

## DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

*Re Rulemaking to Amend Parts 1,2 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Sixth Notice of Proposed Rule Making, CC Docket No. 92-297*

Today's decision continues an unfortunate chapter in the Commission's purported move towards deregulation and reliance on market forces. I have previously voiced my disappointment with the Commission's decision to impose eligibility requirements on LMDS licensees.<sup>1</sup> As those onerous restrictions are scheduled to sunset, the Commission has issued this NPRM apparently seeking out a rationale for an extension of these prohibitions. I believe that economic theory and the LMDS experience to date illustrate the negative impact of these policies. In fact, today's NPRM only adds uncertainty to this fragile market. Therefore I would not have issued today's NPRM, but instead would have allowed the restrictions to end on July 1, 2000.

The Commission imposed eligibility restrictions on LMDS with an assurance that these extreme measures would be temporary. The majority held that "[b]y temporarily restricting incumbents' eligibility to acquire in-region LMDS licenses, this policy maximizes the likelihood of increasing competition in both the LEC and MVPD markets."<sup>2</sup> To date, there has been no LMDS competition in the LEC and MVDS markets. In fact, there has barely been any LMDS service at all.

As I said in 1998, "[e]ligibility restrictions on an innovative new service are a draconian measure; such bans on competition should be used only to prevent a substantial competitive harm to a specific market. Here, the eligibility restrictions are imposed not to prevent a specific harm, but in an attempt to enhance the mere possibility of competition."<sup>3</sup> Nothing in our LMDS experience or the competitive landscape alters my view. Indeed I fear that the possible extension of these eligibility requirements will create greater market uncertainty and further delay the day that LMDS is deployed as a meaningful competitor in any market.

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<sup>1</sup> See *Separate Statement of Commissioner Harold Furchtgott-Roth* in 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 (February 3, 1998). Similar concerns were expressed by Commissioner Powell in that proceeding and by Commissioner Chong in the Second Report and Order.

<sup>2</sup> See Rulemaking to Amend Parts 1,2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, Second Report and Order, 12 FCC Rcd 12545, ¶ 162 (1997); see also *id.* at ¶ 160 (restrictions would be "short-term").

<sup>3</sup> See *Separate Statement of Commissioner Harold Furchtgott-Roth* in LMDS Third Order on Reconsideration.

The Commission initially justified these eligibility restrictions based on its apparent perception that LMDS represented a unique competitive alternative that cable and telephony incumbents would attempt to thwart by purchasing -- and subsequently under-utilizing -- the spectrum. The Second Report held that the “temptation for preemptive acquisition is particularly compelling here because of the unusually large size of the LMDS spectrum allocation. . . relatively unused. . . and [with] development of equipment and technology [that] is already quite advanced.”<sup>4</sup>

While the Second Report and Order touted the service based on its “high” likelihood to provide competition in telephony and cable, our experience has been significantly less positive.<sup>5</sup> Two and a half years later, there is little appreciable deployment of LMDS and the NPRM cites a parade of factors that continue to hinder LMDS development. These factors include service affordability, lack of building access, lack of equipment, and line-of-sight problems. My point is not that LMDS is a good or bad technology, or that it will or will not develop into a viable market alternative. Rather, my point is that there is nothing unique about LMDS that warrants excluding some providers from that market.

The LMDS auctions themselves also seem to support the idea that this spectrum is not a distinctly coveted resource. As the decision notes, there have been two LMDS auctions. In total, the 400 A Block and 525 B Block licenses sold for approximately \$323 million dollars. The Notice trumpets this number: “[t]he willingness of LMDS licensees to bid large sums demonstrates a substantial and probable market for LMDS.”<sup>6</sup> Yet even these sums-- when compared with the tens of billions of dollars bid for companies with only a potential to reach only a portion of America by wire or fiber -- hardly indicate that this spectrum is the “third pipe” into Americans homes that is uniquely well-positioned to compete with incumbent cable and telephony providers.

In this evolving market, the Commission has singled out LMDS among fixed wireless bands for these burdensome restrictions.<sup>7</sup> In reality, there are numerous other competitive wireless alternatives to cable and wireline telephony -- yet we have wisely chosen not to extend the LMDS eligibility restrictions to those services.<sup>8</sup> The availability of these market alternatives further undermines the notion that ILECs and cable companies would have a rational incentive to purchase all the relevant spectrum in each of the fixed wireless bands in order “to protect their market power and preserve a stream of future profits.”<sup>9</sup> The market has simply created too many alternatives for there to be

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<sup>4</sup> See Second Report and Order at ¶ 175.

<sup>5</sup> See Second Report and Order at ¶ 170.

<sup>6</sup> Order at ¶ 31. These costs are also substantial enough, however, to provide a significant disincentive for cable and telephony companies to spend resources trying to obtain these licenses, but not use them efficiently.

<sup>7</sup> All of these market analyses seem misguided too in light of the NPRM’s conclusion that “LMDS will likely not be used as a stand-alone network, but as a ‘roof-top’ means to extend other existing networks. Service providers are likely to use LMDS to fill out their service areas and/or to complement other wireless and fiber means of reaching customers.” Order at ¶ 33.

<sup>8</sup> As noted in the NPRM, these services include the 24 GHz and 39 GHz bands as well as 2 GHz MDS and 2.5 GHz MMDS and ITFS.

<sup>9</sup> Second Report and Order at ¶ 171.

any economically rational “warehousing” of spectrum. This is especially true at a time when incumbent cable and wireline telephony providers are defending their turf from competitors of all shapes and sizes.

In putting aside the telephony and cable market theories, the Notice now posits that LMDS could be a viable broadband competitor. Yet here too there are other alternatives, and the only rationale for keeping some players out is speculation about some future potential harm.<sup>10</sup> Moreover, I had hoped we were past the time when the Commission would seek out new rationales for defending old anti-competitive restrictions. We should be looking to knock down market barriers, not attempting to shore them up.

In contrast to the speculative harms cited by the Notice, there are some significant potential benefits from eliminating these restrictions. First, LECs and cable companies may provide an infusion of much-needed capital to jump start these services.<sup>11</sup> Second, LMDS may be a logical service to use in “filling in” underserved areas for existing providers.<sup>12</sup> Third, LECs and cable operators may be in a position to ease the building access issues based on existing access arrangements. Fourth, the prohibited entities may provide useful expertise in technology, marketing, and product development. While this list is by no means exhaustive, it does demonstrate the potential market benefits from abandoning this competition ban.

Even if there were no identifiable, specific benefits to allowing one class of entities to compete in a market, the mere denial by a government agency of even an opportunity to compete in a market offends basic concepts of justice and equity. If a government agency can deny opportunities to compete in a market to one class of entities, it can just as easily deny opportunities for another class of entities in a different market. It is not for the government to burden any class of would-be competitors with an obligation to demonstrate that they merit an opportunity to compete; it is the obligation of government to demonstrate that anyone should by rule of law be excluded.

No one should suffer the illusion that any market from which anyone has been excluded without the soundest of reasons can be described as competitive. A competitive market has entry uncontrolled by the government. In my view, the Commission and the public would be best served by allowing these potential competitors full access to the marketplace.

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<sup>10</sup> The Commission has elsewhere determined that the broadband marketplace is competitive, thus appearing to undermine any eventual assertion to the contrary here. See e.g. Cable Services Bureau, “Broadband Today,” A Staff Report to FCC Chairman Kennard, at 23-30 (October 1999).

<sup>11</sup> This is consistent with the Commission’s prior conclusions regarding LEC and cable entry into other markets. See e.g. *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, 8 FCC Rcd 7700, ¶ 126 (1993) (“ . . . we also find that allowing LECs to participate in PCS may produce significant economies of scope between wireline and PCS networks. We believe that these economies will promote more rapid development of PCS and will yield a broader range of PCS services at lower costs to consumers. In addition, allowing LECs to provide PCS service should encourage them to develop their wireline architectures to better accommodate all PCS services.”)

<sup>12</sup> Order at ¶ 33.

I also join in the concern expressed by my colleague, Commissioner Powell, regarding the staff-level review that undergirds key parts of today's Notice. All parties are better served by an open process that allows for a free exchange of ideas about pending Commission matters. I see no reason to keep that Report from the parties and join Commissioner Powell in calling for its release.

Based on these considerations, I respectfully dissent.