

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Part 2 of the Commission's Rules)	ET Docket No. 00258
to Allocate Spectrum Below 3 GHz for Mobile and)	
Fixed Services to Support the Introduction of New)	
Advanced Wireless Services, including Third)	
Generation Wireless Systems)	
)	
Petition for Rulemaking of the Cellular)	RM-9920
Telecommunications Industry Association)	
Concerning Implementation of WRC-2000:)	
Review of Spectrum and Regulatory Requirements)	
for IMT-2000)	
)	
Amendment of the U.S. Table of Frequency)	RM-9911
Allocations to Designate the 2500-2520/2670-2690)	
MHZ Frequency Bands for the Mobile-Satellite)	
Service)	

To: The Commission

COMMENTS OF BAYPOINT TV, INC.

February 22, 2001

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SUMMARY

The Supreme Court's recent interpretation of the limits of the FCC's authority to "modify" serves to prevent any reallocation of MDS licenses to other parts of the spectrum band. Under the Act's "modification" authority – whether in Section 316 or 203 – a "modification" may not effect a radical change.

Apart from this legal impediments, the heavy usage to which the MDS channels have been put over the last 20 years, as well as the planned two-way usage which is in the early stages of implementation, create a deeply embedded infrastructure which will be extremely costly to uproot and replace. The FCC's own Chief Engineer has concluded that usage of the MDS/ITFS band for 3G purposes would be highly problematical.

If reallocation occurs, the current MDS licensees should retain their MDS licenses and provide 3G services themselves, if demand warrants. If demand does not warrant, they would continue to provide the services currently provided. The market would thus determine the most efficient use of the spectrum.

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Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third) Generation Wireless Systems)	ET Docket No. 00258
)	
Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT-2000)	RM-9920
)	
Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690 MHZ Frequency Bands for the Mobile-Satellite Service)	RM-9911
)	

To: The Commission

COMMENTS BAYPOINT TV, INC.

Baypoint TV, Inc. hereby submits these comments in response the Commission's NPRM in the captioned docket.

A. The Commission May Not Modify Licenses by Material Changes in Frequency.

1. Historically the FCC has approached the reallocation of spectrum from existing uses to other uses with caution. In a mature service such as broadcasting or MDS, there are likely to be thousands of existing licensees with heavily imbedded investment in the particular use of the frequency which existed when they were issued

their licenses. In the case of subscription-type services such as MDS, there are likely to be *hundreds of thousands* of end-users who have invested in their own home reception equipment or otherwise have come to depend on the service. There is a basic unfairness to all concerned in changing the groundrules under which a license was issued and on which reasonable people have reasonably relied. We appreciate that the courts have generally upheld the Commission's power to modify licenses through rulemaking or adjudication, but it is a power which the FCC wields with great discretion because of the patent inequity to the existing licensees. The instant proceeding is the first instance in which the FCC has proposed the reallocation of spectrum which was originally licensed by competitive bidding, and that circumstance very materially limits the FCC's discretion to reallocate spectrum.

2. While the Communications Act and legal precedents make clear that radio licenses issued by the FCC do not represent an ownership interest in the spectrum itself, see, *e.g.*, Revision of Rules and Policies for Direct Broadcast Satellites, 1 CR 928, 963 (1995), the Act also seems to suggest that licensees do have vested rights to use the license for the term thereof. Section 301 provides, for example, that "no such [radio] license shall be construed to create any right, *beyond the terms, conditions and period of the license.*" Similarly, Section 309(h) provides that station licenses shall be subject, *inter alia*, to the following condition: "The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license *beyond the term thereof* nor in any manner other than authorized therein" Emphasis added. In both paragraphs, Congress seems to have been at pains to limit the right of usage to the term of a particular license with no permanent vesting of ownership

in the spectrum itself; in both sections, the implication is that a license *does* convey a right of usage during the license period – otherwise the italicized language would be unnecessary.¹

3. Here the Commission is contemplating not a mere modification of the MDS holders' licenses, as contemplated by Section 316 of the Act, but a wholesale evisceration of the license itself. As every contract to assign or transfer an FCC license proclaims, a radio license is a unique commodity. The right to transmit at a particular power on a particular segment of the electromagnetic spectrum in a particular geographic area is not remotely fungible. Because of the irreplaceability of radio licenses with anything comparable, courts routinely accord breaches of radio license contracts the status of being unsusceptible to adequate damages “at law” and thus eligible for specific performance as a remedy. For the Commission to “modify” the MDS licenses by relocating them to a different part of the spectrum is not a modification at all. It is a fundamental transformation of the license, and nothing in the Act permits the Commission to go so far.

¹ We note that many legacy MDS licenses are coming up for renewal in May. It would be improper for the Commission to delay action on these renewal applications pending its decision in this proceeding for two reasons. First, if the incumbent MDS licenses are not renewed for some reason, the affected spectrum falls by law to the BTA owners who have an additional five years or so on their licenses. So this gambit would not achieve an immediate clearing of the spectrum. In addition, the Commission has previously declared that MDS licensees are entitled to a renewal expectancy under certain circumstances. Amendment of Parts 21 and 74 of the FCC Rules, 10 FCC Rcd. 13821, 13822 (1995) To retroactively eliminate that renewal expectancy after they have invested time and money in developing their systems in reliance on the expectancy would require a very strong justification.

4. The Supreme Court had occasion not long ago to visit this issue recently in connection with the Commission's proposed "modification" of its tariff rules. MCI v. AT&T, 512 U.S 218 (1994). There the Commission argued that it had the right under the Act to "modify" the requirement that carriers file tariffs by doing away with the tariff requirement altogether. The Court examined the definition of the word "modify" and concluded that Congress could not possibly have intended to permit the Commission, through its modification authority, to do away with an entire facet of the common carrier regulatory scheme. *Id.* "Modify" in the Supreme Court's view, "connotes moderate change." MCI v. AT&T, *supra*, at 228. Any action by the Commission that radically alters something under the guise of "modification" must therefore be ultra vires.

5. Here the Commission proposes to relocate existing users of the spectrum at issue under the powers afforded by Section 316 of the Act to "modify" their licenses. Because the very essence of a radio license is the specific frequency on which operation is permitted, any change in that license parameter to a different segment of the radio band would, under the Supreme Court's analysis, overreach the limited authority granted by Congress. This is particularly so where none of the equipment associated with the

original license would be operable and reception characteristics at the new frequency would be markedly different.²

B. The MDS Bands Are Currently Heavily Used.

1. One element to which the Commission normally accords great weight is the historical use of the spectrum for which a reallocation is being considered. Obviously, the greater the use and investment in a particular band for a particular purpose, the greater the disruption which will be occasioned by a change. Here the MDS band has been in use for some 25 years, primarily as a source of video entertainment. While the industry has struggled somewhat in the past, the initiatives which the Commission took in the 80's and 90's to expand channel availability made MMDS a potential video competitor to cable in some markets. Baypoint's frequencies have been leased out to customers in all markets and are, for the most part, being put to constructive use. These services have all been designed and engineered to the specifications of a 2 GHz operation. None of the coverage characteristics of these systems would be duplicated at higher frequency bands and it is not even clear that the presently offered services would be feasible or viable at much higher frequencies. As noted before, bandwidth for these purposes is not fungible. At a minimum, there would be very serious disruption to existing users and almost certainly a loss of service to

² The Commission sometimes relocates broadcast licensees to other broadcast frequencies, but in such cases the main users of the license – the listeners – can simply tune their radios to the new channel. Arguably, a frequency relocation on that modest order would meet the Supreme Court's definition of a "modification."

many current users. Much of the existing infrastructure would simply have to be scrapped.

2. At the same time, many MDS licensees have been hanging on for years in anticipation of offering two-way uses for MDS channels. Hundreds of licensees have spent large sums engineering two-way systems in reliance on the Commission's Digital Declaratory Ruling and preparing and filing applications seeking authority for such operations. Reallocation of these channels would seriously undermine the design of our planned two-way system and most of the other two-way systems of which we are aware. The disruption of both existing operations and planned operations would therefore be severe.
3. Our own perspective is fully corroborated by the OET Interim Report issued by the Chief Engineer on November 15, 2000. That Report details the current and imminent heavy usage of the band and the serious disruption that any reallocation would occasion. The Chief Engineer duly noted both the existing and planned usages and the investment on the order of several *billion* dollars³ which has already been made in the existing spectrum. OET also outlined the serious technical difficulties which would result from any attempt to use part of the MDS/ITFS spectrum for 3G uses in the major markets. *Id.* The Interim Report does not even attempt to address the characteristics or suitability of any spectrum band which might

be substituted for the existing band.

3 OET Interim Report, *supra*, at ii.

C. If the Commission Nevertheless Decides That Reallocation of the MDS Band Is Justified, Existing Licensees Should Keep Their Licenses

1. Baypoint recognizes that there will be intense pressure to reallocate spectrum for 3G purposes despite the factors set out above. In that event, Baypoint suggests an option which would vastly ameliorate the effect of the reallocation. If the Commission reallocates the MDS spectrum to 3G uses, the existing licensees should not be stripped of their licenses. Rather, they should keep them. They would then have the option of either providing 3G services themselves, or selling or leasing their licenses to other companies who want to provide those services, or not providing 3G services at all⁴. The latter option would, of course, be decided by market considerations. If demand for the current usage of the spectrum exceeded that for 3G service (as it well might in rural parts of the country), the licensee would maintain its present service. Leaving the spectrum in the hands of the present MDS licensees would have a number of salutary effects:

a. The issue of the Commission's authority to effect a radical license modification would be eliminated because the change in authorized usage of a licensee's existing frequency would probably fall within the definition of a "modification" while a change in designated frequency would not.

b. There would no longer be any issues of how and under what timeframes and conditions existing licensees should be relocated to different spectrum. Licensees would either provide the 3G services themselves or they would voluntarily sell or lease their spectrum to others who do want to provide 3G services. No intervention

⁴Given the Commission's policy of flexible usage of allocated spectrum, we understand the Commission's

from the Commission would be necessary since the marketplace would sort out who ultimately provides the 3G services. To the extent there is the demand which the Commission would have to find in order to do the reallocation in the first place, either the existing licensees or someone else would clearly step up to supply the demand. All of this would be done without forced relocation, expense allocation, and all the other issues which arose in the process of clearing the PCS spectrum of microwave users – issues which are far more complex here given the current widespread usage of the MDS spectrum. In short, much of the pain and most of the grave legal impediments associated with a reallocation of the MDS spectrum could be ameliorated by leaving the spectrum in the hands of the existing licensees and then letting the market sort out how the 3G services actually are provided.

Conclusion

For the reasons set forth above, Baypoint urges the Commission not to reallocate the MDS/ITFS spectrum. If it nevertheless does so, the rights of the existing

present plan to permit 3G operation in the chosen band but not to mandate it.

MDS licensees should be preserved by leaving them as the licensees.

Respectfully submitted,
Baypoint TV, Inc.

By _____
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