

**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 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

The Law Firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, on behalf of its rural MDS licensee clients listed in Attachment A hereto (the "Rural Commenters"), submits these comments in the above captioned proceeding in accordance with the Commission's schedule.¹

¹ See 68 FR 111 (June 10, 2003). The Commission's Notice of Proposed Rule Making and Memorandum Opinion and Order was released April 2, 2003. The Commission's Second Memorandum Opinion and Order was released August 8, 2003 (FCC 03-194)(modifying the freeze on applications).

The Rural Commenters generally support the proposals for streamlining the Multipoint Distribution Service (“MDS”) and Instructional Television Fixed Service (“ITFS”) regulatory process that were set forth in the White Paper prepared by the Wireless Communications Association, International, the National ITFS Association and the Catholic Television Network (the “Coalition”). The Rural Commenters agree that the Commission should reduce MDS/ITFS licensee regulatory burdens, and support the tentative conclusion that site-by-site licensing should be eliminated with respect to geographic area licenses. The Commission should review the continuing utility of all of its MDS and ITFS rules, and eliminate those that are no longer necessary or effective in promoting the deployment and use of MDS and ITFS facilities and services.

However, The Rural Commenters are concerned that the proposed new band plans will impose excessive and disruptive costs upon incumbent rural MDS licensees and their customers. These concerns are greatest if fledgling wireless broadband service providers are forced to move to new frequency bands.

The Rural Commenters

Consolidated Telcom holds MDS licenses for operations in the rural communities of Killdeer, Lefor, and Scranton, North Dakota (Channels E1-E4; F1-F4; and H1-H3). Polar Communications Mutual Aid Corporation has recently acquired the geographic area MDS license for the Grand Forks, North Dakota Basic Trading Area (“BTA”)(Channels F1-F4), and is presently attempting to bring wireless high-speed broadband services to rural service areas of North Dakota and Minnesota.² Santel Communications Cooperative, Inc. operates its MDS systems in the rural communities of Mitchell and Mt. Vernon, South Dakota (Channels E1-E4;

² Applications pending for operation on channels E1-4; H1-3.

F1-F4) and is likewise interested in providing advanced services to customers that have traditionally been left with little or no choice for such services. The Rural Commenters can more readily accomplish their service goals if they can focus upon the technical and business problems that must be addressed in bringing wireless broadband services to Rural America, where lower population density, greater distances between potential users and difficult terrain complicate the provision of any wireless service. These entities would benefit from the elimination of unnecessary regulatory hurdles such as outmoded rules and site-by-site licensing procedures. However, the benefits arising from this proceeding will be lost if these rural licensees are forced to relocate to new frequencies at their own expense.

Elimination of Site-by-Site MDS Licensing

The Rural Commenters agree with the Commission's tentative conclusion that holders of MDS and ITFS geographic area licenses should not be required to apply for Commission consent to construct new facilities or modify existing facilities in their existing areas of operation. Like other wireless geographic area licensees (e.g., cellular, Personal Communications Service and 700 MHz Band licensees), MDS and ITFS licensees should be free to construct and operate facilities within their service areas subject only to the existing technical standards necessary to minimize interference. They should be able to construct, supplement and reconfigure their networks without site-specific approvals from the Commission, except in cases where environmental assessments are required.

The provision of wireless broadband service requires high quality signals, reliable and continuous service, and rapid and flexible responses to customer desires. MDS licensees simply cannot obtain, serve or retain their broadband customers if they have to wait three-to-nine months or more to prepare, prosecute and obtain Commission grants of site-specific applications

before they can implement needed additions and changes. The dual needs for quality signals and reliable service require broadband MDS operators to comply with the Commission's interference standards and to coordinate their frequency usage with that of nearby co-channel and adjacent channel users.

Geographic Area Licensing With A “Substantial Service” Option Is Superior To the Current MDS Build-Out Requirements

The Rural Commenters support the Commission's tentative conclusion that MDS Basic Trading Area (“BTA”) authorization holders should be allowed to place transmitters anywhere within their service area without prior authorization, so long as the operation (1) complies with the applicable service rules, including the requirement to protect incumbent operations from interference; (2) does not affect radiofrequency quiet zones; (3) does not require environmental review; and (4) does not require international coordination.

In cases where a BTA authorization holder does not meet its build-out requirement (which has been suspended), the Commission's rules currently call for the partitioning from the BTA of any unserved area, and the re-auctioning of this partitioned area pursuant to the MDS bidding procedures. The original BTA holder is ineligible to participate in the re-auction.

The current MDS five-year build-out requirement may have been reasonable for wireless cable operations, but makes little sense with respect to the two-way wireless broadband services that are rapidly becoming the primary use of the MDS frequencies. Wireless broadband service needs to be provided where customers want it and are willing to pay for it, which criteria may or may not be congruent with the coverage of minimum percentages of the population within particular BTAs. Accordingly, the Commission should adopt a more flexible “substantial service” approach.

The “substantial service” approach constitutes a much more reasonable alternative to the current construction requirements. As with the Wireless Communications Service licensed under Part 27 of its Rules, the Commission should allow MDS licensees the flexibility of making a case-by-case showing of “substantial service” at the time of license renewal. In order to furnish a degree of certainty and encourage investment, the Commission should establish a series of safe harbors (such as service to “niche markets,” service to under-served rural areas, or provision of advanced services) that will allow MDS operators to determine that they have met the “substantial service” requirement. This approach will allow MDS operators to be regulated in a manner similar to other flexible use services and would be consistent with the Congressional mandate to promote “economic opportunity and competition” and to disseminate licenses “among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”³

In addition, if the Commission for any reason retains site-specific licenses in the MDS or ITFS services, it should expand the twelve month construction period to twenty-four months. In light of the developing status of the wireless broadband market and the recent economic upheavals in the telecommunications equipment industry, it can take MDS and ITFS licensees (and especially smaller operators) much longer than expected to obtain the necessary equipment.

Geographic Areas for Unassigned ITFS Licenses

The Commission should license unassigned ITFS spectrum located in rural areas based upon the same BTA license areas associated with MDS channels. The Commission has recognized that small service areas create opportunities for small and rural applicants to obtain spectrum. For example, in the recent lower 700 MHz Band auction, the Commission employed

³ 47 U.S.C. § 309(j)(3)(B).

smaller geographic licensing areas in order encourage participation by small regional and rural providers who were able to meet the service needs of their customers within such smaller areas.⁴ The economic and service characteristics of wireless broadband service are even more favorable for smaller geographic service areas, for the MDS and ITFS operators serving mobile and fixed customers (particularly those in rural areas) need to remain closely attuned to the needs and concerns of their potential customers. Moreover, both Section 309(j) of the Act and the *Auction Reform Act of 2002* require the Commission to provide rural providers with a realistic opportunity to participate in spectrum auctions.⁵

The Commission Should Eliminate Unnecessary MDS Regulations And Reporting Requirements

The Commission should review its MDS regulations, and eliminate requirements that increase regulatory costs without significantly protecting the public interest. Rules that can be eliminated at no loss to the effectiveness of the Commission's mission include: (1) the Section 21.903(b) restrictions on control and ownership of customer equipment; (2) the Section 21.11(a) requirement for annual updates of the FCC Form 430 Licensee Qualification Report; (3) the Section 21.911 Annual Report; and (4) the Section 21.38 requirement for prior Commission approval of pro forma assignments of license and transfers of control. Pro forma transactions should be allowed pursuant to the "after the fact" notification requirements allowed for other commercial services under the Commission's "forbearance" order.⁶

⁴ *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, GN Docket No. 01-74, para. 96 (rel. Jan. 18, 2002).

⁵ 47 U.S.C. §309(j); *Auction Reform Act of 2002*, Pub. L. No. 107-195, 116 Stat. 715 (2002).

⁶ *Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, Memorandum Opinion and Order, 13 FCC Rcd 6293, 6297-99, 6306 ¶¶7-9, 23-24 (1998).

Reservations Regarding Proposed Band Plans

The Rural Commenters' primary reservation concerns the proposed band plans. The band plan proposed by the Coalition, as well as the Commission's two proposed alternatives, separate high-power and low-power operations and require incumbent MDS operators to change their channelization when the transition trigger is pulled. Whereas the plans might be attractive if proposed and adopted in a vacuum, the problem is that the Rural Commenters and other MDS licensees have already spent millions of dollars to implement wireless broadband MDS services, and will have to spend additional millions pursuant to the proposed changes to the MDS band plan. Particularly in the rural areas served by the Rural Commenters, broadband MDS margins are small and business plans have not included expenditures of substantial sums for frequency relocations.

The Rural Commenters are not opposed to the general requirement that a MDS licensee must be financially responsible for the elimination of interference that the transition causes to an ITFS licensee or lessee when the MDS licensee wins its license at auction. The voluntary movement imposes costs on other licensees, so that cost should be borne by that entity which created such costs. However, if a MDS licensee is involuntarily forced to transition to a new frequency band, the entity pulling the transition trigger (the "cost-causer") should bear the costs associated with the elimination of interference. The cost-causer should also be responsible for the other costs imposed by forced transition on the MDS licensee (e.g., retuning and other technical-related work). In other words, the cost-causer should be responsible for the reasonable costs that its actions impose on other licensees, whether those licensees are ITFS or MDS operators. In this way, the cost-causer can make a rational business decision as to whether it will

pull the transition trigger and will not improperly impose costs on the licensees that are forced to transition to a new band plan.

As part of the transition process, the Commission proposes three alternatives to the Coalition proposal. The Rural Commenters believe that a modified version of the proposed second alternative (whereby a three-phase transition process would be implemented) strikes the best balance for proper transitioning. The first phase (voluntary negotiation period) permits market-based transactions to flourish and avoids rigid rules. For the second phase (mandatory negotiation and conversion phase), the Rural Commenters propose that that Commission require good faith bargaining to facilitate forward movement in the transition. The final phase, which compels incumbents to reduce their signal strengths at their own costs, should be modified to require the cost-causer to pay any and all reasonable relocation costs of the incumbent. Accordingly, the Rural Commenters urge the Commission to adopt the proposed second alternative, with the above-described modifications.

A Uniform Band Plan Is Not Required

Not every market requires a uniform band plan. Large regional and national licensees may achieve economies of scale and face lower transactions costs if the Commission decides to adopt large geographic area-based uniform band plans. However, there is little evidence such licensees will actually serve rural communities. Instead, it is very likely that a national/regional licensee approach would result in little or no service to rural areas, and unjustly force the existing rural MDS operators to expend valuable resources for frequency relocation. Therefore, having different band plans may be appropriate for different markets.

Moreover, it is the Rural Commenters' experience and understanding that, for instance, broadband customers are very apt to complain about service interruptions, even very brief ones.

The Commission should not require existing MDS operators, especially those providing broadband services, to incur substantial unforeseen expenses and service interruptions to relocate to different frequencies. If a MDS operator elects to transition its own frequencies to a new band plan, then it should be able to do so. However, forced transitions should be minimized, and one way to do so is to adopt a band plan that recognizes the differences in rural versus urban areas. Any MDS operator required to relocate should be compensated by the Commission or by the private entity or entities requesting a particular MDS operator to relocate.

Unlicensed Use of Unassigned ITFS Spectrum

Unlicensed technologies should not be permitted to operate in current white space in the ITFS spectrum, and where ITFS licenses are returned to the FCC, on a primary basis. The Commission is not currently in a position to ensure that existing MDS and ITFS licensees will be adequately protected from interference that may be caused by these unlicensed operations. This was made clear in the Commission's recent *Spectrum Policy Task Force Report*.⁷ It will be difficult if not impossible to "track down" an interference source, once consumers buy these unlicensed devices off-the-shelf and begin using them wherever they wish. Accordingly, the Rural Commenters are opposed to such operations.

The Commission Should Reduce The ITFS Eligibility Restrictions

Continued retention of the ITFS eligibility restriction is detrimental to the growth of services on the ITFS channels. It is not in the public interest for an MMDS operator who wants to change from providing one-way, high-powered television transmission operations from a single tower to providing two-way Internet access from multiple low-powered base stations, to

⁷ *Spectrum Policy Task Force Report*, ET Docket No. 02-135, p. 33 ("The Task Force recognizes that there are hurdles that must be overcome before the interference temperature metric could serve as a useful spectrum management tool.")(SPEC POL-1)(2002).

first obtain consent of the ITFS operators in the market, especially since MMDS operators lease ITFS facilities. The requirement increases transactions costs and increases the timeframe for offering advanced service alternatives to rural markets.

The Commission should also permit non-educational, for-profit entities to exercise direct ownership control of an ITFS station, so long as they comply with the Commission's rules adopted for the 2500-2690 MHz band. The Rural Commenters are not opposed to Commission adoption of rules comparable to those that apply to DBS under Rule Section 100.5 so long as for-profit entities could exercise direct ownership control of the ITFS station.

Conclusion

The Rural Commenters generally support the ideal of creating a new band plan so that the ITFS/MDS spectrum can be transformed and utilized for advanced fixed and wireless services to rural customers. The Commission should eliminate its site-by-site licensing, build-out and other MDS and ITFS rules that are no longer necessary or effective. However, just as ITFS licensees are to be protected from transition-related elements, MDS licensees that may be involuntarily forced into the new band plan must also be appropriately protected.

Respectfully submitted,

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ATTACHMENT A

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