

May 28, 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:

I am writing on behalf of the Wireless Communications Association International, Inc. (“WCA”) to respond to an ex parte filing by the Ad Hoc MMDS Licensee Consortium (“AMLC”) addressing WCA’s May 25, 2004 ex parte submission.<sup>1</sup>

In that filing, WCA demonstrated that it would be both bad policy and a violation of Section 553 of the Administrative Procedures Act for the Commission to strip substantial spectrum from existing Multipoint Distribution Service (“MDS”) and Instructional Television Fixed Service (“ITFS”) licensees for the creation of two new MDS channels that would then be auctioned. AMLC does not take issue with the arguments advanced by WCA. Rather, AMLC uses WCA’s filing as a springboard to lobby for a suggestion advanced in its comments that the Commission reclaim ITFS channels that are being leased for commercial use and reauction those channels. AMLC contends that “no one filed reply comments objecting to this proposal.” That is absurd. Although WCA did not specifically address this portion of AMLC’s filing in its joint reply comments with NIA and CTN, it should be evident from WCA’s support for the WCA-NIA-CTN joint proposal that WCA strongly opposes AMLC’s plan for eliminating excess capacity leasing and reauctioning ITFS spectrum. So that there is no confusion regarding the issue, WCA will now state expressly what it has heretofore just said implicitly – the Commission

---

<sup>1</sup> As WCA, the National ITFS Association (“NIA”) and the Catholic Television Network (“CTN”) noted in their joint reply comments in this proceeding,, AMLC has not disclosed its constituents other than to claim that they are the “silent majority” of MDS licensees. See Reply Comments of WCA, NIA and CTN, WT Docket No. 03-66, at 7 n. 13 (filed Oct.23, 2003).

Marlene H. Dortch

May 28, 2004

Page 2

should reject AMLC's proposal. Regardless of how the Commission ultimately resolves the present controversy over open eligibility for ITFS spectrum, excess capacity leasing will continue to play a vital role in the relationship between commercial wireless broadband providers and ITFS licensees.

Finally, it should be noted that AMLC's submission of comments proposing the commercial auctioning of ITFS spectrum that is not currently being used for educational purposes in no way cures the Section 553 defect raised by WCA. It is well-settled law that an agency cannot "bootstrap notice from a comment" -- the submission of comments in a rulemaking addressing an issue that is not within the ambit of a notice of proposed rulemaking does not cure a defect in the agency's notice to the public. *See, e.g. Shell Oil v. E.P.A.*, 950 F.2d 741, 760-61 (D.C. Cir. 1991). That would be especially true here, since AMLC's comments did not raise the possibility that the Commission would take spectrum from MDS licensees or from ITFS licensees that are making educational use in order to create new MDS channels that would be auctioned. Yet that is exactly what the proposal that WCA opposes would do.

Pursuant to Section 1.1206(b)(1), this letter is being filed through the Electronic Comment Filing System for inclusion in the public record of the above-reference proceeding. Should you have any questions regarding this filing, please contact the undersigned.

Respectfully submitted,

/s/Paul J. Sinderbrand

Paul J. Sinderbrand

Counsel to the Wireless Communications  
Association International, Inc.