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Federal Communications Commission
Office of the Secretary

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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Re: Amendment of Parts 1, 2 & 21 Governing Use of the Frequencies in 2.1 & 2.5 gHz Bands
PR Docket No. 92-80; RM-7909
Comments

Dear Ms. Searcy:

R. Gardner Partners ("RGP"), by its attorneys, hereby submits its comments in the above-captioned proceeding in response to the Commission's Notice of Proposed Rule Making, FCC 92-173, released May 8, 1992 ("NPRM").

Introduction

The Commission's NPRM seeks comment on several concrete proposals to address and remedy the delays that have affected the processing of applications for stations in the Multipoint Distribution Service (MDS). MDS stations (including both single-channel and multiple channel (MMDS) stations) have been primarily used to provide a multi-channel entertainment service to the public as an over-the-air competitor to traditional cable television service. This new cable-competitive service is often referred to as "wireless cable" service. The MDS channels are frequently used in conjunction with excess air-time capacity of Instructional Television Fixed Service (ITFS) stations, allowing wireless cable systems in a typical market to provide up to 32 channels of programming to subscribers.

While the Commission and Congress have recognized that wireless cable offers the most immediate competition to traditional cable television service, the processing delays encountered by applicants for new MDS stations and operators seeking expanded capacity and modifications, have inhibited the expansion of wireless cable service as a true competitor in the video marketplace. A major cause of the processing delays has been the massive number of applications filed for new MDS stations -- a phenomenon attributable in part to the great promise of wireless cable as a com-

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petitor to traditional cable. Of course, bona fide entrants, who constitute one subset of applicants, cannot be faulted for investing in a new service which has become economically viable sooner than other, marginal technologies. But speculative filers and application mills are to blame for much of the processing gridlock.

Other causes for delays in MDS application processing include: The Commission's failure to allocate adequate staffing to handle the large number of applications, settlement policies that have encouraged the filing of "speculative" applications from entities not interested in establishing the stations applied for, and in general a regulatory framework developed for other types of communications services that are no longer functionally related to the wireless cable service as it has evolved in recent years. It is these issues which the NPRM seeks to address by proposing substantial changes in the present system of reviewing, processing and granting MDS applications.

RGP is an applicant for new MMDS facilities in Santa Cruz, California and its principals are active in other wireless cable markets. We applaud the Commission's efforts to resolve the processing delays and the other impediments which have inhibited the development of wireless cable as a mature competitor to traditional cable television. RGP offers these comments based on both its day-to-day experience in dealing with the present processing system and its vision of how streamlined processing rules can take the wireless cable industry to a new level of competitiveness in the marketplace, for the ultimate benefit of the consumer.

Comments

1. Relocation of MDS Processing and Regulatory Responsibilities

The NPRM proposes, alternatively: The relocation of some or all of the processing of MDS applications and/or the regulation of MDS service to the Private Radio Bureau Licensing Division in Gettysburg; the relocation of both the processing of applications and the regulation of the service to the Mass Media Bureau; or continued processing and regulation by the Common Carrier Bureau. In support of the suggestion to relocate some or all aspects of application processing to the Private Radio Bureau in Gettysburg, the NPRM points to the similarity of the MDS applications to 900 MHz point-to-multipoint applications. In support of the alternative proposal to relocate the process-

ing and regulation of MDS to the Mass Media Bureau, the NPRM points to the similarity and interrelationship of MDS stations to ITFS, which has traditionally been processed and regulated by the Mass Media Bureau.

RGP submits that both the processing of MDS applications and the regulation of this service should remain with the Common Carrier Bureau staff in Washington, D.C. The relocation of the processing of MDS applications and/or the regulation of MDS service to either the Private Radio Bureau or the Mass Media Bureau will lead inevitably to further delay and confusion as those Bureaus bring their staffs to the necessary level of knowledge concerning technical issues and the differences in the processing rules from those applicable to other services now regulated by those Bureaus. The present Domestic Facilities Division staff of the Common Carrier Bureau is the most familiar with the rules, regulations and unique engineering considerations relating to MDS applications and stations, and it is inconceivable that a transfer of the applications and retraining of Private Radio Bureau or Mass Media Bureau staff could be accomplished with anywhere near the speed required to make the change administratively effective. The staff of the Common Carrier Bureau's Domestic Facilities Division and particularly the Domestic Radio Branch have demonstrated an outstanding level of competence, expertise and commitment to the development of the wireless cable industry. To reinvent that collective base of experience and knowledge would set back, not advance, the growth of the industry.

Indeed, just the physical transfer and reorganization of over 20,000 back-logged applications to Gettysburg is a Herculean task that would take many months. The extended down time that would be created through both a physical move of applications and an organizational move of regulatory responsibilities cannot be expected reasonably to result in overall expedition of application processing.

To the extent that H-Group application processing may have previously been handled expeditiously through greater staff availability and computerization capability in the Private Radio Bureau when those frequencies were assigned to OFS, that staffing and computerization capability should be relocated to the Common Carrier Bureau. Pending applications can continue to be processed by the current staff that is most knowledgeable about all aspects of MDS licensing. Reorganization of regulatory responsibilities through a wholesale relocation of MDS applica-

tion processing to the Private Radio Bureau or the Mass Media Bureau would be far less efficient than individualized staffing reassignments to the Common Carrier Bureau.

Further, RGP's own experiences with both the Private Radio Bureau and the Mass Media Bureau suggest that neither is as well prepared to deal with MDS applications as the present Domestic Facilities Division of the Common Carrier Bureau. RGP's experience has been that the Private Radio Bureau staff is less adept than the Common Carrier Bureau staff at dealing with unusual cases, is more likely to dismiss applications due to trivial or erroneously perceived errors, and is more difficult to communicate with to correct minor application problems. RGP's experience with ITFS application processing in the Mass Media Bureau presages that MDS would, like ITFS, be given an unacceptably low priority by the Mass Media Bureau, which presently has a tendency to focus far more attention and resources in radio, television and cable areas than on ITFS. Because ITFS applications have been filed in relatively low volume over the years, the Mass Media Bureau has never put into place the mechanical procedures, such as a computerized data base, necessary to deal with an application intensive industry like wireless cable. Accordingly, if there is a virtue in unifying the processing and regulation of ITFS and MDS, ITFS should be moved to the Common Carrier Bureau; the MDS service should <u>not</u> be moved to the Mass Media Bureau.

There are other practical advantages to maintaining application processing and regulatory responsibilities with the Common Carrier Bureau staff in Washington. Most attorneys, engineers, and consultants who interface regularly with the staff regarding application processing issues are based in Washington, and for those who are based elsewhere, Washington is far more accessible than Gettysburg. Further, the relocation of application processing and regulation to Gettysburg may well mean that the talents of the current staff would not be utilized -- a senseless waste of administrative resources -- unless they were willing to move themselves and their families to Gettysburg. Even if the option of shifting responsibilities for MDS processing and regulation to another Bureau based in Washington were adopted, this would be preferable to the Gettysburg alternative. At least under that scenario, the knowledgeable individuals could be reassigned to the new Bureau without requiring the complete disruption of their lives, and a wholesale turnover of responsible staff members would be much less likely. Such turnover of hands-on engineering and legal staff would be administratively counterproductive.

Finally, the alternative proposal to locate application processing in Gettysburg, while leaving regulatory oversight in Washington, will breed further inefficiencies. Often, application processing issues, especially those raised in petitions to deny, involve both legal and engineering considerations that can be more expeditiously resolved by commonly located staff; when staff attorneys can talk face-to-face with staff engineers, issues are no doubt better understood and problems resolved more expeditiously. Locating these critical staff members over a hundred miles apart would not expedite the processing of MDS applications that, unlike 900 MHz applications, have significant legal as well as engineering aspects.

2. Interference Protection Criteria

The NPRM at paragraphs 12-13 proposes the adoption of distance separation standards for co-channel and adjacent-channel MDS stations in place of the current system of interference protection. RGP opposes the proposal to convert to a system of distance separations. While there may be surface appeal in the apparent simplicity of distance separations, the present system allows for an extraordinary level of flexibility in designing MDS stations without leaving large gaps in the overall terrestrial coverage of wireless cable systems. The use of separations based on assumed antenna heights will virtually guarantee less than optimal coverage by wireless cable, to the obvious detriment of operators attempting to compete with traditional wired cable systems.

Similarly, the imposition of maximum height limits would restrict artificially the reach of wireless cable systems, hampering the systems's ability to compete in geographically expansive MSAs and RSAs. The use of the minimum distance separations would also preclude efficient MDS service to many major communities and MSAs in close proximity to each other, such as Washington/Baltimore, Boston/Providence and Miami/Fort Lauderdale/West Palm Beach.

As a practical matter, the conversion to a system based on distance separations comes far too late in the evolution of the industry. Nearly all MSAs have licensed MDS stations on at least one channel group or pending applications on file awaiting processing. Assuming that existing stations are grandfathered under the prior interference protection rules, their ability to modify, relocate, or improve their facilities at some later date would be severely hampered, if not precluded, by having to comply with the new distance separations standards.

Even more significantly, the proposed new distance separations system would require applicants to amend their pending applications to demonstrate compliance with the new separations standards. This would impose an additional burden on applicants already stultified in their efforts to establish new systems, and would invite numerous petitions for waivers. The requirement of thousands of additional filings from pending applicants will only worsen the backlog of applications now pending before the Commission.

RGP submits that the present interference protection rules are not overly burdensome either to applicants or to the Commission staff in view of the overall benefits of the interference protection system. The use of the interference protection standards has the effect of reducing the filing of speculative applications in that the preparation of applications under the present system requires greater planning on the part of applicants. Although the interference protection rules require more detailed analysis of the selected applicant by the Commission's staff, the greater care necessary in the preparation of applications makes it more difficult for application mills and speculators to produce and file generic, cookie-cutter applications usable in any market.

Finally with regard to the proposed distance separation system, the imposition of both separations requirements and interference protection with respect to co-channel and adjacent-channel ITFS stations as proposed in paragraph 15 of the NPRM would impose an unnecessarily high burden on MDS stations. The imposition of differing standards for MDS-MDS vs. MDS-ITFS station locations hinders the ability of MDS stations to co-locate their facilities with those of ITFS stations in their markets.

3. Utilization of Certifications

The NPRM at paragraph 16 proposes the use of simple certifications, like those used for Part 94 applications, in place of actual showings: (1) that an applicant is legally, financially, technically and otherwise qualified; (2) that there are frequencies available to enable an applicant to render satisfactory service; and (3) that an applicant's transmitter site is available to it. RGP urges the Commission not to relax the present requirements in these categories, which are not overly burdensome to sincere applicants. Mere certifications will allow speculators, unqualified applicants and application mills to abuse the processing system.

Indeed, if any shift in regulatory approach is undertaken, it should be in the direction of tightening, not relaxing, these requirements. The Commission's experience in the FM broadcast station application arena is instructive here. The move toward financial certification directly contributed to the filing of hundreds of speculative applications by unqualified entities more interested in settlement than in service to the public. The Commission itself recently recognized this effect and returned to the requirement of a financial showing for broadcast applicants. See Revision of Application for Construction Permit for Commercial Broadcast Station, 4 FCC Rcd. 3853, 3858, recon. denied, 5 FCC Rcd. 7267 (1990).

Similarly, the present MDS requirement of a site lease option requires an applicant to expend at least some (minimal) effort to plan a realistic facility that is more likely actually to be constructed upon grant. As in the case of the financial certification policy for broadcast applicants, speculators could be expected to certify the availability of a site without bothering to secure the rights to it, if nothing more is required. In this connection, a lesson found in the Private Radio Bureau's regulation of H-Channel OFS applications illustrates the potential for abuse on this score. The absence of the need to establish reasonable assurance of site availability in that service has resulted in rampant abuse by speculators with no genuine intention to construct their facilities, who deprive serious applicants of critical channel capacity. It is our understanding that relatively few of these OFS stations are ever constructed. In short, the requirement of securing at least a site lease option is not burdensome to serious, competent applicants, and this requirement demonstrates to the Commission that the station can in fact be constructed at the location that is proposed. At the same time, enforcement of this requirement involves insignificant staff time and effort.

4. Elimination of Settlements

The NPRM at paragraphs 17 and 21 proposes the elimination of settlement agreements among MDS applicants, and thus the elimination of cumulative lottery chances for settling applicants. The NPRM also proposes prohibiting applicants from holding any interest or position in more than one application for the same channels in any service area. Applications should be accepted only from applicants intending to operate the facilities applied for, not from applicants merely intending to get a share of a winning lottery ticket.

Unlike broadcast context, where there may be only a handful of applicants and a settlement can eliminate entirely the need for a lengthy comparative hearing (an obvious public interest benefit), settlement groups in the MDS context rarely eliminate the need for the lottery to be held, and the reduction in the number of lottery entrants provides no expedition of the lottery process. All that is accomplished by allowing pre-lottery settlements and settlement groups is the encouragement of speculative application filings and grist for the application mills. Settlements among MDS applicants provide no public interest benefits and should be prohibited. In this connection, we believe that damage caused by speculators under the current rules may be rectified by the Commission's dismissing all non-MSA applications not in tentative selectee status for which an appropriate rule waiver request has not been filed. In other words, no settlement groups should be permitted for future applications or pending applications for which lotteries have not been held.

5. Composition of Consolidated Data Base

The Commission has proposed at paragraph 22 of the NPRM to create an up-to-date data base that would reflect the technical parameters of all pending MDS, ITFS and H-channel applications, all existing MDS, ITFS and H-channel stations, and ITFS registered receive sites. Upon completion of the data base, the MDS portion would be put out for public comment, during which time entities whose applications or stations are inaccurately reflected or omitted would have an opportunity to submit corrections.

RGP believes that the consolidated data base is a critical need for everyone involved in MDS service, but that the data base should also include all applications that have been dismissed but are still subject to requests for reconsideration and reinstatement. Presently, such dismissed applications are not reflected in Commission inventories or independent data bases such as those maintained by DataWorld, and this void sometimes gives the false impression that the frequencies are available for application filing.

With respect to which technical parameters are appropriate, we recommend that the format of the new inventory essentially track that of the current MMDS inventory, with none of the present categories omitted. Only one line of data per entity is necessary. Anything more will burden the staff needlessly and

probably decrease the frequency with which revised data bases are made available to the public. In this connection, we note that, although the NPRM indicates that the inclusion of ITFS data in the master data base is contemplated, we have received some indications that this may not be the case, and that all MMDS inventory data may not be included. It is absolutely crucial for the streamlining envisaged by the NPRM, however, that ITFS and present MMDS inventory data be included in the new data base. Again, only essential information should be reflected. (For instance, ITFS receive site data is unnecessary.)

Additionally, the time period to be allowed for applicants for review and submission of corrections to the data base should be at least 90 days after release, and certainly no less than 60 days. The data base should be made available, regularly and in an up-dated form, in three different structures, arranged by market/state, by applicant name and by file number.

6. Order of Application Processing

At paragraphs 23-25 of the NPRM, the Commission has proposed to process and grant backlogged MDS applications in the following order: first, channel 1 and 2 MDS applications (by lottery for the first time); second, MMDS applications filed during the 1983 one-day filing window; and third, MMDS and H-channel applications filed between April 20, 1988, and the release of the NPRM. RGP suggests one variation to this order: in markets where it can be demonstrated that a post-1988 application is the first-filed for its channel group, or under the one-day rule is the first qualified application, and that a wireless cable operator is actively assembling a critical mass of channels for creation of a wireless cable system in the market, a waiver of the processing order should be available. Likewise, in markets where a licensee has entered into a channel lease agreement with the system developer/operator, applications to modify such license in furtherance of development of the system should be given priority in processing. Finally, in the same spirit, the Commission should give processing priority to applicants/licensees who propose to co-locate their facilities in order to facilitate the initiation of new wireless service in the market. Such an approach would directly foster the growth of cable-competitive wireless cable systems.

7. Inclusion of Unapplied-For Frequencies in New Authorizations and Required Build-Outs of Large MSAs/RSAs

The Commission also sought comment (see paragraph 27) as to whether a selectee should be awarded all remaining frequencies in an MSA or RSA without regard to the frequencies originally requested. RGP endorses this proposal, with the caveat that Channels 1 and 2/2A should be excluded unless specifically requested by the applicant, because many wireless cable operators do not desire to utilize these original MDS channels in their systems.

Additionally, the Commission should not require build-outs of an MSA or RSA (as proposed at paragraph 28 of the NPRM) if an applicant has not sought to serve the entire MSA or RSA. Rather, the unserved area should be made available for new applications after grant of the initial MSA or RSA application so long as they comply with established protection criteria. An original applicant may not seek to serve the entire area of a geographically large MSA or RSA due to economic or marketing constraints, and in such circumstances new applicants may be better able or more willing to deliver new MDS service to the public. Thus, an opportunity for fill-in applications to serve unserved or unprotected areas of large MSAs and RSAs should be permitted after the grant of the initial applications.

In a related connection, we urge the Commission to expand the MDS protected service area from 15 to 25 miles or to the MSA boundary, whichever is smaller. This service area standard is consistent with the current capability of wireless cable technology and with the natural configuration of population groupings in many markets.

8. Other Proposals

RGP offers the following additional proposals for consideration by the Commission in order to expedite further the development of new wireless cable service:

A. The Commission should more strictly enforce the construction deadlines for new ITFS stations. The Commission should not be unduly lenient with extension requests from ITFS permittees, especially where the existence of such unbuilt ITFS stations is impeding the development of adjacent-channel MMDS stations. In no event should the Commission grant more than two extensions of the ITFS construction deadline.

B. We recommend a change in the current rules governing the ITFS-MDS relationship. At this time, the rules require that a specific number of hours per week be transmitted over each leased ITFS channel. As a practical matter, by virtue of channel mapping, both the educational receive sites and system subscribers perceive the programming as if it were transmitted over a single channel. There is no benefit to the educator to have actual transmissions on multiple channels, other than to satisfy the letter of the Part 14 rule that equal usage be made of each channel. But there is a great disadvantage to the wireless cable operator who is forced to purchase and maintain the channel mapping equipment.

Given these circumstances, we urge the following approach: In the next 3-5 years, compression technology will be refined and will have become widely available as a reliable vehicle to multiply channel capacity. If the wireless cable operator remains subject to the burden of channel mapping, there will be no incentive in the near future, when compression technology has matured, to continue to utilize ITFS frequencies when it would be simpler and more efficient to abandon the channel mapping requirement as to those frequencies in favor of the unrestricted use of MMDS frequencies. For this reason, we recommend that the Commission allow educational institutions to be licensed on all four channels of an ITFS channel group as long as the total cumulative programming time requirement is met.

C. RGP suggests that MDS completion of construction deadlines be made common for all licenses in the market, consistent with the last-granted license. Cable competitive wireless cable operations cannot realistically be launched with only a few channels -- a critical mass of at least 12 channels is required. At the very least, extensions of construction deadlines should be more readily available for the first-granted MMDS applications in particular markets on a case-by-case basis.

D. RGP also encourages the Commission to expedite review of requests for reinstatement of channel groups which have previously been dismissed. Reinstatement should be granted to all applicants that perfected their applications within thirty days of dismissal, with other reinstatement requests being denied and new lotteries scheduled for those markets. We believe that this approach would fairly accommodate the circumstances of applicants who may not have originally complied with the absolute deadline in a deficiency letter, but nevertheless responsively cured all deficiencies within thirty days. Because a substan-

tial number of applications fall into this category, adopting this procedure would significantly reduce the number of pending reinstatement requests. Of course, the ninety day conditions routinely attaching to newly issued conditional licenses would apply in these circumstances.

E. Commercial ITFS applications filed since January 2, 1992, should be put on a cut-off list immediately. RGP's understanding is that applications in this category have been sitting in boxes in Gettysburg for several months. Unless these applications are accorded cut-off protection quickly, ITFS over-filings (particularly by unscrupulous entities) will continue to subvert the very purpose for opening the eight-channel reserve of ITFS frequencies for commercial application.

F. The Commission should prohibit educational and other ITFS eligible entities from entering into channel lease agreements with any party other than the wireless cable operator. The eligibility criteria should be the same as for a commercial ITFS application by a wireless cable operator. The Commission is well aware of the modus operandi of firms such as Rural Vision, which enter into lease agreements with hapless local schools only to hold critical channels for a king's ransom, utterly beyond the reach of wireless operators unless they accede to absurd lease demands. There is no place in the industry for such behavior and the Commission should modify the rules to eliminate it.

Conclusion

We believe the recommendations contained herein are a reasonable response to the processing dilemma which underlies the NPRM. Accordingly, we urge the Commission to include the parameters discussed herein in its revision of the rules.

Respectfully submitted,

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