

### iii. Classification of LMDS

6. In our *NPRM*, we sought comment on how to classify Local Multipoint Distribution Service ("LMDS") for regulatory fees purposes, which since FY 2000 has been classified in the fee category of Multipoint Distribution Service ("MDS"). We received several comments from respondents suggesting that the LMDS fee category be reclassified in the microwave category. For example, Blooston, Mordkofsky, Dickens, Duffy & Prendergast ("BMDDP") argue that LMDS and the microwave fee category are regulated similarly, and therefore should be classified together. LMDS is regulated in part 101 of the Commission's rules as is the microwave category, whereas MDS is regulated under part 21. LMDS operates in the 28 GHz and 31 GHz bands and is most similar to the "upper band" of microwave services category. BMDDP argues that both the microwave and LMDS services have similar propagation limitations, and each of these services compete (or could compete) for the same subscriber base within the same geographic market area.<sup>5</sup>

7. In their comments, Bennet & Bennet also argue that LMDS should be classified in the microwave category, noting that the present classification of LMDS with MDS places LMDS at a competitive disadvantage without any rational basis.<sup>6</sup> Bennet & Bennet argue that by the Commission's own admission in its *Fixed Wireless Report*, it recognizes that the lower (MDS) and upper (LMDS, microwave) band services have significantly different propagation characteristics and generally serve two distinct markets.<sup>7</sup> As a result, Bennet & Bennet conclude that although LMDS and MDS share some similarities, these two fee categories are regulated under different rules, utilize different network equipment configurations, and serve different markets.<sup>8</sup>

8. The Commission received a reply comment that addressed the distinctions between MDS and LMDS. The Martin Group, on behalf of its Local Multipoint Distribution Service clients, concurs with the arguments raised by respondents Bennet & Bennet, and BMDDP that LMDS should be reclassified in the microwave fee category. The Martin Group also notes that MDS and LMDS are not similar in

technologies or usage.<sup>9</sup> While LMDS and MDS share the same "Multipoint Distribution Service" designation, the technologies involved are radically different—MDS systems, for the most part, use one-way multichannel video systems, while LMDS systems deliver megabytes of data to customers. The Martin Group is not aware of any point-to-point applications of MDS equipment, but point-to-point systems have been successfully deployed using the LMDS spectrum in a manner operationally similar to microwave technology.<sup>10</sup>

9. The three commenters on this issue have raised substantive arguments addressing the technological characteristics of MDS, LMDS, and the microwave fee category. Based on these distinctions, the respondents advocate that LMDS be reclassified as a microwave service for regulatory fee purposes. From the comments we have received, we concur that substantive distinctions exist between MDS and LMDS and that they should not be placed in the same fee category. However, we are unpersuaded that LMDS should be moved to the microwave service category. Recent technological and commercial applications using LMDS service indicate that this service may develop on a separate track from current microwave services. LMDS offers significant potential in offering a broad range of one-way and two-way voice, video, and data service capability, and substantially more capacity than other wireless services. We conclude that the best resolution at this time is to move LMDS administratively into a separate fee category, while maintaining its current fee structure, and initiate a specific proceeding that addresses the policies and fee structure governing LMDS and other wireless services. All other rules and regulations governing LMDS at this time will continue to apply.

10. We note that although we have separated MDS and LMDS into separate fee categories, the regulatory fee amounts for both services this fiscal year will be \$265 per license. This is a reduction of more than 38 percent from last year's fee and is a significantly reduced financial obligation for LMDS licensees.<sup>11</sup>

### iv. Adjustment of Fee Waiver Policies

11. In our *NPRM*, we addressed the policies applicable to granting fee waivers based on financial hardship.<sup>12</sup> We emphasized that under existing policy, although evidence of bankruptcy or receivership is generally sufficient to establish financial hardship, case-by-case review of fee waiver requests is necessary to determine whether a waiver would be in the public interest, even in bankruptcy cases. We also sought comment on whether we should set a cap on the amount of fees that we will generally waive in circumstances involving bankruptcy and otherwise. We tentatively proposed a cap of either \$500,000 or \$1 million on the amount of fees that would be waived for a single entity and its affiliates.

12. Only one commenter, the Verizon telephone companies (Verizon),<sup>13</sup> responded to this proposal. Verizon asserts that the Commission should not grant fee waivers based on bankruptcy. According to Verizon, doing so unfairly shifts the cost of the bankrupt's failure to the Commission and to the bankrupt's competitors, who will have to pay higher fees and suffer competitive disadvantage. Verizon maintains that granting waivers to bankrupts may significantly reduce the revenues from fees. In this regard, Verizon estimates that the current upsurge in bankruptcies may affect companies accounting for up to 20 percent of revenues from large telecommunications firms and 30 percent of large interexchange carriers. Moreover, Verizon observes that companies in bankruptcy may nevertheless have sufficient funds to pay regulatory fees and that especially companies undergoing Chapter 11 reorganization should be expected to pay applicable fees on a going-forward basis.<sup>14</sup> In Verizon's view, the bankrupt entity's liability for regulatory fees should be left to bankruptcy law, which will set the priority of the fees relative to other obligations and discount the bankrupt's liability as appropriate.<sup>15</sup> Verizon agrees with our proposal to cap all other fee waivers at \$500,000 to \$1 million.

13. Although we share Verizon's concern over the impact that bankruptcies may have on our ability to collect fees, we find that Verizon's proposals go too far. We continue to

<sup>5</sup> Comments of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, pages 1–2.

<sup>6</sup> Comments of Bennet & Bennet, PLC on behalf of its LMDS clients, page 1.

<sup>7</sup> *Ibid.*, page 2.

<sup>8</sup> *Ibid.*, pages 2, 4, and 5.

<sup>9</sup> Comments of Martin Group on behalf of its LMDS clients, page 2.

<sup>10</sup> *Ibid.*, pages 2 and 3.

<sup>11</sup> The regulatory fee amount for the MDS/LMDS service category was \$450 per license held in FY 2001, and \$430 per license held in FY 2002.

<sup>12</sup> *Notice of Proposed Rulemaking*, 68 FR 17577, April 10, 2003, paragraphs 10–12.

<sup>13</sup> The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications, Inc.

<sup>14</sup> See 11 U.S.C. 503, 507(a)(1) (allowance of debtor's administrative expenses).

<sup>15</sup> See 11 U.S.C. 507, 726 (regarding priorities).