UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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)

CC Docket No. 92 -297

Reply Comment of the Staff of the
Bureau of Economics of the Federal Trade Commission(1)
August 22, 1996

I. Introduction

The Staff of the Bureau of Economics of the Federal Trade Commission ("FTC Staff") welcomes this opportunity to comment on proposed regulations concerning eligibility restrictions on Local Multipoint Distribution Service ("LMDS") spectrum licenses in the 28 gHz band.(1) The Federal Communications Commission ("FCC") recently released the *First Report & Order and Fourth Notice of Proposed Rulemaking ("4th NPRM")* in its ongoing proceeding to allocate spectrum in this band.(2) Spectrum in this bandwidth can be used for a variety of purposes, including the provision of LMDS. LMDS uses super-high frequency microwaves to send and receive two-way signals in an area, or cell, approximately 3 to 6 miles in diameter. In some respects, it works like the narrowband operations of cellular telephone systems. However, the video, voice, and data broadband LMDS signals are two-way capable (*i.e.*,subscribers can both send and receive signals). Based on the material accumulated over the course of this proceeding, the FCC has concluded (*4th NPRM*, ¶ 14) that there is a substantial likelihood that LMDS will be able to provide competition to facilities-based local phone companies (local exchange carriers, or "LECs") and to cable television operators.(3)

II. Expertise of the Staff of the Federal Trade Commission

The FTC is an independent agency responsible for preventing unfair methods of competition and unfair or deceptive acts or practices.(4) In response to requests by federal, state, and local government bodies, the staff of the FTC often analyzes regulatory or legislative proposals that may affect competition or the efficiency of the economy. In the course of this work, as well as in antitrust and consumer protection research, nonpublic investigations, and litigation, the staff

applies established principles and recent developments in economics to the analysis of competition and consumer protection matters.

The staff of the FTC frequently has commented on competition issues in communications, beginning with a 1924 report to the House of Representatives about competition issues in radio.(5) More recently the staff has submitted comments to the FCC on the implementation of the portion of the Telecommunications Act of 1996(6) that relates to the establishment of open video systems (OVS);(7) the Prime Time Access Rule;(8) television and radio ownership rules and policies;(9) competition, rate deregulation, and cable television service;(10) common ownership of cable systems and national television networks;(11) the "must carry" rules applied to cable television systems;(12) the rules requiring broadcast licenses to be held for three years before being transferred;(13) network ownership of financial interests and syndication rights;(14) spectrum allocation and standards for digital audio broadcasting;(15) and the regulation of "900" telephone number services.(16)

III. Restrictions on LMDS License Eligibility

According to the *4th NPRM* (¶ 105), a principal objective of the Telecommunications Act of 1996 ("1996 Act") is to expedite the introduction of competition to incumbent LECs and cable operators. Because LMDS has the potential to compete both with LECs and cable systems, the FCC is considering whether to adopt eligibility or use restrictions on LECs and cable operators seeking to acquire LMDS spectrum licenses within their geographic service areas (*4th NPRM*, ¶ 1). The FCC intends to allocate only one LMDS license in each service area (*4th NPRM*, ¶ 106); hence, there will be no direct competition among LMDS providers. Restricting or proscribing the acquisition of the LMDS license by a LEC or cable operator serving that same service area eliminates the possibility that either could anticompetitively preclude entry by a third party provider of LMDS. The risk from restricting license eligibility is that incumbent LECs or cable operators may be prevented from attaining scale or scope economies in the provision of existing or new services.

The FCC raised similar issues in the *3rd NPRM* in this proceeding, in considering whether the acquisition of an LMDS license by a LEC or cable operator with an overlapping service area would result in the "warehousing" of spectrum or its diversion to less competitive uses (*3rd NPRM*, ¶¶ 108-109, 130).(17) The LECs and cable multisystem operators ("MSOs") that responded to the *3rd and 4th NPRM* argued that there is no competition-based rationale for such limitations, contending that (1) LECs and cable MSOs would have no financial incentive to warehouse LMDS spectrum (even assuming substantial incumbent market power in markets for multichannel video program distribution ("MVPD") and local telephony); (2) incumbent cable operators and LECs in fact have no market power in either of these markets; (3) preventing LECs and cable operators from holding LMDS licenses in overlapping markets would result in substantial forgone scope economies between wireline and LMDS services; and (4) the geographic overlap between the service areas of incumbent wireline carriers (in particular, cable operators) and the LMDS in many cases will be sufficiently small to eliminate any concern that the acquisition of the LMDS license will be anticompetitive. In the *4th NPRM* the FCC has requested comment again on these issues; we discuss them below.

A. Financial Incentives of a Monopolist to Preempt Entry

Several of the LECs and cable interests responding to the *3rd* and *4th NPRMs* contended that concerns that a LEC would "warehouse" the LMDS spectrum are groundless because "auctions will prevent the warehousing of LMDS spectrum.(18) Similarly, GTE argues that "[g]iven that the LEC will have paid market price for the spectrum in the auction process, it would make no sense to warehouse the spectrum.(19) In its response to the *4th NPRM*, the National Cable Television Association ("NCTA") contended that the FCC's concerns are misplaced because "incumbent cable operators will invest in LMDS [only] if they believe their investment in that service will earn greater returns to capital than other investments.(20) U.S. West asserted that "it is highly implausible that a LEC or cable operator would ?sit' on something for which it bid thousands/millions of dollars simply to prevent competition.(21)

It is difficult to reconcile these arguments with economic analysis. First, the amount spent by a LEC — or any party — on spectrum rights becomes a sunk cost once the expenditure is made; the subsequent disposition of the spectrum will be determined by which use offers the highest profits. The amount spent acquiring the spectrum rights is irrelevant to this profit calculation.

Second, the amount bid by an incumbent LEC or cable operator for LMDS spectrum rights will reflect in part any monopoly profits that are preserved by the "warehousing" (or, more generally, the anticompetitive disposition) of the spectrum; moreover, there are compelling theoretical reasons why an incumbent monopolist often will outbid a prospective entrant for property rights that would permit entry. The basic reasoning is as follows:(22) if entry does not occur, a monopolist continues to earn profits of PM, while if entry does occur (resulting in duopoly), the incumbent earns and the entrant earns (where the "I" and "E" superscripts represent "incumbent" and "entrant", and the "D" subscript represents "duopoly"). Total industry profits without entry therefore are PM; with entry, total industry profits are + . Assuming no cost disadvantages from monopoly, total industry profits under monopoly generally will be greater than total industry profits under noncollusive duopoly (*i.e.*, PM > +). To prevent entry, the monopolist would willingly bid up to the difference between its monopoly profits and its duopoly profits, PM ¾ . To obtain the right to enter, the prospective entrant would willingly bid an amount up to its profits as a duopolist, . Because the monopolist's loss from entry exceeds the entrant's gain (*i.e.*, PM ¾ >), the monopolist will be able to outbid the prospective entrant for the resource (here, the sole LMDS license in a given geographic area) that would allow entry to occur.(23)

The incentive of a monopolist to outbid a potential entrant for an essential input (known in the economics literature as the "persistence of monopoly" effect) will be attenuated, perhaps completely, if the monopolist lacks the means to credibly (and profitably) preempt entry.(24) This could occur, for example, if there are no well-defined property rights to the resources required for entry, or if the entrant possesses a technology not possessed by the incumbent. But in the current case, where only one LMDS license will be made available in each service area, there would seem to be considerable risk that anticompetitive entry preemption would be a profitable strategy for incumbent monopolists to pursue.

While incumbent LECs or cable operators may have substantial anticompetitive incentives to outbid prospective entrants for LMDS spectrum rights, it is probably correct (even in these

circumstances) that the former would not find it most profitable to "warehouse" these rights (*i.e.*, hold them idle). But this does not mean that the acquisition of these rights could not be anticompetitive (compared to the acquisition of those rights by an equally efficient third party). This point is most easily seen by simple analogy to horizontal merger analysis. In those horizontal mergers where conditions are conducive to the creation of post-merger market power,(25) it seldom is alleged the merged entity will retire completely (*i.e.*, "warehouse") the productive assets of the acquired entity. Rather, a more general prediction as to the exercise of post-merger market power is that the merged entity simply will raise the price of both products,(26) while continuing to use the productive capacity of both merger partners (albeit less intensively). It is for this reason that the antitrust agencies generally would find it insufficient to remedy post-merger market power with an order requiring only that both sets of productive capacity continue to be used post-merger. For the same reason, a "build-out" requirement (*i.e.*, requiring the installation of productive capacity within a certain period of time) is not sufficient to remedy the market power that might be created when a LEC acquires an LMDS license. The FCC also would have to regulate the firm to ensure that the output of the firm (*i.e.*, its capacity utilization rate) approximated that of a competitive firm. We conclude, therefore, that requiring only that an incumbent LEC offer LMDS would fail to prevent any consumer welfare losses resulting from the joint pricing of local telephony and LMDS.

B. Market Power of LECs and Cable Operators

The analysis in the preceding section assumes, *arguendo*, that LECs and cable operators could be characterized as monopolists (or, more generally, as firms with substantial market power). The LECs and cable MSOs that responded to the *3rd NPRM* contest this characterization, arguing that telephony and (especially) MVPD markets now are highly competitive, which eliminates any anticompetitive motivation for the acquisition of a geographically overlapping LMDS license and, therefore, any basis for restrictions on LMDS license acquisition. For example, Cox Enterprises, Comcast, and Jones Intercable asserted in a joint comment that "cable television is facing increasing competition from DBS [direct broadcast satellite], wireless cable, LEC cable and LEC video dialtone systems … cable has no market power in the LMDS market and no incentive to quash LMDS as a pro-competitive market force.(27) Similarly, Bell Atlantic claimed that the MVPD market "includes competitors using a wide variety of technologies such as traditional cable systems, DBS systems, Multipoint Multichannel Distribution Systems (MMDS), and satellite master antenna television systems. It is inconceivable that any single entity could gain control of all these technologies and monopolize the MVPD market.(28) BellSouth also opposed any restrictions on LMDS license acquisition, claiming that "[the MVPD] market is already competitive.(29)

Although all consumers now have at least one alternative — DBS — to wireline cable service for MVPD services,(30) and the promise of several other alternatives, it nonetheless seems premature to characterize the numerous geographic markets for MVPD services as competitive. As the FCC noted in last year's *Second Annual Report* on competition in MVPD services,(31) notwithstanding the rapid growth rates recently experienced by alternatives to cable (most notably MMDS and DBS), subscribership for noncable MVPD services still is only 9 percent of total MVPD subscribership In our view, the FCC's principal conclusion in that *Report(32)* —

that “cable television systems remain the primary distributors of multichannel video programming services and continue to enjoy market power in local markets” — remains valid.

A similar conclusion appears warranted with respect to competition in local telephony markets. Although it appears likely that some local markets will witness competitive alternatives to wireline services purchased directly from traditional LECs — a development that likely will be accelerated by the recent FCC action in CC Docket No. 96-98(33) — it would appear, as with MVPD markets, that it is premature to conclude that local telephony is now sufficiently competitive to eliminate competitive concerns that would arise from a LEC acquiring the sole LMDS license in an overlapping service area.(34) Some users — mainly large business customers — have been able to bypass LEC trunk lines by purchasing private line access to the interexchange (*i.e.*, long distance) carriers from “competitive access providers.” But these providers still account for only a very small share of the market for access to local exchange networks. Most small businesses and residential customers are still dependent upon the LECs for access to interexchange carriers, and for the completion of local calls.(35)

C. Scope Economies Between Wireline Services and LMDS Services.

Several commenters argued (implicitly) that eligibility restrictions would deprive them (and therefore consumers) of scope economies between the provision of LMDS and cable (or local telephony) services. For example, Bell Atlantic has argued that “imposing restrictions on the ownership of LMDS licenses might stifle competition [because restrictions] would likely prevent competitors from utilizing an efficient mix of technologies to distribute multichannel video programming. They would also stifle investment by the very entities that are best equipped to become viable competitors through the use of this technology.(36) The National Cable Television Association (“NCTA”) argued that “LMDS spectrum may be an important adjunct to wired facilities in the provision of local telecommunications services.(37) U.S. West contended that “[h]aving been in similar businesses for years, these companies [LECs and cable operators] are best equipped to become viable LMDS competitors. These incumbents have the efficiencies of scale and scope and the necessary expertise, capital, existing infrastructure, and experience to promote the early development of LMDS.(38)

We have two observations on the scope economy issue. First, it is plausible that scope economies could exist between LMDS and traditional wireline MVPD or local telephony, and the issue surely is entitled to serious consideration. However, none of the parties have discussed, or documented in any detail, the source or magnitude of those economies. Indeed, the entire discussion of scope economies in the comments of the LECs and cable MSOs in response to the *3rd NPRM* is limited to the types of nonspecific assertions quoted in the preceding paragraph. While it is difficult to prescribe precisely how much documentation of prospective efficiencies parties should have to supply in a proceeding of this sort, the responses to the *3rd and 4th NPRMs* do not adequately support the asserted existence of substantial scope economies between wireline services and LMDS.(39)

Second, the types of scope economies hinted at by the LECs and MSOs — scope economies deriving from factors such as generalized telecommunications technological marketing expertise — are not necessarily specific to a particular geographic market. Because the FCC has

contemplated restrictions only on LMDS license acquisition in overlapping geographic markets, the only scope economies relevant to assessing the costs of such policy are those that require joint operation of a local exchange (or cable system) and the overlapping LMDS. To the extent that one can infer anything about the source or nature of the possible scope economies from the parties' comments in response to the *3rd* and *4th NPRMs*, there is no basis for concluding that exploitation of these economies requires joint operation of overlapping wireline and LMDS systems.

D. Implementation of a License Restriction

Although a reasonable case can be made for restricting the ability of LECs and cable operators to acquire LMDS licenses when there would be substantial overlap in their service areas, defining practical criteria for what constitutes a significant geographic overlap is not straightforward. The FCC plans to issue one LMDS per Rand-McNally "Basic Trading Area" ("BTA"). These BTAs can be quite large;(40) several of the cable MSOs have argued (*see 4th NPRM*, ¶ 113) that "upon a comparison of the average BTA and the average cable franchise, cable operators will have *de minimis* overlap, and *de minimis* market power for any one service throughout a BTA." The FCC agrees that this is a legitimate issue, and proposes (*4th NPRM*, ¶ 132) a rule along the lines of its cellular/PCS cross-ownership rule, whereby a LEC or cable operator would be considered "in-region" if 20 percent or more of the BTA population is within the bidder's service area.

We agree that when overlaps between a prospective bidder's (*e.g.*, a cable operator) service area and the LMDS are small, it would probably be incorrect to ascribe a substantial anticompetitive purpose or effect to the acquisition of the LMDS spectrum license. The anticompetitive effect would be limited to that area where the actual overlap existed; and if there are regulations requiring uniform pricing within the BTA, there might not be an anticompetitive effect even in that area.(41)

The situation confronted by the FCC in implementing an overlap restriction arises frequently in merger analysis, where a large (in dollar value) transaction results in some small horizontal overlaps in one or more relevant markets. When the overlaps appear to present significant competitive problems,(42) the FTC may in appropriate cases seek structural relief (*e.g.*, a divestiture order directed at the overlapping assets).

In principle, the FCC could adopt a stringent policy against any overlaps, in which case potential bidders for LMDS spectrum would have to decide for themselves whether to divest the overlapping assets as a condition of spectrum acquisition. While one can conceive of circum stances where this might be a relatively low cost option,(43) there likely would be many instances where this is not the case. There could be situations, for example, where a BTA straddles the service areas of two different LECs, but where the overlaps are very unequal (*e.g.*, 1 percent of the BTA is served by one LEC, the remainder by another).(44) A strict policy against any service area overlaps would effectively bar the LEC with the small overlap from acquiring the LMDS license,(45) even though the overall competitive risks from this acquisition would appear slight.

As a possible approach to address this issue, the FCC has proposed (*4th NPRM*, ¶ 132) to adopt a rule similar to the cellular/PCS cross-ownership rule. Consistent with this rule, an incumbent LEC or cable operator would be considered "in-region" if 20 percent or more of the population of a BTA is within a LEC's telephone service area or a cable company's franchised service area. While the FTC staff lacks sufficient information to recommend or endorse a particular numerical threshold for such a rule, in principle the use of such a threshold could contribute to economic efficiency.

IV. Conclusion

Until such time as effective competition is present in MVPD and local telephony markets, the acquisition of LMDS spectrum licenses by competing LECs and cable operators presents potentially significant competitive risks.(46) Accordingly, we believe that there is a reasonable basis for restricting these parties from acquiring LMDS licenses when substantial geographic service area overlaps would result. Although we cannot endorse a particular numerical criterion for determining when such eligibility restrictions would be triggered, we believe that the approach suggested by the FCC in the *4th NPRM* is sound.

(1) This comment represents the views of the staff of the Federal Trade Commission. They are not necessarily the views of the Federal Trade Commission or any individual Commissioner. Inquiries regarding this comment should be directed to Mike Vita (202-326-3493).

(2) *First Report & Order and Fourth Notice of Proposed Rulemaking* in the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Designate 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, July 22, 1996.

(3) Currently there is a 50 channel LMDS system operating in Brighton Beach, NY (Brooklyn), that has approximately 5,000 subscribers.

(4) 15 U.S.C. §§ 41-49.

(5) Federal Trade Commission, *Report on the Radio Industry*, GPO, 1924.

(6) Pub. L. No. 104-104, 110 Stat. 56.

(7) CS No. 96-46 (1996).

(8) MM No. 94-123 (1994).

(9) MM Docket No. 91-140 (1991); MM Docket No. 91-221 (1992)..

(10) MM No. 89-600 (1990).

(11) CT No. 82-434 (1982).

(12) MM No. 90-4 (1991).

(13) BC No. 81-897 (1982).

(14) MM Nos. 82-345 (1983) and 90-162 (1990).

(15) GEN No. 90-357 (1991).

(16) CC No. 91-65 (1991).

(17) We believe that "warehousing," as used in the *NPRM*, means a scenario whereby the spectrum rights remain unused. If this were the only means by which market power could be exercised, it potentially could be addressed satisfactorily by imposing a "build-out" requirement on the licensee, as is proposed in the *4th NPRM*, ¶ 130. As we discuss below, however, "warehousing" is unlikely to be the most profitable anticompetitive disposition of LMDS spectrum; consequently, a "build-out" requirement would not satisfactorily address the competitive problems we identify in § III.A below.

(18)" BellSouth, *Comments in Response to the 3rd NPRM*, September 7, 1995, p. 12.

(19)" GTE, *Comments in Response to the 3rd NPRM*, September 7, 1995, p. 8.

(20)" NCTA, *Comments in Response to the 4th NPRM*, August 12, 1996, p. 3. The NCTA goes on to argue (p. 10) that "[i]nstitution of auctions imposes a major constraint on companies that might consider such a [warehousing] strategy, because they are required to tie up scarce capital assets in ventures that produce no returns."

(21)" U.S. West, *Comments in Response to the 4th NPRM*, August 12, 1996, p. 4.

(22) *See* Tirole, *The Theory of Industrial Organization*, 1988, pp. 346-52, for a more detailed exposition of this argument. *See also* Gilbert and Newberry, "Preemptive Patenting and the Persistence of Monopoly," *American Economic Review*, 72 (1982), 514-26.

(23) Thus, the NCTA is correct when it argues (*Comments in Response to the 4th NPRM*, *supra* note 20, p.2) that auction revenues likely will be higher if the FCC permits incumbent LECs to bid for overlapping LMDS spectrum rights. This is because the amount bid is determined solely by the profits associated with a particular allocation of spectrum rights. When market power is present, this bid will reflect the monopoly profits created or preserved by a particular allocation of the spectrum.

(24) *See* Tirole, *supra* note 22, pp. 350-52. *See also* Krishna, "Auctions With Endogenous Evaluations: The Persistence of Monopoly Revisited," *American Economic Review* 83 (1993), 147-60.

(25) *See* the *Horizontal Merger Guidelines* issued by the U.S. Department of Justice and the Federal Trade Commission, April 2, 1992, § 0.2, for a general overview of these conditions.

(26) *See, e.g.*, Deneckere and Davidson, "Incentives to Form Coalitions with Bertrand Competition," *RAND Journal of Economics*16 (1985), 473-86; and Willig, "Merger Analysis, Industrial Organization Theory, and Merger Guidelines," *Brookings Papers on Economic Activity (Microeconomics)*, 1991, 281-32, esp. 299-305. It should be noted that market power can manifest itself in dimensions other than price and output; *see, e.g.*, Spence, "Monopoly, Quality, and Regulation," *Bell Journal of Economics* 6 (1975), 417-29; Rosen and Mussa, "Monopoly and Product Quality," *Journal of Economic Theory* 18 (1978), 301-17; and Leffler, "Ambiguous Changes in Product Quality," *American Economic Review* 72 (1982), 956-67.

(27)" Joint Parties, *Comments in Response to the 3rd NPRM*, September 7, 1995, p. 5.

(28)" Bell Atlantic, *Comments in Response to the 3rd NPRM*, September 7, 1995, p. 6.

(29)" BellSouth, *Comments in Response to the 3rd NPRM*, *supra* note 18, p. 10.

(30) According to the FCC's *Second Annual Report* In the Matter of Assessment of the Status of Competition in the Market for the Delivery of Video Programming (CS Docket No. 95-61, December 11, 1995), ¶ 50, DBS service is now available in all 48 contiguous states and Alaska.

(31) *Supra* note 30, ¶ 5.

(32) *Id.*

(33) In this order (adopted August 1, 1996) the FCC established a framework of minimum national rules that will enable the states and the FCC to begin implementing the local competition provisions of the Telecommunications Act of 1996. Section 251(c) of the Act requires incumbent LECs to make available to entrants interconnection and access to unbundled network elements, and to offer LEC retail services for resale to telecommunications carriers at wholesale rates. Access to unbundled elements and resale opportunities are methods by which telecommunications carriers can enter local exchange markets. The Order addresses the three paths of entry into the local telephone market enumerated by the 1996 Act. These three methods of entry are full facilities-based entry, purchasing of unbundled network elements from the incumbent LEC, and resale of the incumbent's retail services. The FCC also adopted a minimum list of unbundled network elements that incumbent LECs must make available to new entrants, upon request.

(34) BellSouth (*supra* note 18, p. 10) contends that "LECs would have no bottleneck power through the provision of LMDS," and therefore that LECs should not be restricted from acquiring LMDS licenses in overlapping service areas. BellSouth apparently is referring to the problems of access discrimination that can arise when a regulated monopolist enters the market for a complementary (but unregulated) service. As is well known, this integration can provide the monopolist an opportunity to evade the regulation (*see* Brennan, "Why Regulated Firms Should be Kept Out of Unregulated Markets: Understanding the Divestiture in *United States v. AT&T*," *Antitrust Bull.* 32 (1987), 741-93). With regard to BellSouth's argument, several points seem relevant. First, even if it were true that an LMDS provider would not require any access to the local LEC's facilities (*e.g.*,switches, etc.), there would still be a straightforward competitive

concern arising from the LEC's acquisition of a potential competitor. Second, if (as seems likely) LMDS providers will require access to some of the LEC's "bottleneck" facilities, then joint ownership of these facilities and the LMDS license could (depending upon the effectiveness of Federal and state antidiscrimination regulations) result in the LEC discriminating in favor of its LMDS affiliate, to the detriment of other local wireline competitors (*i.e.*, full- and partial-facilities entrants, and "resellers"). Third, if the provision of LMDS does not involve the use of the LEC's local physical facilities, this seemingly rules out one source of scope economy that could provide an efficiency rationale for the LEC to acquire an overlapping LMDS license. We discuss further the issue of scope economies in § III.C below.

(35) For a general discussion of these issues, *see* Schwartz, "Telecommunications Reform in the United States: Promises and Pitfalls," in Welfens and Yarrow, eds., *Telecommunications and Energy in Systemic Transformation: International Dynamics , Deregulation, and Adjustment in Network Industries*, 1996, esp. § 4.3.

(36)" Bell Atlantic, *Comments in Response to the 3rd NPRM*, *supra* note 28, p. 6.

(37)" NCTA, *Comments in Response to the 3rd NPRM*, September 7, 1995, p. 5.

(38)" U.S. West, *Comments in Response to the 4th NPRM*, *supra* note 21, p. 3.

(39) The recently issued FTC Staff Report *Anticipating the 21st Century: Competition in the New High-Tech, Global Marketplace (vol. I)*, May 1996, ch. 2.III.H, discusses in greater detail evidentiary issues associated with assessment of economic efficiencies in merger analysis.

(40) Basic Trading Areas (BTA) surround a metropolitan area or city and are made up of one or more county boundaries. These areas contain the residents who make the majority of purchases for general merchandise or specialized services such as medical care and entertainment within that metro area. Some Basic Trading Areas contain more than one city because residents may conveniently shop at either one. For example, the New York BTA includes a total of 26 counties from NY, CT, NJ and PA that surround the New York metropolitan area. The Washington BTA, for example, includes the immediate D.C. and Baltimore metro area, and includes Frederick and Washington counties (MD) to the north, and Charles and St. Mary counties to the south.

(41) If a cable system acquired an LMDS license yielding a very small overlap, in the absence of a uniform pricing requirement, the system would charge a relatively high price for LMDS video services and cable services in the overlap area, and a lower price in non-overlap areas (where the LMDS would face competition from independent incumbent cable operators). With a uniform pricing requirement, the system would have to choose between charging the high price throughout the LMDS service area (resulting in a price exceeding the profit-maximizing price in the non-overlap area), or the low price (resulting in a price below the profit-maximizing price in the overlap area). If the nonoverlap area is sufficiently large, the low price will prevail throughout.

(42) As we argued above, given the current structure of most local MVPD markets, acquisition of the overlapping LMDS license by the incumbent cable operator license would likely increase the latter's market power.

(43) A possible example might be when a cable MSO owning a small system contained entirely within the BTA seeks to acquire the associated LMDS license. There, the MSO could alleviate any anticompetitive concerns simply by selling the system. Unless there are substantial efficiency losses to the MSO from this divestiture (or from forgone scope economies; *see* § III.D, *supra*), this will be an efficient way to address the FCC's competitive concerns.

(44) As the *4th NPRM* notes (¶ 132), "LATA lines and cable franchise areas are not coincident with BTA boundaries."

(45) Similar situations could of course arise in the case of cable systems.

(46) We agree with the FCC (*4th NPRM*, ¶ 135) that any blanket restrictions on LMDS license eligibility should be imposed only until there is effective competition in MVPD and local telephony markets.