

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

In the Matter of)
)
Requests for Waiver of Section 101.1003(a))
of the Commission's Rules Establishing)
Eligibility Restrictions on Incumbent)
LECs and Cable Operators in the)
Local Multipoint Distribution Service)

ORDER

Adopted: September 23, 1998

Released: September 23, 1998

By the Chief, Auctions & Industry Analysis Division, and the Chief, Public Safety & Private Wireless Division:

1. The Auctions & Industry Analysis Division and Public Safety & Private Wireless Division ("Divisions") have before them ten requests for waiver of the Commission's rule imposing eligibility restrictions on incumbent local exchange carriers ("LECs") and incumbent cable operators that seek to acquire Local Multipoint Distribution Service ("LMDS") A block licenses in their current service areas.¹ Because these requests address the same issue, we have opted to resolve these matters in one Order.² For the reasons discussed below, we grant these licenses subject to all applicable

¹ See Exhibit G of FCC Form 601s filed by Central Texas Telephone Investments, Inc. ("CTTI") (File No. 0000000093); Farmers Telephone Cooperative, Inc. ("Farmers") (File No. 0000000102); GW Wireless, Inc. ("GW Wireless") (File No. 0000000105), Horry Telephone Cooperative, Inc. ("Horry") (File No. 0000000094); Northern Communications, Inc. ("Northern") (File No. 0000000087); and Venture Wireless, Inc. ("Venture") (File No. 0000000089 and File No. 0000000090). See also Letter to Kathleen O'Brien Ham, Chief, Wireless Telecommunications Bureau Auctions and Industry Analysis Division, Federal Communications Commission, from L. Dan Wilhelmson, General Manager/CEO, Consolidated Telephone Cooperative, dated May 14, 1998 ("CTC"); Letter to Robert James, Senior Engineer, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Jerry R. James, General Manager, Craw-Kan Telephone Cooperative, Inc, dated May 29, 1998 ("Craw-Kan"); Letter to Kathleen O'Brien Ham, Chief, Wireless Telecommunications Bureau Auctions and Industry Analysis Division, Federal Communications Commission, from Kenneth Lund, Jr., General Manager, Northwest Communications Cooperative, dated June 29, 1998 ("Northwest").

² See, e.g., Requests for Waiver of Section 24.711(b)(3) of the Commission's Rules Establishing the Interest Rate on Installment Payments for C Block PCS Licenses, *Order*, 13 FCC Rcd 10230, 10230 (1998). In addressing these waiver requests in a single order, however, we are mindful of our duty to decide each request on the individual facts presented by each petitioner. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("[A]llegations

conditions set forth in the Commission's rules³ and a companion Public Notice also being released today,⁴ and deny the waiver requests. Since we are conditionally granting these licenses, we also dismiss as moot a Petition to Deny filed by Brownwood Television Cable Service, Inc. against Central Texas Telephone Investment's license application.⁵

2. **Background.** Pursuant to Section 101.1003 of the Commission's rules, an incumbent LEC or incumbent cable operator is prohibited from owning an attributable interest in an LMDS A block license if the LMDS license's geographic service area significantly overlaps the incumbent's authorized or franchised service area.⁶ A "significant overlap" of an incumbent's authorized or franchised service area occurs when at least 10 percent of the population of the LMDS licensed service area, as determined by 1990 census figures for the counties contained in that service area, is within the incumbent's authorized or franchised service area.⁷ A winning bidder of an A block license that is subject to this rule must partition and divest either the portion of its authorized or franchised service area that exceeds the overlap restriction, or the portion of its LMDS service area that exceeds the overlap restriction.⁸ The divestiture must occur within 90 days of the final grant of the license, which is contingent upon the licensee's compliance with the rule.⁹ If a licensee is unable to find a buyer in the required period of time, divestiture may be made to an interim trustee provided the licensee has no interest in or control of the trustee and the trustee may dispose of the divested portion of the license as it sees fit.¹⁰

3. Section 101.1003 was adopted to foster competition in the local telephone and multichannel video distribution ("MVPD") markets.¹¹ In the *LMDS Second Report and Order*, the

... stated with clarity and accompanied by supporting data are not subject to perfunctory treatment, but must be given a "hard look.")

³ See generally Subpart L of Part 101 of the Commission's rules, 47 C.F.R. § 101.1001 *et. seq.*

⁴ See FCC Announces the Conditional Grant of 13 Local Multipoint Distribution Service Licenses, *Public Notice*, DA 98-1938 (rel. September 23, 1998).

⁵ See *infra* note 33 and accompanying text.

⁶ 47 C.F.R. § 101.1003(a).

⁷ 47 C.F.R. § 101.1003(d).

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

⁹ 47 C.F.R. § 101.1003(f)(4)-(6).

¹⁰ 47 C.F.R. § 101.1003(f)(1)(iii).

¹¹ Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5—29.5 GHz Frequency Band, To Reallocate the 29.5—30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, FCC 97-82, 12 FCC Rcd 12545, 12625, ¶ 179 (1997) ("*LMDS Second Report and Order*").

Commission found that although there are several potential and actual sources of competition to incumbent LECs and cable operators in their respective markets, none of these technologies has yet posed a significant competitive antidote to the incumbents' market power.¹² Because of its significant capacity and potential to supply a wide range of one- and two-way services, including video, voice and data, the Commission concluded that the LMDS service provides a significant opportunity to increase competition in these markets.¹³ The Commission further recognized, however, that an in-region LMDS license would be particularly valuable to incumbent LECs and cable operators as it would allow them not only to provide increased or additional services, but also to preserve excess profits that an independent LMDS competitor could erode.¹⁴

4. After reviewing the extensive record compiled in the LMDS proceeding,¹⁵ the Commission decided to restrict temporarily incumbent LECs and cable operators from obtaining full ownership of LMDS A block licenses that significantly overlapped with their service areas.¹⁶ As the Commission explained, this approach would allow incumbent LECs and cable operators to participate in the LMDS auction and provide LMDS service, but also would ensure the entry of new LMDS operators that could provide competition.¹⁷ The restriction would apply for a three-year period, but could be extended if necessary to further promote competition in the local exchange and MVPD markets.¹⁸ However, the Commission also recognized that during the restriction period, some incumbent LECs and cable operators might be able to show that conditions in a particular market were sufficiently competitive to eliminate the restriction.¹⁹ The Commission thus provided that subsequent to the initial grant of LMDS licenses, an incumbent LEC or cable operator could obtain a waiver of the eligibility restriction upon showing that the petitioner no longer had market power

¹² *Id.* at 12618, ¶ 164.

¹³ *Id.* at 12621, ¶ 170. Two blocks of licenses were auctioned in each of 493 Basic Trading Areas ("BTA"). Each LMDS A block license comprises 1150 MHz of spectrum, which is the largest spectrum block ever auctioned by the Commission. Each LMDS B block license comprises 150 MHz of spectrum.

¹⁴ *Id.* at 12617, ¶ 163.

¹⁵ *See id.* at 12790-98 (Appendix E "List of Pleadings").

¹⁶ *Id.* at 12616-17, ¶ 162. Although a higher standard was originally proposed, the Commission ultimately concluded that the eligibility restriction would apply only when 10% or more of the LMDS BTA population overlapped an incumbent's authorized or franchised service area. The Commission explained that this figure was more consistent with other wireless services' ownership rules. On reconsideration, the Commission further noted that rural telephone companies generally have small service areas, which are less likely to trigger the eligibility restriction. *See* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5—29.5 GHz Frequency Band, To Reallocate the 29.5—30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Third Order on Reconsideration*, FCC 98-15, 13 FCC Rcd 4856, 4891 ¶ 99 (1998) ("*LMDS Third Order on Reconsideration*").

¹⁷ *LMDS Second Report and Order*, 12 FCC Rcd at 12616-17, ¶ 162.

¹⁸ *Id.* at 12616, ¶ 160. The eligibility restriction became effective on June 30, 1997 and will terminate on June 30, 2000, unless the Commission finds it necessary to extend the restriction for the reasons discussed above.

¹⁹ *Id.* at 12633, ¶ 199.

in its authorized or franchised service area due to the entry of a new competitor, other than an LMDS licensee, into such service area.²⁰

5. Several rural telephone company bidders for A block licenses filed requests for waiver of the eligibility restriction at the time they filed applications to participate in the LMDS auction.²¹ At that time, an appeal of the eligibility restriction as applied to rural telcos was pending in the U.S. District Court of Appeals for the D.C. Circuit, and petitions for reconsideration of various provisions of the *LMDS Second Report and Order*, including the eligibility restriction as applied to rural telcos, were pending before the Commission. On February 6, 1998, the court upheld the eligibility restriction generally and as applied to rural telephone companies.²² On February 11, 1998, the Commission denied petitions for reconsideration of the eligibility restriction.²³ The LMDS auction commenced on February 18, 1998 and closed on March 25, 1998. Winning bidders were required to file long-form applications by April 9, 1998.²⁴ Winning bidders for A block licenses that had filed waiver requests with their short-form applications repeated their requests in their long-form applications, and other winning bidders also filed requests for waiver of the eligibility restriction at that time.²⁵ In addition, CTC, Craw-Kan, and Northwest filed waiver requests as minor modifications to their long-form applications.²⁶ Some petitioners argued that they met the waiver criteria established under

²⁰ *Id.* See also 47 C.F.R. § 101.1003(a)(2).

²¹ These applications were due on January 20, 1998. See "FCC Announces Spectrum Auction Schedule for 1998," *Public Notice*, DA 97-2497, 12 FCC Rcd 19726 (1997). Applicants that filed waiver requests with their short form applications and subsequently were winning bidders on A block licenses include: Farmers Telephone Cooperative, Inc.; GW Wireless, Inc., Horry Telephone Cooperative, Inc.; and Venture Wireless, Inc. See also "Auction of Local Multipoint Distribution Service (LMDS) Licenses, Status of Applications to Participate in Auction," *Public Notice*, DA 98-141, 13 FCC Rcd 2181 (1998). In the latter *Public Notice*, the Bureau specifically noted that acceptance of these applications did not indicate that the waiver requests had been granted. See *id.* at 2. The Bureau further noted that final resolution of these requests would be released separately, and might affect an applicant's qualifications to hold a license or particular licenses. *Id.*

²² *Melcher v. FCC*, 134 F.3d 1143 (D.C. Cir. 1998).

²³ See *LMDS Third Order on Reconsideration*, 13 FCC Rcd at 4863-4904.

²⁴ See "Winning Bidders in the Auction of 986 Local Multipoint Distribution Service (LMDS) Licenses," *Public Notice*, DA 98-572 (rel. March 26, 1998).

²⁵ Winning bidders that first filed waiver requests with their long form applications include: Central Texas Telephone Investments, Inc. and Northern Communications, Inc.

²⁶ See Letter to Kathleen O'Brien Ham, Chief, Wireless Telecommunications Bureau Auctions and Industry Analysis Division, from L. Dan Wilhelmson, General Manager/CEO, Consolidated Telephone Cooperative, dated May 14, 1998; Letter to Robert James, Senior Engineer, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Jerry R. James, General Manager, Craw-Kan Telephone Cooperative, Inc, dated May 29, 1998; Letter to Kathleen O'Brien Ham, Chief, Wireless Telecommunications Bureau Auctions and Industry Analysis Division, Federal Communications Commission, from Kenneth Lund, Jr., General Manager, Northwest Communications Cooperative, dated June 29, 1998.

Sections 101.23 and 101.1003(a)(2) of the Commission's Rules.²⁷ Other petitioners did not cite to either of these waiver rules, but based their waiver requests on factors similar to the criteria established in Sections 101.23 and 1.3 of the Commission's Rules.²⁸

6. In a Public Notice released on April 16, 1998, the Wireless Telecommunications Bureau ("Bureau") sought comment on a March 26, 1998 letter from the United States Telephone Association ("USTA") to Chairman Kennard urging the Commission to eliminate eligibility restrictions for reaucted licenses and all ownership restrictions on previously auctioned licenses.²⁹ The Bureau also sought comment on all aspects of the instant waiver requests.³⁰ The Bureau received 12 comments³¹ and 8 reply comments in response to the *Waiver Public Notice*.³² In addition, Brownwood Television Cable Service, Inc. filed a Petition to Deny CTTI's license application solely on the basis that CTTI's waiver request should be denied.³³ Many commenters—mostly rural telephone cooperatives that had filed waiver requests and rural telco interest groups—support a waiver of the eligibility restriction for all rural telephone companies that were winning bidders of A block licenses.³⁴ One commenter supports the eligibility restriction but argues that small business LMDS licensees should be allowed to sell all or part of their licenses to incumbent LECs or cable

²⁷ See 47 CFR §§ 101.23 and 101.1003(a)(2). See also Exhibit G of FCC Form 601s filed by CTTI (File No. 0000000093) and Northern (File No. 0000000087); and Letter to Robert James, Senior Engineer, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Jerry R. James, General Manager, Craw-Kan Telephone Cooperative, Inc, dated May 29, 1998.

²⁸ See Exhibit G of FCC Form 601s filed by Farmers (File No. 0000000102), GW Wireless (File No. 0000000105), Horry (File No. 0000000094), and Venture (File No. 0000000089 and File No. 0000000090); Letter to Kathleen O'Brien Ham, Chief, Wireless Telecommunications Bureau Auctions and Industry Analysis Division, Federal Communications Commission, from L. Dan Wilhelmson, General Manager/CEO, Consolidated Telephone Cooperative, dated May 14, 1998, and Letter to Kathleen O'Brien Ham, Chief, Wireless Telecommunications Bureau Auctions and Industry Analysis Division, Federal Communications Commission, from Kenneth Lund, Jr., General Manager, Northwest Communications Cooperative, dated June 29, 1998.

²⁹ See Letter to William E. Kennard, Chairman, Federal Communications Commission, from Roy M. Neel, President and CEO, United States Telephone Association, dated March 26, 1998.

³⁰ See "Wireless Telecommunications Bureau Seeks Comment On Requests for Waiver of Incumbent LEC/Cable Eligibility Restrictions," *Public Notice*, 13 FCC Rcd 10944 (1998) ("*Waiver Public Notice*").

³¹ The Bureau received 10 comments and 2 comments filed by Time Warner Cable that were styled as comments in opposition to specific waiver requests. These comments and reply comments are being made part of the record in this proceeding.

³² Parties filing comments and reply comments, and the abbreviations used to refer to such parties, are listed in the Appendix.

³³ See Brownwood Television Cable Service, Inc. ("Brownwood") Petition to Deny and Comments.

³⁴ Golden West Comments at 1; NTCA Comments at 3; RTG Comments at 1-2; RTFC Comments at 7; Venture Comments at 1; USTA Reply Comments at 7.

operators.³⁵ In contrast, two commenters oppose any waivers of the rule,³⁶ and two commenters oppose grant of a waiver on any grounds except Section 101.1003(a)(2),³⁷ which, they argue, is not available to the instant petitioners at this time.³⁸ Finally, SCCTA and Time Warner Cable specifically oppose the grant of Farmers' and Horry's waiver requests, and Duckhorn, Falcon, and Brownwood oppose the grant of CTTI's waiver request.³⁹

7. Discussion. Section 101.23 requires waiver requests to demonstrate either "that the underlying purpose of the rule will not be served or will be frustrated by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest and an applicant has shown the lack of a reasonable alternative."⁴⁰ As discussed in greater detail below, the Divisions find that petitioners have failed to meet either of the showings required for grant of a waiver. Moreover, any assertions made pursuant to Section 101.1003(a)(2) are inapplicable. As noted above, Section 101.1003(a)(2) provides that subsequent to the initial grant of LMDS licenses, an incumbent LEC or cable operator may obtain a waiver of the eligibility restriction upon showing that the petitioner no longer has market power in its authorized or franchised service area due to the entry of a new competitor, other than an LMDS licensee, into such service area.⁴¹ However, the Commission has clearly stated that a waiver pursuant to this section is available only to entities seeking to obtain LMDS licenses through assignments or transfers of control, and is not available in the case of the initial award of licenses through the auction process.⁴² We therefore reject assertions by Time Warner, Falcon, SCCTA, and Brownwood that the waiver requests should be dismissed as premature under Section 101.1003(a)(2). If, as these

³⁵ Kingdon R. Hughes Comments at 2.

³⁶ BellSouth Comments at 2 ("Affirmative action on the USTA letter will be much more efficient than piecemeal consideration of individual waiver requests. The Commission has a choice of proceeding by adopting rules of general applicability or by waiver. . . . The far better course would be to reexamine the incumbent LEC/cable eligibility restriction in either a rulemaking or a forbearance context."); SCCTA Comments at 5 ("It would be patently inequitable for the Commission to retroactively make preferential exceptions to the rule now for the ILECs seeking waivers in this proceeding").

³⁷ See *supra* note 20 and accompanying text.

³⁸ Time Warner (Farmers) Comments at 5-7; Time Warner (Horry) Comments at 5-7; Falcon Reply Comments at 6-7. See also Brownwood Petition to Deny at 3; SCCTA Comments at 5-6 ("[T]he Commission did not envision the filing of waiver requests *prior to* initial LMDS licensing. . . . Not only are both the Farmers or HTC waiver requests premature, but neither waiver request presents the type of competitive market conditions that the Commission envisioned when it stated that it may consider waiver requests of its LMDS eligibility restrictions.")

³⁹ SCCTA Comments at 5; Time Warner Comments (Farmers) at 1; Time Warner Comments (Horry) at 1; Duckhorn Comments at 1; Falcon Reply Comments at 1; Brownwood Petition to Deny at 2.

⁴⁰ 47 C.F.R. § 101.23. See also Virginia Tech Foundation, Inc., Petition for Reconsideration of Request for Waiver of Section 101.1112(g)—Auction No. 17, Local Multipoint Distribution Service, *Order*, 13 FCC Rcd 4535, 4536 (1998).

⁴¹ See *supra* note 20 and accompanying text.

⁴² *LMDS Third Order on Reconsideration*, 13 FCC Rcd at 4871, ¶ 27.

commenters argue, we were limited to applying Section 101.1003(a)(2), the restrictive language contained therein might require such a result. However, we are not so restricted, since petitioners may seek rule waivers at any time under the general Part 101 waiver provision.⁴³ Therefore, we evaluate each waiver request according to the criteria set forth in Section 101.23.

8. The following table summarizes pertinent facts underlying the waiver requests.⁴⁴

Summary of Petitioners' Waiver Requests

Petitioner	A Block License Won	Population Overlap Claimed (%)	Petitioner Holds B Block license?	Other Bidders for A Block License?
CTTI	Brownwood, TX	15.64	Yes	Yes
CTC	Dickinson, ND	N/A	No	Yes
Craw-Kan	Pittsburgh-Parsons, KS	17.23	No	Yes
Farmers	Sumter, SC	66	No	Yes
GW Wireless	Rapid City, SD	18	No	Yes
Horry	Myrtle Beach, SC	68	Yes	Yes
Northern	Bemidji, MN	17.87	Yes	Yes
Northwest	Williston, ND	29	No	Yes
Venture	Aberdeen, SD	32	No	Yes
Venture	Huron, SD	18	No	Yes

9. Petitioners argue that, for a variety of reasons, their status as rural telephone companies justifies grant of their petitions for waiver. Contrary to petitioners' arguments, their status as rural telcos does not demonstrate how application of the eligibility restriction will not serve or will frustrate its underlying purpose, or why grant of a waiver is otherwise in the public interest. Several petitioners argue that any restrictions on their ability to utilize "alternative technologies" to deliver services to their subscriber-members "would result in a disservice to the public and undermine the policy goals of the rule itself."⁴⁵ Others assert that application of the rule conflicts with the Commission's statutory mandate to promote the delivery of advanced telecommunications services to rural America,⁴⁶ and that denying their waiver requests is inconsistent with Section 309(j)(3)(A) of the Communications Act.⁴⁷ RTG and RTFC support this position, arguing that only rural LECs, and especially member-owned cooperatives, have the

⁴³ See 47 C.F.R. § 101.23.

⁴⁴ The population overlap claimed by each petitioner is important because the rule requires divestiture when ten percent or more of the LMDS service area population is located within the incumbent's authorized or franchised service area. The fact that some petitioners also hold the B Block license in the subject BTAs is pertinent because it undermines their argument that they cannot adequately serve these rural areas without a waiver. Finally, the fact that other bidders placed bids on the A block licenses in each of the subject BTAs is significant because it indicates that, contrary to some petitioners' arguments, the winning bidders are not necessarily the only entities interested in serving these rural areas.

⁴⁵ Farmers Waiver Request at 1; Horry Waiver Request at 1; CTC Waiver Request at 1; Northwest Waiver Request at 1.

⁴⁶ CTTI Waiver Request at 3-4; Craw-Kan Waiver Request at 3; Northern Waiver Request at 3.

⁴⁷ Venture Waiver Requests at 1; Venture Comments at 2-4; GW Wireless Waiver Request at 1.

incentive to extend LMDS service to rural America.⁴⁸

10. The Commission considered such issues when it adopted the eligibility restriction at issue in these waiver petitions. Section 309(j) of the Communications Act contains several objectives that guide the Commission in auctioning spectrum for new services.⁴⁹ These objectives include both the promotion of competition and the dissemination of licenses to rural telephone companies.⁵⁰ However, as the Commission explained in the *LMDS Second Report and Order* and the *LMDS Third Order on Reconsideration*, the Commission's primary objective in the LMDS proceeding was to encourage competition in the telephony and MVPD markets.⁵¹ Thus, the Commission determined that a policy favoring restricted eligibility for a limited time would result in the greatest likelihood of increased competition in the local telephone and MVPD markets.⁵² Since the Commission concluded that the record did not indicate any basis to find that rural LECs would not have the same opportunities and incentives for anticompetitive use of LMDS licenses as other incumbent LECs, these entities were not exempted from the restriction.⁵³ However, the Commission also concluded that the rule as crafted would not hinder the introduction of LMDS in rural areas.⁵⁴ This finding was specifically upheld by the court in *Melcher*, which stated that "the FCC's imposition of the three-year eligibility restriction on rural LECs is fully consistent with a reasonable interpretation of section 309(j), and the Commission has clearly explained its basis for concluding that this eligibility restriction will foster competition."⁵⁵ Finally, with regard to CTTI, Horry, and Northern, we note that these parties can use their B Block licenses to provide services throughout their BTAs.

11. Similarly, petitioners' status as rural telephone companies, or, more specifically, rural telephone cooperatives, does not demonstrate unique facts that render the eligibility restriction inequitable, unduly burdensome, or otherwise contrary to the public interest. In addition, petitioners have failed to demonstrate the lack of a reasonable alternative. Craw-Kan, CTTI, and Northern claim that because they are subscriber-owned cooperatives, "it will be difficult to choose which subscribers will get the services and which subscribers will not."⁵⁶

⁴⁸ See, e.g., RTFC Comments at 4.

⁴⁹ 47 U.S.C. § 309(j)(3)(A)-(D).

⁵⁰ *Melcher*, 134 F.3d at 1154.

⁵¹ *LMDS Second Report and Order*, 12 FCC Rcd at 12615, ¶ 159; *LMDS Third Order on Reconsideration*, 13 FCC Rcd at 4896, ¶ 87.

⁵² *LMDS Second Report and Order*, 12 FCC Rcd at 12616-17, ¶ 162.

⁵³ *LMDS Third Order on Reconsideration*, 13 FCC Rcd at 4898, ¶ 93.

⁵⁴ *LMDS Second Report and Order*, 12 FCC Rcd at 12625, ¶ 179.

⁵⁵ *Melcher*, 134 F.3d at 1155. See also Brownwood Petition to Deny at 4.

⁵⁶ CTTI Waiver Request at 3-4; Northern Waiver Request at 3; Craw-Kan Waiver Request at 4.

Similarly, Venture and GW Wireless argue that because their parent companies provide phone service to only the rural portions of the subject BTAs, compliance with the rule will require that these companies divest their LMDS licenses over either a significant portion of their wireline service areas, or the more densely populated, "cost-effective" areas of their respective LMDS BTAs.⁵⁷ Finally, Farmers, Horry, CTC, and Northwest contend that it would be inequitable and unduly burdensome to exclude them from access to efficient technological methods of delivering telecommunications services to their rural customers.⁵⁸

12. As discussed above, Petitioners' status as rural telephone companies or cooperatives alone does not advance their cases for waivers.⁵⁹ Many such entities provide service to regions throughout the country, and the Commission was not unaware of this fact when it included these entities within the scope of the eligibility restriction.⁶⁰ Venture, GW Wireless, CTC, Farmers, Horry, and Northwest have offered no additional information to demonstrate why application of the rule would be unduly burdensome or inequitable in its particular case as required under Section 101.23.⁶¹ This information would be especially significant given the extent of the population overlap in most of the subject BTAs, and particularly in the case of Horry, which holds the B Block license in the Myrtle Beach BTA. We also note that these six petitioners have entered into or are in the process of negotiating partitioning arrangements among themselves or with other entities, which prevents them from arguing the lack of a reasonable alternative to a waiver.⁶² We are pleased that several parties are negotiating with other rural telephone companies, thereby furthering the policy objectives of the eligibility restriction.

13. CTTI, Northern, and Craw-Kan also argue that denial of a waiver would be inequitable because the divested overlap area in each BTA would unfairly lose the benefit of the

⁵⁷ Venture Comments at 4, Golden Wireless Comments at 5. Venture and Golden Telephone also claim that applying the eligibility restriction to rural telephone companies will "reduce the operating efficiencies of these businesses and delay the provision of advanced telecommunications services to persons living in the particular area." Venture Comments at 3, Golden Wireless Comments at 4. However, in adopting the eligibility restriction, the Commission noted that despite specific query on this subject, there was no evidence that these temporary restrictions would result in a sacrifice of efficiency gains. *LMDS Second Report and Order*, 12 FCC Rcd at 12624, ¶ 177.

⁵⁸ Farmers Waiver Request at 1; Horry Waiver Request at 1; CTC Waiver Request at 2; Northwest Waiver Request at 2.

⁵⁹ Falcon Reply Comments at 16; Time Warner Comments at 10-11.

⁶⁰ *See, e.g.*, RTG Comments at 2 ("RTG is an organized group of rural telecommunications companies whose purpose it is to advocate on behalf of providers and prospective providers of rural wireless telecommunications service. . . . RTG participated extensively before the Federal Communications Commission in [the LMDS proceeding].")

⁶¹ *See* Time Warner Comments (Farmers) at 7-8; Time Warner Comments (Horry) at 7-8. *See also* 47 CFR § 101.23(b).

⁶² *See* Farmers amended Waiver Request at 1; Horry amended Waiver Request at 1; CTC long form application, FCC Form 601, at Exhibit D; Letter to Amy Zoslov, Chief, Wireless Telecommunications Bureau Auctions and Industry Analysis Division, from Margaret Nyland, Kraskin, Lesse & Cosson, LLP (dated June 30, 1998); Venture Waiver Request at 2; GW Wireless long form application, FCC Form 601, at Exhibit G.

competition that their LMDS service would bring.⁶³ They claim that divestiture is not a reasonable alternative because no other entities are interested in providing LMDS service to their BTAs, which are "not very desirable."⁶⁴ For example, Craw-Kan and Northern point to the fact that only one other bidder bid on each of their licenses, and that they won their licenses relatively early in the auction, to show that there was a lack of interest in their BTAs.⁶⁵

14. These assertions are unsupported by the record. We agree with Falcon that we should not evaluate a waiver request by speculating as to why entities or individuals did not participate in the LMDS auction or why they did or did not bid on particular licenses.⁶⁶ The fact that only one other bidder sought the A block license is not dispositive of whether other entities would be interested in serving this area via a partitioning or disaggregation arrangement. Both Craw-Kan and Northern have indicated that several other independent rural telephone companies serve the subject BTAs.⁶⁷ Although these entities may not have chosen to participate in the auction, they are precisely the type of entities that the Commission sought to aid in adopting partitioning and disaggregation rules for the LMDS service, and many have expressed an interest in pursuing such arrangements.⁶⁸ Therefore, we reject Northern's claim that denial of its waiver request will result in a forfeiture of its license and the denial of service to the BTA.⁶⁹ With regard to Craw-Kan, this argument also overlooks the possibility that the divested area may receive LMDS service from Liberty Cellular, the B Block license holder in the subject BTA.

15. With regard to CTTI, we note that another bidder continued to place bids for the Brownwood BTA A Block license through round 117 (the auction closed in round 128). In addition, CTTI revealed on its Form 601 that prior to filing its short-form application, it participated in preliminary discussions regarding partitioning with Leaco Rural Telephone Cooperative.⁷⁰ Although CTTI also indicated that it did not appear that the parties would enter a formal partitioning agreement, these discussions, along with the demonstrated competition for the license, undermine CTTI's argument that it is the only entity willing to provide LMDS service to

⁶³ See CTTI Waiver Request at 3-4; Northern Waiver Request at 3; Craw-Kan Waiver Request at 3.

⁶⁴ CTTI Waiver Request at 3; Northern Waiver Request at 3; Craw-Kan Waiver Request at 3.

⁶⁵ See CTTI Waiver Request at 3-4; Northern Waiver Request at 3; Craw-Kan Waiver Request at 3.

⁶⁶ Falcon Reply Comments at 12-13.

⁶⁷ Craw-Kan Waiver Request at 3, note 6; Northern Waiver Request at 3, note 5.

⁶⁸ See, e.g., RTG Comments at 2 ("Many of RTG's members were successful bidders in the recently completed Local Multipoint Distribution Service ("LMDS") auction. Other RTG members intend to acquire LMDS licenses by geographically partitioning licenses."); RTFC Comments at 2 ("RTFC members have informed us of their intent to acquire LMDS licenses through geographic partitioning.")

⁶⁹ See Northern Waiver Request at 3-4.

⁷⁰ See CTTI long-form application, FCC Form 601, at Exhibit D.

the Brownwood BTA.⁷¹ Furthermore, the Commission's rules provide that if licensees are unable to secure a buyer within the 90-day period provided for divestiture, they may divest to an interim trustee, provided the licensee has no interest in or control of the trustee and the trustee may dispose of the license as it sees fit.⁷²

16. In the event their waiver requests are denied, Venture and GW Wireless request that they be permitted to either: 1) return their licenses without paying a "difference payment" or other penalty, or 2) divest themselves of all or part of the licenses within 90 days of the final grant of the licenses.⁷³ Venture and GW Wireless further argue that "the imposition of penalties or default payments on such entities would be grossly unfair, especially since these entities are owned by the very subscribers desiring such service, and would inhibit the provision of advanced telecommunications services to the rural citizens served by telephone cooperatives."⁷⁴

17. Again, neither party has offered a reason other than its rural telephone cooperative status to support its request for preferential treatment under the Commission's rules. In addition, contrary to both parties' assertions, Section 101.1003(f)(4) does not permit licensees to divest their entire licenses as a means of complying with the eligibility restriction; rather, the rule explicitly states that divestiture is limited to the options provided under Section 101.1003(f)(1).⁷⁵ With regard to the request for a waiver of penalties, we note that GW Wireless and Venture can avoid the imposition of any penalties by complying with the divestiture requirement within ninety days of this *Order*. We further note, however, that absent extraordinary circumstances, a waiver of the penalty provisions set forth under Section 101.1003(f)(6) would undermine the integrity of the auctions process. All parties were aware of the eligibility restriction when they decided to participate in the auction, and, as mentioned above, the D.C. Circuit Court of Appeals upheld the eligibility restriction both generally and as applied to rural telephone companies prior to the

⁷¹ See also *LMDS Second Report and Order*, 12 FCC Rcd at 12625, ¶ 179 ("Rural LECs have not made the case that they are the only entities that can provide LMDS service in their service territories.")

⁷² 47 C.F.R. § 101.1003(f)(1)(iii).

⁷³ Venture Waiver Requests at 1; GW Wireless Waiver Request at 1.

⁷⁴ Venture Waiver Requests at 1; GW Wireless Waiver Request at 1.

⁷⁵ Section 101.1003(f)(1) reads, in pertinent part:

(f) ***

(1) Divestiture shall be limited to the following prescribed means:

(i) ***

(ii) Other LMDS applicants disqualified under paragraph (a) of this section will be permitted to:

(A) Partition and divest that portion of the existing authorized or franchised service area that causes it to exceed the overlap restriction in paragraph (d) of this section, subject to applicable regulations of state and local governments; or

(B) Partition and divest that portion of the LMDS geographic service area that exceeds the overlap restriction in paragraph (d) of this section. 47 C.F.R. § 101.1003(f)(1).

commencement of the auction.⁷⁶ Similarly, the Commission adopted the penalties for failing to comply with the divestiture requirement almost one year prior to the commencement of the LMDS auction.⁷⁷ Specifically, the rule provides that a winning bidder's failure to comply with the divestiture requirement within the applicable time frame will be treated as a material bad faith misrepresentation, and that the penalty for such misrepresentation includes forfeiting the full winning bid amount(s), as well as any other monies paid the Commission, and any other action the Commission deems appropriate based on the facts presented in each case.⁷⁸ Moreover, the Commission clarified this rule prior to the commencement of the auction in the *LMDS Third Order on Reconsideration*.⁷⁹ For these reasons, we deny these requests, but we emphasize that GW Wireless and Venture can avoid these penalties by complying with the divestiture requirement within ninety days of the date of this *Order*.

18. Finally, we emphasize that by requiring these entities to divest a geographic portion of their service areas, we hope to create additional opportunities for other rural telephone companies to enter the LMDS market. As the court in *Melcher* noted, our partitioning rules are intended to help small businesses by making ownership of an LMDS service more affordable, because such entities do not have to garner sufficient capital to purchase and effectively utilize an entire LMDS license.⁸⁰ In fact, the Commission specifically considered the potential benefits to rural telephone companies in adopting the partitioning and disaggregation rules,⁸¹ and commenters have revealed that many rural telcos are interested in pursuing this option.⁸² Thus, requiring petitioners to eliminate the population overlap between their telephone and LMDS service areas by partitioning the overlap area will create increased opportunities for rural telcos and other small businesses. Indeed, the record in this proceeding indicates that this is already happening.⁸³ Therefore, we are confident that requiring these divestitures will not limit the availability or quality of LMDS services to rural areas.

ORDERING CLAUSES

⁷⁶ See *supra* note 22 and accompanying text.

⁷⁷ See *LMDS Second Report and Order*, 12 FCC Rcd 12545 at Appendix A. See also 47 CFR § 101.1003(f)(6).

⁷⁸ See 47 CFR § 101.1003(f)(6).

⁷⁹ See *LMDS Third Order on Reconsideration*, 13 FCC Rcd at 4871-72, ¶ 33.

⁸⁰ *Melcher*, 132 F.3d at 1159-1160. See also *LMDS Second Report and Order*, 12 FCC Rcd at 12606-08, ¶¶ 140-145.

⁸¹ *Id.* at 12695, ¶ 362 ("The degree of flexibility we will afford in the use of this spectrum, including provisions for partitioning or disaggregating spectrum, should assist in satisfying the spectrum needs of rural telephone companies at low cost.")

⁸² See *supra* note 68 and accompanying text.

⁸³ See *supra* note 62 and accompanying text.

19. For the reasons set forth above, IT IS ORDERED that the requests for waiver of Section 101.1003(a) filed by Central Texas Telephone Investments, Inc; Consolidated Telephone Cooperative; Craw-Kan Telephone Cooperative, Inc.; Farmers Telephone Cooperative, Inc.; GW Wireless, Inc.; Horry Telephone Cooperative, Inc.; Northern Communications, Inc.; Northwest Communications Cooperative, and Venture Wireless, Inc. ARE HEREBY DENIED.

20. IT IS FURTHER ORDERED that Brownwood Television Cable Service, Inc.'s Petition to Deny Central Texas Telephone Investments, Inc.'s license application IS HEREBY DISMISSED as moot.

21. IT IS FURTHER ORDERED that the 10 above-referenced license applications of Central Texas Telephone Investments, Inc; Consolidated Telephone Cooperative; Craw-Kan Telephone Cooperative, Inc.; Farmers Telephone Cooperative, Inc.; GW Wireless, Inc.; Horry Telephone Cooperative, Inc.; Northern Communications, Inc.; Northwest Communications Cooperative, and Venture Wireless, Inc. ARE HEREBY CONDITIONALLY GRANTED subject to the conditions and procedures set forth in Section 101.1003 of the Commission's rules and the companion Public Notice released today.⁸⁴

⁸⁴ See *supra* note 4.

22. These actions are taken pursuant to delegated authority as set forth in 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Amy J. Zoslov
Chief, Auctions & Industry Analysis Division
Wireless Telecommunications Bureau

D'wana R. Terry
Chief, Public Safety & Private Wireless Division
Wireless Telecommunications Bureau

APPENDIXParties Filing Comments

BellSouth Corporation ("BellSouth")
Brownwood Television Cable Service, Inc. ("Brownwood") (Petition to Deny and Comments)
Duckhorn Broadcasting, Inc. ("Duckhorn")
Golden West Telecommunications Cooperative, Inc. ("Golden West")
Kingdon R. Hughes
National Telephone Cooperative Association ("NTCA")
Rural Telecommunications Group ("RTG")
Rural Telephone Finance Cooperative ("RTFC")
South Carolina Cable Television Association ("SCCTA")
Time Warner Cable ("Time Warner")
US West Communications, Inc.
Venture Wireless, Inc. ("Venture")

Parties Filing Reply Comments

Central Texas Telephone Investments, Inc. ("CTTI")
Falcon Telecable ("Falcon")
Farmers Telephone Cooperative, Inc. ("Farmers")
Horry Telephone Cooperative, Inc. ("Horry")
Golden West Telecommunications Cooperative, Inc.
Northern Communications, Inc. ("Northern")
United States Telephone Association ("USTA")
Venture Wireless, Inc.