

RECEIVED

EX PARTE OR LATE FILED

MAR 24 2003

Dear Mr. Krinsky:

ORIGINAL

Federal Communications Commission
Office of the Secretary

RE: comments on the rural wireless options

WT 02-381

Technology Solutions, Inc. is a small business-technology consulting firm located in Kearney, NE. We have numerous clients in the Kearney and surrounding communities. A good portion of them are in the medical field. The medical community has some special needs based on the security of their information as well as some immediacy issues.

The purpose of this letter is as follows: to find a resolution for the lack of options in the 2500-2690 MHz band for Licensed Wireless Internet Technology in Kearney, Nebraska; to pursue the possibility of the FCC and NTIA allocating additional spectrum in different bands for the 3G wireless technology (which is a matter currently under review); and to contribute to the rural wireless comments being taken at this time by the Wireless Telecommunications Bureau Contact, Robert Krinsky (202) 418-2909 or email rkrinsky@fcc.gov.

THE PRELIMINARY ISSUE:

The common complaint in our area is the lack of options for high-speed Internet service. Our largest competition is Charter Communications, also known as CC VIII Operating LLC. We also have a DSL service offered from Frontier. There are a few wireless options offered from other towns, but none presently in Kearney.

Our medical clients have looked to us to offer an alternative to the current Internet service. The current use of the Internet for radiologists would be to review MRI and CAT scans from home, when on call. They also provide tele-radiology to rural areas in Nebraska along with all patients billing. These services can save lives by allowing the doctors to get online and make a determination immediately, instead of driving to the hospital to read the film.

The issue is that the reliability of the cable service regulated by the FCC is not enforced. Downtime is constantly a problem. One of our clients has taken steps on its own to file a complaint with the FCC due to the outages. The following are excerpts from the January 27th filing:

Great Plains Radiology and Nuclear Medicine, P.C. ("GPR"), through counsel and pursuant to Section 76.7 of the rules of Federal Communications Commission ("FCC" or "Commission"), respectfully files its emergency petition for special relief against Charter Communications, Inc. ("Charter"). Charter provides cable television and high-speed Internet access connections to businesses and residents of Kearney, Nebraska, pursuant to a franchise issued to Charter by the City of Kearney. As demonstrated below, Charter has failed to provide adequate Internet access connections to GPR and generally refuses to address these service problems. These chronic service quality problems, in turn, cause significant harms to GPR as it tries to provide high-quality medical services to its hospitals, imaging center, and patients in rural Nebraska and Kansas and, as a further result thereof, constitute a threat to the continued financial viability of GPR's business operations.

In its Internet Over Cable Ruling, the Commission concluded that cable modem service (of the type being provided to GPR by Charter) was “properly classified as an interstate information service,” rather than as a “cable service” or a “telecommunications service.” The Commission also posed, but did not answer the questions of who-the FCC, state governments or local franchise authorities-should regulate cable modem service and then, to what degree. Those issues are, as of the date of this petition, still undecided and pending before the FCC.

While Kearney is one of Nebraska’s larger communities, it is still small by national standards and is surrounded by very small towns and sparsely populated rural areas. In this market, there simply are not a wide variety of options for customers seeking high-speed Internet access connections. Needless to say, if there were viable competitive options, GPR would have abandoned Charter’s service a long time ago.

The FCC’s response to the filing follows:

The Commission, in its Inquiry Concerning High-speed Access to the Internet Over Cable and Other Facilities, **17 FCC Rcd 4798** (2002), concluded that high speed Internet access over cable systems is an interstate information service under Title I of the Communications Act, not a cable service under Title VI. Contemporaneous with that decision, the Commission issued a Notice of Proposed Rulemaking seeking comment, inter alia, on how the Title I classification affected certain aspects of state or local regulation of cable Internet services, including consumer protection and customer service regulation. These and other regulatory issues related to cable Internet access service remain pending before the Commission.

Accordingly, although I can appreciate the concerns raised in your filing, no basis in the rules exists at this time to provide the requested relief. Nor would it be possible to attempt to adjudicate these issues without prejudging the very matters under review in the pending I rulemaking. Until such time as the Commission takes action on these matters, we are not in a position to consider granting the relief you seek and your petition, therefore, is dismissed.

OUR SOLUTION:

We have begun to **look** into offering a wireless Internet service for our community, based on our client’s and our own personal experience with the options in the area. We have two options with wireless Internet, licensed and unlicensed. Unlicensed Internet is less expensive and usually easier to implement, but problems of interference can occur and these are not easily resolved. Licensed is obviously a much more secure method. If someone else is broadcasting over our frequency, the issue is clear-cut as to who is in the right and who is in the wrong. Licensed is the only option for the 3G mobile wireless technologies that we are looking to implement.

TECHNICAL FACTS:

Licensed frequency or "Spectrum" for 3G mobile wireless Internet is in the 2500MHz to 2690MHz range. This is referred to as MMDS (Multi-channel Multi-point Distribution Service) originally allocated for distribution of multi-channel video services. There are thirteen channels in this range. These are the commercial channels that may be purchased for distributing wireless Internet. All are owned by Charter Communications.

There is also an ITFS (Instructional Fixed Television Service) allocated to educational organizations for the purposes of providing distance-learning services. There are twenty channels in this range. These may be leased to commercial operators so long as there are some usages being utilized for the original intent. Four of five schools have reported they are leasing to Charter Communications, and the fifth is still investigating. The wireless TV Charter is offering is broadcasting 32 channels, thus the assumption at this point is that all ITFS channels are leased to Charter.

In 1996, the FCC defined basic trading areas (BTAs) for MMDS frequencies throughout the United States. The licenses for each BTA were subsequently offered at auction and acquired by telecom providers and MMDS system operators. In 1998, the FCC approved the use of the MMDS frequencies for two-way services, and has since approved this range for the cutting edge mobile 3G technologies we are looking to implement. Charter Communications also owns the BTA. The BTA number in Keamey is BTA 167.

OUR COMPLAINT:

Currently, Charter Communications owns the entire licensed MMDS spectrum, and if they are leasing from five different schools all of the ITFS Spectrum, there is nothing to support the two channels we need to run our business. We are running into an issue of having absolutely no channels available in this spectrum to purchase, and no options to lease.

WHAT WE HAVE DONE TO RESOLVE OUR ISSUE:

These frequencies are intended to offer a medium for competition with the cable companies. No cable companies were supposed to be allowed to purchase this spectrum. We have spoken with telecommunications lawyer, Dawn Alexander of Alexander and Associates in Washington D.C. at length about this issue. She is the lawyer who works with the manufacturer of the wireless equipment and she is knowledgeable about the FCC rules and regulations regarding the usages of this spectrum. We do not have her on retainer; we have just had conversations about the rules and regulations involved with the FCC and this licensed frequency.

We have also spoken to John Schauble, Chief of the Policy and Rules Branch of the FCC about this issue. He wasn't very helpful, stating that he would speak with Ms. Alexander, about why a cable provider was able to own MMDS and what the possible reasons for it were, but he wasn't willing to look into the matter otherwise. He stated even if Charter had filed illegally and were using these channels, it would be a huge undertaking to get these channels away from them.

Barrett Brick, a lawyer with the FCC, was the most helpful. He looked up information on the possible exceptions and said there were three possibilities. One, they filed their forms illegally. Two, they were granted a waiver or grandfathered. Three, they have proven to allow effective competition in the market. He felt that the third option was what Charter had done. In the event of the last two options he told me, "we were out of luck" and they would be able to keep their channels. In response we questioned him about whether Charter was allowing for any competition in this frequency range. At present, the only range available for licensed wireless 3G mobile Internet technologies and he said that our only option would be to get the media and state senators involved.

We are speaking with the schools now to see if the option is there to lease when Charter's 10-year lease expires. The schools are telling us that the 10-year lease should end in 2004 or 2005. If a school would be willing to subsequently lease to us at that time, we might be able to pursue this option.

WHAT WE WOULD LIKE TO SEE HAPPEN:

We would like to see whether or not the MMDS spectrum was obtained legally and are operational according to the FCC rules. If not, we would like to see these opened up for auction to allow for effective competition in this market. Thus, the original intent of this frequency as a medium of competition with cable operators would be fulfilled.

The only documentation with the FCC I have found thus far is an effective competition grant to Cable USA (the previous cable provider in the area, bought out by Charter Communications) in August, 2001. I cannot find anything about Charter Communications being granted this "waiver." Cable USA's petition for establishing effective competition listed Charter Communications as having (100%) of the households, leaving us with the assumption that Charter should not be eligible to gain this status.

The history of this MMDS spectrum is where we will find the answers to these questions. In 1996 who purchased the BTA and how has it changed hands to Charter Communications? Did Charter and Cable USA establish effective competition before they were the owners of the MMDS spectrum or was it just in 2001? If so, there is a case that these frequencies were obtained illegally and should revert back to the original owner or be auctioned off a second time. Effective competition seems to be defined by subscribers to a cable service, not necessarily just cable TV. Which means they would need to count not only TV but internet clients in their 30% and we would like it proven that they still meet this criteria or forfeit these channels.

TO RESTATE OUR INTENT:

We need to find a resolution for the lack of options in the 2500-2690 MHz band for Licensed Wireless Internet Technology in Keamey, Nebraska.

We would like your office to assist in the pursuit of addressing the FCC and NTIA to allocate additional spectrum in different bands for the 3G wireless technology (which is a matter currently under review).

We would like to contribute to the rural wireless comments being taken at this time by the Wireless Telecommunications Bureau Contact, Robert Krinsky (202) 418-2909 or email rkrinsky@fcc.gov.

Thank you **for** taking the time to look into this matter and we would appreciate any further feedback we might receive.

Dan Spellman
Leigh Ann Spellman
Technology Solutions, Inc.
dpellman@tsi.ws
(308)237-0123
(308)233-5399

Appendix A:

THE FCC RULES AND REGULATIONS TITLE 47

PART 21--DOMESTIC PUBLIC FIXED RADIO SERVICES--Table of Contents

Subpart K--Multipoint Distribution Service

Sec. 21.912 Cable television company eligibility requirements and MDS/cable cross-ownership.

(a) Notwithstanding the provisions of Sec. 21.900 of this part, initial or modified authorizations for stations in the 2150-2162 MHz and 2596-2680 MHz frequency bands may not be granted to a cable operator if a portion of the Multipoint Distribution Service (MDS) station's protected services area is within the portion of the franchise area actually served by the cable operator's cable system. No cable operator may acquire such authorization either directly, or indirectly through an affiliate owned, operated, or controlled by or under common control with a cable operator.

(b) No licensee of a station in this service may lease transmission time or capacity to a cable operator either directly, or indirectly through an affiliate owned, operated, controlled by, or under common control with a cable operator, if a portion of the Multipoint Distribution Service (MDS) station's protected services area is within the portion of the franchise area actually served by the cable operator's cable system.

(c) Applications for new stations, station modifications, assignments or transfers of control by cable operators of stations in the 2150-2162 MHz and 2596-2680 MHz frequency bands shall include a showing that no portion of the protected service area of the MDS station is within the portion of the franchise area actually served by the cable operator's cable system, or of any entity indirectly affiliated, owned, operated, controlled by, or under common control with the cable operator.

(d) The provisions of paragraphs (a) through (c) of this section will not apply to one MDS or MMDS channel used to provide locally-produced programming to cable headends. Locally-produced programming is programming produced in or near the cable operator's franchise area and not broadcast on a television station available within that franchise area. A cable operator will be permitted one MDS channel in an MMDS protected service area for this purpose, and no more than one MDS channel in an MMDS protected service area may be used by a cable television company or its affiliate or lessor pursuant to this paragraph. The licensee for a cable operator providing local programming pursuant to a lease must include in a notice filed with the Wireless Telecommunications Bureau a cover letter explicitly identifying itself or its lessees as a local cable operator and stating that the lease was executed to facilitate the provision of local programming. The first application or the first lease notification in an area filed with the Commission will be entitled to the exemption. The limitations on one MDS channel per party and per area include any cable/MDS operations grandfathered pursuant to paragraph (f) of this section or cable/ITFS operations grandfathered pursuant to Sec. 74.931(e) of this chapter. The cable operator must demonstrate in its MDS/MMDS application that the proposed local programming will be provided within one year from the date its application is granted. Local

programming service pursuant to a lease must be provided within one year of the date of the lease or one year of grant of the licensee's application for the leased channel, whichever is later. If an MDS license for these purposes is granted and the programming is subsequently discontinued, the license will be automatically forfeited the day after local programming service is discontinued.

(e) Applications filed by cable television companies, or affiliates, for MDS channels prior to February 8, 1990, will not be subject to the prohibitions of this section. Applications filed on February 8, 1990, or thereafter will be returned. Lease arrangements between cable and MDS entities for which a lease or a firm agreement was signed prior to February 8, 1990, will also not be subject to the prohibitions of this section. Leases between cable television companies, or affiliates, and MDS/MMDS station licensees, conditional licensees, or applicants executed on February 8, 1990, or thereafter, are invalid.

(1) Applications filed by cable operators, or affiliates, for MMDS channels prior to February 8, 1990, will not be subject to the prohibitions of this section. Except as provided in paragraph (e)(2) below, applications filed on February 8, 1990, or thereafter will be returned. Lease arrangements between cable and MDS entities for which a lease or a firm agreement was signed prior to February 8, 1990, will also not be subject to the prohibitions of this section. Except as provided in paragraph (e)(2) below, leases between cable operators, or affiliates, and MDS/MMDS station licensees, conditional licensees, or applicants executed on or before February 8, 1990, or thereafter are invalid.

(2) Applications filed by cable operators, or affiliates for MDS channels after February 8, 1990, and prior to October 5, 1992, will not be subject to the prohibition of this section, if, pursuant to the then existing overbuild or rural exceptions, the applications were allowed under the then existing cable/MMDS cross-ownership prohibitions. Lease arrangements between cable operators and MDS entities for which a lease or firm agreement was signed after February 8, 1990, and prior to October 5, 1992, will not be subject to the prohibitions of this section, if, pursuant to the then existing rural and overbuild exceptions, the lease arrangements were allowed.

(3) The limitations on cable television ownership in this section do not apply to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 623(1) of the Communications Act.

(f) Interested persons may file a petition to deny an application filed pursuant to paragraph (d) of this section within 30 days after the Commission gives public notice that the application or petition has been filed. Petitions must be served upon the applicant, and must contain a complete and detailed showing, supported by affidavit, of any facts or considerations relied upon. The applicant may file an opposition to the petition to deny within 30 days after the filing of the petition, and must serve copies upon all persons who have filed petitions to deny. The Commission, after consideration of the pleadings, will determine whether the public interest, convenience and necessity would be served by the grant or denial of the application, in whole or in part. The Commission may specify other procedures, such as oral argument, evidentiary hearing or further written submission directed to particular aspects, as it deems appropriate.

See the FCC website for full document. www.fcc.gov
<http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=47&PART=21&SECTION=912&YEAR=2002&TYPE=TEXT>

Appendix B:

Section 623 (l)

(l) DEFINITIONS.--As used in this section--

(1) The term "effective competition" means that--Communications Act of 1934

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

(B) the franchise area is--(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area;

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or

(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

(2) The term "cable programming service" means any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than

(A) video programming carried on the basic service tier, and

(B) video programming offered on a per channel or per program basis.

See the FCC website for full document. www.fcc.gov
<http://www.fcc.gov/Reports/1934new.pdf>