

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands	)	WT Docket No. 03-66 RM-10586
	)	
Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service; and Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
	)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico	)	WT Docket No. 02-68 RM-9718
	)	

**COMMENTS OF WAVETEL, L.L.C.,  
WAVETEL NC LICENSE CORPORATION,  
AND WAVETEL TN, L.L.C.**

WaveTel, L.L.C., on behalf of itself and its wholly owned subsidiaries, WaveTel NC License Corporation and WaveTel TN, L.L.C. (hereinafter, collectively, "WaveTel"), and by its attorneys hereby submits comments in the above-captioned proceeding respecting the April 2, 2003 *Notice of Proposed Rule Making and Memorandum Opinion and Order* ("NPRM&MO&O"). WaveTel operates Multipoint Distribution Services ("MDS") and Instructional Television Fixed Service ("ITFS") facilities in North Carolina and Tennessee. Each of WaveTel NC License Corp. and WaveTel TN, L.L.C., hold several MDS licenses and conditional licenses in North Carolina and Tennessee, respectively. Additionally, WaveTel, L.L.C., has excess capacity lease agreements with

numerous ITFS licensees located in North Carolina and Tennessee. WaveTel is submitting comments specifically with regard to Section III.F.14 of the *NPRM&MO&O*, entitled “Performance Requirements”.

#### **I. SUSPENSION OF CONSTRUCTION DEADLINES**

1. The *NPRM&MO&O* at p.84 ¶¶200 and 201 solicits comments regarding how long the Commission should continue to suspend construction deadlines after release of a *Report and Order* in this proceeding. WaveTel believes that MDS BTA authorization holders should receive an additional two years from release of the *Report and Order*, in which to complete construction of their facilities. MDS site-based licensees should receive the equivalent of their original build-out period, *i.e.*, twelve months, and ITFS site-based licensees should receive the equivalent of their original build-out period, *i.e.*, eighteen months, from the release date of the *Report and Order*, in which to complete construction of their facilities.

2. As the Commission is well aware, there has been a significant change in the focus of the service offerings and in the technical flexibility of the MDS and ITFS industries (hereinafter, the “Industry”) over the past ten years. The Industry has gone from a video based service to one that can offer digital two-way and high-speed broadband services. Over the past ten years, the Commission has eased the restrictions on the use of ITFS frequencies, allowed the Industry to employ digital technologies and construct two-way and low-power cellularized communications systems, and now is considering reallocating the 2150-2160 MHz band for new fixed and mobile advanced wireless services. These continual regulatory and technical changes in the Industry have caused significant uncertainty and reluctance on the part of licensees to construct facilities that may become obsolete immediately.

3. Indeed, beginning in 1995, when WaveTel entered into excess capacity lease agreements with ITFS licensees and applicants throughout North Carolina, WaveTel was planning to develop a statewide wireless cable system offering primarily video services to subscribers, utilizing ITFS and

MDS frequencies. However, as a result of changes in the Industry, including increased flexibility which permits two-way digital service, WaveTel determined that a business plan based solely on video service to subscribers was not viable. This was evidenced by the large number of business failures and bankruptcy filings by wireless cable providers who relied solely on providing video service to subscribers in attempting to compete with wireline cable operators. Thus, WaveTel reevaluated its business plan to focus on providing broadband services, including two-way applications utilizing MDS and ITFS frequencies, which necessitated a switch to digital technology and two-way facilities. In many instances, WaveTel and the ITFS licenses participating in its state-wide system had to expend additional resources to obtain modified licenses from the Commission, which included running interference studies to identify any new potential interference resulting from the proposed modifications<sup>1/</sup>, and then to modify the facilities themselves.

4. This change in focus and the continual changes in the regulations governing MDS and ITFS operations, as well as the interference issues that have arisen as a result of the developing technical flexibility, have made it difficult for MDS and ITFS operators to meet construction deadlines. With the resolution of these issues and the greater regulatory certainty that will come out of this rule making proceeding, MDS and ITFS operators will be able to proceed with development of their systems, but must be afforded sufficient opportunity to construct their facilities in an orderly and economically feasible manner. After years of regulatory uncertainty compounded by rapidly changing technology, the ITFS/MDS infrastructure is disjointed and poorly integrated. It will require significant time and resources to engineer, coordinate and construct new stations. The deadline suspensions recommended herein will ensure that operators and licensees have enough time to build out their systems in an orderly manner and incorporate the operating parameters of the new rules into system construction.

## **II. REINSTATEMENT OF CANCELED MDS AND ITFS PERMITS**

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<sup>1/</sup> In some cases, transmitter sites had to be relocated to resolve potential interference issues.

5. In the *NPRM&MO&O* at p.84 ¶201, as modified by *Order*, FCC 03-169, released July 10, 2003, the Commission suspended the construction deadlines for MDS and ITFS site-based licensees and permittees with unexpired licenses or permits or that had timely filed requests for extension of their construction deadlines pending as of the release date of the *NPRM&MO&O*. For the same reasons the Commission suspended these deadlines, the Commission should suspend the construction deadlines of any MDS or ITFS site-based licensee whose timely filed extension request was dismissed or denied and for which the licensee or permittee had a timely filed petition for reconsideration pending as of the release date of the *NPRM&MO&O*. The licensees or permittees with pending appeals are similarly situated to those with pending extension requests and therefore should be treated similarly.<sup>1/</sup> Indeed, the only difference between them is that those with pending appeals have had their extension requests review and denied by the Commission and those with the pending extension requests have not yet had their requests reviewed and denied by the Commission. Suspension of the construction deadlines for any MDS or ITFS site based licensee with a timely filed pending petition for reconsideration is the only way to ensure that this class of authorization holders is not treated in arbitrary and capricious manner. Thus, there is no rational reason to treat those with pending appeals of the dismissals of their timely filed extension requests differently from those with pending extension requests.

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<sup>2/</sup> See, e.g., *Leroy Garrett v. Federal Communications Commission*, 513 F.2d 1056 (D.C. Cir. 1975); *Channel 16 of Rhode Island, Inc. v. Federal Communications Commission*, 440 F.2d 266 (D.C. Cir. 1971); *WAIT Radio v. Federal Communications Commission (I)*, 418 F.2d 1153 (D.C. Cir. 1969); *WAIT Radio v. Federal Communications Commission (II)*, 459 F.2d 1203 (D.C. Cir. 1972); *Melody Music, Inc. v. Federal Communications Commission*, 343 F.2d 730 (D.C. Cir. 1965).

### III. CONSTRUCTION PERIODS

6. The *NPRM&MO&O* at ¶192 solicits comments on whether MDS and ITFS site-based licensees need more time to construct their facilities and whether the construction periods for such site-based licenses should be extended. WaveTel believes the Commission should retain the current 12-month and 18-month construction periods for site-based MDS and ITFS licenses, respectively. Now that the Commission will be resolving many of the outstanding issues that have caused construction delays in the past, the current construction periods should apply and will afford licensees adequate time to complete construction of their stations.

7. Additionally, the Commission should continue to treat MDS and ITFS site-based licensees differently respecting the amount of time allotted for construction of their respective facilities. As the Commission has noted, *NPRM&MO&O* at p.80 n.470, and as WaveTel has experienced when dealing with ITFS licensees, MDS licensees can obtain financing and schedule construction of their facilities more quickly than ITFS licensees, who typically have institutional budgeting and scheduling processes with which they must comply. This dichotomy between MDS and ITFS licensees will not change as a result of this rule making proceeding. Therefore, the Commission should continue to allow ITFS site-based licensees the additional six months to construct their facilities, which will accommodate most institutional budgeting and scheduling protocols.

8. Moreover, the Commission should continue its present policy concerning extension requests filed by ITFS site-based licensees that comply with §73.3534 of the Commission's rules. Notably, this policy does *not* include the three criteria test set forth in the *NPRM&MO&O* at p.80 ¶192 and n.470, which, as of late, the Wireless Telecommunications Bureau ("WTB") has been improperly applying in its review of extension requests filed by such ITFS licensees and permittees. Section 73.3534(c) of the Commission's rules provides that an extension of time to construct an ITFS station will be granted "...upon a specific and detailed narrative showing that the failure to

complete construction was due to causes not under the control of the permittee, or upon a specific and detailed showing of other sufficient justification for an extension.” See 47 C.F.R. §73.3534(c). Patently, the strict one-in-three criteria are not included in this standard of review for ITFS extension requests.

9. The Commission adopted the one-in-three criteria standard in a rule making proceeding pertaining to the construction of broadcast stations<sup>3/</sup>, which standard it codified in §73.3534 of the rules. Notably, the Commission explicitly exempted ITFS from application of the one-in-three standard. See *Broadcast MO&O*, 102 FCC 2d at p.1055, n.4. This explicit exemption remained in the rule<sup>4/</sup> until November 1998, when the Commission again revised its rules governing the construction of broadcast stations.<sup>5/</sup> In the *Broadcast R&O*, the Commission further revised the broadcast construction rules by extending the construction period and allowing additional time to construct only in the event of an act of God or administrative or judicial review. Additionally, the Commission modified §73.3534 of its rules by making it applicable only to ITFS station construction, deleting the one-in-three standard in its entirety, and replacing the old wording with the current version, which prescribes a less stringent standard of review. See *Broadcast MO&O*, 13 FCC Rcd at ¶¶83-89 and Appendix C at p. C-5; 47 C.F.R. §73.3534 (1998).

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<sup>3/</sup> In the Matter of Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations, FCC 85-647, *Memorandum Opinion and Order*, 102 FCC 2d 1054 (1985) (“*Broadcast MO&O*”).

<sup>4/</sup> See, e.g., 47 C.F.R. §73.3534 (1996); *In re Application of Temple University of the Commonwealth System of Higher Education*, 13 FCC Rcd 13668, 13671, ¶12 (1998).

<sup>5/</sup> See In the Matter of 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Procedures, MM Docket No. 98-43, *Report and Order*, 13 FCC Rcd 23056 (1998) (“*Broadcast R&O*”).

10. Reliance on the Commission's 1995 ITFS rule making decision<sup>6/</sup> to support application of the one-in-three criteria to ITFS extension requests, is misplaced. Specifically, in the *ITFS R&O*, 10 FCC Rcd 2921 at ¶ 82, the Commission mentioned that it had set forth, in its broadcast rules, the requirements an educator must meet to obtain an extension of time to construct a station, and then recited the one-in-three standard. However, in n.127 of the *ITFS R&O*, the Commission declared that ITFS facilities would be subject to the provisions of §73.3534(b) of the rules. The version of §73.3534(b) of the rules existing in February 1995 (and as it remained until November 1998) explicitly excluded ITFS from the one-in-three standard. That version of §73.3534(b) stated:

Applications for extension of time within which to construct broadcast stations, *with the exception of... Instructional TV Fixed stations*, will be granted only if one of the following three circumstances have occurred....

*See* 47 C.F.R. §73.3534(b) (1995) (emphasis added). Thus, notwithstanding the vague and contradictory discussions in the decision, the *ITFS R&O* made no change in the rule or in the standard of review to be applied to ITFS requests for extension of time to construct.<sup>7/</sup> Thus, ITFS was never subject to the one-in-three standard and it cannot be applied today.

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<sup>6/</sup> Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Report and Order*, 10 FCC Rcd 2907, 2921 ¶82 (1995) ("*ITFS R&O*").

<sup>7/</sup> This is further evidenced in a subsequent Commission decision, *The School Board of Indian River County*, 12 FCC Rcd 2588 ¶5 (1997) ("*Indian River*"), wherein the Commission reaffirmed that ITFS is exempt from the one-in-three standard. Moreover, a Commission rule making decision is akin to legislative history while a Commission rule carries the force of a statute. A footnote in the text cannot erase a rule.

11. The provisions of §553 of the Administrative Procedures Act (“APA”) prohibit the Commission from changing its rules or policies without first providing public notice of the proposed change and then allowing public comment.<sup>8/</sup> And the Commission must provide a clear, reasoned analysis of the change in the prior rule or policy to effect notice.<sup>9/</sup> As noted, after the *ITFS R&O*, §73.3534(b) continued to expressly exempt ITFS from the one-in-three standard, so any notice and opportunity for comment would exist, if at all, only in some subsequent proceeding.

12. Of course, there is no such subsequent proceeding. When the Commission later revised §73.3534 of the rules pursuant to the *Broadcast R&O*, *supra*, it tellingly did not apply the one-in-three standard to ITFS, but rather, reiterated the less stringent standard that had been applied to ITFS all along. Furthermore, the Commission has been routinely granting ITFS requests for extension of time to construct complying with the current provisions of §73.3534(c)<sup>10/</sup>. It is only recently, since the transfer of the ITFS from the Media Bureau to the WTB, that such requests are being denied<sup>11/</sup>, because, apparently unaware and unfamiliar with this regulatory history, the WTB is applying the wrong standard of review. Should the Commission decide to change the standard of review, it must first comply with the notice and comment procedures of §553 of the APA.

#### IV. CONCLUSION

13. In conclusion, the Commission should suspend the build-out deadlines for MDS BTA authorization holders for two years from the release date of a *Report & Order in this proceeding*.

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<sup>8/</sup> See, e.g., *National Family Planning and Reproductive Health Association, Inc., et al. v. Louis W. Sullivan, M.D., Secretary, U.S. Department of Health and Human Services*, 979 F. 2d 227 (D.C. Cir. 1992); *James Gilbert v. National Labor Relations Board*, 56 F.2d 1438 (D.C. Cir. 1995).

<sup>9/</sup> See, e.g., *Greater Boston Television Corporation v. Federal Communications Commission*, 44 F.2d 841 (D.C. Cir. 1970); *Motor Vehicle Manufacturers Association of the United States, Inc. et al. v. State Farm Mutual Automobile Insurance Co., et al.*, 463 U.S. 29 (1983).

<sup>10/</sup> See, e.g., Public Notice, Report No. 671, rel’d 2/20/02; Public Notice, Report No. 677, rel’d 2/26/02; Public Notice, Report No. 687, rel’d 3/8/02; Public Notice, Report No. 1152, rel’d 4/17/02; Public Notice, Report No. 1159, rel’d 4/24/02.

<sup>11/</sup> See, e.g., Public Notice, Report No. 1365, rel’d 12/18/02; Public Notice, Report No. 1395, rel’d 1/22/03; Public Notice, Report No. 1426, rel’d 2/26/03.



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