

May 25, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *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 --
WRITTEN EX PARTE PRESENTATION

Dear Ms. Dortch:

The Wireless Communications Association International, Inc. (“WCA”) understands that the Commission has before it a proposal in the above-referenced proceeding that would create two new Multipoint Distribution Service (“MDS”) channels for auction to new entrants, at least in part by taking spectrum from incumbent MDS and Instructional Television Fixed Service (“ITFS”) licensees in the 2500-2690 MHz band. I am writing on behalf of WCA to express its strongest possible opposition to this proposal. Not only would adoption of this approach represent poor communications policy because of its impact on operations by incumbent licensees, but it also would violate the Administrative Procedures Act (the “APA”).

This fatal legal flaw is explained in detail in the accompanying legal memorandum. Simply summarized, the *Notice of Proposed Rulemaking* (“NPRM”) that commenced this proceeding did not propose to create new MDS channels in the band for auction. The accompanying memorandum establishes that, as with any substantive rule change, the Commission cannot even consider the proposal that is presently before it without first providing the public with the notice and opportunity to comment mandated by Section 553 of the APA. The NPRM did not explicitly do so, nor can the creation of two new MDS channels for auction fairly be considered a logical outgrowth of any proposal advanced in the NPRM.¹ If the Commission adopts the proposal at this juncture, there is every reason to believe that appellate

¹ Not surprisingly, no party filing formal comments or reply comments in response to the *Notice of Proposed Rulemaking* discussed a possible creation of new MDS channels that would be auctioned to promote new entry.

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review would be sought and that the Commission's creation of the new MDS channels for auction would be reversed.

This litigation risk, and the delay in broadband deployments that would inevitably result pending Court review of the MDS/ITFS bandplan, is not worth taking. Nor is it worth delaying the adoption of rules in this proceeding for the months it would take to comply with the Commission's obligations under Section 553 of the APA.² After years in which an unfavorable regulatory environment has deterred broadband deployments, the Commission is now poised to adopt rules based on a proposal advanced by WCA and the ITFS leadership that will, in Chairman Powell's words, "chip off the regulatory barnacles encumbering ITFS and MDS."³ The record is clear that operators are prepared to deploy new wireless broadband systems once the new rules become effective, bringing wireless broadband to areas that cannot be served economically under the current rules.⁴

Meanwhile, any interest the Commission has in promoting new entry into the MDS/ITFS arena can be satisfied through the secondary market by way of license assignments, transfers of control over licensees, leases, and lease assignments. The MDS/ITFS secondary market is as active now as it has been at any time over the past two decades. Indeed, it is estimated that approximately 40-50 percent of the MDS/ITFS spectrum (measured by MHz/pops) has changed hands through secondary market transactions over the past year. The vitality of the MDS/ITFS secondary market is illustrated by the fact that two of the four most extensive spectrum holdings today are controlled by Nextel and Craig McCaw, who had access to no MDS or ITFS spectrum just a year ago. Nextel is in the process of acquiring spectrum in scores of markets as a result of secondary market transactions with WorldCom, Inc. and Nucentrix Broadband Networks, Inc. ("Nucentrix"). An article in last week's *Business Week* establishes that although Mr. McCaw has been active in the MDS/ITFS arena for just a few months, he already "holds the exclusive rights to radio spectrum in [Jacksonville, FL and] about 100 other cities."⁵

² This is particularly so since, as addressed in recent *ex parte* notifications and below, (i) there is no need for auctioning newly-created MDS channels to provide newcomers with access to spectrum, and (ii) the reduction in bandwidth that incumbents would suffer to accommodate such new channels would have an adverse impact on the ability of incumbents to provide wireless broadband services. See, e.g. Letter from Paul J. Sinderbrand to Marlene H. Dortch, WT Docket No. 03-66, at 2-3 (filed May 19, 2004).

³ *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*, 18 FCC Rcd 6722, 6858 (2003)(separate statement of Chairman Powell)

⁴ For example, in recent meetings representatives of W.A.T.C.H. TV Company and WinBeam, Inc. provided the Commission with detailed information as to where they intend to deploy new service offerings upon adoption of the rules proposed by WCA. See, e.g. Letter from Paul J. Sinderbrand to Marlene H. Dortch, WT Docket No. 03-66, at Attachments (filed May 19, 2004) (providing maps illustrating intended deployments).

⁵ "Craig McCaw's Secret Plan," *Business Week*, at 78-80 (May 24, 2004).

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Moreover, the secondary market is working not just for national players with billions of dollars like Nextel and Mr. McCaw, but also for more regional industry participants. For example, representatives of W.A.T.C.H. TV Company and WinBeam, Inc. visited each of the Commissioners' offices last week and discussed how upon adoption of the new rules they will be able to expand beyond the areas they currently serve thanks to recently-completed secondary market transactions. Unison Wireless, Inc., a new entrant into the MDS/ITFS arena, recently secured assignment of spectrum leases from Nucentrix covering 23 rural markets.⁶ Opportunities abound for others to follow this path -- as a result of the decisions by WorldCom and Nucentrix to reject a wide range of leases as part of their Chapter 11 reorganizations, there is a substantial quantity of spectrum newly-available in large and small markets across the nation.

In short, there is no need for the Commission to create and auction new MDS channels to provide new entrants with access to MDS/ITFS spectrum. Given that many operators are anxious to begin deploying new wireless broadband facilities once the new rules are adopted and given the unrefuted evidence that a reduction in available bandwidth along the lines being considered would impair operations by existing licensees, WCA urges the Commission to reject the proposed creation of new MDS channels out of spectrum taken from incumbent licensees and instead move promptly towards adopting new rules that can be adopted without legal challenge and provide long-overdue regulatory certainty.

Pursuant to Section 1.1206(b)(1), this written *ex parte* presentation is being filed electronically with the Commission via the Electronic Comment Filing System for inclusion in the public record of the above-reference proceeding. Should you have any questions regarding this presentation, please contact the undersigned

Respectfully submitted,

/s/ Paul J. Sinderbrand

Paul J. Sinderbrand

Counsel to the Wireless Communications
Association International, Inc.

cc: Hon. Michael K. Powell
Hon. Kathleen Q. Abernathy
Hon. Kevin J. Martin
Hon. Michael J. Copps

⁶ See *Nucentrix Broadband Networks, Debtors*, Case No. 03-39123-HDH-11 (Dallas Div, N.D. Tex., US Bank. Ct.)

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MEMORANDUM

May 25, 2004

This memorandum has been prepared at the request of the Wireless Communications Association International, Inc. (“WCA”) to address whether the Commission at this juncture in WT Docket No. 03-66 may lawfully adopted a new proposal to create two new Multipoint Distribution Service (“MDS”) channels for auction. As shown below, the requisite prior notice and opportunity to comment regarding this proposal has not been afforded to MDS and Instructional Television Fixed Service (“ITFS”) licensees, system operators or other potentially interested members of the public, and thus adoption of the proposal would constitute a direct violation of the requirements of Section 553 of the Administrative Procedure Act (the “APA”).

I. FACTUAL BACKGROUND

The genesis of the instant issue can be traced to the Commission’s September 24, 2001 *First Report and Order* in ET Docket No. 00-258 (the “*AWS First R&O*”). In that decision, the Commission found that “the 2500-2690 MHz band is extensively used by incumbent ITFS and MMDS licensees” and that the public interest would best be served by “not relocating the existing licensees or otherwise modifying their licenses.”¹ Thus, the Commission terminated its examination of possible reallocation of a portion of the 2500-2690 MHz band for IMT-2000 or mobile satellite services. In addition, the *AWS First R&O* added a mobile allocation to the 2500-2690 MHz band, allowing MDS and ITFS licensees to enjoy the same sort of flexibility that is driving efficient utilization of other wireless spectrum.² The Commission recognized, however, that its current rules do not permit MDS/ITFS licensees to take full advantage of that flexibility. The Commission therefore stated that it “will have to explore in a separate future proceeding the service rules that will apply to permit mobile operations in the [2.5 GHz] band.”³

To assist the Commission in its effort to reform the MDS/ITFS rules as suggested in the *AWS First R&O*, on October 7, 2002, WCA, along with the National ITFS Association and the Catholic Television Network (collectively, the “Coalition”), submitted a “white paper” which

¹ *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*, First Report and Order and Memorandum Opinion and Order, 16 FCC Rcd 17222 (2001) (“*AWS First R&O*”).

² *Id.* at 17236-7.

³ *Id.* at 17238 (emphasis added).

proposed a variety of rule changes designed to promote the most efficient flexible utilization of the 2500-2690 MHz band by existing licensees (the “Coalition Proposal”).⁴ The specific details of the rule changes proposed by the Coalition are a matter of public record in WT Docket No. 03-66 and need not be reiterated here. Most importantly for purposes of the instant issue, the Coalition Proposal did not contemplate the auctioning of any spectrum in the 2500-2690 MHz band other than the auctioning of ITFS “white space” – areas where some or all of the ITFS allocation is not licensed.⁵

The *Notice of Proposed Rulemaking* (“*NPRM*”) in WT Docket No. 03-66 sought comment on adoption of the Coalition Proposal, as well as several other alternative approaches to restructuring the 2500-2690 MHz band.⁶ However, the *NPRM* never suggested that any new bandplan for 2500-2690 MHz would include new MDS channels that would be auctioned, much less that such new channels would be created by reducing the amount of spectrum licensed to incumbents.⁷ To the contrary, the *NPRM* sought comment on four specific auction proposals, none of which would have resulted in the auctioning of newly-created MDS channels. First, like the Coalition Proposal, the *NPRM* proposed an auction of the unlicensed ITFS “white space.”⁸ Second, the Commission sought comment on auctioning the seven 125 kHz response channels that were formerly associated with MDS channels E3, E4, F3, F4, H1, H2 and H3 and that are now allocated to the Private Operational Fixed Service but unlicensed.⁹ Third, the Commission sought comment on the use of competitive bidding for the presently unlicensed spectrum in the 2500-2690 MHz band in the Gulf of Mexico.¹⁰ Finally, the *NPRM* requested comment on the possible use of a “two-sided” auction that would facilitate consolidation by allowing incumbent MDS and ITFS licensees to auction their licenses at the same time the Commission uses

⁴ See “A Proposal for Revising The MDS and ITFS Regulatory Regime,” The Wireless Communications Association International, Inc. *et al.*, RM-10586, at 4-5 (filed Oct. 7, 2002).

⁵ See *id.* at 42.

⁶ See *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 MHz and 2500-2690 MHz Bands*, 18 FCC Rcd 6722, 6725 (2003) (footnote omitted) (emphasis added).

⁷ See *id.* at 6745-7.

⁸ *Id.* at 6749 (“One means of seeking to increase the intensity and efficiency of use of the ITFS spectrum would be to license the *unassigned* ITFS spectrum using geographic area licensing.”) (emphasis added); *id.* at 6753 (“The most compelling argument for [licensing available ITFS spectrum using Basic Trading Areas] is that we used BTAs when auctioning unused MDS spectrum in 1996. A similar approach when auctioning *unused* ITFS spectrum would be consistent and would arguably make it easier for licensees to aggregate spectrum”) (emphasis added); *id.* at ¶ 6755 (“Another possible means of ensuring utilization of the *unassigned* ITFS spectrum would be to allow unlicensed operation in the *unassigned* ITFS spectrum on a primary basis.”) (emphasis added); *id.* at 6815 (“[C]onsistent with the Coalition proposal, we now are considering an auction of new licenses for using ITFS spectrum in geographic areas *that will encompass currently unassigned areas.*” (emphasis added).

⁹ See *id.* at 6747.

¹⁰ See *id.* at 6756-7.

competitive bidding to license presently unlicensed spectrum.¹¹ Nowhere did the Commission suggest that it was contemplating the auctioning of newly-created MDS channels.

Not surprisingly, then, not one of the one hundred thirty-six (136) formal comments or reply comments submitted in response to the *NPRM* discussed any establishment of new MDS channels in the 2.5 GHz band that would be auctioned. Nor has any ex parte filing appearing in the public record to date advanced such a proposal. However, the Commission apparently is now considering whether to adopt a bandplan that would create two new 6 MHz MDS channels (at least in part by taking spectrum from incumbent licensees) and auctioning those channels.¹²

II. DISCUSSION

Given the failure of the *NPRM* to suggest in any manner that the Commission would utilize this proceeding to carve new MDS channels out of the 2500-2690 MHz band for auction, adoption of this approach at this time would violate Section 553 of the APA. It is well settled that where final rules depart substantially from the rules proposed by a federal agency in an informal rulemaking proceeding, interested parties are denied their right to the prior notice and opportunity to comment guaranteed by Section 553 of the APA.¹³ In such situations, “the adequacy of the notice depends . . . on whether the final rule is a ‘logical outgrowth’ of the proposed rule.”¹⁴ The proposal to create new MDS channels for auction fails that legal standard.¹⁵

¹¹ *See id.* at 6820.

¹² It is not clear whether auction eligibility for these new MDS channels would be limited and, if so, how such status would be defined. It is beyond the scope of this memorandum to address the legal and policy implications of such a limit, although it is worth noting that, just as the *NPRM* failed to give notice that new MDS channels would be created, it failed to give notice of any possible eligibility restrictions on those channels.

¹³ *See Shell Oil Company v. Environmental Protection Agency*, 950 F.2d 741, 759 (D.C. Cir. 1991); *American Medical Association v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995), citing 5 U.S.C. § 533(b)-(c) (1998) (“The APA requires an agency to provide notice of a proposed rule, an opportunity for comment, and a statement of the basis and purpose of the final rule adopted.”).

¹⁴ *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994)(citation omitted).

¹⁵ In addition, the Commission’s failure to provide notice and an opportunity to comment violates the rights afforded incumbent licenses under Section 316(a)(1) of the Communications Act, as amended (47 U.S.C. § 316(a)(1)). That provision provides that: “[a]ny station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest No such order or modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.” It is beyond argument that taking spectrum away from an incumbent licensee equates to a modification of that licensee’s license, and thus is subject to the prior notice and hearing requirements of Section 316(a)(1). While the Commission can modify licenses through an informal rulemaking proceeding, the use of that

As observed by the United States Court of Appeals for the District of Columbia Circuit, “something is not a logical outgrowth of nothing.”¹⁶ Here, the *NPRM* contained *nothing* which suggested the Commission was considering the creation of new MDS channels in the 2500-2690 MHz band to be awarded by auction. Given the quantity of spectrum that must be taken from incumbent licensees to implement this proposal and the adverse consequences of a reduction in channel width on the ability of licensees to productively utilize their spectrum, one would certainly expect that, had the Commission made its intentions known in the *NPRM*, it would have received significant opposition from incumbent MDS/ITFS licensees. The absence of any such opposition in the record is the most compelling possible evidence that incumbent MDS/ITFS licensees, system operators and other potentially affected members of the public were not apprised that the Commission might create new MDS channels for auction out of licensed spectrum, and thus had no opportunity to comment on that issue as mandated by the APA.¹⁷

Furthermore, the Commission will not be able to escape the consequences of its error by claiming lack of prejudicial error.¹⁸ As the D.C. Circuit noted not long ago in *Sugar Cane Growers Cooperative v. Veneman*, “an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure.”¹⁹ Simply stated, it is impossible for the Commission to have a full and fair record on the legal, technical and economic implications of the creation of new MDS channels to be auctioned to new entrants by reducing the spectrum licensed to incumbents without giving interested parties notice and an opportunity to comment thereon.²⁰ If the proposal is adopted, the Commission’s failure to provide that opportunity will fall within any reasonable definition of “prejudicial error.”

vehicle does not obviate the need to provide the notice of the proposed action, the rationale and an opportunity to be heard mandated by Section 316. Given the *NPRM*’s silence on these issues, it cannot be seriously suggested that the Commission has complied with Section 316.

¹⁶ *Kooritzky*, 17 F.3d at 1513.

¹⁷ *See, e.g., Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003) (“[T]he comments submitted . . . demonstrate that the parties did not appreciate that the Commission was contemplating revision of the dual scheme of payment responsibility [*vis-à-vis* compensating payphone service providers for certain calls made from their payphones]. Nor did anything in the Bureau’s Notice suggest that the Commission would impose additional reporting requirements on IXCs, and the commenters understandably submitted no comments on this point. Necessarily, then, the Bureau’s Notice did not provide “actual notice” sufficient to remedy the Commission’s procedural shortcomings.”) (citation omitted).

¹⁸ *See* 5 U.S.C. § 706.

¹⁹ 289 F.3d 89, 96 (D.C. Cir. 2002).

²⁰ *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978) (“Given the lengths that the [Environmental Protection] Agency must travel to justify its revisions between the interim and final stages [of its rulemaking proceeding], we cannot be sure that further and ultimately convincing public criticism of those changes would not have been forthcoming had it been invited by the Agency.”)

III. CONCLUSION

The *NPRM* in WT Docket No. 03-66 failed to give MDS/ITFS licensees, system operators or other interested members of the public notice that the Commission was considering creation of two new MDS channels for auction, nor can the creation and auction of such new channels be considered a “logical outgrowth” of any of the proposals made in the *NPRM*. As such, were the Commission to create such new MDS channels at this time, its decision would be subject to reversal and remand by the United States Court of Appeals.