

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Promoting Efficient Use of Spectrum Through) WT Docket No. 00-230
Elimination of Barriers to the Development of)
Secondary Markets)
)

To: The Commission

***EX PARTE* COMMENTS OF MDS AMERICA, INCORPORATED
IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING**

INTRODUCTION

MDS America, Incorporated (“MDS America”), by its attorneys, submits these *ex parte* comments in support of certain Commission proposals in this docket.¹ In particular, in response to the Commission’s inquiry in the *Further Notice*,² MDS America supports extension of the Secondary Market Policies to the new Multichannel Video Distribution and Data Service (“MVDDS”).³ MDS America’s affiliate, MDS Operations, Inc. (“MDS Operations”), was the successful bidder for 60 licenses in the recent MVDDS auction.⁴

¹ *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-113 (released Oct. 6, 2003). The Report and Order portion of this decision is referred to as the “R&O”, and the Further Notice of Proposed Rulemaking portion of this decision is referred to as the “Further Notice.”

² *Further Notice* at ¶310.

³ *See* Auction of Licenses in the Multichannel Video Distribution and Data Service rescheduled for January 14, 2004, Notice and Filing Requirements, Minimum Opening bids, Upfront Payments and Other Auction Procedures, *Public Notice*, 18 FCC Rcd 17553 (2003).

⁴ *Public Notice*, “Multichannel Video Distribution and Data Service Spectrum Auction Closes: Winning Bidders Announced,” DA 04-215 (February 2, 2004) at Attachment A.

MDS America supports extension of the Secondary Markets policies to MVDDS because the MVDDS spectrum has been awarded to the initial licensees pursuant to auction. MDS America also supports maximum flexibility for spectrum leasing, including for “designated entities.”

DISCUSSION

I. SECONDARY MARKET POLICIES SHOULD BE EXTENDED TO MVDDS

Many participants in this docket, including rural carriers, express support for extending the Secondary Market policies to additional services.⁵ MDS America particularly recommends application of the Secondary Market policies to MVDDS to speed the roll-out of MVDDS in rural areas.⁶ Extension of the Secondary Markets policies to MVDDS would allow licensees to swap and aggregate spectrum for more cost-effective and efficient deployment in rural areas and thus would expedite implementation of broadband services. This is especially likely to occur if, as urged by MDS America in the Rural Flexible Spectrum docket,⁷ MVDDS licensees are permitted to use higher operating parameters in rural areas. Implementation of the Secondary Markets policy with respect to MVDDS also may facilitate provision of data and video distribution services by separate, specialized providers, particularly in rural areas, and thus may increase consumer choice.

Extension of the Secondary Market policies to MVDDS also may increase access to capital for the roll-out of MVDDS services by providing a source of revenue to fund MVDDS implementation and to help licensees service build-out loans. The comments of Cantor Fitzgerald Telecom Services, Inc., and Spectrum Market, LLC, demonstrate that, regardless of whether the

⁵ See, e.g., Comments of the Blooston Law Firm (representing a number of rural telephone companies and small businesses providing wireless services to the public); see also Comments of Cantor Fitzgerald Telecom Services, Inc. (supporting extension of Secondary Market policies to additional services).

⁶ MVDDS was not included in the original Notice of Proposed Rulemaking because the service had not yet been authorized. *R&O* at n. 189; *Further Notice* at ¶ 310 and n. 514.

⁷ Comments of MDS America, Incorporated, in Response to Notice of Proposed Rulemaking, WT Docket Nos. 02-381, 01-14; 03-202 (filed Dec. 29, 2003).

Commission expands its information databases, the private sector is contemplating making markets that will assist in matching potential lessees with spectrum licensees.

Leasing flexibility will also permit more efficient use of spectrum in other situations. For example, a licensee's proposed services may not require use of all the spectrum covered by its licenses. Through leasing, services can be provided using a portion of that spectrum on an interim basis. There may also be technological innovations subsequent to initial licensing that allows additional services to be implemented using a licensee's spectrum.⁸ Application of the Secondary Markets policy to MVDDS would thus encourage efficient spectrum usage and development of new services.

That a single MVDDS license is awarded for each Designated Market Area ("DMA") should not affect the Commission's decision to extend the Secondary Markets policies to MVDDS.⁹ Auction prices have reflected the one-to-a-DMA license policy. Moreover, while MVDDS is being implemented to increase consumer choice, the ubiquity of satellite services makes it unlikely that MVDDS would be the only service option for consumers, and thus inter-modal competition should exist even where cable television service is unavailable. There is therefore no reason to limit application of the Secondary Market policies. For rural areas, Secondary Market policies may be especially important in supporting MVDDS deployment by promoting greater access to capital for MVDDS licensees.

II. MAXIMUM LEASING FLEXIBILITY SHOULD BE PERMITTED

MDS America agrees with commenters like Salmon PCS, LLC, that the Commission should forbear from heavy regulation of leasing arrangements and should not prevent licensees that received bidding credits as "designated entities" from leasing to entities that would not have

⁸ MDS America does not propose that lessees be permitted to use leased MVDDS spectrum in a manner that would cause harmful interference to DBS or NGSO operations as defined in the Commission's Rules at the time of such use.

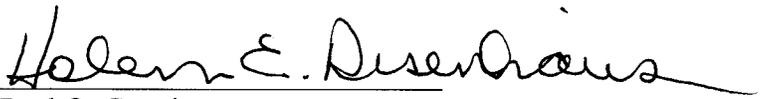
qualified for such credits.¹⁰ Such restrictions would hinder achievement of the goals of the Secondary Markets policies. They would needlessly limit the degree to which efficient spectrum usage could be achieved and would frustrate the utility of using leasing arrangements to expedite MVDDS build-out. Like The Cellular Telecommunications & Internet Association, AT&T Wireless Services, Inc., and others, MDS America also supports broad forbearance with respect to *pro forma* assignment/transfer and lease transactions. MDS America further agrees that clarification of the forbearance rules would assist licensees in determining what transactions qualify for forbearance.

CONCLUSION

For the reasons above, MDS America encourages the Commission to extend its Secondary Market policies to MVDDS and to allow maximum flexibility in leasing arrangements.

Respectfully submitted,

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⁹ See *Further Notice* at ¶ 310 (inquiring as to this issue).

¹⁰ MDS America supports the request of Salmon PCS, LLC, that the FCC clarify its affiliation rules so designated entities will not inadvertently lose their status by entering into leasing arrangements.