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Before the
FEDERAL COMMUNICATIONS COMMISSION RECEIVED
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Revision of Multichannel Multipoint) RM-10586
Distribution Service and Instructional)
Television Fixed Service Rules)

**COMMENTS OF BELLSOUTH CORPORATION AND BELLSOUTH
WIRELESS CABLE, INC.**

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EXECUTIVE SUMMARY

BellSouth Corporation and BellSouth Wireless Cable, Inc. (collectively, “BellSouth”) support the joint proposal of The Wireless Communications Association International, Inc., the National ITFS Association and Catholic Television Network (the “Joint Industry Proposal”) to substantially revise the Commission’s regulatory framework for the Multipoint Distribution Service (“MDS”) and the Instructional Fixed Television Service (“ITFS”). As one of the largest holders of licensed and leased MDS/ITFS spectrum in the United States, BellSouth believes it is imperative that the Commission act quickly on the Joint Industry Proposal and finally unshackle the MDS/ITFS industry from the antiquated broadcast-style regulation and overly conservative technical rules that have hobbled rapid deployment of MDS/ITFS spectrum for new wireless services.

BellSouth initially made substantial investments in MDS/ITFS spectrum to provide digital multichannel video or “wireless cable” service in direct competition with incumbent cable operators. Unfortunately, the advent of DBS and digital cable, coupled with the line of sight and professional installation requirements documented in the Joint Industry Proposal, have made the continued use of MDS/ITFS spectrum for video services uneconomic. Accordingly, like many others in the industry, BellSouth has been exploring ways to take advantage of the Commission’s flexible use policy for MDS/ITFS spectrum. If adopted, the core concepts in the Joint Industry Proposal, *e.g.*, deinterleaving of channels, utilization of a flexible bandplan that accommodates both one-way and two-way operations, streamlining of application procedures, elimination of outdated interference protection rules, etc., will facilitate that process and expedite the provision of new wireless services to consumers.

By the same token, the Commission must recognize that BellSouth and others have already sunk enormous resources into their existing MDS/ITFS operations, and that it simply makes no economic sense (and yields no meaningful benefit to the public) to force MDS/ITFS operators to continue transmitting from facilities that ultimately will be rendered obsolete by the Joint Industry Proposal. This is especially true where, as in BellSouth’s case, the operator has already provided a significant level of service during its license term. Under those circumstances, it is hardly fair to put BellSouth’s authorizations at risk solely because its discontinuance of transmissions in anticipation of the transition happens to coincide with license renewal. To hold otherwise would be impossible to reconcile with the flexible use paradigm, which accords BellSouth and other MDS/ITFS operators the right to rely on their sound business judgment rather than regulatory fiat when determining the best means of delivering new services to consumers.

BellSouth believes that the Commission can easily address this problem with a two-fold solution already recommended in the Joint Industry Proposal. *First*, the Commission should apply a “substantial service” test at license renewal for all MDS/ITFS licensees (as it already does for other wireless services), and permit an MDS/ITFS licensee to retain its license where it demonstrates that it has provided substantial service *at any point during the license term*, as opposed to just at renewal time. Under this approach, a demonstration that substantial service exists at renewal time

would only be required at the end of the next license term. Consistent with its prior approach to the Interactive Video and Data Service, the Commission should also declare that all MDS Basic Trading Area build-out requirements and all construction periods contained within all outstanding **MDS** and ITFS conditional licenses are immediately suspended and will be superceded by the substantial service test at renewal.

Second, the Commission should eliminate its rules that require forfeiture or cancellation of MDS/ITFS licenses due to discontinuance of operation (*i.e.*, 47 C.F.R. §§ 21.44(a)(3), 21.303 and 74.932(d)), and declare that the substantial service test at renewal will govern as described above. Moreover, to assure MDS/ITFS licensees that any discontinuance of their operations will not bear on their upcoming license renewals, the Commission should immediately suspend any enforcement of its current “discontinuance” rules pending any permanent elimination of the rules via rulemaking. Again, this approach will serve the public interest by permitting MDS/ITFS licensees to terminate unnecessary operations and achieve a more expeditious and cost-efficient transition to the new regulatory regime.

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**COMMENTS OF BELLSOUTH CORPORATION AND BELLSOUTH
WIRELESS CABLE, INC.**

BellSouth Corporation and BellSouth Wireless Cable, Inc. (collectively, “BellSouth”), hereby submit their comments in response to the Commission’s October 17, 2002 *Public Notice* (DA 02-2732), in which the Commission has requested comment on the joint proposal of The Wireless Communications Association International, Inc., the National ITFS Association and Catholic Television Network to substantially revise the Commission’s Part 21 and Part 74 rules for the Multipoint Distribution Service (“MDS”) and Instructional Television Fixed Service (“ITFS”) (the “Joint Industry Proposal”). For the reasons set forth below, BellSouth supports the Joint Industry Proposal and urges the Commission to issue a *Notice of Proposed Rulemaking* proposing adoption of the Joint Industry Proposal as soon as possible, in accordance with the recommendations discussed herein.

I. INTRODUCTION.

BellSouth is one of the largest holders of licensed and leased MDS/ITFS spectrum in the United States.’ At a time when incumbent cable operators held an even larger market share than they do today, BellSouth was one of the few companies to step forward and commit unprecedented resources to developing MDSOTFS spectrum for competitive digital wireless cable service. Indeed, the company invested hundreds of millions of dollars to acquire MDS/ITFS spectrum rights, deploy transmission and reception equipment, establish the operational infrastructure necessary to develop competitive digital wireless cable systems, and provide distance learning facilities and opportunities for local ITFS licensees.

Unfortunately, the advent of DBS and digital cable, combined with the line of sight and professional installation requirements documented in the Joint Industry Proposal, have required BellSouth to reexamine its continued use of MDS/ITFS spectrum for video services.’ As a result, like many others in the MDS/ITFS industry, BellSouth has been exploring ways to take advantage of the Commission’s flexible use policy by deploying MDSOTFS facilities for advanced wireless services. For that reason,

¹ Presently, BellSouth’s MDS/ITFS channel rights encompass approximately 3.5 million homes in several large markets in Florida, and in Atlanta, New Orleans and Louisville.

² See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 FCC Rcd 6005, 6009 (2001). BellSouth announced the phase-out in December, 2000; at the time, the company had launched service in Atlanta, New Orleans and Orlando, and had begun providing service on a more limited basis in Jacksonville and Daytona Beach. Under BellSouth’s phase-out plan, the company’s existing MDS/ITFS multichannel video subscribers were transitioned to EchoStar’s DBS service or other alternative video service providers.

BellSouth was an active participant in the various working groups which helped produce the Joint Industry Proposal.

BellSouth believes that the revised regulatory framework set forth in the Joint Industry Proposal is a well-considered, sensible approach that will promote flexible use of MDS/ITFS spectrum. As discussed in greater detail in the Joint Industry Proposal, consumers will not recognize the full benefits of the Commission's flexible use policy for MDS/ITFS unless the Commission sheds all vestiges of its broadcast-style regulation of MDS/ITFS spectrum and replaces it with a regulatory scheme grounded in the following core concepts: (1) elimination of the Commission's outdated and counterproductive interleaving of MDS/ITFS channels; (2) adoption of a flexible bandplan that will accommodate and protect one-way high-power, high-site operations, while permitting deployment of advanced two-way cellularized operations, (3) substantial modification of the Commission's existing MDS/ITFS interference protection rules, which to date have prevented deployment of two-way advanced wireless services with no countervailing benefit to the public, and (4) removal of unnecessary regulatory burdens on MDS/ITFS licensees and conformity of the MDS/ITFS rules to Wireless Telecommunications Bureau standards for geographically-licensed flexible use services.

By the same token, it must be remembered that the industry's transition to the new regulatory regime will be a complex, time-consuming and expensive enterprise. Hence, consistent with the overriding concept of flexible use, any transition plan adopted by the Commission must permit BellSouth and other MDS/ITFS licensees to choose a "migration path" that is best suited to their individual circumstances. As discussed below, the Commission can achieve this result via flexible application of its "substantial

service” standard at renewal time and immediate suspension of any rules that would require MDS/ITFS licensees to build or maintain obsolete facilities as a *quid pro quo* for preserving their existing authorizations.

II. DISCUSSION.

A. *The Commission Should Adopt A Substantial Service Renewal Test That Recognizes Service Provided At Any Point During The License Term.*

BellSouth’s position on transition issues is rooted in one basic principle: MDS/ITFS licensees should be permitted to accomplish their transition to the new regulatory regime in accordance with sound economic principles and their best business judgment, not arbitrary, across-the-board regulatory determinations as to how and when the transition should take place. This principle is nothing more than a logical extension of the Commission’s flexible use policy with respect to MDS/ITFS spectrum – as recently observed by Chairman Powell, “[t]oday’s marketplace demands that we provide license holders with greater flexibility to respond to consumer wants, market realities and national needs.”³ Similarly, as the Commission noted when it added a mobile allocation for MDS/ITFS spectrum in the 2500-2690 MHz band, “[W]e find that adding a mobile allocation to the band would not deter investment in current fixed wireless operations . . .

³ “Broadband Migration III: New Directions in Wireless Policy,” Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the Silicon Flatirons Telecommunications Program, University of Colorado at Boulder (Oct. 30, 2002).

[T]he public interest is served because a flexible allocation allows licensees to make efficient use of spectrum, especially if licensees are given greater freedom in determining the specific services to be offered.”⁴

BellSouth fully expects that it will be required to stop transmitting from its existing MDS/ITFS facilities in order to implement the complex technical and logistical changes necessary for any transition to the Joint Industry Proposal bandplan, either for its own operations or for the benefit of neighboring facilities who are in the process of transition. Unfortunately, BellSouth will face the threat of losing its licenses (either via denial of license renewal or, as discussed in Section II.B *infra*, via automatic license forfeiture/cancellation) if it does so. As discussed in the Joint Industry Proposal, there is no valid public policy reason to expose BellSouth and other MDS/ITFS licensees to that kind of risk:

It is essential for the Commission to recognize that in the process of transitioning the nation to the new bandplan, some licensees will be required to cease their current service offerings before they are in a position to launch new services under the new bandplan. Indeed, some have done so already in anticipation of converting to advanced wireless technologies. . . [I]t may be necessary for licensees in one market to cease high-power, high-site operations in the LBS and UBS in order to avoid cochannel interference to next generation operations in markets quite some distance away. . . [T]he Commission cannot jeopardize the licenses of those who are transitioned and therefore must cease current operations.’

⁴ *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*, 16FCC Rcd 11222, 11236(2001).

⁵ Joint Industry Proposal, Appendix B at 4 n. 9. See also *id.* at 46 n. 122 (“[M]any licensees are discontinuing video operations in contemplation of migrating to second generation broadband services once the Commission revises its rules. That is a sound practice that the Commission should encourage. There is no public interest benefit to preserving non-viable service offerings merely because renewal approaches and, to the contrary, such behavior will merely delay the deployment of the second generation broadband services.”).

Accordingly, to give BellSouth and other MDS/ITFS operators certainty that their actions in anticipation of the transition will not put their licenses at risk, the Commission must accord MDS/ITFS licensees the benefit of a “substantial service” test at license renewal, as it presently does for other “flexible” wireless services.⁶ As discussed in the Joint Industry Proposal, the Commission’s handling of the Interactive Video and Data Service (“IVDS”) provides precedent for this approach.⁷

Here, however, the Commission’s review of “substantial service” should not be limited to a snapshot of the licensee’s service at renewal time. Indeed, determining substantial service solely at the moment of license renewal is particularly inequitable for MDS/ITFS licensees like BellSouth who have already provided such service during their license term. Simply put, there is no sound public policy reason to disregard BellSouth’s past performance and put its licenses at risk solely because its decision to exercise its flexible use rights and cease transmissions from obsolete facilities happens to coincide

⁶ *See id.* at 44 (noting that the Commission has adopted the substantial service renewal standard for all Part 27 licensees). The Commission has defined “substantial” service as that which is “sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.” *See id.*, quoting *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”)*, 12 FCC Rcd 10785, 10843-44 (1997). Substantial service may also be demonstrated under the Commission’s “safe harbor” approach, in which the agency may consider such factors as, for example, whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee’s operations serve niche markets or focus on serving populations outside of areas served by other licensees. *Id.* As noted in the Joint Industry Proposal, this sort of case-by-case review is particularly appropriate for MDS/ITFS licensees. *See id.* at 45 (“The use of a standard that is evaluated on a case-by-case basis is particularly appropriate for MDS and ITFS licensees. Unlike most other services, MDS/ITFS system operators will be providing service using channels cobbled together from a variety of sources. . . . Thus, focusing merely on the population served via stations authorized pursuant to a particular license hardly tells the story as to whether the public is adequately served.”)

⁷ In response to the marketplace failure of IVDS, the Commission granted IVDS licensees greater flexibility in the types of services they could offer, permanently eliminated the IVDS build-out requirements and replaced them with a substantial service test at renewal. *See id.* at 47-48 and the cases cited therein.

with license renewal.’ Where **an** MDS/ITFS licensee has provided substantial service at any point during the license term, it should be awarded renewal for a full license term (*i.e.*, ten years) – only at the end of that period should the licensee be required to demonstrate that it is providing substantial service at the time of renewal.

In addition, the use of a substantial service renewal test is necessary to eliminate unnecessary burdens on MDS/ITFS licensees who have not yet built out their facilities pursuant to existing authorizations. It must be remembered that BellSouth and other MDS/ITFS operators hold an amalgamation of rights (either as licensees or channel lessees) to MDS Basic Trading Area (“BTA”) authorizations and site-based MDS/ITFS licenses, all having different build-out requirements and construction periods that terminate on different dates, and thus in different stages of construction at any given time.’ Absent immediate relief from these build-out requirements and construction periods, MDS/ITFS licensees will be forced into constructing facilities that may be rendered moot by the transition. Hence, to give MDS/ITFS licensees some badly needed certainty about this issue, the Commission should immediately suspend any enforcement of all **BTA** build-out requirements and MDS/ITFS construction periods, and declare that

⁸ It should be noted that BellSouth and others who hold rights to **MDS** channels 1/2/2A in the 2150-2162 MHz band are already experiencing substantial regulatory uncertainty due to the ongoing threat that those channels will be relocated to new spectrum to create additional auctionable spectrum for third generation (“3G”) wireless services. *See 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*, 16 FCC 16043, 16061 (2001). To date, the Commission has yet to identify any relocation spectrum for **MDS** channels 1/2/2A.

⁹ The Commission currently requires that **MDS** BTA authorization holders build out their facilities by August 16, 2002 or their existing build-out date, whichever is later. *See Extension of the Five-Year Build-Out Period for BTA Authorization Holders in the Multipoint Distribution Service*, 16 FCC Rcd 12593 (2001). For site-licensed **MDS** and **ITFS** stations, the relevant construction periods are twelve months and eighteen months, respectively. See 47 C.F.R. §§ 21.43(a), 73.3534(a).

they will be superseded by the substantial service test at renewal, if adopted.” Again, the Commission’s treatment of IVDS provides the required precedent:

We believe that the proposals set forth in the pending IVDS Petition for Rulemaking, including those regarding construction requirements, are inextricably tied to the construction requirements as they apply to these licensees. Requiring IVDS licensees to comply with rules that are under Commission review would not further the public interest in this instance, *particularly since the subject rule directly impacts IVDS system planning and implementation.*”

Plainly, these observations are equally applicable to MDS/ITFS licensees here – the Joint Industry Proposal, if adopted, will trigger a sea change in how MDS/ITFS facilities are authorized and deployed, and thus will have an unprecedented effect on MDS/ITFS system planning and implementation. Thus, as in the case of IVDS, there is ample good cause for the Commission to immediately suspend all MDS/ITFS build-out requirements and construction periods pending the adoption of final rules in this proceeding.”

¹⁰ Joint Industry Proposal at 43 n. 117.

¹¹ *Requests by Interactive Video and Data Service Auction Winners to Waive the January 18, 1998, and February 28, 1998 Construction Deadlines*, 13 FCC Rcd 756 (WTB, 1998) (emphasis added).

¹² With respect to ITFS, it should be remembered that BellSouth and other commercial operators provide critical financial support to ITFS licensees in exchange for the right to lease their excess channel capacity; that financial support, in turn, is used by the ITFS community to fund the provision of qualified educational programming via authorized ITFS facilities. *See, e.g., Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Two-way Fixed Transmissions*, 13 FCC Rcd 19112, 19148 (1998) (“An MDS operator trying to run a system across its [Basic Trading Area] must cooperate with the various ITFS licensees in its BTA. Likewise, many ITFS licensees depend on the compensation paid by their local MDS operator to make their own systems a reality. Therefore, the viability of the services depends on the parties working together in good faith.”) (the “*Two-way Report and Order*”); *Amendment of Part 74 of the Commission’s Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 (1994) (“In today’s market environment, MDS and ITFS channels are interrelated components of an integrated set of channels used to provide non-broadcast instructional and entertainment programming in a given market.”). Clearly, given the symbiotic relationship that currently exists between MDS and ITFS licensees today, commercial MDS/ITFS operators and

B. The Commission Should Immediately Suspend Any Enforcement Of Its Rules That Require Forfeiture or Cancellation of MDS/ITFS Licenses Upon Discontinuance Of Operations.

An MDS/ITFS licensee's decision to discontinue transmissions ahead of the transition carries additional **risks** separate and apart from license renewal. Under Section 21.44(a)(3) of the Commission's Rules, a license for an MDS station is automatically forfeited without further notice to the licensee upon the voluntary removal or alteration of the facilities which renders the station not operational for a period of 30 days or more.¹³ Under Section 21.303(d), if service from an MDS station is discontinued for a consecutive period of twelve months or longer, the licensee must surrender its license to the Commission for cancellation, even if the station's facilities are not removed.¹⁴ Similarly, under Section 74.932(d), an ITFS station which is nonoperational for a period of one year is deemed to have been "permanently discontinued and is subject to license forfeiture."¹⁵

Just as it is inequitable to put an MDS/ITFS licensee's renewal at **risk** solely because it discontinues transmissions from obsolete facilities ahead of the transition, it is

ITFS licensees should be afforded the opportunity to arrive at joint solutions that will provide educational services in the most efficient manner possible ahead of the transition, so as to minimize any long-term disruption to **ITFS** educational operations and avoid any unnecessary operational costs that inevitably are borne by the commercial operator. *See, e.g., Two-Way Report and Order*, 13 FCC Rcd at 19159 ("In light of the varied market strategies that different wireless cable operators will implement in a digital environment, and likewise in light of the broad range of educational uses to which different ITFS licensees will seek to devote their channels, it is not a simple matter to arrive at a "one size fits all" approach towards minimum **ITFS** educational usage requirements and reservation of spectrum solely for instructional purposes, whether immediate or future.") (footnote omitted).

¹³ 47 C.F.R. § 21.44(a)(3)

¹⁴ *Id.* § 21.303(d).

¹⁵ *Id.* § 74.932(d).

patently unfair to expose an MDS/ITFS licensee to pre-renewal license forfeiture or cancellation for the same reason. Accordingly, the Commission should eliminate Sections 21.44(a)(3), 21.303(d) and 74.923(d) and declare that the substantial service renewal test will govern as described above. Moreover, to give MDS/ITFS licensees certainty as to the status of their authorizations during consideration of the substantial service renewal test in this matter, the Commission should immediately suspend any enforcement of those rules pending the adoption of final rules in any subsequent rulemaking proceeding.¹⁶ As with suspending build-out requirements and construction periods, an immediate suspension of these rules will serve the public interest by permitting MDS and ITFS licensees to discontinue unnecessary operations and otherwise enable them to take steps in anticipation of the transition without fear that their licenses will be jeopardized in the process.

III. CONCLUSION.

Chairman Powell recently put it best: “[I]f the Commission is to do its job, the public interest must reflect the realities of the marketplace and current spectrum use. Today, I would suggest that full and complete consumer choice of wireless devices and services is the very meaning of the public interest.”” The Joint Industry Proposal embodies that idea, and will serve the public interest if the transition mechanisms discussed above are adopted. BellSouth thus urges the Commission to initiate a rulemaking proceeding as soon as possible and issue rules that will permit that transition

¹⁶ The Commission should also suspend any rule that requires notice to the Commission of any discontinuance of MDS/ITFS operations. See *id.* §§ 21.303(b)-(c).

”Powell, n. 3 *supra*.

to commence in the near term, in accordance with the recommendations set forth in the Joint Industry Proposal and the comments set forth above

Respectfully submitted,

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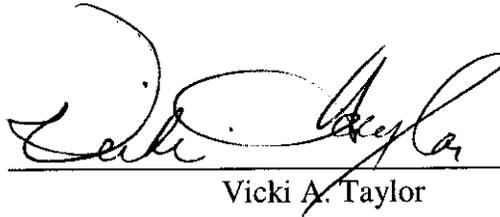
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I do hereby certify that I have this 14th day of November 2002 served the following parties to this action with a copy of the foregoing **COMMENTS** by hand delivery or placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

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