

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

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 1999

Released: August 17, 1999

By the Chief, Wireless Telecommunications Bureau:

1. The Wireless Telecommunications Bureau ("Bureau") has before it five petitions for reconsideration of an Order denying ten requests for waiver of Section 101.1003(a) of the Commission's Rules. For the reasons discussed below, we deny these petitions for reconsideration.

2. Background. Section 101.1003(a) of the Commission's Rules imposes a temporary ownership restriction on incumbent local exchange carriers (LECs) and incumbent cable

1 See Requests for Waiver of the Commission's Rules Establishing Eligibility Restrictions on Incumbent LECs and Cable Operators in the Local Multipoint Distribution Service, Order, 13 FCC Rcd 18694 (WTB 1998) ("LMDS Waiver Order"). The following parties (collectively, "Petitioners") filed petitions for reconsideration of the LMDS Waiver Order: Central Texas Telephone Investments, Inc. ("CTTI"); Craw-Kan Telephone Cooperative, Inc. ("Craw-Kan"); GW Wireless, Inc. ("GW Wireless"); Northern Communications, Inc. ("Northern"); and Venture Wireless, Inc. ("Venture Wireless"). In addition, Brownwood Television Cable Service, Inc. ("Brownwood") filed an Opposition to CTTI's Petition for Reconsideration, arguing that CTTI's Petition is procedurally defective and substantively deficient, and CTTI filed a Reply to Brownwood's Opposition disputing these contentions.

operators that win certain in-region Local Multipoint Distribution Service (LMDS) licenses in Commission auctions.² The restriction applies to any such entity that wins an A block license in a Basic Trading Area (BTA) with a population that significantly overlaps the incumbent's service area.³ Within 90 days of the final grant of the license, which is contingent upon compliance with the rule,⁴ the incumbent must partition and divest the overlapping portion of either its incumbent service area or its LMDS service area.⁵ Nine rural LECs that won A block licenses applied for waivers of Section 101.1003(a).⁶ The Bureau sought comment on these waiver requests,⁷ and, after carefully considering the record, the Auctions and Industry Analysis Division and Public Safety and Private Wireless Division ("Divisions") denied the waiver requests and granted the applicants' licenses subject to their compliance with the rule.⁸

3. Discussion. Waiver requests must 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."⁹ The Divisions found that the waiver applicants failed to meet either prong of the

² See 47 C.F.R. § 101.1003(a).

³ A "significant overlap" occurs when 10 percent or more of the LMDS BTA population, as determined by 1990 census figures, is located within the incumbent's authorized or franchised LEC or cable television service area. See 47 C.F.R. § 101.1003(d).

⁴ See 47 C.F.R. § 101.1003(f)(3)-(6).

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

⁶ See Appendix A of the *LMDS Waiver Order*, 13 FCC Rcd at 18708.

⁷ See "Wireless Telecommunications Bureau Seeks Comment on Requests for Waiver of Incumbent LEC/Cable Eligibility Restrictions," *Public Notice*, 13 FCC Rcd 10944 (WTB 1998).

⁸ As of December 23, 1998, all Petitioners had filed partitioning or divestiture agreements with the Commission, as required by Section 101.1003(f)(4) of the Commission's Rules.

⁹ 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 (WTB 1998). We note that as of February 12, 1999, Section 1.925 of the Commission's Rules replaced Section 101.23. See *In re Biennial Regulatory Review-Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, Report and Order*, 13 FCC Rcd 21027 (1998).

rule.¹⁰ Specifically, they found that: 1) all of the waiver requests were predicated on facts or arguments related to the applicants' status as rural LECs;¹¹ 2) the Commission had already rejected those arguments during the LMDS rulemaking and affirmed the denial on reconsideration; and 3) the waiver applicants had not supplied any new facts or arguments in support of their waiver requests.¹² Petitioners now renew many of the same or make substantially similar arguments in their petitions for reconsideration.¹³ Petitioners have not,

¹⁰ Contrary to Venture's and GW Wireless's assertions that the Divisions denied their waiver requests on grounds that they had not met the requirements of both subsections (a) and (b) of Section 101.23, the Divisions stated in the *LMDS Waiver Order* that waiver applicants must meet *either* prong, and that none of the waiver applicants had done so. See *LMDS Waiver Order*, 13 FCC Rcd at 18699, ¶ 7.

¹¹ For example, several waiver applicants claimed that any restrictions on their ability to utilize "alternative s to their members would undermine the policy goals of the rule, and that application of the rule to rural LECs conflicts with the Commission's statutory mandate to promote the delivery of advanced services to rural America. See *LMDS Waiver Order*, 13 FCC Rcd at 18700-01, ¶¶ 9-10. Others argued that because they are subscriber-owned cooperatives, it would be difficult to choose a portion of the BTA to partition, see *id.* at 18702, ¶ 11; that the population of the partitioned portion would be unfairly deprived of LMDS service since no other entities would be interested in providing service to these areas, see *id.* at 18703, ¶ 13; and that only rural LECs, and especially member-owned cooperatives, have the incentive to provide LMDS service to rural America, see *id.* at 18700, ¶ 9.

¹² See, e.g., *LMDS Waiver Order*, 13 FCC Rcd at 18701, ¶ 10. See also Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, To Reallocate the 29.5–30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Third Order on Reconsideration*, 13 FCC Rcd 4856, 4897, ¶ 92, 4900, ¶¶ 99-100 (1998) (*LMDS Third Order on Reconsideration*)" (rejecting argument that unless rural LECs are exempt from the restriction, the rural areas they serve will not receive LMDS services); *id.* at 4894-98, ¶¶ 85-94 (rejecting argument that the Commission failed to consider its obligations under Section 309(j) of the Communications Act in deciding to subject rural LECs to the eligibility restriction); *id.* at 4903-04, ¶¶ 108-110 (rejecting argument that the Commission failed to balance the goals of the Telecommunications Act of 1996 with other statutory goals, such as universal service); *id.* at 4897, ¶ 93 (rejecting assertion that no competitors would be interested in providing LMDS to rural areas). With regard to the last issue, we also note that there were no unsold licenses in the most recent LMDS auction, indicating a strong interest in the provision of LMDS service. See "Local Multipoint Distribution Service Auction Closes," *Public Notice*, DA 99-927 (released May 14, 1999).

¹³ For example, Petitioners argue that divestiture will undermine the purpose of the rule by delaying service to the divested areas, which, they argue, are not attractive to other LMDS providers, see, e.g., *Craw-Kan, CTTI, and Northern Petitions* at 7-9 and *GW Wireless Petition* at 5; and that denial of their waiver requests would be contrary to various provisions of the Telecommunications Act of 1996, as codified in sections 309(j)(3) and 706 of the Communications Act, see, e.g., *Craw-Kan, CTTI and Northern Petitions* at 17-19 and *GW Wireless Petition* at 11-13. *Craw-Kan, CTTI, and Northern* also claim that partitioning is not a viable alternative for them because it would require that some cooperative members receive LMDS service while others do not, resulting in disparate treatment of "similarly-situated individuals." See *Craw-Kan and Northern Petitions* at 14-15 and *CTTI Petition* at 15-16. In addition, all petitioners assert that partitioning is not a reasonable alternative because the cost to operate a stand-alone LMDS system serving only the partitioned areas (e.g., portions of their LEC service areas) would be

however, offered new information to persuade us that the underlying decision regarding these issues was erroneous. We therefore address only those arguments raised in the petitions for reconsideration that the Divisions have not already considered and rejected.

4. Petitioners¹⁴ argue that the Divisions failed to address the specific facts and circumstances that supported their waiver requests under the “hard look” standard set forth in *WAIT Radio v. FCC*.¹⁵ We disagree. As the court stated in *WAIT Radio*, “the very essence of waiver is the assumed validity of the general rule.”¹⁶ Therefore, “an applicant for waiver faces a high hurdle even at the starting gate.”¹⁷ In this case, both the Commission and the Court of Appeals for the D.C. Circuit upheld the restriction as applied to all rural LECs.¹⁸ In basing their waiver requests exclusively on their rural LEC status and the rural nature of their BTAs, therefore, Petitioners failed to demonstrate either unique circumstances making application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest; or why application of the rule would frustrate its underlying purpose.¹⁹ Moreover, although it is not unusual for the Divisions to address multiple waiver requests in a single order,²⁰ as *Craw-Kan*,

prohibitive. See, e.g., *GW Wireless* Petition at 8-9; *Craw-Kan* and *Northern* Petitions at 6-10; and *CTTI* Petition at 6-11.

¹⁴ See, e.g., *Craw-Kan*, *CTTI*, and *Northern* Petitions at 5; *GW Wireless* Petition at 5, 11.

¹⁵ 418 F.2d 1153 (D.C. Cir. 1969) (“*WAIT Radio*”). See also *BellSouth Corp. and BellSouth Wireless, Inc. v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999) (“*BellSouth*”) (upholding the Commission’s denial of a waiver request).

¹⁶ 418 F.2d at 1157.

¹⁷ *Id.* at 1158.

¹⁸ The Commission specifically concluded that “[t]here was no basis to find that rural LECs would not have the same opportunities and incentives for anti-competitive use of LMDS licenses as other incumbent LECs.” See *LMDS Third Order on Reconsideration*, 13 FCC Rcd at 4897, ¶ 93. See also *Melcher v. FCC*, 134 F.3d 1143 (D.C. Cir. 1998).

¹⁹ For example, *GW Wireless* claims that it provided facts about its remote service area and indicated that the overlap area comprised only the outlying rural portions of its BTA. See *GW Wireless* Petition at 5. These facts, however, do not distinguish it from other LMDS licensees, several of which are rural LECs serving low-density areas that are outside the largest city or population center in their BTAs. As the Divisions noted in the *LMDS Waiver Order*, the Commission determined that such entities should not be excluded from the rule.

²⁰ 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 Licensees*, *Order*, 13 FCC Rcd 10230 (WTB 1998) (denying 17 waiver requests); *Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses*, *Order*, 9 FCC Rcd 6384 (WTB 1994) (denying 13 waiver requests).

Northern and CTTI suggest, we note that it was particularly appropriate here given the degree of similarity among the waiver requests.²¹ We nevertheless find that the Divisions carefully considered each individual application and all comments filed in the record.²²

5. Petitioners also argue that because the population overlaps in their respective BTAs are “minimal,” a waiver will not raise the anti-competitive concerns that the eligibility restriction was designed to address, and that in any case, as rural LECs, they lack the ability and incentive to engage in anti-competitive behavior.²³ We disagree. With regard to the first issue, these petitioners made similar arguments in their underlying waiver requests, which were not addressed because there is no *de minimis* exception to the rule, and, as stated above, they had not otherwise made the required showing under either prong of Section 101.23.²⁴ With regard to the second argument, after extensive analysis, the Commission concluded that “all incumbent LECs and cable operators would have incentives to attempt to foreclose competitive entry in their respective markets.”²⁵ In criticizing this conclusion, Petitioners challenge the applicability

²¹ Although the arguments raised in the waiver applications were very similar, the degree of overlap varied widely among the subject BTAs. As we discuss herein, however, there is no *de minimis* exception to the rule. Thus, while the existence of overlap is significant, the degree of overlap is not. See *LMDS Waiver Order*, 13 FCC Rcd at 18700, ¶ 8, n. 44. See also *BellSouth*, 162 F.3d at 1224 (upholding the Commission’s denial of request for *de minimis* waiver of the CMRS spectrum cap).

²² See *supra* note 7.

²³ See, e.g., *Craw-Kan and Northern Petitions* at 19; *CTTI Petition* at 20; *GW Wireless Petition* at 11. In addition, in an Erratum to its Petition, *Venture Wireless* states that it had previously miscalculated the population overlap in its Aberdeen, SD and Huron, SD BTAs, and that the correct percentages respectively are 12.91% and 14.23%, as opposed to 32% and 18%. This correction, *Venture Wireless* argues, strengthens its argument that “it has only *de minimis* overlap. . . and. . . lacks the ability to suppress the provision of LMDS service in an anti-competitive fashion.” *Venture Wireless Erratum* at 2-3.

²⁴ See *LMDS Third Order on Reconsideration*, 13 FCC Rcd at 4900, ¶¶ 98-100 (“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. . . . [E]ven 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.”)

²⁵ See *id.* at 4897, ¶ 92 (emphasis added). In addition, the Commission concluded that “there was no basis to find that rural LECs would not have the same opportunities and incentives for anti-competitive use of LMDS licenses as other incumbent LECs and, accordingly. . . determined to treat them no differently than other monopoly providers to achieve the goals. . . set forth in Section 309(j).” *Id.* at 4897, ¶ 93. The Commission also concluded that rural LECs, many of which are subscriber-owned cooperatives, did not make the case that they are the only entities able and/or willing to provide LMDS service in their service areas. See *LMDS Waiver Order*, 13 FCC Rcd at 18701, ¶ 10. See also *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*

of the rule to rural LECs,²⁶ but fail to demonstrate either unique facts about their individual circumstances (beyond claiming that their BTAs are among the most sparsely-populated), or why the underlying purpose of the rule will not be served in their cases. We therefore reject these assertions.

6. Craw-Kan, CTTI, and Northern claim that their population overlaps are particularly negligible because the Commission originally proposed a 20 percent benchmark, and adopted a 10 percent benchmark “largely ‘for the sake of overall simplicity, ease of compliance, and administrative efficiency to conform with the overlap rule applicable to the CMRS spectrum cap.’”²⁷ This was an inappropriate objective, they claim, since LMDS is a fixed service, and “an overlap in a fixed service arguably has less impact than the same amount²⁸ We find these arguments unpersuasive. As an initial matter, although the Commission originally proposed the use of a 20 percent benchmark, its intent was to elicit comment on the use of the benchmark contained in the former broadband PCS-cellular cross-ownership rule (now contained in the CMRS spectrum cap rule), which is 10 percent.²⁹

Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12625, ¶ 179 (1997) (*LMDS Second Report and Order*); *LMDS Third Order on Reconsideration*, 13 FCC Rcd at 4897, ¶ 92; 4900, ¶ 100.

²⁶ For example, CTTI, Craw-Kan, and Northern assert that the “minimal” amount of overlap in their service areas alone prevents them from acting in an anti-competitive manner. See Craw-Kan and Northern Petitions at 19; CTTI Petition at 20. GW Wireless cites comments that were filed by its parent company, Golden West Telecommunications Cooperative, Inc. (“Golden West”) in support of its waiver petition. See GW Wireless Petition at 3. In those comments, however, Golden West merely claimed that “[s]ince the owners of the cooperative are its customers, the concern which forms the basis for the LMDS/LEC cross-ownership restriction--that the telephone company will behave in an anti-competitive manner--does not apply.” Golden West also claims that its “long and undisputed tradition of community service” should reassure the Commission that it will make effective use of LMDS technology. Neither claim, however, amounts to an affirmative showing that rural LECs lack the incentive to act in an anti-competitive manner.

²⁷ See Craw-Kan and Northern Petitions at 19-20; CTTI Petition at 20-21 (*citing LMDS Second Report and Order*, 12 FCC Rcd at 12629, ¶ 188).

²⁸ The difference, they assert, is that in mobile services, “control of part of the service area has the potential to affect subscriber behavior throughout the service area. . . . [t]herefore, a smaller amount of overlap has the potential to affect the service area as a whole.” In fixed services, however, “the overlap affects only the actual overlap area. . . . [t]here is no impact on the service area as a whole.” Craw-Kan and Northern Petitions at 19; CTTI Petition at 21.

²⁹ 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, *First Report and Order and Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd 19005, 19056 ¶ 132 (“*LMDS Fourth NPRM*”). See also 47 C.F.R. § 20.6(c).

Moreover, the Commission acknowledged this inadvertent mischaracterization of the PCS rule in the *LMDS Second Report and Order*.³⁰ In addition, the Commission sought comment on the use of the broadband PCS-cellular rule because it found that LMDS and PCS “involved similar

³¹ More important, however, Petitioners’ argument regarding mobile and fixed services is flawed because it challenges the validity of the eligibility restriction, but provides no basis for their individual waiver requests. These concerns would have been more appropriately raised during the LMDS rulemaking, when the Commission twice sought comment on applying an eligibility restriction to incumbent LECs and cable operators.³²

7. Finally, Craw-Kan, CTTI, and Northern also claim that the 10 percent overlap benchmark inequitably penalizes small incumbents, such as themselves, that acquired A block licenses in what they characterize as “small” BTAs.³³ In such circumstances, they argue, there is an increased likelihood that small incumbents will exceed the 10 percent overlap benchmark, an inequality that is “exactly what waivers are designed to rectify.”³⁴ This contention is another way of arguing that rural LECs should be excluded from the eligibility restriction. The Commission has twice rejected this argument, and it is therefore an insufficient basis for a waiver absent a demonstration that the Commission’s concerns regarding anti-competitive behavior are not present in these particular cases, or that other unique facts or circumstances exist. Petitioners have not provided this information, and we therefore reject this argument.

³⁰ See *LMDS Second Report and Order*, 12 FCC Rcd at 12629, ¶ 187.

³¹ See *LMDS Fourth NPRM*, 11 FCC Rcd at 19056, ¶ 132; *LMDS Third Order on Reconsideration*, 13 FCC Rcd at 4885-86, ¶ 66. The Commission has noted that it “modified the cellular-broadband PCS cross-ownership rule only as necessary to apply its provisions to incumbent LECs and cable companies in the context of the LMDS eligibility restriction.” *LMDS Third Order on Reconsideration*, 13 FCC Rcd 4866, ¶ 18.

³² 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 and Suite 12 Group Petition for Pioneer’s Preference, *Third Notice of Proposed Rulemaking and Supplemental Tentative Decision*, 11 FCC Rcd 53, 89-92, ¶¶ 97-105 (1995); *LMDS Fourth NPRM*, 11 FCC Rcd at 19056, ¶ 132. See also *LMDS Third Order on Reconsideration*, 13 FCC Rcd at 4866, ¶ 18.

³³ See Craw-Kan and Northern Petitions at 14-15; CTTI Petition at 15-16. Specifically, these petitioners characterize their BTAs as “rural and low population density areas.” Craw-Kan and Northern Petitions at 15; CTTI Petition at 16.

³⁴ See Craw-Kan and Northern Petitions at 14; CTTI Petition at 15.

ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petitions for reconsideration of the *LMDS Waiver Order* filed by Central Texas Telephone Investments, Inc., Craw-Kan Telephone Cooperative, Inc., GW Wireless, Inc., Northern Communications, Inc., and Venture Wireless, Inc., ARE HEREBY DENIED.

9. This action is taken pursuant to delegated authority as set forth in 47 U.S.C. § 155(c) and 47 C.F.R. §§ 0.331 and 1.106.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Sugrue
Chief, Wireless Telecommunications Bureau

APPENDIX

Parties Filing Petitions for Reconsideration

Central Texas Telephone Investments, Inc. (“CTTI”)
Craw-Kan Telephone Cooperative, Inc. (“Craw-Kan”)
GW Wireless, Inc. (“GW Wireless”)
Northern Communications, Inc. (“Northern”)
Venture Wireless, Inc. (“Venture Wireless”)

Parties Filing Oppositions to Petitions for Reconsideration

Brownwood Television Cable Service, Inc. (“Brownwood”)

Parties Filing Replies to Oppositions to Petitions for Reconsideration

Central Texas Telephone Investments, Inc. (“CTTI”)