent with the CMRS spectrum cap attribution rule.¹¹⁷ Similarly, the designated entity auction rule is consistent with existing designated entity auction rules for other services,¹¹⁸ and with the general auction procedures set forth in Part 1, Subpart Q, of the Commission's Rules.¹¹⁹ The Commission previously recognized the different treatment of warrants and other convertible interests under its ownership eligibility and auction rules in the CMRS spectrum cap rules.¹²⁰ Webcel has presented no persuasive arguments for why we should depart from existing precedent or why maintaining the different treatments of convertible securities for purposes of ownership restrictions and auction rules is otherwise unreasonable.

77. Bell Atlantic argues that, within the ownership restrictions in other services, the Commission consistently has not attributed warrants and other convertible securities until they are actually exercised or converted. Bell Atlantic contends that this was the case with the cable television and multi-channel multipoint distribution service (MMDS) cross-ownership restriction contained in Section 21.912 of the Commission's Rules and with the DBS ownership rule.¹²¹ Bell Atlantic is correct that the treatment of warrants and other convertible interests in the attribution rule in the LMDS ownership restriction is consistent with existing treatment of warrants and convertible interests under other ownership and eligibility restrictions. We have noted that the Commission found good reasons, when it adopted attribution rules and the 20 percent level in the ownership eligibility restriction, to adopt rules that are consistent with existing rules governing wireless service licensees.¹²² Webcel fails to present support for its claim that the same treatment

¹¹⁷ *Second Report and Order*, 12 FCC Rcd at 12630-31 (paras. 191-192).

¹¹⁸ *Id.* at 12691-92 (para. 352).

¹¹⁹ 47 C.F.R. § 101.1101; 47 C.F.R. § 1.2110(a)(4).

¹²⁰ 47 C.F.R. § 20.6(d)(5), which states (emphasis added):

[D]ebt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until conversion is effected, *except that this provision does not apply in determining whether an entity is a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in § 1.2110 of this chapter or other related provisions of the Commission's rules.*

¹²¹ Bell Atlantic Opposition at 5-6, nn.10-11, citing 47 C.F.R. § 21.912 and *DBS Report and Order*, 11 FCC Rcd at 9811, Appendix C, Attribution Rules (para. 5).

¹²² *Second Report and Order*, 12 FCC Rcd at 12630 (para. 191).

of warrants and other convertible securities in the LMDS ownership restriction would undermine the restriction or to present any good reason why such treatment otherwise should be different for LMDS than for other wireless services.

78. We disagree with Webcel that potential anticompetitive activities by incumbent LECs or incumbent cable companies require that we treat warrants and convertible interests differently for purposes of LMDS ownership eligibility than in the CMRS spectrum cap and other ownership rules. Webcel argues that an LMDS licensee with a substantial percentage of convertible instruments from in-region cable or telephone entities has no incentive to compete, is restricted by covenants commonly used with such interests, and can manipulate the bidding process in the auction to acquire licenses at any price. We discuss above similar arguments made by Webcel with respect to the participation of incumbents in the auction.¹²³ Whether warrants or other convertible interests in general suppress competition as Webcel alleges is debatable. Although the Commission has sought comment on their impact in the mass media context, it has not, to date,¹²⁴ modified the rule that treats convertible interests as nonattributable until conversion is effected.¹²⁵ Webcel does not demonstrate how anticompetitive activities have occurred under the identical provisions in the CMRS spectrum cap and the other ownership eligibility restrictions. While we acknowledge that these interests might, in certain contexts, raise competition concerns, there is no basis to conclude that, in this instance, the relevant incumbents would act differently so as to require a different treatment for warrants and other convertibles in attributing interests under the LMDS eligibility rules.

79. Although we conclude that Webcel has failed to provide a sufficient basis for any revision to the LMDS convertible interest rule, we intend to make use of the safeguards and requirements in our current rules in order to ensure that the anticompetitive conduct feared by Webcel does not materialize and that the integrity of the eligibility restrictions is maintained. We also emphasize that parties may raise these issues in the context of petitions to deny particular license applications. In the recently adopted *Part 1 Third Report and Order*, the Commission adopted new ownership disclosure requirements for short-form and long-form applications.¹²⁶

¹²³ See paras. 11-39, *supra*.

¹²⁴ The Commission has sought comment on whether certain types of business interrelationships, such as combinations of debtholding and business relationships, ought to be included in the attribution rules of ownership restrictions in the context of broadcast attribution rules. *Attribution Notice*, 10 FCC Rcd at 3651-52 (paras. 96-99). The Commission subsequently sought further comment on a specific proposal to attribute debt interests or other nonattributable equity interests above a specified benchmark that are held by a program supplier or same market media entity. *Attribution Further Notice*, 11 FCC Rcd at 19899-19908 (paras. 8-25).

¹²⁵ 47 C.F.R. § 73.3555, note (f).

¹²⁶ *Part 1 Third Report and Order*, at paras. 71-78, adopting 47 C.F.R. § 1.2112(a).

The new Section 1.2112(a) requires that each application for a license or authorization must disclose fully the real party or parties in interest and must include the following information in an exhibit:

- (1) A list of any Commission-regulated business 10 percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, attributable stockholder, or key management personnel of the applicant. This list must include a description of each such business's principal business and a description of each such business's relationship to the applicant.
- (2) A list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest.
- (3) A list of any party holding a 10 percent or greater interest in any entity holding or applying for any Commission-regulated business in which a 10 percent or more interest is held by another party which holds a 10 percent or more interest in the applicant.
- (4) A list of the names, addresses, and citizenship of any party holding 10 percent or more of each class of stock, warrants, options, or debt securities together with the amount and percentage held.
- (5) A list of the names, addresses, and citizenship of all controlling interests of the applicants.
- (6) In the case of a general partnership, the name, address, and citizenship of each partner, and the share or interest participation in the partnership.
- (7) In the case of a limited partnership, the name, address, and citizenship of each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses).
- (8) In the case of a limited liability corporation, the name, address, and citizenship of each of its members.
- (9) A list of all parties holding indirect ownership interests in the applicant, as determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, that equals 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or

represents actual control, it shall be treated and reported as if it were a 100 percent interest.

Although this rule was not in effect before the filing of LMDS short-form license applications, the rule will be in effect by the time the long-form applications must be filed and all auction winners will be required to fully and completely comply with these required disclosures.

80. In addition, each applicant for an LMDS license claiming status as a small business is required to supply the Commission with a variety of ownership information pursuant to Section 1.2112(b) of the Commission's Rules.¹²⁷ This information includes:

- (1) Gross revenues for each of the following: the applicant and its affiliates; the applicant's attributable investors; affiliates of the applicant's attributable investors; and, if the applicant is a consortium of small businesses, the members of the consortium.
- (2) A list and summary of agreements or instruments that support the applicant's eligibility as a small business, including the establishment of *de facto* or *de jure* control.¹²⁸
- (3) A list and summary of any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, rights to hire and fire employees, and rights to appoint members to boards of directors or management committees.

81. The information described in the preceding two paragraphs will be publicly available for each applicant and provides an effective means to determine whether particular business arrangements would potentially violate the LMDS eligibility restrictions. We believe this information will ensure that the letter and spirit of the eligibility restrictions are satisfied.

82. We also emphasize that we are cognizant of the competitive concerns that have caused Webcel to seek a further examination of the soundness of the convertible interest rule promulgated in Section 101.1003(e)(5) of the Commission's Rules.¹²⁹ We conclude, however, that our treatment of convertible interests in our ownership attribution rules would benefit from a

¹²⁷ 47 C.F.R. § 2112(b), as added by the *Part 1 Third Report and Order*. See also Public Notice, Wireless Telecommunications Bureau Responds to Questions About the Local Multipoint Distribution Service Auction, DA 98-37, released Jan. 9, 1998, at 2.

¹²⁸ These agreements or instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written. See 47 C.F.R. § 2112(b)(2).

¹²⁹ 47 C.F.R. § 101.1003(e)(5).

more comprehensive examination. The examination should include an evaluation of the criteria for implementing such rules in the context of competitive and other relevant factors in different communications markets. For this reason, we intend to undertake such an examination as part of a more comprehensive proceeding that will address the Commission's various ownership restrictions and attribution standards.

83. Finally, Webcel requests clarification regarding why "warrants" are not identified in the LMDS auction rule, inasmuch as they are specifically included in the same auction rule for the PCS C and F block auctions.¹³⁰ Webcel asks whether the omission of warrants from the LMDS auction provision is an oversight or whether warrants will not be attributable in determining an affiliate in that rule. The omission is not oversight. We specifically adopted the LMDS auction rules based on our general auction rules contained in Part 1, Subpart Q, which also do not identify warrants in the definition of affiliated interest.¹³¹ We will treat warrants to the same extent they have been considered to be "stock options, convertible debentures, and agreements to merge" in the existing rule.¹³²

4. Treatment of Rural Telephone Companies

84. Alliance and RTG argue that the Commission erred when it failed to exclude rural telephone companies from the eligibility restriction imposed on the ownership of LMDS licenses by incumbent LECs and incumbent cable companies.¹³³ In the *Second Report and Order*, the Commission considered and rejected the arguments of commenters on behalf of rural telephone interests, including Alliance and RTG, that rural telephone companies should be exempt from any restriction on LEC ownership of LMDS licenses.¹³⁴ Alliance and RTG argue that the Commission misconstrued or ignored several things, including the obligations to rural LECs under Section 309(j) of the Communications Act, the impact of the restriction and the definition of significant overlap, the limited usefulness of partitioning and other alternatives to spectrum access, and Congressional directives in the 1996 Act.

a. Section 309(j) Requirements

¹³⁰ Webcel Petition at 22 n.48, citing 47 C.F.R. § 24.709(b)(7).

¹³¹ *Second Report and Order*, 12 FCC Rcd at 12676 (para. 311); 47 C.F.R. Part 1, Subpart Q.

¹³² 47 C.F.R. § 1.2110(a)(4).

¹³³ Alliance Petition; RTG Petition at 2-11.

¹³⁴ *Second Report and Order*, 12 FCC Rcd at 12625-26 (paras. 179-181).

85. Alliance and RTG argue that Section 309(j) imposes specific obligations on the Commission to provide opportunities for rural LECs to participate in the provision of spectrum-based services such as LMDS and ensure rapid deployment of these new services to rural Americans.¹³⁵ They argue that Section 309(j)(3) requires the Commission to design competitive bidding systems to further these specific goals, and that Section 309(j)(4) requires the Commission to prescribe regulations ensuring economic opportunity for rural telephone companies and the prompt delivery of service to rural areas.¹³⁶ Petitioners argue that, despite these directives, the Commission adopted no special provisions to ensure participation by rural telephone companies, but rather misconstrued the statute by creating hurdles to their ability to provide LMDS to rural areas. RTG argues that, when the Commission did assess the propriety of eligibility restrictions under Section 309(j), it failed to take into account the status of rural LECs as designated entities and conduct a market analysis of rural areas to ensure that the analysis of competition is accurate.¹³⁷

86. We find that the *Second Report and Order* fully considered the statutory requirements of Sections 309(j)(3) and 309(j)(4) in determining whether to restrict the opportunity of any class of service providers to obtain and use spectrum to provide LMDS, including rural LECs. The Commission noted at the outset that it is well established that Section 309(j)(3) specifically authorizes it to specify eligibility and other characteristics of a license, based on a series of objectives.¹³⁸ In considering the basis for an eligibility restriction on incumbent LECs and incumbent cable companies, the Commission recognized the objectives in Section 309(j)(3)(B) that we promote economic opportunity and competition by avoiding excessive concentration of licenses and by distributing licenses among a wide variety of applicants. The Commission did not ignore the identification of rural telephone companies as applicants to be included in achieving those competitive goals, as petitioners claim. Indeed, rural companies have been granted special advantages under the bidding rules as small businesses in their acquiring a license.

87. Nor did the Commission misconstrue or otherwise disregard the requirement in Section 309(j)(3)(A) that objectives of the statute include the development and rapid deployment of new services for the benefit of the public that includes those residing in rural areas, as petitioners claim. The *Second Report and Order* reflects the serious consideration of these service objectives in several aspects of the rules. The entire regulatory framework for LMDS is structured to promote competition and enhance service for every consumer by easing entry

¹³⁵ Alliance Petition at 3-6; RTG Petition at 3-5.

¹³⁶ 47 U.S.C. §§ 309(j)(3)(A), 309(j)(4)(C)-(D).

¹³⁷ RTG Petition at 4-5.

¹³⁸ *Second Report and Order*, 12 FCC Rcd at 12614-15 (paras. 157-158); 47 U.S.C. § 309(j)(3)(A)-(D).

requirements, as well as the operating and technical requirements, on licensees to ensure their flexibility in meeting any service needs. Nothing suggests that the framework will not achieve these goals in meeting rural service needs.

88. Moreover, the Commission proposed and adopted the eligibility restriction to make sure that monopolists that would be subject to competition from LMDS in their own regions do not bar the entry of new LMDS services seeking to initiate lower cost alternatives or service in underserved areas, which will benefit rural, as well as urban, areas. The Commission has an obligation under Section 309(j)(3) to consider safeguards to protect the public interest in the use of the spectrum, and it met this obligation by promoting competition in all areas, including rural areas. Section 309(j)(4) directs that our regulations ensure prompt delivery of service to rural areas and provide opportunities for rural telephone companies, among the other designated entities. We believe the LMDS regulations will help rural areas and rural telephone companies by taking into account the benefits of competition and establishing safeguards to ensure the success of LMDS.

89. The Commission weighed and balanced all of the several competing statutory policy objectives in considering the eligibility restriction and whether incumbent LECs and incumbent cable companies would impede substantially the pro-competitive benefits of licensing LMDS.¹³⁹ Contrary to petitioners' assertions, none of the objectives guarantees licenses for rural LECs. Instead, the Commission concluded that the primary goal of the statutory scheme is to encourage efficient competition in the telephony and video distribution markets while providing opportunities for smaller operators. The Commission undertook an extensive analysis of the market and competition in the local telephony and cable markets and, based on the record evidence of comments and economic testimony, as well as our own predictive judgment, concluded that all incumbent LECs and incumbent cable companies would have incentives to attempt to foreclose competitive entry in their respective markets.¹⁴⁰ The Commission specifically found that this could result in inefficient use of the spectrum and a failure to promote competition, which are two factors we are required to assess under Sections 309(j)(3)(B) and 309(j)(3)(D).

90. The Commission determined that the incentive for in-region LECs and cable companies to attempt to prevent competition is particularly strong because of the unusually large amount of spectrum to be licensed for LMDS. It also determined that the eligibility restriction would foster competition by reserving the license for entrants without market power in either the local telephony or cable markets.¹⁴¹ The Commission balanced all of the various policy objectives

¹³⁹ *Second Report and Order*, 12 FCC Rcd at 12614-16 (paras. 157-159).

¹⁴⁰ *Id.* at 12621-23 (paras. 170-175).

¹⁴¹ *Id.* at 12622 (para. 173).

promoted by Section 309(j) before determining that allowing incumbent monopolists in the telephone and cable markets to participate without restriction in the new LMDS market would inhibit the development and deployment of the LMDS spectrum.

91. In addition to taking all of the factors in Section 309(j) into account in considering the eligibility restriction, the Commission similarly balanced those factors in establishing LMDS bidding rules.¹⁴² It concluded that the auction rules would foster economic opportunity and the distribution of licenses among a wide variety of applicants, including small businesses, consistent with the statutory requirements. Contrary to RTG's assertions, the Commission considered the treatment of those designated entities, including rural LECs, identified in the statute in pursuing our objectives of promoting competition and economic opportunity. Special provisions were adopted for small businesses to participate in the auction that would further the objectives of Section 309(j).¹⁴³ The Commission specifically found no basis for special provisions, apart from the small business provisions, to ensure the participation of rural LECs, whose interests were found to be adequately addressed.¹⁴⁴

92. Furthermore, the Commission specifically considered whether to apply the eligibility restriction to rural LECs. Contrary to petitioners' assertions, the Commission specifically balanced the factors identified in Section 309(j) concerning rural LECs with the remaining objectives before rejecting petitioners' arguments that they should not be excluded.¹⁴⁵ The Commission did not misconstrue or adopt new standards under Section 309(j) when it stated that rural LECs had not made the case that they are the only entities to provide LMDS in their service territories. Instead, the Commission was addressing the arguments in their comments that, unless rural LECs are exempt from the restriction and can participate freely in acquiring LMDS licenses, the rural areas they serve would not receive LMDS services. While the Commission agreed that the provision of LMDS service to rural consumers should not be impaired, it concluded that the eligibility restriction imposed generally on all LECs would not hinder the introduction of LMDS in rural areas and instead is consistent with our goal to promote competitive entry.

93. There was no basis to find that rural LECs would not have the same opportunities and incentives for anticompetitive use of LMDS licenses as other incumbent LECs and, accordingly, the Commission determined to treat them no differently from other monopoly providers of telephone service in order to achieve the goals of economic opportunity and competition set forth

¹⁴² *Id.* at 12672-74 (paras. 302-305).

¹⁴³ *Id.* at 12686-88 (paras. 340-343).

¹⁴⁴ *Id.* at 12695-96 (paras. 362-363).

¹⁴⁵ *Id.* at 12625 (para. 179).

in Section 309(j). Contrary to petitioners' claims, the Commission was not requiring rural LECs to show that they are the only entities that can provide LMDS to rural areas, but only rejecting their suggestion that no competitors were interested in rural service. It is precisely to promote the entry of other competitors that the Commission adopted the restriction and a licensing framework for LMDS that promotes competition.

94. Alliance argues that we should reconsider what it claims is the Commission's disregard in previous decisions of the Section 309(j) mandate on behalf of rural telephone companies. Alliance also contends that the Commission should stop relying on precedent with respect to rural telephone company eligibility, including, most recently, the *PCS Partitioning Order*.¹⁴⁶ Alliance is correct that the *Second Report and Order* is entirely consistent with the determination in similar wireless proceedings to deny similar requests for special treatment by rural telephone companies that were based on claims under Section 309(j).¹⁴⁷ Alliance does not demonstrate why the determinations for LMDS should be different. As Alliance points out, the *PCS Partitioning Order* considered the provisions of Section 309(j)(3) and found that they direct the Commission to further the rapid deployment of new technologies for the benefit of the public, including those residing in rural areas, to promote economic opportunity and competition and to ensure the efficient use of spectrum. The Commission found that, although encouraging the participation of rural LECs in the subject service is an important element in meeting these goals, Congress did not dictate that licensing rural LECs to provide spectrum-based services should be the sole method of ensuring the rapid deployment of service in rural areas.¹⁴⁸

¹⁴⁶ Alliance Petition at 3-4, citing Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-148, 11 FCC Rcd 21831 (1997) (*PCS Partitioning Order*).

¹⁴⁷ The Commission recently exempted rural LECs and companies serving fewer than 2 percent of the Nation's subscriber lines from the requirement that incumbent LECs may only provide CMRS through a separate corporation that meets structural separation requirements. That exemption, however, was based on the exemption accorded these entities in Section 251(f) of the Communications Act, as added by the 1996 Act, from similar obligations imposed on other LECs. The Commission found that, in this instance, the exemption of rural LECs also promotes the goals of Section 309(j)(3) by forgoing a requirement that imposed operational burdens resulting in additional costs and reporting requirements that Congress sought to reduce on rural LECs in Section 251(f). Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services and Implementation of Section 601(d) of the Telecommunications Act of 1996, WT Docket No. 96-162, Report and Order, 12 FCC Rcd 15608, 15709-10 (paras. 69-75) (1997), citing 47 U.S.C. §§ 251(b), 251(c).

¹⁴⁸ *PCS Partitioning Order*, 11 FCC Rcd at 21843-44 (para. 15). The Commission recently stated that the CMRS spectrum cap was one of the most effective mechanisms the Commission could employ to achieve the goals of Section 309(j) to avoid excessive concentration of licenses and distribute them among a wide variety of applicants, even though rural LECs are not exempt from its requirements. *PCS Remand Order*, 11 FCC Rcd at 7873-74 (para. 102), 7884 (para. 125).

b. Impact of the Restriction and the Criteria for Significant Overlap

95. Alliance and RTG request reconsideration of the application of the eligibility restriction to rural LECs, contending the Commission failed to consider its impact on them.¹⁴⁹ They argue that the Commission erred in concluding that, because rural LECs are generally small, they are unlikely to have the degree of overlap with BTAs necessary to trigger the eligibility restriction.¹⁵⁰ They assert that the size of the LEC is irrelevant in triggering the overlap determination and that it is more likely a small rural LEC would be disqualified under the definition. Additionally, RTG argues that the Commission erred in finding that partitioning is a method by which rural LECs can acquire LMDS spectrum.¹⁵¹ RTG contends that the overlap restriction renders partitioning useless for rural LECs.

96. At the outset, we disagree that consideration of the impact of the definition of a significant overlap and the availability of partitioning of licenses, which were discussed elsewhere in the *Second Report and Order*, were used as the basis for including rural LECs within the eligibility restriction. The Commission adopted the eligibility restriction to promote competition in the new LMDS market based on its conclusion that incumbent LECs and incumbent cable companies might well attempt to foreclose competition in their respective markets. The anticompetitive activities that were described could involve any incumbent LEC. As discussed above, there is no basis either in the statute, Commission policy, or the record to exclude rural LECs from the eligibility restriction. The purpose in discussing the extent of overlapping interests, the availability of partitioning, and other issues was to address the impact of the restriction on rural LECs and alternative ways of acquiring LMDS spectrum in response to concerns raised in the comments.

97. We also disagree with the arguments of Alliance and RTG that the Commission miscalculated the importance of the definition of a significant geographic overlap to rural LECs and that rural LECs will be subject to greater disqualification under its terms than other incumbent LECs. The eligibility restriction prohibits an incumbent LEC or incumbent cable company from having an attributable interest in an LMDS license whose geographic service area significantly

¹⁴⁹ Alliance Petition at 6-7; RTG Petition at 5-7.

¹⁵⁰ *Second Report and Order*, 12 FCC Rcd at 12625-26 (para. 180).

¹⁵¹ *Id.* at 12625-26 (para. 180), 12695 (para. 362).

overlaps such incumbent's authorized or franchised service area. A significant overlap is defined in Section 101.1003(d) as follows:¹⁵²

(d) Significant overlap with authorized or franchised service area. For purposes of paragraph (a) of this section, a significant overlap of an incumbent LEC's or incumbent cable company's authorized or franchised service area occurs when at least 10 percent of the population of the LMDS licensed service area, as determined by the 1990 census figures for the counties contained in such service area, is within the authorized or franchised service area.

98. Alliance and RTG are correct that determination of a significant overlap of the geographic areas is not based on the size of the respective areas or the size of the companies, but rather on the size of the population in the LMDS license area that is within the service area of the incumbent LEC or incumbent cable company. In adopting the 10 percent threshold, the Commission concluded that an overlap of less than 10 percent of the population is sufficiently small that the potential for exercise of undue market power by the incumbent LEC or incumbent cable company is slight.¹⁵³ As RTG states, even a small rural LEC may not hold an LMDS license if 10 percent or more of the population of the LMDS license area is within the rural LEC's telephone service area.

99. The Commission did not apply a different definition of significant overlap or imply it was somehow disregarding the definition, to which it specifically referred, when it characterized rural LECs as small in considering the impact of the overlap definition on their operations. In their comments, the rural LECs characterized their operations as smaller LECs that serve rural consumers rather than urban consumers. The Commission specifically addressed their argument that they should be exempt from the eligibility restriction because consumers in rural areas would not be served unless rural LECs are able to participate in the new market. Thus, it was not unreasonable to conclude that, because rural LECs are generally small, they are less likely than other LECs to have the degree of overlap with LMDS licensed areas that triggers the eligibility restriction. This is logical, since the population center of an LMDS service area is more likely to be within the territory of an urban LEC than a rural LEC and it is less likely that 10 percent of the

¹⁵² *Id.* at 12628-29 (paras. 186-188), adopting 47 C.F.R. § 101.1003(d), as modified in the *First Erratum*, released Apr. 7, 1997.

¹⁵³ *Id.* at 12629 (para. 188).

population in the LMDS service area would be within the rural LEC territory than the urban LEC territory.¹⁵⁴

100. Nevertheless, the Commission was merely observing that the impact of the eligibility restriction may not be as harsh as the rural LECs anticipated for a variety reasons, one of which is the likelihood of a population overlap given their own claims of their rural locations and sizes. However, even if the supposition were found to be incorrect and rural LECs were affected to the same extent as other LECs, we still would have subjected rural LECs to the eligibility restriction. The Commission found no reason why incumbent rural LECs would not have the same opportunities and incentives for anticompetitive use of LMDS licenses as other incumbent LECs. The Commission concluded that they should be treated no differently in order to ensure the success of the eligibility restriction in achieving the goal of competition in the new LMDS marketplace.¹⁵⁵

101. In addition, if rural LECs are prevented by the overlap definition from holding a specific LMDS license, as petitioners claim, they are not barred from providing LMDS altogether and have available meaningful opportunities for service. First, they can acquire LMDS licenses outside their local exchange service areas. Second, as discussed in the *Second Report and Order* and below, they can acquire spectrum through partitioning of the 1,150 megahertz license. Third, the eligibility restriction does not apply to the 150 megahertz license.¹⁵⁶ In addition, the divestiture provision permits any LEC to obtain an LMDS license and then divest any overlapping area or attributable interest to the extent necessary to come into compliance, thereby enabling the LEC to provide LMDS in the remaining in-region areas. Thus, a rural incumbent LEC may hold an LMDS license in its own service areas as long as it does not provide telephone service to more than 10 percent of the population of the LMDS licensed area or maintain an attributable interest in the LMDS licensee.

102. Incumbent rural LECs also may find it attractive to expand into areas adjacent to their own service areas in order to provide LMDS. Unlike the LEC's existing wireline operations, which involve an extensive wired infrastructure in its service area, LMDS is a wireless service that can be established without incurring the expense of building a new wired infrastructure. The

¹⁵⁴ Typically, a BTA includes a population center or centers, such as a large city or town, and the surrounding rural area. BTA boundaries are based on county lines because most statistical information relevant to marketing is published in terms of counties. *Second Report and Order*, 12 FCC Rcd at 12605 (para. 136 n.197). Thus, the populations of BTAs are not evenly distributed, so that it is not unlikely that rural LECs serve smaller populations in the rural areas.

¹⁵⁵ See paras. 86-91, *supra*.

¹⁵⁶ *Second Report and Order*, 12 FCC Rcd at 12625-26 (para. 180).

absence of large start-up costs for LMDS should open opportunities for expansion into new regions by rural LECs, even those that are relatively small companies with limited capital.

103. We disagree with RTG's assertion that geographic partitioning is not a useful method for rural LECs to acquire LMDS spectrum and is rendered useless by the overlap definition. RTG asserts that it repeatedly has argued in wireless proceedings adopting new service rules, such as the *Competitive Bidding Fifth Report and Order*¹⁵⁷ and the *PCS Partitioning Order*, that partitioning does not satisfy the mandate of Section 309(j). Yet we specifically considered the many benefits to rural areas and rural LECs that would accrue from partitioning.¹⁵⁸ In adopting partitioning and disaggregation for LMDS licenses to encourage the efficient and effective use of LMDS spectrum, the Commission noted that geographic partitioning should be a method for entities with local concerns or limited capital to serve a portion of a BTA and for rural areas to be served sooner than otherwise would be possible. The nature of the LMDS cell structure makes partitioning useful in delivering services to isolated areas, such as rural towns that do not lie within major market areas. In adopting the LMDS auction rules and rejecting the claims of rural LECs for special auction provisions, the Commission found that partitioning of an LMDS license provides flexibility in the use of the spectrum that should assist in satisfying the spectrum needs of rural LECs at low cost.¹⁵⁹ As RTG acknowledges, the Commission consistently has found that allowing licenses in other services to be geographically partitioned from larger service areas provides rural LECs with enhanced opportunity to participate in the provision of new services and is thus in the public interest.¹⁶⁰

104. In arguing that partitioning is nevertheless useless for rural LECs, RTG contends that the telephone service area of a rural LEC will almost always exceed 10 percent of any partitioned LMDS service area. RTG argues that this is because the rural LEC lacks the wherewithal to compete in markets geographically distant from its base of operations and that, therefore, it realistically is limited to serving that portion of partitioned markets that encompass its wireline service areas and adjacent markets.

105. RTG is correct that the eligibility restriction applies to LMDS licensed areas that are partitioned, as well as to the entire BTA. Although in the *Fifth NPRM* issued in conjunction with the *Second Report and Order* the Commission proposed modifications to the LMDS service rules

¹⁵⁷ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5597-99 (paras. 148-153) (1994) (*Competitive Bidding Fifth Report and Order*).

¹⁵⁸ *Second Report and Order*, 12 FCC Rcd at 12607-08 (paras. 141-145).

¹⁵⁹ *Id.* at 12695 (para. 362).

¹⁶⁰ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5598 (paras. 150-151).

to implement its decision to permit partitioning and disaggregation of LMDS licenses, the Commission proposed no modifications concerning the application of the eligibility restriction to partitioned licenses.¹⁶¹ As we have stated, the means of divestiture in the rule include partitioning of the geographic area of the LMDS licensed area that exceeds the overlap restriction.¹⁶² This is consistent with the determination to allow partitioning of PCS licenses and to apply the CMRS spectrum cap to partitioned licensed areas and disaggregated spectrum.¹⁶³ Compliance with the terms of the cap are based on the post-partitioning populations of each licensee's partitioned market; neither the partitioner nor the partitionee can count the population in the other party's portion of the market in determining its own compliance with the spectrum cap.

106. RTG, however, is not correct that the application of this rule will always result in the rural LEC exceeding 10 percent and never being able to acquire a partitioned licensed area. RTG's argument rests on the rural LEC deciding, as a marketing matter, to seek only those partitioned LMDS licenses covering their own wireline service areas. As the Commission has stated, the same competitive concerns that persuaded it to impose the eligibility restriction on incumbent LECs to prevent anticompetitive activities also persuaded it to apply the restriction to incumbent rural LECs. In adopting the definition of a significant overlap in the *Second Report and Order*, the Commission relied on the definition adopted for the CMRS spectrum cap and found that it applied equally to the goals the Commission sought to achieve in adopting the LMDS eligibility restriction.¹⁶⁴ Unless the overlap restriction applies equally to rural incumbent LECs, the objectives to promote the effective entry of new competitors in the LMDS marketplace and enhance competition with monopolist incumbent LECs and incumbent cable companies may not be achieved. RTG does not refute the proposition that incumbent rural LECs would have the same incentive and ability as non-rural incumbents to acquire an LMDS license to foreclose entry by competitive LMDS providers in their own service areas. Thus, the fact that rural LECs may prefer to provide LMDS in their own service areas does not mean the public interest in competitive services would be served by permitting them to do so.

107. As a final matter, RTG argues that the availability of the 150 megahertz LMDS license, which is not subject to the eligibility restriction, is not a reasonable alternative and does not justify denying rural LECs access to the 1,150 megahertz license. Contrary to RTG's assertion, the Commission did not rely on the availability of the 150 megahertz license to justify including rural LECs in the eligibility restriction. Rather, it identified the availability of the 150

¹⁶¹ *Second Report and Order*, 12 FCC Rcd at 12716-17 (paras. 423-424).

¹⁶² 47 C.F.R. § 101.1003(f)(1)(ii).

¹⁶³ *PCS Partitioning Order*, 11 FCC Rcd at 21868 (para. 72).

¹⁶⁴ *Second Report and Order*, 12 FCC Rcd at 12629-30 (para. 188).

megahertz license as one of several alternative means by which rural LECs can provide LMDS.¹⁶⁵ As RTG acknowledges, the smaller license provides spectrum for a niche service and may be an alternative for entry into the LMDS marketplace.

c. Congressional Directives in Telecommunications Act of 1996

108. Alliance and RTG argue that the Commission failed to balance the competition goals of the Telecommunications Act of 1996 with its other important national goals reflected in the Communications Act of 1934, such as universal service.¹⁶⁶ Alliance asserts that the universal service requirements of Sections 214(e)(2) and 254, as well as the equal access requirements of Section 251(f), in the statute recognize the vital participation of rural LECs.¹⁶⁷ RTG argues that, as reflected in the Commission's recent *Universal Service Order*, the definition of what services must be included in universal service is continually changing.¹⁶⁸ RTG argues that many of the service offerings contemplated for LMDS may be included in the definition of universal service. Alliance and RTG argue that the statute provides that rural LECs are the sole telecommunications carriers eligible within their service areas to receive support for providing universal service. Therefore, they assert, adopting rules that deny rural LECs the ability to provide LMDS would hinder service to high cost rural areas and is thus contrary to the universal service goals.

109. In the *Second Report and Order*, the Commission considered several arguments from LECs and cable operators that any restrictions on LECs or cable companies would be inconsistent with the 1996 Act.¹⁶⁹ The Commission found that these arguments were rebutted by several provisions in the statute. Those provisions include Section 10 of the Communications Act, which recognizes the need to reduce market power by encouraging competitive entry into communications markets. The Commission also noted that specific sections of the Communications Act, such as Section 613(c), provide authority to prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications, such as LMDS, that operate in the same community. Alliance and RTG do not demonstrate that the Commission erred in considering such sections.

¹⁶⁵ *Id.* at 12625-26 (para. 180).

¹⁶⁶ Alliance Petition at 6-9; RTG Petition at 8, 11.

¹⁶⁷ Alliance Petition at 8, citing 47 U.S.C. §§ 214(e)(2), 251(f), 254(c)(1).

¹⁶⁸ RTG Petition at 11, citing Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (*Universal Service Order*).

¹⁶⁹ *Second Report and Order*, 12 FCC Rcd at 12624-25 (para. 178), citing 47 U.S.C. §§ 160, 533(c).

110. Although the Commission did not specifically address the universal service provisions in Section 254, the decision to adopt the eligibility restriction and apply it to rural LECs is consistent with our universal service goals. Section 254 of the Communications Act, added by the 1996 Act, states that, in seeking to promote the Congressional goal of universal service, the Commission should ensure that consumers from all parts of the Nation, including rural areas, have access to telecommunications and information services that are comparable to service in other more urban areas and at rates that are comparable to the rates available in urban areas. As we have stated, granting rural LECs an exemption from the eligibility restriction would be contrary to our goals in adopting the restriction of preventing incumbent LECs and incumbent cable companies with market power from foreclosing the entry of new competitors in their regions. The decision not to exempt rural LECs from the restriction will, we believe, result in increased, competitive LMDS service to rural areas at reasonable rates. The Commission always has had universal service as its mission, and preserving the LMDS spectrum for new entrants without market power in their regions is consistent with that mission.

5. Other Matters

a. Study Regarding Termination of Eligibility Restrictions

111. Before leaving our discussion of issues raised in this reconsideration proceeding regarding the in-region eligibility restriction, we clarify two aspects of the *Second Report and Order* that relate to the eligibility restrictions and the underlying competitive concerns that prompted those restrictions.

112. First, in adopting the provision that terminates the eligibility restrictions on June 30, 2000,¹⁷⁰ the Commission stated that ``the restrictions may be extended if, upon review prior to the end of this period, we determine that maintaining the restriction would further promote competition in the local exchange or MVPD [multichannel video programming distribution] market, or both."¹⁷¹ The Commission also noted in the *Second Report and Order* that it would undertake its review of the eligibility restrictions in 2000, in conjunction with its obligation under Section 11 of the Communications Act "to determine whether competition has increased sufficiently to make these regulations unnecessary."¹⁷² Upon further consideration, however, we

¹⁷⁰ The sunset date is calculated pursuant to Section 101.1003(a)(1) of the Commission's Rules, 47 C.F.R. § 101.1003(a)(1), which provides, *inter alia*, that the eligibility restriction shall terminate three years after the effective date of Section 101.1003.

¹⁷¹ *Id.* at 12616 (para. 160).

¹⁷² *Id.* at 12632-33 (para. 198), citing 47 U.S.C. § 161.

have concluded that it will be necessary to begin this review prior to 2000 and to provide a framework for the use of the Commission's resources in carrying out the review.

113. In light of this, we instruct the Chief Economist, the Chief of the Cable Services Bureau, the Chief of the Common Carrier Bureau, the Chief of the Mass Media Bureau, the Chief of the International Bureau, the General Counsel, and the Chief of the Wireless Telecommunications Bureau to prepare jointly a study examining whether "there [has been] sufficient entry and increases in competition in the markets at issue . . . for us to be able to sunset the restrictions on incumbent LECs and cable companies . . ." ¹⁷³ The results of this study, together with a joint recommendation, shall be submitted to the Commission not later than June 30, 1999. Based upon this report and recommendation, as well as other reports (*e.g.*, annual video competition report to Congress) ¹⁷⁴ and Commission actions (*e.g.*, Section 271 determinations), ¹⁷⁵ we will resolve whether to initiate a rulemaking proceeding to extend the date for the termination of the eligibility restrictions.

b. Review of Assignment and Transfer Applications

114. Second, we note that, even after termination of the eligibility restrictions, the Commission's rules relating to the assignment and transfer of LMDS licenses will provide us with an effective tool to ensure that proposed license acquisitions by incumbent LECs or cable operators will not, in particular cases, be inconsistent with the pro-competitive policies that guide our licensing of LMDS and that led to our establishment of the eligibility restrictions. Our rules regarding the assignment or a transfer of an LMDS license require prior Commission approval. ¹⁷⁶ Therefore, in connection with our review of any such proposed assignment or transfer, we intend to examine whether such an assignment or transfer would promote or impede our pro-competitive policies. Specifically, some of the factors we intend to consider in determining whether a

¹⁷³ *Second Report and Order*, 12 FCC Rcd at 12633 (para. 198).

¹⁷⁴ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, released Jan. 13, 1998.

¹⁷⁵ 47 U.S.C. § 271(c)(2)(B).

¹⁷⁶ The assignment or transfer of an LMDS license is subject to Section 101.53 of the Commission's Rules, 47 C.F.R. § 101.53, which implements Section 310(d) of the Communications Act, 47 U.S.C. § 310(d). Section 101.53(a) provides that an assignment or transfer may not be effectuated "except upon application to the Commission and upon [a] finding by the Commission that the public interest, convenience and necessity will be served thereby." 47 C.F.R. § 101.53(c).

particular market actually is sufficiently competitive, at the time of the application for an assignment or transfer, are:¹⁷⁷

- (1) the number and capacity of competing providers of local telephone or multichannel video services, especially those with independent means of distribution, that are available to a significant number of consumers in the geographic region at issue;
- (2) the substitutability of the services of those competing providers with the local telephone and multichannel video services offered by the incumbent LEC or cable firm;
- (3) evidence as to whether the LEC or cable company could or would lose a significant portion of its subscribers to its competitors if it unilaterally increased its prices or lowered the quality of its services;
- (4) the regulatory environment for competing providers in the relevant geographic region; and
- (5) whether the LEC or cable company seeking to acquire the LMDS license has in fact experienced a significant loss in market share due to the entry of new competitors or the expansion of existing competitors.

B. Service Rules

1. Frequency Coordination and Emission Masks

115. Alcatel seeks clarification how LMDS licensees can fulfill the obligation to conduct frequency coordination with neighboring LMDS systems under the area-wide licensing of LMDS.¹⁷⁸ The *Second Report and Order* adopted the requirement that LMDS licensees avoid interference problems by coordinating operations with other LMDS licensees in the geographic areas immediately adjacent to their BTA boundary under the existing coordination procedures in Section 101.103(g) of the Commission's Rules.¹⁷⁹ The requirement is triggered when an LMDS licensee would operate transmitting facilities located within 20 kilometers of the boundaries of its

¹⁷⁷ These factors are drawn from the *Second Report and Order*, where they were developed for purposes of determining whether to grant petitions for waiver of the eligibility requirements. See *Second Report and Order*, 12 FCC Rcd at 12633-34 (para. 199).

¹⁷⁸ Alcatel Letter at 2.

¹⁷⁹ 47 C.F.R. § 101.103(d); *Second Report and Order*, 12 FCC Rcd at 12663-64 (paras. 273-279), adopting 47 C.F.R. § 101.103(g).

BTA. The LMDS licensee is required to initiate the coordination process with respect to any neighboring BTA licensee that may be affected by such operations and complete the process before it may initiate such operations.¹⁸⁰

116. Alcatel notes that the licensing framework for LMDS adopted in the *Second Report and Order* permits the LMDS licensee to construct and operate individual stations anywhere within its BTA service area without filing an application for prior Commission authorization.¹⁸¹ Alcatel argues that it is unclear how frequency coordination can be conducted without the adjacent LMDS licensee obtaining a license for its individual facilities and providing the technical data that is available for licensed facilities. Alcatel contends that the LMDS licensee that is required to initiate the coordination requirement will not know the necessary information about any neighboring LMDS licensees to fulfill its obligation. Alcatel argues that this lack of critical data could be a significant problem because an LMDS signal is capable of being transmitted well over 20 kilometers. Moreover, Alcatel contends that license partitioning and disaggregation would result in smaller adjacent service areas that are more vulnerable to interfering signals.¹⁸² Alcatel argues that the Commission must establish some mechanism to provide the data needed for frequency coordination.¹⁸³

117. We find that the necessary information is available for the LMDS licensee to fulfill the frequency coordination requirement we imposed on LMDS licensees in new Section 101.103(g) of the Commission's Rules and, thus, no additional mechanism is needed to provide the information. The coordination requirement is limited to those situations in which an LMDS licensee operates transmitting facilities located within 20 kilometers of its BTA boundary. When that occurs, the licensee is obligated to complete the coordination procedures set out in Section 101.103(d)(2), as modified by any special provisions we adopted for LMDS licensees in Section

¹⁸⁰ In addition, the same rule also requires the LMDS licensee operating in the 31,000-31,075 MHz and 31,225-31,300 MHz bands to coordinate with non-LTTS co-channel incumbent licensees operating in these bands if its facilities would operate within 20 kilometers of such neighboring facilities. *Second Report and Order*, 12 FCC Rcd at 12664 (para. 280), adopting 47 C.F.R. §§ 101.103(b)(1)(i-iii), 101.103(g)(1). Also, LMDS licensees operating in the 29,100-29,250 MHz band have special coordination requirements with certain satellite licensees. 47 C.F.R. § 101.103(h). Alcatel's concerns, however, are not pertinent to these additional coordination requirements, inasmuch as they involve non-LMDS licensees that do not have area-wide licenses.

¹⁸¹ *Second Report and Order*, 12 FCC Rcd at 12643 (para. 222).

¹⁸² As for Alcatel's concern about the impact of interfering signals on the smaller service areas resulting from partitioning and disaggregation, our proposed service rules to implement such activities and to apply the frequency coordination requirements to disaggregated or partitioned licenses remain pending a final decision. *Id.* at 12716 (para. 423). Thus, Alcatel's concern will be addressed at that time.

¹⁸³ Alcatel Letter at 3.

101.103(g), with any neighboring LMDS licensees that may be affected in order to keep system interference to a minimum.¹⁸⁴ The coordination process consists of two separate elements, notification and response, in which the LMDS licensee and such neighbors exchange the necessary technical data to identify and resolve any interference problems.¹⁸⁵ The process may be completed orally, such as informally by telephone, as well as in writing or electronically.

118. Under the procedures, the LMDS licensee initiates the coordination process by notifying the neighboring LMDS licensees of the "relevant technical details" of its proposed facility changes that triggered the coordination requirement.¹⁸⁶ In order to determine which neighboring LMDS licensees should be notified, the identity of all licensees is in the Commission's database, and this information is readily available. Thus, the LMDS licensee is able to obtain the identity of any holders of LMDS licenses in the geographic areas adjacent to the BTA boundary that it believes could be affected by its facilities located within 20 kilometers of its common boundary. If an adjacent license was assigned and partitioned or disaggregated for use by another entity that operates facilities that may be affected, that would have been subject to public notice and would be in the Commission's database, as well. Although the location of each of the LMDS facilities in the adjacent licensed areas may not be known to the LMDS licensee, that is not information necessary to fulfilling the notification requirement of informing adjacent LMDS licensees of the technical extent of its own facilities within the 20-kilometer area of its boundary with them. As long as the LMDS licensee provides any potentially-affected LMDS license holders operating in the adjacent geographic areas with accurate technical data of its own facility, as required in the notification, the adjacent operators can determine which, if any, of their facilities may be affected and can respond appropriately.

119. The coordination process requires that, after notification, the responding licensee is to indicate promptly any potential interference and specify technical details, whereupon the licensees are required to make every reasonable effort to eliminate any problems and conflicts.¹⁸⁷ The *Second Report and Order* specified that the coordinating parties must supply the necessary information related to their channelization and frequency plan, receiver parameters (*e.g.*, noise figure, bandwidth, and thresholds), and system geometry.¹⁸⁸ Thus, contrary to Alcatel's assertion, the LMDS licensee will be informed by its neighboring LMDS licensees that respond to its

¹⁸⁴ *Second Report and Order*, 12 FCC Rcd at 12663-64 (paras. 278-279).

¹⁸⁵ 47 C.F.R. § 101.103(d)(2)(i).

¹⁸⁶ 47 C.F.R. § 101.103(d)(2)(ii).

¹⁸⁷ 47 C.F.R. §§ 101.103(d)(2)(iv), 101.103(g)(2).

¹⁸⁸ *Second Report and Order*, 12 FCC Rcd at 12663-64 (para. 279).

notification of the extent of their operations to be affected, including the location of such facilities or other critical data, to enable the licensee to complete the coordination process. Moreover, if no response to its notification is received within 30 days, the licensee is deemed to have made reasonable efforts to coordinate and may commence operation.¹⁸⁹

120. Additionally, the *Second Report and Order* adopted a provision to ensure that the technical data submitted with an initial application for an LMDS license is updated as necessary to accurately reflect a licensee's facilities. As Alcatel notes, LMDS licensees are permitted to construct stations and place them in operation anywhere within their authorized geographic areas at any time.¹⁹⁰ The Commission recognized, however, that it is important to have on file updated information on the technical aspects of any such operations for purposes of enforcement.¹⁹¹

121. Accordingly, the Commission required that LMDS licensees notify the Commission within 30 days after constructing or moving facilities and include a statement of the technical parameters of the new or changed station.¹⁹² To accomplish this, the Commission modified the existing application filing procedures that provide for notification within 30 days of permissible changes that do not require prior Commission approval and included LMDS licensees that add, remove, or relocate facilities within their licensed area.¹⁹³ In all other respects, the LMDS applicant seeking an initial authorization of a geographic area and the LMDS licensee seeking a major or minor modification of an existing facility would file an application under the appropriate application filing procedures and provide the necessary technical information.¹⁹⁴ Thus, updated information on the location and technical parameters of the facilities of any LMDS licensees, including adjacent licensees, also is available from such applications, whether for prior approval or for notification of permissible modifications.

¹⁸⁹ 47 C.F.R. § 101.103(g)(2).

¹⁹⁰ *Second Report and Order*, 12 FCC Rcd at 12643-44 (para. 222), adopting amendment to 47 C.F.R. § 101.15(a) and new 47 C.F.R. § 101.1009(a).

¹⁹¹ *Id.* at 12647-48 (para. 235).

¹⁹² *Id.*, adopting 47 C.F.R. § 101.1009(b). The Commission adopted similar requirements when it implemented new service rules for area-wide licensing in other wireless services. *See, e.g.*, Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552 and RM-8506, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 10980 (para. 80), adopting 47 C.F.R. § 90.763(b)(4) (1997) (*220 MHz Third Report and Order*), *recon. pending*.

¹⁹³ 47 C.F.R. § 101.61(c)(10).

¹⁹⁴ 47 C.F.R. §§ 101.15(a), 101.57(a)(1), 101.59(a), 101.59(b)(1).

122. Alcatel also requests clarification whether, in adopting provisions in the *Second Report and Order* to provide adequate protection from potential radio frequency (RF) radiation emissions to subscribers and the public, the Commission applied the existing emission mask requirements in Part 101 of the Commission's Rules to LMDS.¹⁹⁵ Alcatel requests that the Commission reaffirm that the general emission requirements in Part 101 apply to LMDS. The considerations in adopting RF rules concerned radiation exposure and standards for how much power may radiate at specified distances, which have nothing to do with emission masks.¹⁹⁶ The *Second Report and Order* did not address emission masks and, accordingly, the existing rules in Part 101 apply. Specifically, the emission specifications set out in Section 101.111 apply to LMDS.¹⁹⁷

2. Construction Requirements

123. RTG seeks reconsideration of the flexible build-out requirements we imposed on LMDS licensees.¹⁹⁸ The construction rule requires that licensees provide "substantial service" in their area within the 10-year licensed period, at which time the licensee is to submit a showing of substantial service as described in the rule and the *Second Report and Order* in order to renew the license.¹⁹⁹ RTG argues that the rule violates the mandate of Section 309(j)(4)(B) of the Act that governs performance requirements and requires prompt delivery of service to rural areas. RTG asserts that the guidelines for substantial service are so permissive as to be meaningless and therefore provide no incentive to licensees to provide service to high cost rural areas. RTG argues a stricter construction rule is necessary to encourage service and partitioning on behalf of rural LECs. RTG contends that we erred in using the same construction rule we adopted for the Wireless Communications Service (WCS),²⁰⁰ and requests that we revise the rule to reflect the more stringent requirements in other services such as cellular.

124. CellularVision opposes the request and argues that strict construction requirements are not necessary to maximize coverage to rural areas. CellularVision argues that service in rural

¹⁹⁵ Alcatel Letter at 2 n.7.

¹⁹⁶ *Second Report and Order*, 12 FCC Rcd at 12669-70 (paras. 292-296).

¹⁹⁷ 47 C.F.R. §§ 101.111(a)(1), 101.111(a)(2).

¹⁹⁸ RTG Petition at 12-15.

¹⁹⁹ *Second Report and Order*, 12 FCC Rcd at 12658-61 (paras. 263-272), adopting 47 C.F.R. § 101.1011.

²⁰⁰ Amendment of the Commission's Rules To Establish Part 27, the Wireless Communications Service (WCS), GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10830-36 (paras. 111-115) (1997) (*WCS Report and Order*).

areas is better achieved through partitioning based on marketplace demand and that strict construction requirements could discourage development of the variety of services that LMDS licensees may provide.²⁰¹ We consider the arguments more fully below.

125. Contrary to RTG's contention, the Commission fully considered the statutory obligations under Section 309(j)(4)(B) of the Act in adopting the construction rule in the *Second Report and Order*. As RTG notes, Section 309(j)(4)(B) requires that we prescribe performance requirements, such as appropriate deadlines, that take into account not only the prompt delivery of service to rural areas, but also that prevent warehousing of spectrum and that promote investment in and rapid deployment of new technologies and services.²⁰² Thus, service to rural areas is one of three factors for consideration and, contrary to RTG's suggestion, is not a goal that is reserved exclusively for rural LECs to achieve. As described below, the Commission considered all three factors in weighing the benefits of the construction requirement it adopted and specifically concluded that the rule it adopted would promote efficient use of the spectrum, encourage the provision of service to rural areas, and prevent the warehousing of spectrum.²⁰³ Moreover, in determining that the requirements were consistent with the statutory obligations under Section 309(j)(4)(B), the Commission specifically reserved the right to review the rule in the future.²⁰⁴ Complaints or our own monitoring initiatives or investigations may indicate that a reassessment is warranted under the statutory provisions and that more stringent requirements may be necessary to resolve anticompetitive problems or lack of service to rural areas.

126. We disagree with RTG that reliance on the same construction rule the Commission recently adopted in the WCS rules is misplaced or inappropriate.²⁰⁵ RTG points out the many differences between WCS and LMDS, and argues that LMDS licensees should be held to more rapid delivery of service. Yet the Commission did not rely on similarities between the services in finding the same standard appropriate. Instead, it considered the standard in the context of LMDS and found a number of reasons why it was appropriate for implementing LMDS and meeting the requirements of Section 309(j).²⁰⁶ Specifically, the Commission rejected stricter construction requirements as neither practical nor desirable in meeting the objectives of Section

²⁰¹ CellularVision Consolidated Opposition to RTG's Petition at 8-9.

²⁰² 47 U.S.C. § 309(j)(4)(B).

²⁰³ *Second Report and Order*, 12 FCC Rcd at 12659 (para. 266).

²⁰⁴ *Id.* at 12661 (para. 272).

²⁰⁵ 47 C.F.R. § 27.14.

²⁰⁶ *Second Report and Order*, 12 FCC Rcd at 12659-60 (paras. 267-268).

309(j) because the broad range of new and innovative services in LMDS, many of which remain in the design stage awaiting issuance of licenses, makes it difficult to devise specific construction benchmarks.

127. The Commission also found that stricter requirements could discourage participation in LMDS because of the new nature and broad definition of the service, and because equipment is under development, and there may be licensees able to conduct certain operations that have to await further technological developments. The Commission adopted safe-harbor examples to demonstrate substantial service under an LMDS license at the end of the 10-year period, including as factors whether a licensee is serving niche markets or populations outside of areas served by other licensees.²⁰⁷ In all respects, the Commission found that the construction standard it adopted promoted the goals of Section 309(j) and the goals for LMDS.

128. As a final matter, RTG argues that reliance on the effectiveness of competitive bidding to assign licenses to those most willing to use the license, the availability of partitioning and disaggregation of LMDS licenses, and the broad universal service policies do not establish that the liberal construction rule is consistent with Section 309(j).²⁰⁸ Contrary to RTG's suggestion, the Commission identified these as additional Commission policies and practices that, together with the LMDS construction requirements, it believes will be effective in promoting service to rural areas.²⁰⁹ The Commission did not rely on these policies and practices to justify the construction rule or otherwise find it consistent with Section 309(j)(4)(B). As discussed at length above, the Commission found that geographic partitioning of LMDS licenses will be useful in expediting delivery of services to rural areas²¹⁰ and that the mission of universal service to rural areas as well as urban areas will be promoted through competition.²¹¹

C. 31 GHz Spectrum Designation

1. Background

²⁰⁷ *Id.* at 12660-61 (para. 270).

²⁰⁸ RTG Petition at 13-14.

²⁰⁹ *Second Report and Order*, 12 FCC Rcd at 12661 (para. 271).

²¹⁰ *See* para. 103, *supra*.

²¹¹ *See* para. 110, *supra*.

129. In the *First Report and Order and Fourth NPRM*, the Commission adopted a band plan that provided 1,000 megahertz of spectrum in the 28 GHz band for use by LMDS.²¹² The band plan, however, provided that 150 megahertz of LMDS spectrum between 29.1-29.25 GHz would be shared on a co-primary basis with certain satellite providers and would be restricted to hub-to-subscriber (*i.e.*, one-way) transmissions. The Commission decided it would be necessary to provide additional spectrum so that LMDS providers would be able to offer the full range of services contemplated by the proposed LMDS rules. The *Fourth NPRM* found that existing use of the 31 GHz spectrum band at 31.0-31.3 GHz was relatively light and concentrated in a few areas, and proposed to redesignate that spectrum for LMDS on a primary protected basis.²¹³ It was noted that the existing rules did not provide interference protection for incumbent licensees and comments were requested on methods to accommodate their operations without affecting the proposed implementation of LMDS in the band.

130. In the *Second Report and Order*, the Commission balanced the public interest objectives of preserving existing 31 GHz services, in particular the traffic control systems provided by governmental licensees, against the demand for LMDS, whose telecommunications and video services are incompatible with existing services.²¹⁴ The Commission considered competing band use plans submitted by CellularVision and Sierra for dividing the band in order to accommodate both the incumbent licensees and services as well as LMDS. Based on these considerations, the Commission concluded that the competing interests reflected in the record would best be accommodated by designating the entire 300 megahertz of spectrum in the 31 GHz band for use by LMDS, but modifying our proposal and segmenting the band based on certain aspects of both of the band plans to provide protection for certain incumbent licensees.²¹⁵

131. The band was segmented to establish a segment of 150 megahertz in the middle of the 300 megahertz, in which all incumbents may continue to operate but on a secondary basis to LMDS operations and subject to harmful interference from LMDS. The segments of 75 megahertz at each end of the band are described as the outer 150 megahertz segment in which those incumbent 31 GHz licensees not authorized in the Local Television Transmission Service (LTTS) are accorded protection from harmful interference from LMDS operators. These incumbents consisted of private business and governmental licensees. The non-LTTS licensees in the middle segment were provided the option to relocate to the outer 150 megahertz to receive protection upon filing an application for modification of their licenses within 15 days from the

²¹² *Fourth NPRM*, 11 FCC Rcd at 19033-34 (paras. 67-71), 19043-45 (paras. 97-98).

²¹³ *Id.* at 19043-47 (paras. 95-104).

²¹⁴ *Second Report and Order*, 12 FCC Rcd at 12558-95 (paras. 15-115).

²¹⁵ *Id.* at 12581-87 (paras. 79-105).

effective date of the rules. Because the entire 300 megahertz was designated for LMDS licensing, the Commission determined not to accept new applications for new or expanded licenses under the existing 31 GHz service rules and to dismiss all pending applications for such licenses.

2. Designation of Spectrum for Incumbent Services

132. Sierra requests that we reconsider the decision to redesignate the entire 300 megahertz in the 31 GHz band to LMDS. Sierra argues that the Commission erred in not adopting the proposal in Sierra's band plan to designate only the middle 150 megahertz for LMDS and preserve the outer 150 megahertz exclusively for continued use under the existing rules for private, point-to-point services.²¹⁶ Sierra supports the Commission's adoption of those aspects of its band segmentation plan that provide protection to existing private business and governmental licensees in the outer 150 megahertz and allow those existing licensees located in the middle band to relocate to the outer band. However, Sierra argues that the Commission's decision to close the outer 150 megahertz segment to future growth under the existing rules in order to give the segment to LMDS is not supported by the record and is contrary to the public interest.

133. Commpare, CSG, Sunnyvale, Videolinx, and Westec submit letters in support of Sierra's petition.²¹⁷ These parties claim that they are involved in the development or distribution of the 31 GHz equipment manufactured by Sierra. Sunnyvale and Videolinx argue that Sierra's 31 GHz equipment is an inexpensive wireless solution for traffic management through intersection coordination and video surveillance and that continued designation of the band is essential to the public safety. Commpare states that it is a reseller both domestically and in Latin America of the equipment Sierra manufactures for 31 GHz and argues that our decision will adversely affect the manufacture of Sierra's equipment, resulting in the loss of Commpare's Latin American market, which, it asserts, relies on such wireless means for certain telecommunications services. CSG and Westec are system integrators of microwave systems that rely on Sierra's 31 GHz equipment for some of their wireless customers.

134. CellularVision and TI oppose Sierra's requests. They argue that the Commission established a thorough record in the *Second Report and Order* that provides ample justification for the Commission's findings and that addresses all of the arguments Sierra raises on reconsideration.²¹⁸ They argue that Sierra fails to make any new arguments, and that the Commission should summarily deny Sierra's petition. CellularVision and TI assert that the 31 GHz band plan is an acceptable compromise based on the Commission's careful balancing of the

²¹⁶ Sierra Petition at 2-4.

²¹⁷ Commpare, CSG, Sunnyvale, Videolinx, and Westec Letters.

²¹⁸ CellularVision Opposition to Sierra's Petition at 9; TI Opposition to Sierra's Petition at 1-4.

public interest factors reflected by Sierra and others to protect the operations of certain existing licensees while meeting the immediate spectrum requirements of LMDS. They argue that there is no basis to grant Sierra's petition to abandon the 31 GHz band plan compromise or otherwise modify our decision. We consider the arguments more fully below, and deny the petitions.

a. LMDS Spectrum Needs

135. Sierra argues that there is no basis for our determination in the *Second Report and Order* that the entire 300 megahertz of the 31 GHz band is necessary for the full range of LMDS operations and is technically suitable and useful for LMDS.²¹⁹ Sierra asserts that the Commission relied upon unsupported speculations of LMDS proponents that fail to demonstrate any actual need or use for more than 1,000 megahertz of unencumbered spectrum, which Sierra argues can be satisfied by designating only the middle 150 megahertz of the band plan to LMDS. Sierra contends that, until the *Fourth NPRM* proposed to designate the 31 GHz band for LMDS, there was no interest or need expressed for more than 1,000 megahertz for each LMDS provider.

136. CellularVision and TI oppose Sierra's contention that LMDS received more spectrum in the 31 GHz band than was warranted by the record.²²⁰ TI argues that the *Second Report and Order* demonstrates that the need for more than one gigahertz of unencumbered spectrum for LMDS is well established in this proceeding. CellularVision contends that Sierra ignores the history of the LMDS proceeding, in which the *First NPRM* proposed 2,000 megahertz of contiguous and unencumbered spectrum for the two LMDS licenses, and the realities of the licensing scheme ultimately adopted for LMDS, in which no single LMDS license is assigned more than 1,000 megahertz of unencumbered spectrum. TI submits a letter supporting our determinations in the *Second Report and Order*, but requesting we clarify that securing additional spectrum for LMDS is a priority to ensure the full potential of LMDS is met and that we continue efforts to locate spectrum below 27.5 GHz to designate for LMDS.²²¹

137. We disagree with Sierra's contention that the findings in the *Second Report and Order* of the need for, and suitability of, the entire 300 GHz in the 31 GHz band for LMDS are unsupported.²²² In the *Second Report and Order*, the Commission noted the numerous comments in support of designating the 31 GHz band for LMDS, which included comments from satellite systems, cable, rural telephone, and television trade associations, and potential licensees or

²¹⁹ Sierra Petition at 5-6.

²²⁰ CellularVision Opposition to Sierra's Petition at 6-8; TI Opposition to Sierra's Petition at 5-6.

²²¹ TI Request for Clarification at 2.

²²² *Second Report and Order*, 12 FCC Rcd at 12566-68 (paras. 38-43).

manufacturers.²²³ These commenters described the importance of the additional 300 megahertz to accommodate the high-speed, broadband, interactive services that make up LMDS, and they contended that the additional spectrum in the 31 GHz band would address concerns that 150 of the 1,000 megahertz of spectrum in the 28 GHz band would be shared on a co-primary basis with Non-Geostationary Orbit/Mobile Satellite Service feeder links. The Commission noted that CellularVision, Webcel, and other commenters seek the extra capacity to maximize the potential for LMDS to compete with incumbent cable and telephone services, and to encourage development of other commercially viable uses for LMDS spectrum. The comments described the experimentation and advancements in two-way services that require the 300 megahertz to ensure the development of LMDS. As the Commission concluded, making available for LMDS the entire 300 megahertz in the 31 GHz band would permit the full range of telecommunications and video services the licensees intend to offer and ensure greater potential for LMDS in the marketplace.²²⁴

138. Sierra does not demonstrate that these comments were unreliable or that, for some technical or operational reasons, LMDS would neither use nor benefit from the entire 300 megahertz as the comments stated. The Commission rejected Sierra's previous arguments that 31 GHz was not suitable for LMDS and that alternative spectrum should be used, finding no technical obstacles to its use and that several equipment manufacturers were committed to developing its use.²²⁵ As TI notes, the Commission rejected requests to designate adjacent spectrum below 27.5 GHz for LMDS because the spectrum is not available, but we determined to continue discussions with the National Telecommunications Information Agency (NTIA) on the feasibility of commercial usage.²²⁶ We clarify for TI that those discussions are continuing as part of our over-all goal to obtain additional spectrum to meet a variety of commercial demands, depending on the availability of the spectrum and the demands at that time.

139. Moreover, CellularVision is correct that Sierra ignores the compromise band plan the Commission adopted for the 31 GHz band to accommodate the competing interests at Sierra's request. Although, based on the record, the Commission denied Sierra's request to exclude LMDS altogether from the outer 150 megahertz, it nevertheless granted the request to the extent Sierra sought to require LMDS licensees in that segment to protect non-LTTS incumbent licensees that otherwise were without any legal protection from harmful interference. Thus,

²²³ *Id.* at 12559-61 (paras. 20-23).

²²⁴ *Id.* at 12567 (para. 40).

²²⁵ *Id.* at 12567-68 (paras. 41-43).

²²⁶ *Id.* at 12567-68 (para. 42).

LMDS was not accorded completely unencumbered access to the 300 megahertz of the 31 GHz band, as Sierra states, but only as to the middle 150 megahertz segment.

140. Additionally, as CellularVision notes, the licensing blocks do not provide any single LMDS license with more than 1,000 megahertz of unencumbered spectrum. The Commission adopted two license blocks for the LMDS spectrum in the 28 GHz and 31 GHz bands.²²⁷ The larger LMDS license of 1,150 megahertz has 150 megahertz of spectrum encumbered by satellite interests in the 28 GHz band, while the smaller license of 150 megahertz consists of the outer segment of the 31 GHz band where incumbent licensees are protected. This is a substantial reduction from the 2,000 megahertz of unencumbered contiguous spectrum proposed in the 28 GHz band in the *First NPRM* to provide for two LMDS licenses.²²⁸

141. Although satellite demands required the Commission to authorize initially only 850 megahertz for LMDS on an unencumbered basis in the *First Report and Order*, it was found that without additional unencumbered spectrum, some proposed LMDS systems would not be able to provide the full panoply of two-way services anticipated.²²⁹ In the *Fourth NPRM* issued in conjunction with the *First Report and Order*, the Commission made plain the intention to designate the additional spectrum necessary to satisfy the significant consumer demand for the telephone and video services of LMDS and the belief that the 300 megahertz of spectrum in the 31 GHz band would ensure consumers access to these new and competitive services and technologies.²³⁰ Sierra does not demonstrate on reconsideration that the extensive record that was relied upon in adopting the proposal is without any foundation for finding a need by LMDS for the additional 300 megahertz of spectrum.

b. Near-Term Use and Growth of Incumbent Services

142. Sierra argues that the *Second Report and Order* underestimated the extent of current use of the 31 GHz band and of the demand for future use.²³¹ Sierra argues that the Commission considered only incumbent licensees when it provided for their protection in the outer 150 megahertz segments, and that the evidence of rapid future growth by existing services was ignored. Sierra contends that the Commission cannot fairly balance the growth prospects of

²²⁷ *Id.* at 12600-01 (paras. 125-127).

²²⁸ *First NPRM*, 8 FCC Rcd at 560 (para. 20).

²²⁹ *First Report and Order and Fourth NPRM*, 11 FCC Rcd at 19043 (para. 97).

²³⁰ *Id.* at 19044-45 (paras. 98-100).

²³¹ Sierra Petition at 6-10.

LMDS against the present implementation of incumbent services without taking their future growth into account. Sierra asserts that it and several other commenters presented extensive data to show that current use is neither light nor sparse and that future growth will be prodigious. CellularVision and TI argue that, in addressing similar claims by Sierra, the Commission fully considered the extent of current and future 31 GHz services and that Sierra's claims remain unsupported on reconsideration.²³² CellularVision and TI claim that Sierra ignores the Commission's responsibility to revisit spectrum use to determine its most efficient and effective use in the public interest and the record analysis demonstrating only minimal, scattered spectrum use over the past 12 years under the existing point-to-point 31 GHz rules, as compared to the demand for the new broadband services of LMDS.

143. We disagree with Sierra that the decision to designate the 31 GHz band rested on only a presumption that use of the 31 GHz band is relatively light and concentrated in a few sparsely populated areas, and that the reality is otherwise.²³³ In making the decision, the Commission undertook an extensive analysis of the number of incumbent licensees, the types of services they are licensed to provide, and the nature and scope of all the services that operate in the band.²³⁴ That was done to address the arguments of Sierra, Sunnyvale, and others that the number of licensees is extensive, particularly insofar as there are governmental licensees using the spectrum for traffic control services. Based on this review, the Commission concluded that, despite the nationwide availability of the spectrum, the number of entities licensed under the existing rules for 31 GHz services is small and the locations are very few and confined.²³⁵

144. Although Sierra does not contend that the figures and analyses are wrong, it nevertheless addresses certain aspects of the Commission's findings that it argues would show that current use is not light and that there could be a prodigious rate of growth under the existing 31 GHz point-to-point rules, particularly by governmental entities to provide traffic control systems. Specifically, Sierra notes that the Commission corrected the total number of licensees from the numbers reflected in the *Fourth NPRM* to 86 licensees. Sierra, however, fails to acknowledge the breakdown and analysis of the licensed services and that, of the total, only 19 are governmental licensees, of which 14 are municipal licensees.²³⁶

²³² CellularVision Opposition to Sierra's Petition at 4-5; TI Opposition to Sierra's Petition at 6-7.

²³³ Sierra Petition at 9, citing *Fourth NPRM*, 11 FCC Rcd at 19035-37 (paras. 75, 99).

²³⁴ *Second Report and Order*, 12 FCC Rcd at 12568-73 (paras. 44-56).

²³⁵ *Id.* at 12573 (para. 56).

²³⁶ *Id.* at 12569-70 (para. 47).

145. Of the remaining licensees, 59 are licensed under the LTTS procedures to provide service on a temporary, as-needed basis anywhere in a broad area, have alternative spectrum available, and did not submit comments.²³⁷ The final eight licensees are private business licensees that use the service within a business or group. The Commission considered all of the evidence presented by Sierra and in other comments that the numbers are higher, particularly for governmental entities, but could verify only 19 as licensed. The remainder were found to be duplicates, manufacturers or dealers that are not subject to the service rules, unlicensed users that cannot be taken into account, or users whose nature and status could not be determined based on the evidence presented by Sierra.²³⁸ Sierra does not demonstrate that the figures or analyses of current use are mistaken or otherwise in error.

146. In further support of its claims of extensive use, Sierra notes that the list the Commission set out in Appendix B to the *Second Report and Order* identifying the existing governmental and private business licensees shows licensees in 11 states scattered across every part of the country, plus the Gulf of Mexico region.²³⁹ It argues that there are several governmental licensees whose populations considerably exceed 50,000. Sierra then identifies the entire population figures of the three states that are licensees, namely California, Washington, and Wisconsin, as well as some of the city and county licensees. Sierra, however, does not explain how these figures support its contention that the use of the 31 GHz band is extensive and nationwide. In identifying the non-LTTS licensees, Appendix B confirms the identity of the 19 governmental licensees and the 19 municipalities in which they operate, as well as the identity of the eight private business licensees and the eight municipalities in which they operate, plus the private business licensee in the Gulf of Mexico.²⁴⁰ Of the governmental licensees, the largest number are located in California and their operations are in 12 municipalities of varying sizes. Of the remaining seven governmental licensees, they operate in a single municipality in six states, except for two municipalities in Washington. The eight private business licensees operate in the remaining four states noted by Sierra, but their operations also are very localized and limited to locations within eight municipalities.

147. We find that Sierra's reliance on entire populations of the states in which the governmental licensees are located bears no relationship to either the nature of their licensed service areas or the geographic areas they are authorized to serve. The *Second Report and Order* examined the Commission's goals in implementing the 31 GHz service rules in 1985 and the scope

²³⁷ *Id.* at 12572-73 (para. 55), 12585 (para. 89).

²³⁸ *Id.* at 12569 (para. 45), 12570-71 (paras. 48-50), 12571 (para. 52).

²³⁹ Sierra Petition at 7 nn.24, 25.

²⁴⁰ *Second Report and Order*, 12 FCC Rcd at 12763-65 (Appendix B).

of the licensed services as part of the Commission's responsibility to determine whether spectrum is being put to the most efficient and effective use in the public interest.²⁴¹ As the Commission pointed out, the 31 GHz services are licensed on a point-to-point basis or within an area defined by a point and radius under simplified rules that were to encourage various short-range services. The Commission examined all the comments from governmental entities, both licensed and unlicensed, that included such municipalities as Palm Springs, San Diego, Topeka, Honolulu, and Long Beach and that described 31 GHz service in terms of the number of traffic signals and intersections with the respective municipalities.²⁴² Both from the described services and the locations identified in Appendix B, it is clear that neither the governmental entities nor the remaining licensees provide service on a state-wide or county-wide basis as Sierra contends, but rather are limited to a few short-range communication operations as part of various traffic control systems or private businesses within specific municipalities.

148. Moreover, we disagree with Sierra that the *Second Report and Order* failed to consider the evidence of rapid growth in 31 GHz services and the future needs for the incumbent services.²⁴³ Contrary to Sierra's assertion, the Commission considered not only "all incumbent licensees and interests" as Sierra claims in determining the correct number and extent of existing services,²⁴⁴ but the extent to which the record supported arguments by Sierra and others of substantial growth. Sierra repeats its claims that, as the provider of most of the 31 GHz transmitters, it has shipped 75 percent more transmitters in 1996 than 1995, and expects to ship four times more in 1997 than 1996.²⁴⁵ But it submits no information in support of its claims to indicate how such claims are reflected in the small number of existing licensees or pending applicants that are governmental entities. Sierra repeats the claim that a list of 42 customer sites being installed or planned submitted by Sunnyvale is further proof of growth. The Commission found, however, that only 12 on the list were licensees and the status of the remainder as future licensees would be unpredictable.

149. The Commission fully considered the number of pending applications and we disagree on reconsideration that they are further evidence of pressure for growth in the band.²⁴⁶

²⁴¹ *Id.* at 12571-73 (paras. 54-55).

²⁴² *Id.* at 12573-75 (paras. 58-61).

²⁴³ Sierra Petition at 7-10.

²⁴⁴ *Second Report and Order*, 12 FCC Rcd at 12571 (para. 51).

²⁴⁵ *Id.* at 12571 (para. 53).

²⁴⁶ *Id.* at 12589 (para. 100).

As the Commission pointed out, they were filed after the *Fourth NPRM* when we proposed to redesignate the 300 megahertz in the 31 GHz band to LMDS and specifically requested comments on whether to accept any new applications, modifications, or renewal applications under the 31 GHz rules.²⁴⁷ The Commission thoroughly considered the extent to which the comments, which were from the traffic control interests, addressed the plans by states and municipalities to expand existing systems or establish new traffic control systems.²⁴⁸ Yet all of the applications were from new applicants that are not licensees and, thus, no existing licensees sought during that period to expand their systems as Sierra claims. Moreover, with the exception of Nevada DOT, none of the comments addressed new or planned systems that were the subject of pending applications. Nevada DOT, together with the Cities of Las Vegas and North Las Vegas (Cities), had filed applications to initiate a traffic signal control system for the Las Vegas metropolitan area.²⁴⁹ The Commission noted that the remaining applicants essentially were non-governmental entities. None of the evidence supports Sierra's repeated contentions of rapid growth of services in the 31 GHz band under the previous service rules. We find that its comparison to future growth of LMDS is misleading, since LMDS is being authorized for the first time and the only existing service from CellularVision was established under a one-time waiver of the existing rules that led to the initiation of this proceeding.

c. Public Interest Issues

150. Sierra argues that the Commission did not give proper weight to the public interest in the incumbent 31 GHz services and the need to preserve their licensing in the outer 150 megahertz segment, rather than redesignate that segment for LMDS.²⁵⁰ Sierra argues that, although the Commission acknowledged the public interest in the traffic control systems provided by the governmental licensees and properly extended frequency protection to them, the Commission eliminated all further licensing under the rules without any explanation of why their expanding use of the band should be ignored. Sierra asserts that the disregard for future users makes no sense in view of the recognition of the public interest and the pressure for expanded services. Sierra further argues that the alternative methods that the Commission suggested were available for governmental entities to obtain spectrum are not acceptable. CellularVision and TI disagree with Sierra. They argue that the Commission was careful to thoroughly examine the public interest associated with the incumbent services and to balance that interest against the public interest in favor of LMDS to satisfy the Commission's obligation to determine the most

²⁴⁷ *Fourth NPRM*, 11 FCC Rcd at 19046-47 (para. 103).

²⁴⁸ *Second Report and Order*, 12 FCC Rcd at 12587 (paras. 95-96).

²⁴⁹ *Id.* at 12587 (para. 95), 12589 (paras. 100-101).

²⁵⁰ Sierra Petition at 10-14.

efficient use of the spectrum.²⁵¹ CellularVision and TI contend that the Commission accorded more than sufficient weight to the public interest in the incumbent licensees and gave them ample deference when the Commission modified our proposal to grant them protected status from LMDS interference in the outer 150 megahertz.

151. We disagree that the Commission ignored the public interest in preserving the 31 GHz band for the continued use by governmental entities for traffic control systems. Sierra cites to numerous comments from governmental entities, IMSA, and equipment dealers; yet the Commission fully considered them all in the *Second Report and Order*. Based on these comments, the Commission concluded that traffic control systems are an important category of incumbent services that currently make the most extensive use of the 31 GHz spectrum and are increasingly being used by governments to meet Federal goals to reduce congestion and air pollution.²⁵² Accordingly, the Commission determined that incumbent licensees should continue to operate free from interference and could require protection from LMDS.²⁵³ For these reasons the Commission modified its proposal and adopted, in part, the band plan proposed by Sierra to segment the 300 megahertz in the 31 GHz band to provide an outer sub-band of 150 megahertz that allows incumbent governmental licensees to continue their traffic signal operations with protections from LMDS.²⁵⁴

152. The Commission, however, did not find persuasive evidence to preserve the outer 150 megahertz segment for the continued and exclusive licensing of 31 GHz services, including traffic control systems. The Commission pointed out that, in weighing the public interest, incumbent interests must be balanced against the interests in promoting LMDS as an important new technology with a wealth of innovative services that are expected to compete with local telephone and cable service to enhance customer choice.²⁵⁵ This careful balancing led to the band plan we adopted for incumbent licensees. The Commission fully considered the comments in response to its inquiry whether to accept any applications for new service under the 31 GHz rules, including the arguments from Sierra, governmental entities, and licensees that seek to preserve the existing rules for licensing.²⁵⁶ It then balanced the competing interests in continuing 31 GHz

²⁵¹ CellularVision Opposition to Sierra's Petition at 5-6; TI Opposition to Sierra's Petition at 7-8.

²⁵² *Second Report and Order*, 12 FCC Rcd at 12573-75 (paras. 57-62).

²⁵³ *Id.* at 12577 (para. 67).

²⁵⁴ *Id.* at 12581-87 (paras. 79-95).

²⁵⁵ *Id.* at 12577 (para. 68).

²⁵⁶ *Id.* at 12587-88 (paras. 94-97).

licensing and implementing LMDS under an entirely different licensing scheme, based on all the record evidence.

153. Contrary to Sierra's assertion, the Commission did explain the basis for terminating future licensing under the 31 GHz rules. Based on this extensive record, the Commission found several reasons why further growth and development of the 31 GHz services to the exclusion of LMDS in the outer 150 megahertz segment of the band would be inconsistent with the record. These included the need to fully accommodate LMDS as it develops, the incompatibility of 31 GHz services with LMDS that could have a chilling effect on the development of LMDS, and the uncertainties of the described plans for future growth of traffic systems in light of the rapidly changing technology for traffic systems.²⁵⁷ As we demonstrate, Sierra does not refute the determination that LMDS would benefit from the additional spectrum and that incumbent services are not extensive. Thus, the Commission properly concluded that use of this spectrum under the existing rules over the past 12 years has been minimal and that designating future licensing on the 31 GHz band for LMDS fulfills our obligation to designate spectrum for the most effective and efficient use.²⁵⁸

154. We disagree with Sierra that governmental entities cannot obtain an acceptable level of service from spectrum obtained through the alternative means described in the *Second Report and Order*.²⁵⁹ First, Sierra argues that bidding on the 150 megahertz license in their BTAs is not an option for most local governmental entities. Sierra contends that they only need a tiny fraction of the BTA, it is not practical for them to engage in the business of selling or leasing excess spectrum, the BTA encompasses several cities with separate installations, and few have the resources or time to participate collaboratively in the auction.²⁶⁰ We do not find these arguments persuasive. The 150 megahertz license was adopted in order to assign the outer 150 megahertz of the 31 GHz band as a separate and smaller license that is more easily available to smaller operators.²⁶¹ The Commission concluded that this smaller license addressed the needs of commenters for a smaller bandwidth to provide for smaller operators, niche markets, and services that are economically viable under cheaper, narrower bandwidth licenses. The Commission sought to make it easier for any incumbent licensee or entity interested in continuing to have access to the 31 GHz band for incumbent services to acquire a license for the redesignated

²⁵⁷ *Id.* at 12588-89 (paras. 98-99).

²⁵⁸ *Id.* at 12589-90 (para. 101).

²⁵⁹ *Id.* at 12594-95 (para. 114).

²⁶⁰ Sierra Petition at 12-13.

²⁶¹ *Second Report and Order*, 12 FCC Rcd at 12601 (paras. 128-129).

spectrum under the LMDS licensing rules. Thus, the smaller license is available as an option to those small entities that are interested in providing service under the LMDS rules to gain access to 31 GHz spectrum.

155. Sierra next asserts that acquiring spectrum from the local LMDS licensee through spectrum disaggregation or geographic partitioning of the LMDS license is not feasible.²⁶² As Sierra points out, the Commission adopted its proposal to divide the 31 GHz band into the two outer 75 megahertz segments to accommodate the traffic control systems described by Sierra, which require a full 150 megahertz for each intersection or stretch of highway and thereby occupy all of the outer segments.²⁶³ Sierra contends that disaggregation would not provide enough spectrum and geographic partitioning would transfer rights to far more area than the local entity can use, inasmuch as a system occupies only a small fraction of an area. We disagree. Although the procedural rules governing disaggregation or partitioning are pending, the *Second Report and Order* determined to provide licensees the flexibility to disaggregate and partition their licenses to encourage use of the spectrum and leave the size of licenses to the marketplace.²⁶⁴ The Commission proposed that the parties be given the flexibility to define the partitioned license area. A governmental entity would be able to do so, based on its pattern of usage, so that it would hold spectrum for a license area appropriately defined to meet its needs.²⁶⁵ Whether or not disaggregation is a viable option, the entity may use partitioning both to acquire the portion of an area it wants from the LMDS licensee or to sell off the excess areas of its own license.

156. As for the remaining alternatives, Sierra argues that transferring to a different transmission medium and leasing service or transmission capacity from a common carrier would require leaving the 31 GHz band for more expensive equipment, put public safety services in the hands of a commercial provider, and may result in reliance on wired systems that are prohibitively expensive.²⁶⁶ We do not find Sierra's arguments persuasive. The expense and availability of equipment or bands useful to governmental entities are variables that cannot be predicted, in light of the rapid development of equipment and the flexibility in our rules that allow licensees to craft the service that is in demand. As the Commission stated, we cannot predict that 31 GHz will continue to offer the best technology, or that LMDS technology will not be developed to suit some of the incumbent services. The Commission further noted that LMDS supporters indicated

²⁶² Sierra Petition at 13.

²⁶³ *Second Report and Order*, 12 FCC Rcd at 12582-83 (paras. 82-83).

²⁶⁴ *Id.* at 12608 (para. 145).

²⁶⁵ *Id.* at 12595 (para. 413).

²⁶⁶ Sierra Petition at 13-14.

a desire to provide access to any licensed spectrum they may acquire either through leasing or other means through which similar traffic control systems could grow.²⁶⁷

157. Sierra requests clarification of the footnote that states, after the discussion of the alternatives to licensing under the existing 31 GHz rules, that most of the nation's metropolitan areas do not rely on wireless technology for their traffic control systems.²⁶⁸ Sierra argues that any implication that wireless systems are not essential for traffic control is wrong and that, instead, most areas have inadequate signal coordination and its purchase orders show the demand for the 31 GHz wireless systems.²⁶⁹ The footnote is clear. It is prefaced by the information that only 19 governmental entities are licensed under the existing rules for 31 GHz service to provide traffic control operations. In light of this record of 31 GHz usage, and taking into account the large number of local jurisdictions across the Nation, it can certainly be stated that most cities do not use 31 GHz spectrum for wireless traffic control. This is another factor that the Commission weighed in determining the impact of a decision to close the band to new licensing under the 31 GHz rules, together with the other factors discussed above.

3. Refiling of Dismissed Applications

158. Sierra argues that, if the Commission affirms the decision to designate the entire 300 megahertz in the 31 GHz band for LMDS, the Commission should, at a minimum, reinstate the pending 31 GHz applications that had been held in abeyance since the *Fourth NPRM* and subsequently dismissed in the *Second Report and Order*.²⁷⁰ Sierra contends that the reinstated applications, if ultimately granted, should be entitled to the same interference protections and relocation procedures generally accorded incumbent 31 GHz licensees. In its petition for reconsideration, Sierra argues, first, that the Commission erred in finding that the applicants were on notice that they might no longer be able to provide the desired services using the 31 GHz spectrum. Sierra contends that, even if the time between the *Fourth NPRM* and the *Second Report and Order* were an effective notice period, it was too short for those dismissed applicants that were governmental entities to alter the lengthy preparatory process involved in implementing a traffic control system. Second, Sierra argues that the Commission failed to properly balance the potential public interest benefits associated with the dismissed applications. It contends that the considerable number of dismissed applications filed on behalf of Nevada DOT's planned traffic

²⁶⁷ *Second Report and Order*, 12 FCC Rcd at 12588-89 (para. 99).

²⁶⁸ *Id.* at 12595 (para. 114 n.158).

²⁶⁹ Sierra Petition at 14.

²⁷⁰ *Id.* at 15-18.

system offer public safety benefits that outweigh any benefits that may come from auctioning 31 GHz spectrum free of those proposed operations.

159. In response, TI opposes Sierra's request and argues that reinstatement of the dismissed applications would be inconsistent with the record and would upset the band plan the Commission adopted for 31 GHz, which seeks to fully accommodate the development of LMDS without interference from other licensees.²⁷¹ CellularVision opposes Sierra's request to reinstate all dismissed applications for the same reasons, arguing that the Commission should deny Sierra's request to permit any future growth under the existing 31 GHz point-to-point rules, based on the public's interest in LMDS as reflected in the record.²⁷²

160. Nevada DOT submits a request that suggests that, if the Commission does not grant the Sierra petition, the Commission should, in the alternative, reinstate the dismissed applications filed by Nevada DOT, as well as the Cities of Las Vegas and North Las Vegas (Cities), that implement the Las Vegas Valley Traffic Operational System based on installed 31 GHz equipment.²⁷³ Nevada DOT requests that the Commission grant the applications on a temporary basis to allow the traffic system to proceed with the operational schedule as planned and use the installed 31 GHz equipment until an alternative communication method or technology is located, designed, and implemented. Nevada DOT sets out a 2-year time-line of activities to be accomplished before an alternative technology would be in place and requests that it be allowed to seek an extension of the current operations with any LMDS licensee that obtains access to the area. Nevada DOT proposes that the system be authorized to operate on a secondary basis, with the understanding that the system would cease and desist upon request from any LMDS provider that is adversely impacted. Nevada DOT argues that an exception to authorize the dismissed Nevada applications under its proposal would not interfere with the Commission's objectives in redesignating 31 GHz for LMDS, and would benefit the public safety and public investment in the fully developed traffic system maintained by Nevada DOT.

161. Parsons supports Nevada DOT's request, arguing that the purchase and installation of the 31 GHz equipment took place before the *Second Report and Order* and that either a permanent or an interim authorization of the Nevada applications would give Nevada DOT the time to design an alternative system to replace the installed equipment while providing the public the benefit of the current system.²⁷⁴

²⁷¹ TI Opposition to Petition at 8-10.

²⁷² CellularVision Opposition to Sierra's Petition at 6 n.20.

²⁷³ Nevada DOT *ex parte* Letter of May 29, 1997.

²⁷⁴ Parsons Letter of May 28, 1997.

162. CellularVision opposes the request of Nevada DOT.²⁷⁵ CellularVision argues that the grant of the dismissed Nevada applications is a grant of future point-to-point use under new licenses that is inconsistent with our determination to designate the 31 GHz band for LMDS and not encumber the spectrum with any additional licenses operating under the prior point-to-point rules. CellularVision also argues that many problems would result from authorization of the conditional licenses that Nevada DOT requests, including the potential interference with LMDS operations that adversely affects consumers and that involves the Commission in the procedures to require Nevada DOT to cease operations. Moreover, it argues that other parties can be expected to petition the Commission for similar relief.

a. Public Interest Issues

163. Based upon our review of the pleadings, we have decided to reconsider the actions taken in the *Second Report and Order* regarding the dismissed 31 GHz applications. As discussed more fully below, we conclude that the public interest will be served by our permitting certain secondary operations to LMDS under the procedures and operating requirements that we establish in this Order. Thus, we will permit the dismissed applicants to refile applications for authorization for the same private fixed 31 GHz services requested in their previously filed applications, but with the condition that such authorizations will be secondary to LMDS operations.

**i. Basis of Secondary Operational Status
for Dismissed Applicants**

164. As we have discussed, there are several reasons to conclude that further growth and development of the 31 GHz services would be inconsistent with the public interest in designating the band for LMDS. These reasons include the need to fully accommodate the broadband potential of LMDS that could be delayed by a reduction in spectrum, the incompatibility of existing 31 GHz services with LMDS that could have a chilling effect on LMDS potential, and the uncertainties of the future growth of traffic systems under new technology developments.²⁷⁶ Although we have discussed why new licensing of 31 GHz services is inconsistent with these findings, for the following reasons we do not find that permitting the 31 GHz services reflected in the dismissed applications to operate on a secondary basis would result in any such problems or otherwise adversely impact LMDS.

²⁷⁵ CellularVision Consolidated Opposition to Nevada DOT's *ex parte* Letter at 6-8.

²⁷⁶ See para. 153, *supra*.

165. The dismissed applicants are few in number, and the scope of their services is identified in the applications that were dismissed. The majority of the applications seek authorization for the traffic system in the Las Vegas metropolitan area described by Nevada DOT and other commenters, which the Commission considered in the *Second Report and Order*. The remaining applications were filed primarily for other fixed microwave services by a few applicants, none of which has participated in this proceeding or been represented by any participating entity. Although all dismissed applicants will be given the opportunity to refile their dismissed applications modified for secondary status to LMDS, it is unclear how many of them will do so and how many would be granted a final authorization. Thus, the number of operations established by the result of our action in this Order may be narrower in scope than reflected by the dismissed applications.

166. The action we take in this Order also addresses the concern expressed by CellularVision that granting Nevada DOT's request to authorize the dismissed operations will result in other parties seeking similar relief, to the detriment of our goals for LMDS. We permit only those applicants with dismissed applications that were dismissed in the *Second Report and Order* to refile applications. Moreover, the dismissed applicants may only seek authorization secondary to LMDS in refiled applications and for the same stations and services contained in the dismissed applications. These limitations, we conclude, reduce uncertainties concerning future traffic system operations and prevents the type of system growth that could affect LMDS operations.

167. Furthermore, the 31 GHz services to be authorized under the refiled applications will be governed by the operational limitations the Commission imposed on incumbent 31 GHz licensees in the *Second Report and Order*, with the exception of one provision. We will follow the request of Nevada DOT to authorize operations requested in the dismissed applications on a *secondary* basis to LMDS. Secondary operations are defined as "[r]adio communications which may not cause interference to operations authorized on a primary basis and which are not protected from interference from these primary operations."²⁷⁷

168. Thus, the new licenses based on the dismissed applications will be limited to secondary status to LMDS and will *not* be accorded any protection from harmful interference from LMDS.²⁷⁸ The new licenses must accept any interference from LMDS and also may not interfere with LMDS operations. Although the Commission made an exception for non-LTTS incumbent licensees operating in the outer 150 megahertz segment and provided them with co-primary status with LMDS, we disagree with Sierra that the exception should apply to any new

²⁷⁷ Section 101.3 of the Commission's Rules, 47 C.F.R. § 101.3.

²⁷⁸ *Second Report and Order*, 12 FCC Rcd at 12584 (para. 80 n.116).

licenses based on the dismissed applications. The protection afforded to that class of licensees was based on the needs of existing licensees with well-established traffic control systems or private business services that had been licensed before LMDS without expectation of harmful interference from LMDS.

169. We disagree with CellularVision that authorizing the dismissed operations on a secondary basis to LMDS, as requested by Nevada DOT, would result in the myriad of problems that CellularVision claims.²⁷⁹ Secondary status prevents any adverse impact on LMDS consumers from interference by the operations of the dismissed applicants. There is no basis for the view that Nevada DOT would not operate as authorized, which states that it will cease and desist upon request from any affected LMDS provider.²⁸⁰ Instead, we find that imposing secondary status on licenses issued under our refiling provision would prevent the chilling effect or problems that the Commission expected to result from future incompatible incumbent services on the same band. As with the LTTS and certain other incumbent licensees, the dismissed licensees refiling the dismissed applications would have several possible options for resolving any frequency conflicts that arise with an LMDS system.²⁸¹ The secondary licensee could modify its system to eliminate interference to LMDS systems, acquire the use of spectrum from the LMDS licensee through geographic partitioning, transfer its operations to a different spectrum band or transmission medium, or lease service or transmission capacity from another carrier.

170. In addition, as with incumbent 31 GHz licenses, new 31 GHz licenses based on the dismissed applications would authorize services to the full extent permitted under their terms, but would *not* permit any expansion or increase in operations.²⁸² As the Commission explained, if the licensees are non-LTTS, they may be authorized either on a point-to-radius basis or a point-to-point basis. To stay within their existing service parameters, the radius licensees may add links, as long as they do not go outside the radius. The point-to-point licensees may not add additional links and are limited to whatever frequency pairs are authorized.²⁸³

²⁷⁹ CellularVision Consolidated Opposition to Nevada DOT's *ex parte* Letter at 7-8.

²⁸⁰ Nevada DOT *ex parte* Letter of May 29, 1997, at 2.

²⁸¹ *Second Report and Order*, 12 FCC Rcd at 12585 (para. 90).

²⁸² *Id.* at 12590 (para. 102).

²⁸³ LTTS licenses are authorized nationwide without designation of points to serve short-term immediate point-to-point needs for radio links. If any of the dismissed applicants seeks LTTS licenses, the operations they initiate could be anywhere nationwide and cannot be limited. This is different from the Commission's treatment in the *Second Report and Order* of incumbent LTTS licenses, which were limited to operations already in existence. *Id.* Nonetheless, we find that the limited nature of LTTS and the limitations placed on the growth of other 31 GHz services, in conjunction with their secondary status to LMDS, precludes any delays in implementation or expansion

171. Moreover, Nevada DOT refutes the benefits that the Commission found in favor of dismissing the traffic system applications filed by Nevada DOT and the Cities. The Commission recognized that the system had been underway for several months and that Nevada DOT, Sierra, and other commenters requested implementation because of the special circumstances. Based on the record at that time, however, the Commission concluded that dismissal of the applications would spare the unnecessary expenses of implementing a system for which the future is at best uncertain under the impact of expanding LMDS operations.²⁸⁴ Sierra, however, contends that the costs to Nevada DOT of doing without the traffic system are greater than the Commission believed and require a second look.²⁸⁵ Nevada DOT asserts that, rather than be spared any expenses, the failure to authorize the applications for the traffic system will result in considerable stranded public investment in 31 GHz equipment that is already installed and operationally tested.²⁸⁶ In these circumstances, we cannot conclude that dismissal of these applications serves the public interest in the manner the Commission anticipated, but rather that permitting the operations on a secondary basis to LMDS under the limitations requested by Nevada DOT will enable implementation of traffic control systems, will provide time to obtain replacement technology, and will not adversely impact the implementation of LMDS.

172. We find on reconsideration that the circumstances of the 31 GHz pending applications are distinguishable from those in the *220 MHz Third Report and Order*²⁸⁷ and the *39 GHz Report and Order*²⁸⁸ in which the Commission dismissed pending applications. As here, those proceedings adopted new rules for wireless services that significantly altered the existing service rules to establish a new service and had pending applications filed under the existing rules that had been held in abeyance.²⁸⁹ The Commission found that dismissal was in the public interest,

of LMDS.

²⁸⁴ *Id.* at 12589-90 (para. 101).

²⁸⁵ Sierra Petition at 17.

²⁸⁶ Nevada DOT *ex parte* Letter of May 29, 1997.

²⁸⁷ *220 MHz Third Report and Order*, 12 FCC Rcd at 11038-41 (paras. 197-206).

²⁸⁸ Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, RM 8553, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz, PP Docket No. 93-253, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd 18600 (1997) (*39 GHz Report and Order*).

²⁸⁹ *220 MHz Third Report and Order*, 12 FCC Rcd at 11038 (paras. 197-198); *39 GHz Report and Order*, 12 FCC Rcd at 18639-45 (paras. 83-97).

noting in the *39 GHz Report and Order* that a grant under the previously existing rules would frustrate the Commission's goals by continuing the licensing scheme that was being replaced, and by affecting the initiation of desirable new services under the new rules in those bands.²⁹⁰ In addition, the Commission noted in the *220 MHz Third Report and Order* that authorizing the pending applications would restrict the pool of new applicants, who would be prevented from seeking the new licenses that encompassed the areas encumbered by licensees operating under the previous service rules that were no longer in the public interest.²⁹¹

173. As we discuss in this section, we find that none of these factors is present in weighing the impact of permitting, on a *secondary basis* to LMDS, the operations in the dismissed 31 GHz applications on our goal to implement LMDS on the 31 GHz band. Although it is well established that the Commission may dismiss pending applications that do not comply with new rules,²⁹² there is no requirement that we do so in a case where, as here, the public interest would benefit and no harm would ensue from permitting the requested operations.

ii. Procedure and Rule Changes

174. In order to implement our decision to permit 31 GHz operations secondary to LMDS, we affirm the dismissal of the pending applications, but without prejudice to their being refiled under the application procedures for authorization of the same 31 GHz services previously requested as modified in this Order.²⁹³ The *Second Report and Order* directed that the filing fees be refunded to the extent fees were paid when the dismissed applications were filed, noting that governmental entities are exempt from the fee requirement.²⁹⁴ Any refiling of a dismissed 31 GHz application must be for authorization of the same stations and services requested in that dismissed

²⁹⁰ *220 MHz Third Report and Order*, 12 FCC Rcd at 11038 (para. 198); *39 GHz Report and Order*, 12 FCC Rcd at 18644 (para. 96).

²⁹¹ *220 MHz Third Report and Order*, 12 FCC Rcd at 11038-39 (para. 200).

²⁹² *Id.* at 11040-41 (para. 206).

²⁹³ We have decided that affirming the dismissal of applications without prejudice is a more reasonable approach than reinstating the applications. Circumstances have changed since the dismissed applications were filed and, as we have discussed, any authorization of 31 GHz services in such new licenses will be secondary to LMDS and limited to the scope of the services authorized, without modification or expansion. While the applicants may still expect to obtain 31 GHz authorization to provide the 31 GHz services they intended, they may not wish to operate subject to the new limitations on expansion and subject to secondary status to LMDS. Thus, we provide the dismissed applicants the option to refile the dismissed applications if they decide to seek authorization to operate at 31 GHz under these terms.

²⁹⁴ *Second Report and Order*, 12 FCC Rcd at 12589 (para. 100 n.141), 47 C.F.R. §§ 1.1113, 1.1114(f).

application. Such authorized operations are afforded the same status, as previously afforded under the 31 GHz licensing rules, to share the frequency with other 31 GHz operations without protection from harmful interference with each other.²⁹⁵ However, such operations are limited to secondary status to LMDS operations, *and* cannot interfere with LMDS, *and* must accept interference from LMDS. The refiling option is available for a 60-day period following the effective date of the rules adopted in this Order. Only entities that had applications pending as of the adoption date of the *Second Report and Order* on March 11, 1997, and dismissed at that time will be eligible to submit applications, and we will not accept any new applications for such operations.

175. All of the dismissed 31 GHz applications requested authorization for fixed microwave services and, therefore, any applications to be refiled would be governed by the service rules in Part 101 of the Commission's Rules.²⁹⁶ Thus, applications shall be resubmitted under the requirements in Section 101.13, Section 101.15, or the LTTS procedures in Section 101.801, as appropriate to the service requested.²⁹⁷ The *Second Report and Order* modified certain operating rules to limit assignment in the 31 GHz band to LMDS after March 11, 1997, and to accommodate the continued operations of incumbent 31 GHz licensees by preserving their technical requirements to the extent they were authorized before March 11, 1997.²⁹⁸ We will amend those rule modifications to permit the assignment of the 31 GHz band to those 31 GHz licenses based on the dismissed 31 GHz applications filed before March 11, 1997, but authorized after such date, and to permit their operations. We include the clarification that new licensees must operate on a secondary basis to LMDS.

²⁹⁵ *Id.* at 12571-72 (para. 54), citing former Section 101.147(t) of the Commission's Rules, 47 C.F.R. § 101.147(t).

²⁹⁶ Although some of the applications may have been filed under previous service rules before they were consolidated in Part 101, all applicants will refile their authorization requests in the dismissed applications under the rules and procedures in Part 101, which streamlined and simplified the previous rules. Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules To Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-148, Amendment of Part 21 of the Commission's Rules for the Domestic Public Fixed Radio Services, CC Docket No. 93-2, McCaw Cellular Communications, Inc., Petition for Rulemaking, RM-7861, Report and Order, 11 FCC Rcd 13449 (1996) (*Part 101 Report and Order*).

²⁹⁷ 47 C.F.R. §§ 101.13, 101.15, 101.801.

²⁹⁸ *Second Report and Order*, 12 FCC Rcd at 12591 (para. 105), adopting 47 C.F.R. §§ 101.147(a) n. (16), 101.147(u), 101.803(a) n. (7), 101.803(d) n. (9).

176. Under Part 101, any licenses, which are secondary to LMDS, to be issued based on the refiled applications would be for a 10-year period and may be renewed.²⁹⁹ We do not adopt the proposal of Nevada DOT that any grant be temporary. This will permit use of the spectrum until interference would be caused an LMDS licensee, at which time the secondary licensee will have to eliminate the interference or cease operations. Since, as with the incumbent 31 GHz licensees, the new licensees may not expand or increase the authorized operations, they also are limited to modifications of their operations under Section 101.61 that do not require prior authorization and allow for the replacing of equipment or other small changes to ensure flexibility without expansion. The *Second Report and Order* amended the modification procedures in Section 101.57 to exclude incumbent licensees from filing applications for such license modifications, and we will also amend the rule to preclude licensees authorized on the basis of the pending applications filed before March 11, 1997, from filing such modification applications.³⁰⁰

iii. New Applications

177. Only entities that had applications on file when the Commission adopted the *Second Report and Order* on March 11, 1997, and were dismissed at that time are eligible to refile such applications as described above. This is an exception to the Commission's determination to terminate future licensing under the 31 GHz rules and is based on unique and distinguishable circumstances discussed above. As discussed earlier in this Order, we do not find any basis on reconsideration to support the continued licensing of 31 GHz services, including traffic control systems, rather than designating the 31 GHz band exclusively for future licensing under the LMDS rules. Therefore, we will not accept any new applications for such 31 GHz operations. Any ongoing 31 GHz operations will be limited either to those of the incumbent licensees or of the licensees who refile their applications dismissed on March 11, 1997, and are authorized under the terms and conditions in this Order.

178. We have pointed out that, in deciding whether to permit future licensing of 31 GHz services, the *Second Report and Order* balanced all of the evidence to determine the public interest and concluded that the benefits of allowing growth of incumbent services is outweighed by the potential harm to LMDS.³⁰¹ Although we have decided that there is no adverse impact on LMDS of allowing the pending applicants to operate on 31 GHz on a secondary basis to LMDS, that would not be the case with allowing the filing of new 31 GHz applications for access to spectrum that is designated for LMDS. While we will authorize the new licenses based on the dismissed applications on a secondary basis to LMDS, we do not find that applying similar

²⁹⁹ 47 C.F.R. § 101.67.

³⁰⁰ *Second Report and Order*, 12 FCC Rcd at 12590 (para. 103), amending 47 C.F.R. § 101.57.

³⁰¹ See para. 152, *supra*.

treatment to future licensing of 31 GHz services would alleviate the concerns of potential harm to LMDS nor benefit such future licensees.

179. We recognize that, in addition to the interest reflected in the pending applications to use 31 GHz for traffic systems, there is support from various governmental entities for the growth of 31 GHz traffic systems to meet Federal goals to reduce vehicular traffic congestion and air pollution.³⁰² There are important public interest objectives served by the synchronization of traffic lights through use of wireless technology, including the benefits to the environment of reduced pollution, lessened demand for new highways, and accident reduction. We reiterate, however, that there are alternative means by which governmental entities seeking access to 31 GHz to initiate traffic control systems may still acquire spectrum or can otherwise obtain the traffic services they need.³⁰³ The alternative means, and the other spectrum options in particular, would better serve the important objectives of governmental entities seeking to use the 31 GHz band for traffic control services than new 31 GHz licenses secondary to LMDS and susceptible to preemption and interruption.

180. Among the alternatives we have discussed, LMDS licensees may partition and disaggregate spectrum to governmental entities under the LMDS service rules. In light of the flexibility in the Commission's rules, LMDS licensees also may have the opportunity to develop a traffic control service to provide to municipalities. In addition, governmental entities can bid on the 150 megahertz LMDS license that the Commission established to accommodate niche markets or smaller operators. Moreover, governmental entities may use a different transmission technology and medium than the 31 GHz band to provide traffic control services.

181. Incumbent providers on 31 GHz spectrum were authorized under the fixed microwave service rules in Part 101 that the Commission modified in the *Second Report and Order* to exclude future licensing only on the 31 GHz band.³⁰⁴ There are several spectrum bands identified in those rules that are available for a governmental entity to seek authorization of the private operational fixed point-to-point services that permit operation of traffic control systems.³⁰⁵ Indeed, Nevada DOT and USDOT described the development of traffic control systems for a

³⁰² See para. 151, *supra*.

³⁰³ See paras. 154-156, *supra*.

³⁰⁴ *Second Report and Order*, 12 FCC Rcd at 12590-91 (paras. 104-105).

³⁰⁵ 47 C.F.R. § 101.101.

variety of bands, and indicated that 31 GHz is one of several bands being used for the Las Vegas system.³⁰⁶

182. Among the frequencies available to accommodate traffic light control is the 23 GHz band, between 21.1-23.6 GHz, that the Commission considered in the *Second Report and Order* as a possible band for relocating the incumbent licensees to enable them to continue their existing operations on a primary basis.³⁰⁷ Although the Commission found the cost of modifying existing 31 GHz radios or replacing them with 23 GHz equipment too burdensome to conclude that 23 GHz was a suitable substitute for incumbent licensees, that is not the case for new applicants that have not purchased 31 GHz equipment and seek a viable alternative to 31 GHz spectrum for traffic light synchronization and control purposes. In the 23 GHz band, as well as other bands listed in the rules for assignment for private fixed services, the operations would have primary, protected status and governments purchasing such systems could expect that the equipment would have useful lives uninterrupted by LMDS or other services.

b. Notice Issues

183. We do not persuasive Sierra's arguments that reconsideration of the dismissal of the pending applications is required because the Commission failed to provide sufficient notice of the proposed rule change to redesignate 31 GHz for LMDS. As Sierra acknowledges, the pending applications were filed after the *Fourth NPRM* and before the *Second Report and Order* and, thus, the Commission concluded that the applicants had notice of the possibility of a change in the rules for the 31 GHz band.³⁰⁸ The *Fourth NPRM* set out the proposal to redesignate the 300 megahertz in the 31 GHz band for LMDS on a protected basis and the impact of the proposal on incumbent services which the Commission pointed out are unprotected under their service rules.³⁰⁹

184. The Commission determined that, in light of this impact on incumbent services, it was appropriate to seek comment on whether to accept new applications, modifications, or renewal applications in the 31 GHz band. Indeed, several of the comments, including those of Sierra and Nevada DOT, specifically addressed our request for comments and the dismissal of pending applications, which we fully considered in the *Second Report and Order*.³¹⁰ These

³⁰⁶ *Second Report and Order*, 12 FCC Rcd at 12573-74, 12588-89 (paras. 58-59, 99).

³⁰⁷ *Id.* at 121579 (paras. 72-73).

³⁰⁸ *Id.* at 12589 (para. 100).

³⁰⁹ *Fourth NPRM*, 11 FCC Rcd at 19046-47 (para. 103).

³¹⁰ *Second Report and Order*, 12 FCC Rcd at 12587-88 (paras. 94-96).

comments demonstrate that Sierra and Nevada DOT knew that future licensing under the 31 GHz rules was in jeopardy and had notice that, if the Commission adopted its proposals, applications for new licenses might not be considered.

4. Frequency Tolerance Level

185. Sierra requests that, with respect to the outer 150 megahertz segment of the 31 GHz band, the Commission rescind or postpone for two years the 0.001 percent frequency tolerance requirement the Commission adopted in the *Second Report and Order* in the LMDS technical rules.³¹¹ Sierra requests that we reinstate the former tolerance level in the 31 GHz service rules of 0.030 percent. Sierra argues that the new tolerance standard for LMDS will prevent governmental entities from expanding operations and prevent use of its existing 31 GHz equipment. Sierra cites engineering data that it had presented to show the cost of modifying its equipment to meet the new tolerance level under the LMDS rules. Sierra further argues that LMDS has no need for the 0.001 percent level because it is unlikely that LMDS will even use the spectrum. Finally, Sierra argues that the Commission failed to give appropriate notice of the new frequency tolerance when it proposed to designate the band for LMDS.

186. We deny Sierra's request. As discussed above, we deny Sierra's request for reconsideration of our determination to designate the outer 150 megahertz segment of the 31 GHz band for LMDS. The Commission adopted the 0.001 percent frequency tolerance level as appropriate for all LMDS transmitting equipment, based on comments that the Commission sought in the *Third NPRM* on technical rules for LMDS.³¹² Sierra does not demonstrate on reconsideration that the level is not appropriate for LMDS or that the 0.030 level for incumbent services is better suited for LMDS, which is the service to be licensed on the 31 GHz band. As thoroughly discussed, the Commission declined to allow new or expanded 31 GHz services under the incumbent rules and, thus, there is no basis to continue reliance on the prior frequency tolerance level of 0.030 under those rules.³¹³

187. In permitting all incumbent 31 GHz licensees to continue operating to the full extent permitted under the existing terms of their licenses without expanding or increasing services, the Commission specifically allowed incumbent licensees authorized before March 11, 1997, to continue their authorized operations at the prior level of 0.030.³¹⁴ Thus, to the extent incumbent

³¹¹ Sierra Petition at 18-22.

³¹² *Second Report and Order*, 12 FCC Rcd at 12668-69 (para. 291).

³¹³ *Id.* at 12588-91 (paras. 98-105).

³¹⁴ *Id.* at 12668-69 (para. 291), adopting footnote 8 to 47 C.F.R. § 101.107.

services continue their authorized operations, they are governed by their existing tolerance level. Sierra does not demonstrate that this provision is inadequate or otherwise fails to permit the licensees authorized under the prior 31 GHz service rules to operate the equipment designed for those services.

188. We will modify our rules to include the additional licenses that we may authorize after March 11, 1997, pursuant to our decision in this Order to permit the refiling of the dismissed 31 GHz applications. As with incumbent licensees, these new licensees would be authorized to provide the requested 31 GHz services that would be governed by the prior service rules, including the prior frequency tolerance level. As for Sierra's concerns about the impact of the new LMDS frequency tolerance level on governmental entity licensees operating under the prior level, those entities that are incumbent licensees as of March 11, 1997, are protected in the outer 150 megahertz segment of the 31 GHz band and are entitled to coordinate with LMDS operators for an accommodation.³¹⁵ As discussed above, any governmental entity that may become a new licensee as a result of refiling a dismissed application that was on file before March 11, 1997, will obtain secondary status the same as all 31 GHz incumbent licensees in the middle 150 megahertz segment and all LTTS 31 GHz incumbent licensees.³¹⁶

189. Finally, we reject Sierra's contention that notice was not provided of the LMDS frequency tolerance level. Comments were sought in the *Third NPRM* on all aspects of proposed technical rules for LMDS.³¹⁷ In addition, we thoroughly discuss above the adequacy of the notice of the proposed redesignation of the 31 GHz band in the *Fourth NPRM*. Commenters had ample opportunity to respond to both aspects of our proposals before our deliberations in the *Second Report and Order*.

D. Reconsideration of Dismissal of Waiver Petitions

1. Background

190. In January, 1991, the Commission granted a license to Hye Crest Management, Inc., predecessor-in-interest to CellularVision, to provide LMDS service in the 28 GHz band in the New York Primary Metropolitan Statistical Area (PMSA) pursuant to a waiver of the Part 21

³¹⁵ 47 C.F.R. § 101.103(b)(1)(i), 101.103(b)(1)(ii).

³¹⁶ 47 C.F.R. §§ 101.103(b)(1), 101.103(b)(2).

³¹⁷ *Third NPRM*, 11 FCC Rcd at 96-98 (paras. 118, 123).

rules which only allowed point-to-point operation in this band.³¹⁸ Subsequent to this grant, a total of 971 applications were filed for similar waivers of the rules in order to operate LMDS facilities. The Commission implemented a freeze on the acceptance of applications for common carrier point-to-point microwave service in the 28 GHz band in an order released October 29, 1992, to stop the filing of additional waiver applications.³¹⁹ In an Order issued in conjunction with the *First NPRM*, the Commission denied the pending waiver applications because the Commission found it more appropriate to establish service rules for the licensing and operation of LMDS, rather than granting waivers of the existing rules.³²⁰ Several of the LMDS waiver applicants filed petitions for reconsideration of this dismissal.

191. In the Order on Reconsideration released in conjunction with the *Second Report and Order*, the petitions for reconsideration were denied.³²¹ The Commission stated that it has wide latitude in choosing whether to proceed by adjudication, such as a waiver proceeding, or by rulemaking. Because the waiver applications were found to have raised issues of general applicability, the Commission pointed out that their disposition was better suited to a rulemaking as determined in the *First NPRM*. The Commission alternatively considered whether, on reconsideration, petitioners showed that the waiver applications met the applicable standards that govern waiver of frequency allocation in *Big Bend Telephone*.³²² The Commission concluded that, under the standards, the applications also would not be granted because the proposed use of frequencies was detrimental to the assigned users at the time they were filed, they did not meet the public interest standards for waiver of frequency designation, and any unique aspects of a service or an applicant do not outweigh the countervailing public interest in the resolution of the fundamental service issues by rulemaking rather than adjudication.

³¹⁸ Application of Hye Crest Management, Inc., for License Authorization in the Point-to-Point Microwave Service in the 27.5-29.5 GHz Band and Request for Waiver of the Rules, File No. 10380-CF-P-88, Memorandum Opinion and Order, 6 FCC Rcd 332 (1991) (*Hye Crest Order*).

³¹⁹ Petitions for Redesignation of the Common Carrier Point-to-Point Microwave Radio Service Frequency Band 27.5-29.5 GHz, RM-7722, RM 7872, Order, 7 FCC Rcd 7201 (1992).

³²⁰ *First NPRM*, 8 FCC Rcd at 564-65 (para. 51).

³²¹ *Second Report and Order*, 12 FCC Rcd at 12705-11 (paras. 388-406).

³²² Big Bend Telephone Company, Inc. and Dell Telephone Cooperative, Inc., File Nos. 14850-CF-P-84 through 14949-CF-P-84, File Nos. 14811-CF-P-84 through 14848-CF-P-84, Memorandum Opinion and Order, 2 FCC Rcd 2413 (1986) (*Big Bend Telephone*).

192. LDH and M3ITC submit petitions for further reconsideration of the Order on Reconsideration that request that the Commission reinstate their applications for processing.³²³ They argue that they raise numerous issues that the Commission did not consider previously on reconsideration, such as the rights of previously cut-off applicants, and that the Commission has a statutory obligation to consider these issues. They seek to ensure that all relevant issues are addressed before final action is taken to dismiss their applications for waiver under the previously existing 28 GHz service rules. We consider the issues more fully below, and deny the requests.

2. Retroactive Application of Service Rules

193. LDH and M3ITC argue that the Commission may not retroactively apply new service rules in the 28 GHz band to pending applications. M3ITC argues that the Commission does not have the statutory authority to apply new rules retroactively to parties that engaged in transactions with the agency in good faith reliance upon existing rules.³²⁴ LDH argues that the Commission may adopt new rules, but that giving new rules retroactive effect is an extraordinary measure that the courts in numerous cases have frowned upon.³²⁵ LDH argues that the Order on Reconsideration ignored certain validly adopted rules and statutory requirements that governed the processing of their applications under the existing rules and that the applications may not be dismissed under retroactively applied rules without appropriate consideration.

194. LDH argues that, before the Commission proposed to change the rules in the *First NPRM*, its waiver applications had passed the "cut-off" date when mutually exclusive applications must be filed in response to the public notice of their applications.³²⁶ Many of the applications were the subject of petitions to deny and competing applications, and a settlement proposal was filed. LDH contends that the Commission may not retroactively apply new processing rules to divest applicants of the rights obtained from cut-off status until we balance the harm of retroactive application of new rules with the harm of undermining implementation of the new rules. Specifically, LDH argues that we are required by the statute and our rules to consider the petitions to deny and the settlement agreement submitted for our approval with respect to certain

³²³ LDH Petition at 3 n.2; M3ITC Petition at 2.

³²⁴ M3ITC Petition at 2, citing *Bowen v. Georgetown University Hospital*, 488 U.S. 203 (1988) (*Bowen*).

³²⁵ LDH Petition at 4, citing, among other decisions, *Yakima Valley Cablevision v. F.C.C.*, 794 F.2d 737, 745 (D.C. Cir. 1986) (*Yakima Valley*); *McElroy Electronics Corporation v. F.C.C.*, 990 F.2d 1351, 1365 (D.C. Cir. 1993); 86 F.3d 248, 257 (D.C. Cir. 1996).

³²⁶ LDH Petition at 4-6; 47 C.F.R. § 21.31.

of the applications.³²⁷ LDH also argues that the Commission is required under the auction authority in Section 309(j) of the Act to take measures to expedite service to the public and avoid mutual exclusivity, and that the Commission did the opposite when it dismissed the cut-off applications.³²⁸ LDH contends that granting those cut-off applications not subject to competing applications and ready for a grant would achieve these goals and avoid reopening the window to increase the number of competing parties.

195. We disagree with petitioners' claims of retroactivity. There are fundamental differences between the applications that were the subject of retroactive rules in the cases relied on by petitioners and the waiver applications that they filed which are under review here. It is well established by the courts that an applicant has no vested right to a continuation of the substantive standards in effect at the time its application was filed, whether or not the application has been accepted and achieved cut-off status.³²⁹ Under these principles, LDH and M3ITC have no vested rights in the waiver applications that were pending at the Commission and that were dismissed in order to implement new LMDS service rules. Therefore, the Commission is not applying a rule "retroactively," as petitioners claim, when it applies new application standards to applicants with pending applications. The petitioners' situation is distinguishable from the cases relied on by petitioners in which rule changes were applied so as to affect vested rights or liabilities.³³⁰

196. These principles apply with greater force with respect to petitioners' waiver applications because petitioners did not even qualify for licenses under the service rules that were in effect when they filed their applications. Petitioners were seeking waivers of the existing point-to-point rules they now ask us to enforce so as to permit them to provide a substantially different service, LMDS. As the Commission found in dismissing the 971 waiver applications in the *First NPRM*, the applications were based on existing point-to-point rules that were not structured for

³²⁷ LDH Petition at 7-8.

³²⁸ *Id.* at 5-6.

³²⁹ *See, e.g., Chadmore Communications, Inc. v. F.C.C.*, 113 F.3d 235, 240-41 (D.C. Cir. 1997) (Commission's application of new policy on "extended implementation authority" to pending applicants did not have a "retroactive effect" because pending applicants did not have any vested right to continued application of the rules in effect when they filed their applications); *Hispanic Information & Telecom. Network v. F.C.C.*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989) ("The filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed.").

³³⁰ In *Yakima Valley* the Commission retroactively changed its enforcement policy with respect to cable franchise fees that were imposed prior to the policy change. Similarly, in *Bowen* the Department of Health and Human Services applied new limits on medicare reimbursements to services rendered prior to the adoption of the new limits, for which the health care providers had vested rights to reimbursement.

the large amount of spectrum requested for individual licensees and did not reflect the geographic service areas or the technical parameters proposed for the new LMDS service.³³¹ Granting the waiver requests would amount to a *de facto* redesignation of the 28 GHz band and, as the Commission emphasized on reconsideration in the *Second Report and Order*, such issues of general applicability should be considered under our rulemaking authority rather than by adjudication through separate waiver proceedings.³³²

197. The Commission, thus, properly dismissed applications in which applicants clearly had no vested rights in the continuation of standards they sought to waive, and which raised issues of general applicability better resolved by rulemaking. Furthermore, the extent to which any of the waiver applications had been processed under the existing rules and achieved cut-off status is not relevant, because the Commission has found that the applications did not meet the applicable standards for waiver. As the Commission stated, even if only a few waiver applications had been filed, any showing of further interest in point-to-multipoint service in the 28 GHz band would have warranted the decision to institute a rulemaking proceeding to accommodate the new service.³³³ Limiting the number of waiver applications by examining only cut-off applications would not have resolved the underlying spectrum policy issues raised by these applications.

198. Finally, we disagree with LDH that the Commission acted inconsistent with its auction authority under Section 309(j) by refusing to grant certain of the cut-off applications. The Commission dismissed the applications for sufficient reasons long before it adopted rules to designate the 28 GHz band for LMDS and to use auction procedures to choose from among mutually exclusive applications filed pursuant to those new rules. Although LDH is correct that Section 309(j)(6)(e) instructs the Commission to avoid mutual exclusivity and proceed with auctions, that provision was not in existence and did not apply to the circumstances under which the Commission summarily dismissed the waiver applications.³³⁴

3. Standards for Waiver and Summary Dismissal

199. LDH argues that summary dismissal of the waiver applications does not meet the level of review that we are required to give requests for waiver. LDH contends that, as waiver

³³¹ *First NPRM*, 8 FCC Rcd at 564-65 (para. 51).

³³² *Second Report and Order*, 12 FCC Rcd at 12705 (paras. 388-389).

³³³ *Id.* at 12711 (para. 405).

³³⁴ 47 U.S.C. § 309(j)(6)(e); *DIRECTV*, 110 F.3d at 828 ("That provision instructs the agency, in order to avoid mutual exclusivity, to take certain steps, such as the use of an engineering solution, within the framework of existing policies.").

requests, the applications contained detailed specifications of the proposed service and its benefits that the court in *WAIT Radio* stated should not be subject to perfunctory treatment, but must be given a hard look.³³⁵ LDH and M3ITC further argue that the dismissal of the applications is inconsistent with the Commission's treatment of the first waiver application filed by Hye Crest, which was granted, and of the pending MMDS applications, which were permitted to be processed under the prior rules despite the adoption of new wide-area licensing and auction rules in the *MDS Report and Order*.³³⁶ LDH and M3ITC contend that the Commission's summary dismissal of their waiver applications failed to justify their disparate treatment from these other applications.

200. We disagree that summary dismissal of the 971 waiver applications was procedural error. As we discuss above, petitioners have no vested rights that require a grant of their applications for waiver or further processing, either under the Communications Act or the Commission's rules. The applications failed to conform with the point-to-point service rules governing the 28 GHz band under which they were filed. Unless a waiver of the rules is granted, the applications were unacceptable and subject to summary dismissal.³³⁷ The listing of some applications on public notice, the filing of petitions to deny or settlement proposals, and the passing of the cut-off date for the filing of mutually exclusive applications do not bar the subsequent summary dismissal of such applications that fail to comply with the governing application rules.

201. Moreover, the Commission fully considered, in both the *First NPRM* and the *Second Report and Order*, the specific standards set out in *Big Bend Telephone* and *WAIT Radio* by which we determine whether to waive our service rules.³³⁸ The Commission found that granting these requests would have adversely affected the interests of point-to-point microwave users to which the spectrum was then assigned by depriving them of the spectrum awarded to them. It also concluded that the public interest would not be served because granting a large number of waiver requests would result in the widespread offering of services incompatible with the existing licensing framework for the 28 GHz band. In these circumstances, the public interest was found

³³⁵ LDH Petition at 8-9, citing *WAIT Radio v. F.C.C.*, 418 F.2d, 1153, 1157 (D.C. Cir. 1969).

³³⁶ *Id.* at 9-10, citing *Hye Crest Order*, 6 FCC Rcd at 334 (paras. 21-24) and Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and the Instructional Television Fixed Service, MM Docket No. 94-131 and PP Docket No. 93-253, FCC 95-230, Report and Order, 10 FCC Rcd 9589, 9601 (para. 89) (1995) (*MDS Report and Order*); M3ITC Petition at 2.

³³⁷ *See, e.g.*, *United States v. Storer Broadcasting*, 351 U.S. 192 (1956) (Commission does not have to hold a full hearing on each application but may establish general rules outlining certain of its policies); 47 C.F.R. § 21.20.

³³⁸ *First NPRM*, 8 FCC Rcd at 565 (paras. 52-53); *Second Report and Order*, 12 FCC Rcd at 12706-11 (paras. 390-406).

to be better served by initiating a rulemaking to develop consistent rules of general applicability to provide for LMDS and avoiding individual waivers to allow services that would make future implementation of LMDS more difficult. These determinations satisfied the "hard look" requirement of *WAIT Radio* for considering waivers.

202. Furthermore, petitioners' claims of disparate treatment are without merit, inasmuch as the waiver applications that were summarily dismissed were not similarly situated with either Hye Crest's application or the MMDS applications. In dismissing the waiver applications in the *First NPRM*, the Commission fully considered the different circumstances that prevailed in its considerations of the first waiver application filed by Hye Crest.³³⁹ In *Hye Crest*, the Commission had found that a formal rulemaking proceeding to permanently redesignate the band for LMDS was premature inasmuch as the waiver was not a *de facto* redesignation of the band and an onslaught of waiver requests was not anticipated. An initial waiver would allow some experimental use of the band for LMDS. In considering the waiver applications subsequently filed, the Commission found that granting them would constitute a *de facto* redesignation of the band that should be handled by a rulemaking proceeding. This is the course the Commission said it would take if interest in using the band for point-to-multipoint services did develop. As for the MMDS applications cited by petitioners, those applications were filed in compliance with the applicable MMDS service rules and the issues were confined to determining the method for selecting among mutually exclusive applications.³⁴⁰ This is entirely different from the waiver applications at issue here, which sought to implement a new service not provided in the rules and which raised issues of general applicability.

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

203. A Supplemental Final Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act,³⁴¹ is set forth in Appendix C.

B. Further Information

204. For further information concerning this rulemaking proceeding contact Barbara Reideler or Jay Whaley, Policy Division at (202) 418-1310, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, D.C. 20554.

³³⁹ *First NPRM*, 8 FCC Rcd at 565 (paras. 52-53).

³⁴⁰ *MDS Report and Order*, 10 FCC Rcd at 9569 (para. 89).

³⁴¹ 5 U.S.C. § 604.

VI. ORDERING CLAUSES

205. ACCORDINGLY, IT IS ORDERED that the actions of the Commission herein ARE TAKEN pursuant to Sections 4(i), 257, 303(r), and 309(j) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 257, 303(r), 309(j).

206. IT IS FURTHER ORDERED that the late-filed letters of CommPare, Inc., CSG Wireless, Inc., State of Nevada Department of Transportation, Parsons Transportation Group, Inc., and Westec Communications, Inc., ARE ACCEPTED.

207. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by the Independent Alliance, LBC Communications, LDH International, Inc., M3 Illinois Telecommunications Corporation, the Rural Telecommunications Group, Sierra Communications, Inc., and Webcel Communications, Inc., ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

208. IT IS FURTHER ORDERED that the Motion for Stay Pending Review of Petition for Reconsideration filed by LDH International, Inc., IS DENIED.

209. IT IS FURTHER ORDERED that the Commission's Rules ARE AMENDED as set forth in Appendix B.

210. IT IS FURTHER ORDERED that the applications that were dismissed in the *Second Report and Order* are permitted to be refiled under the terms and conditions in this Third Order on Reconsideration and SHALL BE FILED no later than 60 days following the effective date of this Order.

211. IT IS FURTHER ORDERED that the provisions of this Order and the Commission's Rules, as amended in Appendix B, SHALL BECOME EFFECTIVE 60 days after publication of this Order in the Federal Register.

212. IT IS FURTHER ORDERED that the Director, Office of Public Affairs, SHALL SEND a copy of this Order, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

List of Pleadings

Petitions for Reconsideration

The Independent Alliance (Alliance)
LBC Communications, Inc. (LBC)
LDH International, Inc. (LDH), filed together with a Motion for Stay Pending Review of
Petition for Reconsideration.
M3 Illinois Telecommunications Corporation (M3ITC)
The Rural Telecommunications Group (RTG)
Sierra Digital Communications, Inc. (Sierra)
Webcel Communications, Inc. (Webcel)

Oppositions to Petitions for Reconsideration

Bell Atlantic Corporation Opposition to Webcel Petition (Bell Atlantic)
CellularVision USA, Inc. Opposition to Sierra Petition (Cellularvision)
Cellularvision Consolidated Opposition to Nevada DOT and RTG Petitions
RTG Opposition to Webcel Petition
Texas Instruments, Inc., Opposition to Sierra Petition (TI)

Letters in Support of Petitions for Reconsideration

Letters of Commpare, Inc. (Commpare), CSG Wireless, Inc. (CSG), Sunnyvale General
Devices and Instruments (Sunnyvale), Videolinx, Inc. (Videolinx), and Westec
Communications, Inc. (Westec) in support of Sierra Petition.
Letter of Parsons Transportation Group, Inc (Parsons) in support of Nevada DOT Petition.

Letters Requesting Clarification

Alcatel Network Systems (Alcatel)
TI

Ex Parte Letters

Nevada Department of Transportation (Nevada DOT)

Replies to Oppositions

RTG

Webcel

APPENDIX B**Final Rules**

Part 101 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 101 - FIXED MICROWAVE SERVICE

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

Authority: 47 U.S.C. §§ 154, 303, 309(j), unless otherwise noted.

2. Section 101.57 is amended by revising paragraph (a)(1) to read as follows:

§ 101.57 Modification of station license.

(a)(1)(i) Except as provided in paragraph (a)(1)(ii) of this section and in § 101.59, no modification of a license issued pursuant to this part (or the facilities described thereunder) may be made except upon application to the Commission.

(ii) The provisions of paragraph (a)(1)(i) of this section shall not apply in the case of (A) licenses authorized for operation in the 31,000-31,300 MHz band prior to March 11, 1997; (B) non-Local Multipoint Distribution Service licenses authorized for such operation in the band pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**; and (C) the Local Multipoint Distribution Service as provided in § 101.61(c)(10).

* * * * *

3. Section 101.103 is amended by adding paragraph (b)(3) as follows:

§ 101.103 Frequency coordination procedures.

* * * * *

(b) * * *

(3) Non-LMDS operations in the entire 31,000-31,300 MHz band licensed after March 11, 1997, based on applications refiled no later than **[insert date 60 days after publication in the Federal Register]** are unprotected with respect to each other and subject to harmful interference from each other.

(i) Such operations and any operations licensed prior to March 11, 1997, in the band are unprotected with respect to each other and subject to harmful interference from each other.

(ii) Such operations are licensed on a secondary basis to LMDS operations licensed in the band, may not cause interference to LMDS operations, and are not protected from interference from LMDS operations.

(iii) Such operations licensed on a point-to-point basis may not be extended or otherwise modified through the addition of point-to-point links. Such operations licensed on a point-to-radius basis may add additional stations within the licensed area.

* * * * *

4. Section 101.107 is amended by revising footnote /8/ in paragraph (a) to read as follows:

§ 101.107 Frequency tolerance.

(a) * * *

/8/ For stations authorized prior to March 11, 1997, and for non-Local Multipoint Distribution Service stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**, the transmitter frequency tolerance shall not exceed 0.030 percent.

* * * * *

5. Section 101.113 is amended by revising footnote /8/ in paragraph (a) to read as follows:

§ 101.113 Transmitter power limitations.

(a) * * *

/8/ For stations authorized prior to March 11, 1997, and for non-Local Multipoint Distribution Service stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**, the transmitter output power shall not exceed 0.050 watt.

* * * * *

6. Section 101.147 is amended by revising footnote /16/ in paragraph (a) and by revising the introductory text of paragraph (u) to read as follows:

§ 101.147 Frequency assignments

(a) * * *

/16/ As of June 30, 1997, frequencies in these bands are available for assignment only to LMDS radio stations, except for non-LMDS radio stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**.

* * * * *

(u) *31,000-31,300 MHz.* Stations licensed in this band prior to March 11, 1997, may continue their authorized operations, subject to license renewal, on the condition that harmful interference will not be caused to LMDS operations licensed in this band after June 30, 1997. Non-LMDS stations licensed after March 11, 1997, based on applications refiled no later than **[insert date 60 days after publication in the Federal Register]** are unprotected and subject to harmful interference from each other and from stations licensed prior to March 11, 1997, and are licensed on a secondary basis to LMDS. In the sub-bands 31,000-31,075 MHz and 31,225-31,300 MHz, stations initially licensed prior to March 11, 1997, except in LTTS, and LMDS operations authorized after June 30, 1997, are equally protected against harmful interference from each other in accordance with the provisions of § 101.103(b). For stations, except in LTTS, permitted to relocate to these sub-bands, the following paired frequencies are available:

* * * * *

7. Section 101.803 is amended by revising note /7/ of paragraph (a) and revising note /9/ of paragraph (d) to read as follows:

§ 101.803 Frequencies.

(a) * * *

/7/ As of June 30, 1997, frequencies in this band only are available for assignment to LMDS radio stations, except for non-LMDS radio stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**. Stations authorized prior to June 30, 1997, may continue to operate within the existing terms of the outstanding licenses, subject to renewal. Non-LMDS stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]** shall

operate on an unprotected basis and subject to harmful interference from similarly licensed stations or stations licensed prior to June 30, 1997, and on a secondary basis to LMDS radio stations.

* * * * *

(d) * * *

/9/ As of June 30, 1997, frequencies in this band only are available for assignment to LMDS radio stations, except for non-LMDS stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**. Stations authorized prior to June 30, 1997, may continue to operate within the existing terms of the outstanding licenses, subject to renewal. Non-LMDS stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]** shall operate on an unprotected basis and subject to harmful interference from each other or stations licensed prior to June 30, 1997, and on a secondary basis to LMDS radio stations.

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APPENDIX C

Supplemental Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, *See* 5 U.S.C. § 603 (RFA), a Final Regulatory Flexibility Analysis (FRFA) was incorporated in Appendix D of the Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking (*Second Report and Order*) in this proceeding.¹ The Commission's Supplemental Final Regulatory Flexibility Analysis (SFRFA) in this Third Order on Reconsideration reflects revised or additional information to that contained in the FRFA. The SFRFA thus is limited to matters raised in response to the *Second Report and Order* that are granted on reconsideration in the Third Order on Reconsideration. This SFRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 846 (1996), codified at 5 U.S.C. §§ 601 *et seq.*²

I. Need For and Objectives of the Action

The actions taken in this Third Order on Reconsideration are in response to petitions for reconsideration or clarification of the service rules adopted in the *Second Report and Order* to implement the new Local Multipoint Distribution Service (LMDS) on the 28 GHz and 31 GHz frequency bands. The petitions are denied, except the petitions seeking reconsideration of the decision to dismiss the pending applications requesting authorization of 31 GHz services under the previous service rules. The rule changes adopted in the Third Order on Reconsideration allow the dismissed applicants to refile their applications for the same 31 GHz authorization, but on a secondary basis to LMDS. The rule changes are intended to permit the limited 31 GHz services requested in the dismissed applications that include traffic control systems, among other services in the public interest, while reaffirming the Commission's decision to terminate future licensing of new applications under the previous 31 GHz service rules and designate the 31 GHz band for LMDS, which offers a wide array of telecommunications and video programming distribution services.

¹ 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, Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, CC Docket No. 92-297, Suite 12 Group Petition for Pioneer Preference, PP-22; Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12768-89 (1997) (*Second Report and Order*). Certain abbreviated references used in the Third Order on Reconsideration are also used in this Appendix.

² Title II of the Contract with America Act is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA).

II. Summary of Significant Issues Raised by the Public in Response to the Final Regulatory Flexibility Statement

No comments were received in direct response to the FRFA. In response generally to the *Second Report and Order*, the Commission received petitions, as well as *ex parte* letters and letters in support, that seek reconsideration, and also received oppositions to those petitions. Sierra requests that the dismissed 31 GHz applications be reinstated and the licensees given the same interference protections and relocation procedure that the Commission accorded incumbent 31 GHz licensees when it redesignated the 31 GHz band for LMDS. Sierra argues that the potential public interest benefits in authorizing the requested services in the dismissed applications, which include public safety services and public expenditures, outweigh any benefits that may come from licensing 31 GHz for LMDS free of the requested services. Nevada DOT requests that its applications and the applications of the Cities for a traffic control system be granted on a temporary basis and secondary to LMDS in order to allow the implementation of equipment that was purchased and installed and to provide public safety services while the licensees seek an alternative technology or frequency band.

CellularVision and TI oppose the requests. They contend that authorization of the 31 GHz operations in the dismissed applications is inconsistent with the decision to designate the 31 GHz for LMDS and that the operations would interfere with LMDS, result in enforcement problems for LMDS, and precipitate other applications for similar relief.

III. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

The rule changes adopted in the Third Order on Reconsideration would apply to a specific number of entities that had pending applications for authorization of 31 GHz services on file that were dismissed when the Commission adopted the *Second Report and Order* on March 11, 1997. We estimate that there are approximately 10 dismissed applicants with several dismissed applications, based on Commission records. The dismissed applicants are permitted to refile the dismissed applications and obtain a license to provide the 31 GHz services designated in the band before the Commission designated the band for LMDS. No new applicants may request such 31 GHz authorization. Also, no new applications may be filed by the dismissed applicants, which may only refile the dismissed applications.

The FRFA found that the rules adopted at that time would apply to all incumbent 31 GHz licensees providing 31 GHz services under the previous 31 GHz service rules. The Commission determined the description and estimate of the number of small entities among the total number of 31 GHz licensees based on the licensed services and their qualifications as small

entities. Of the total number of 86 licensees, 59 were LTTS licensees, 8 were private business licensees, and 19 were governmental entities. To determine which of the licensees qualified as small entities, the Commission estimated the number of governmental entities with populations less than 50,000, but was unable to determine which of LTTS licensees or private business licensees were small. To ensure that no small interests were overlooked, the Commission assumed that most of the licensees were small entities and estimated that at least 50 of the 86 licensees to be small entities.³

Since the revisions adopted in the Third Order on Reconsideration do not apply to incumbent 31 GHz licensees, the estimates of small entities in the FRFA is not affected and does not need to be adjusted. The revisions instead apply to the small and specific number of dismissed applicants that requested 31 GHz licenses and are permitted to refile for the same services requested in the dismissed applications. There are a variety of dismissed applicants, including governmental entities and private businesses. Inasmuch as the total number of dismissed applicants is very small and only ten are estimated, we will assume that all of these are small entities in order to ensure that no small interests are overlooked.

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

The dismissed applicants have the option to refile applications for the same services requested in the dismissed applications within 60 days following the effective date of the Third Order on Reconsideration. Not all of the dismissed applicants may decide to refile their dismissed applications. The filing fees were refunded to the dismissed applicants that paid fees. The applicants may only apply for the same stations and services contained in the dismissed applications, and the licenses will be secondary to LMDS licenses. All of the dismissed applications requested service authorizations that are governed by the established licensing, operating, and technical rules and procedures in Part 101 of the Commission's Rules (47 C.F.R. §§ 101.1 *et seq.*). Thus, the data required for refiling the dismissed applications were collected on the dismissed applications and the refiling requirement does not require new information nor impose any undue burdens on the dismissed 31 GHz applicants, including small businesses.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The rule changes adopted in the Third Order on Reconsideration are in response to petitions for reconsideration filed by entities that, for purposes of this analysis, we have

³ *Second Report and Order*, 12 FCC Rcd at 12780-81.

considered to be small entities. The changes minimize any significant economic impact on small entities consistent with our objectives in adopting the rule changes and consistent with the comments we received.

The requests of Sierra, Nevada DOT, and other commenters are granted to permit the 31 GHz operations requested in the dismissed applications. Although we determine that terminating future licensing under the 31 GHz rules was consistent with the public interest in designating the 31 GHz band for LMDS, we find that permitting the operations reflected in the dismissed applications and modified by the Order is an exception based on unique circumstances that is in the public interest. Nevada DOT demonstrates that dismissal of the considerable number of applications to implement the Las Vegas traffic control system would not spare the unnecessary expenses identified in the *Second Report and Order*, but rather would prevent the use of purchased and installed equipment until a replacement technology is found. To the extent that applicants have already invested in constructing these systems, the system could be implemented during the inception of LMDS without substantial additional investment for retooling or relocation at this time.

Although Sierra requests that we reinstate the dismissed applications, we decide that providing the dismissed applicants with the opportunity to refile the applications is a more reasonable approach to licensing the dismissed applications. The filing fees were returned to the dismissed applicants that paid fees. The Third Order on Reconsideration reaffirms the dismissal of the pending applications, but without prejudice to their being refiled within 60 days of the effective date of this Order to provide applicants time to consider whether to refile. Circumstances have changed since the pending applications were filed and reinstated application may not reflect the applicant interests or intentions. The new licenses will be secondary to LMDS licenses and limited to the scope of the services authorized, without modification for expansion. Dismissed applicants that do not wish to operate in this manner have the option to not reapply.

We decide to permit the dismissed applicants to refile the applications for licensed authorization under the established licensing procedures in Part 101, which governed the dismissed applications. Licenses will be issued for a 10-year period and may be renewed, which provides Nevada DOT more opportunity to implement its services than the temporary license it requested. As for CellularVision's concern that allowing the refiling of the dismissed applications will encourage the filing of similar applications, only the applications that were dismissed in the *Second Report and Order* may be refiled and they are limited to the same stations and services contained in the pending applications. The number of applicants are very few and the scope of their services is already identified in the dismissed applications, so that uncertainties about the impact of the refiling opportunity should be reduced.

We decide to authorize any licenses based on the dismissed applications on a secondary basis to LMDS, so that such 31 GHz licensees may not interfere with LMDS and must accept any interference from LMDS. As noted, we have considered the concerns of CellularVision and TI about potential interference with LMDS operations. Under a license that is secondary to LMDS licenses, the licensees are prevented from adversely impacting LMDS and are required to modify their systems to eliminate interference or seek alternative access to frequencies. As we conclude, it is in the public interest to allow these important traffic control facilities to continue to operate as long as they do not interfere with future LMDS operations. In addition, the new licensees may provide service to the full extent permitted under the license, but are not permitted any expansion or increase in operations, further minimizing any impact of the new 31 GHz services on LMDS.

Thus, we decline to grant Sierra's request to accord the new licensees the same interference protection against LMDS that we adopted in the *Second Report and Order* for non-LTTS licensees in the outer 150 MHz segment of the 31 GHz band. That protection was based on the needs of existing 31 GHz licensees that had well-established traffic control systems or private business services that were licensed before LMDS was designated for the band, circumstances which do not apply here. Moreover, Nevada DOT requests that the dismissed applications, including the considerable number of its own and those of the Cities, be subject to secondary status to LMDS to accommodate LMDS concerns and facilitate the authorization of the dismissed applications in light of the redesignation of the band for LMDS. On balance, permitting the licensing of the limited operations requested in the few dismissed applications on a secondary basis to LMDS will prevent the undue economic hardships to small entities that seek to implement the proposed services, while preventing any chilling effect on the potential development of LMDS in 31 GHz by new LMDS licensees that are small entities.

VI. Report to Congress

We will send a copy of this Supplementary Final Regulatory Flexibility Analysis, along with the Third Order on Reconsideration, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A copy of the Third Order on Reconsideration and this SFRFA (or summary thereof) will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy for the Small Business Administration.