RECEIVED

JUN 29 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Amendment of Parts 1, 2, and 21 of the	)	PR Docket No. 92-80
Commission's Rules Governing Use of the	)	RM 7909
Frequencies in the 2.1 and 2.5 GHz Bands	)	

ORIGINAL FILE

COMMENTS

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

Paul J. Sinderbrand
Dawn G. Alexander

Keck, Mahin & Cate
1201 New York Avenue, N.W.
Penthouse Suite
Washington, D.C. 20005-3919
(202) 789-3400

Its Attorneys

June 29, 1992

No. of Copies rec'd 0+9
List ABCDE

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE MDS APPLICATION PROCESSING BACKLOG HAS BEEN CAUSED BY CHRONIC UNDERSTAFFING OF THE DOMESTIC RADIO BRANCH AND THE EMERGENCE OF MDS APPLICATION MILLS, NOT THE COMMISSION'S INTERFERENCE PROTECTION RULES. 9

A. The Current Backlog Has Been Caused By Understaffing And The Activities Of The Application Mills. 9

B. The Commission Can Take Immediate Steps To Minimize The Adverse Impact Of The Freeze Without The Need Of Formally Adopting New Rules. 14

C. The Interference Protection Rules Are Not Materially Slowing The Processing Of MDS Applications. 20

D. Once The Application Mills Are Deterred, The Commission Should Be Able To Process MDS Applications In Timely Fashion Under The Current Interference Protection Rules. 22

III. THE COMMISSION SHOULD ACT FORCEFULLY TO DETER THE FILING OF SPECULATIVE AND GREENMAIL APPLICATIONS. . . . 24

A. The Commission Should Adopt The Proposals Advanced In WCA's Petition For Rulemaking To Stem The Tide Of Application Mill Generated Filings. 24

1. Barring Settlements Will Reduce The Number of Application Mill Generated Filings That Continue To Flood The Domestic Radio Branch. 26

2. The Commission Should Amend Sections 21.901(d)(2) and 21.901(f)(2) Now To Stop Cellular-Style Alliances Before They Develop. 31

B. The Commission Should Revise Its Filing Fees For MDS Applications To Deter Speculation. 33

C. The Protected Service Area Must Be Redefined To Deter Speculative Applications. 35

D. The Commission Should Reconsider Its Proposal To Revise The Rules Governing The Assignment Of MDS Applications And Conditional Licenses And The Transfer Of Control Of MDS Applicants And Conditional Licensees. 43

IV. ADOPTION OF THE REVISED INTERFERENCE PROTECTION RULES PROPOSED IN THE NPRM, EVEN ON AN INTERIM BASIS TO ADDRESS THE EXISTING BACKLOG, WOULD HAVE A DEVASTATING IMPACT ON THE GROWTH OF WIRELESS CABLE. 46

A. Adoption Of The Eighty and Forty-Eight Kilometer Cochannel and Adjacent Channel Station-To-Station Separation Standards Proposed In The NPRM Would Frustrate The Growth Of Wireless Cable. 49

1. Any Separation Standards Must Be Calculated To Reflect The Mounting Of Reception Equipment Above Ground Level. 50

2. The *NPRM* Makes Other Erroneous Assumptions That Must Be Corrected. 51

3. Adoption Of The Proposed Station-To-Station Separation Standards Would Be Inappropriate. 52

B. The Commission Should Abandon Its Proposal To Require MDS Conditional Licensees To Protect Actual ITFS Receive Sites Installed At The Time MDS Operations Commence. 56

C. The Proposed Imposition Of A Restriction On Antenna Height Is Inappropriate And Would Adversely Impact Existing Operators. 59

V. THE COMMISSION SHOULD AFFORD THE HIGHEST PROCESSING PRIORITY TO THOSE APPLICATIONS MOST LIKELY TO BENEFIT A WIRELESS CABLE OPERATOR. 64

VI. MODERATE RULE CHANGES WILL EXPEDITE THE PROCESSING OF MDS APPLICATIONS. 68

A. The Commission Should Adopt The NPRM's Proposal To Revise The New Rules Regarding Service Of Interference Analyses On ITFS Interests To Avoid Unnecessary Delays In Processing MDS Applications. 68

B. The Commission Should Amend Section 21.902(c) To Provide Certainty As To Which Facilities An Applicant Must Analyze For Potential Interference, Thereby Expediting Processing. 70

C. The Commission Should Simplify Its Rules And The MDS Application Form In Order To Avoid Wasting Staff Resources Considering Elements That Do Not Deter Speculation. 72

D. The Commission Should Adopt Its Proposal To Discontinue The Licensing Of Very Low Power Signal Boosters. 73

VII. THE COMMISSION SHOULD COMBINE IN A SINGLE BRANCH THE PROCESSING OF MDS AND ITFS APPLICATIONS AND THE REGULATION OF THE TWO SERVICES. 74

VIII. CONCLUSION 78

EXECUTIVE SUMMARY

WCA applauds the Commission's efforts to extract the wireless cable industry from the grip of the application mills that have so bogged down MDS application processing. However, WCA believes that the *NPRM* proposes technical solutions so radical that there adoption would have a severe adverse impact on the future growth of the wireless cable industry. In WCA's view, there are some less drastic steps that the Commission can take in order to expedite the processing of MDS applications and otherwise promote the development of the wireless cable industry, while retaining the current approach to interference protection:

I. STEPS TOWARDS ELIMINATING THE CURRENT BACKLOG:

A. The staff in Gettysburg should be tasked with creating a combined database of ITFS and MDS stations and applications and all future applications should be routed through Gettysburg for initial processing to assure they promptly appear on public notice. Right now, the lack of a definitive database makes the processing of many critical applications difficult, if not impossible, for the staff. It also makes the filing of new MDS applications a "crap shoot" because it is impossible to determine whether there are any previously proposed MDS or ITFS facilities that must be protected. A combined database will not only help the industry, it will provide the staff members charged with processing MDS applications ready access to the ITFS receive site information needed to complete processing.

B. The Common Carrier Bureau has a computer program designed to screen out those applications that violate the MDS filing freeze. Hundreds, if not thousands, of pending applications meet that description. That program should be utilized, the violators identified and the offending applications returned if they do not seek a waiver. Much of that work has been completed, but the applications are sitting in boxes awaiting the staff attention necessary to physically return them to the applicants. Perhaps the staff in Gettysburg can provide the manpower necessary to complete the task.

C. The staff should quickly resolve the pending legal issues and conduct new lotteries among the 1983 remaining MDS applicants. Once those new lotteries are held, the tentative selectees should be issued conditional licenses and dismiss the lottery losing applications. In this way, the market will be freed for new applicants in the event the conditional licensee fails to meet the conditions imposed upon it.This should be a high priority item, for frequently the MDS channels awaiting a new lottery are critical to the

development of a wireless cable system in the market, and many major markets are involved.

D. The Commission should select alternative tentative selectees in future lotteries to avoid the need for new lotteries when the winner's application is dismissed.

E. The Commission should combine ITFS and MDS application processing in a single branch. Scarce engineering resources are being wasted because redundant work is being done at the Domestic Radio Branch and the Distribution Facilities Branch. Particularly now that MDS applications can be filed for any of the ITFS channels where educational use is minimal, the balkanization of application processing makes little sense. Combining staffs will also afford management the flexibility to move personnel between ITFS and MDS issues as needs arise over time and should eliminate the inter-Bureau squabbles that have erupted in the past.

II. STEPS THAT CAN IMMEDIATELY MINIMIZE BURDENS ON THE INDUSTRY WITHOUT A RULEMAKING:

A. The Commission should immediately implement WCA's proposal for joint market-by-market processing of ITFS and MDS applications to speed the launch of new wireless cable systems.

B. At present, the Domestic Radio Branch does not make MDS applications available for public inspection once they are listed on the inventory of pending MDS applications, but instead waits until they are accepted for filing. Yet, it is taking months for applications to be accepted for filing. As a result, the developer of a wireless cable system often finds it must protect previously proposed stations, but cannot review the applications for those stations to determine whether system design changes are necessary. Obviously, this is delaying the launch of new systems. The Commission should make MDS applications available for public inspection as soon as they are listed on the inventory so as to avoid these delays.

III. RULE CHANGES TO AVOID FUTURE BACKLOGS:

A. The Commission should the proposed restrictions on full and partial lottery settlements to deter application mills from continuing to overrun the MDS application processing system. The ability of the Mass Media Bureau to timely process most ITFS applications demonstrates that when speculative filings are eliminated (and there are only a few speculative ITFS

applications being filed), the flow of applications from legitimate wireless cable entities can be handled. After all, since 20 of the 33 wireless cable channels are ITFS channels, the Mass Media Bureau generally has the bulk of the processing work associated with wireless cable system development. The experience of the Mass Media Bureau demonstrates that it is not the interference protection rules that are the problem, it is the number of speculative applications.

B. The Commission should adopt pending WCA's proposal for a revised protected service area definition to deter the filing of speculative, greenmail applications.

C. Increasing the filing fee associated with an application for a new MDS conditional license will deter speculative filings.

D. The Commission should adopt the proposal to reduce delays in the processing of MDS applications by simplifying the process of coordinating MDS applications with ITFS entities. Bluntly put, the ITFS service requirements delay the processing of applications for far longer than necessary to protect the legitimate interests of the ITFS community. That, coupled with a definitive database of ITFS receive sites available to processing engineers, should permit the Commission to expedite the processing of MDS applications without compromising the interference protection afforded ITFS stations or requiring wireless operators to construct facilities without any assurance that they can be operated.

E. The Commission should modify Section 21.902(c) to clarify which previously proposed stations a MDS applicant must analyze for potential interference. Such an approach will eliminate the need for the processing staff to seek additional information from applicants, expediting service.

F. The Commission should eliminate the need for applications for very low power signal boosters and instead move towards a block licensing system. To require the filing of a Form 494 and a Form 494A for each very low power signal booster and the processing of those forms by the staff places unnecessary burdens on both the applicant and the Commission's staff. Given the very limited potential for interference from a very low power signal booster, the wireless operator installing such a device should merely be required to notify the Commission and certify that the interference, FAA and other requirements have been met.

RECEIVED

JUN 29 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Amendment of Parts 1, 2, and 21 of the	)	PR Docket No. 92-80
Commission's Rules Governing Use of the	)	RM 7909
Frequencies in the 2.1 and 2.5 GHz Bands	)	

COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.415(a) of the Commission's Rules, hereby submits its inital comments in response to the *Notice of Proposed Rule Making* ("*NPRM*") in the captioned proceeding.

I. INTRODUCTION

WCA is the trade association of the wireless cable industry. Its members include the operators of virtually every wireless cable system in operation in the United States, as well as equipment manufacturers, programmers and holders of the radio licenses that are critical to the distribution of wireless cable services. As such, WCA has a vital interest in the subject of this proceeding -- the future of the rules and policies that govern the licensing of the Multipoint Distribution Service ("MDS")[1] and Instructional

---

[1]For purposes of this pleading, WCA will employ the convention adopted in the *NPRM* of using "MDS" to refer collectively to the single channel and multichannel MDS authorizations, unless otherwise indicated. *See Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 GHz and 2.5 GHz Bands*, FCC 92-173, at 1 n.1 (rel. May 8, 1992)[hereinafter cited as "*NPRM*"). WCA also supports the Commission's proposal to revise its Rules as necessary to reflect this convention. *Id.*

Television Fixed Service ("ITFS") facilities that wireless cable system operators depend upon to distribute programming to their subscribers.[2]

In the little more than two years that have passed since WCA filed its seminal Petition for Rule Making that led to the initiation of General Docket No. 90-54, the Commission has done yeoman's service in revisiting and revising a variety of rules and policies that had inadvertently frustrated the fullest development of wireless cable as an effective competitor to traditional coaxial cable television systems. As the Commission acknowledged when it opened that proceeding:

> the rules and policies governing the spectrum assets that can be assembed and utilized by [wireless cable] operators not only contain possibly obsolete provisions, but also vary substantively from service to service. These restrictions and variations have adverse effects on [wireless cable] operators in terms of capability, convenience, and simplicity of use, and consequently on [wireless cable]'s competitiveness in today's multichannel video marketplace, which is increasingly characterized by high capacity systems. The time has come, then, to review and to rationalize and simplify, where possible, the host of disparate technical,

---

[2]*See, e.g. Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6410 (1990)[hereinafter cited as "*Gen. Docket No. 90-54 R&O*"].

> procedural, ownership, and other requirements and restrictions applicable to [wireless cable] operators, with a view towards facilitating this service.[3]

Although WCA's pending Petition for Partial Reconsideration of the *Order on Reconsideration* in General Docket No. 90-54 illustrates that a few material regulatory obstacles remain despite the Commission's efforts over the past two years,[4] the Commission most certainly has made significant strides towards its goal of assuring that wireless cable serve as "a competitive spur to coaxial cable system operators."[5]

In no small part because so many of the inadvertent regulatory barriers have been lifted over the past two years, the wireless cable industry is today proving itself ready, willing and able to provide the competitive spur envisioned by the Commission. To date, there are approximately 100 wireless cable systems in operation across America, serving over one half million subscribers. WCA is aware that serious prospective operators are currently developing systems in at least 100 other communities. In short, the industry is proving that Commissioner Duggan was correct when, a year ago, he proclaimed:

---

[3]*Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 971 (1990)[hereinafter cited as *Gen. Docket No. 90-54 NPRM/NOI*"].

[4]WCA Petition for Partial Partial Reconsideration, Gen. Docket No. 90-54 (filed Dec. 13, 1991)[hereinafter cited as "WCA Petition for Partial Reconsideration"].

[5]*Id.*

> I believe that of all the emerging alternatives to traditional cable, wireless cable appears to be the best today. Why? Because it is easier and less expensive to get up and running. Because this nascent industry has proven its power to overcome formidable obstacles. Because wireless is proving, dramatically, its appeal to consumers. And because wireless cable is here, now, available in the real world -- ready to compete today.[6]

WCA certainly appreciates the Commission's intention of further promoting the emergence of wireless cable through the initiation of this proceeding and the release of the *NPRM*. Bluntly put, however, WCA fears that if some of the more radical proposals being advanced in the *NPRM* in this proceeding are adopted, the success of the Commission's efforts in General Docket No. 90-54 to promote the emergence of wireless cable as effective competition to coaxial cable will be undermined. Make no mistake, as will be discussed in more detail below, WCA believes that many of the proposals advanced in the *NPRM* will have a positive impact on the wireless cable industry and should be implemented. Adoption of the proposals advanced in the *NPRM* concerning the elimination of lottery settlement groups, tightening of the one-to-a-market rule, utililizing lotteries to select from among mutually exclusive MDS Channel 1, 2 and 2A applicants, simplifying petition to deny procedures, and eliminating very low power booster licensing will all benefit the wireless cable industry.

---

[6]"'Inquiring Whose Son This Stripling Is . . .': The Growth and Future of Wireless Cable", Remarks of Commissioner Ervin S. Duggan before the Wireless Cable Association, at 4 (July 23, 1991) (underscoring omitted).

To the extent that WCA will be disagreeing in the following pages with some of the proposals advanced in the *NPRM* intended to expedite processing, those disagreements stem from WCA's concerns over (i) the adverse impact that such proposals will have on the development of additional wireless cable systems, and (ii) the possibility of subjecting existing wireless cable subscribers to harmful electrical interference if the proposals advanced in the *NPRM* are adopted. These concerns derive from the proposals in the *NPRM* to scrap the current MDS/ITFS interference protection standards and replace them with station-to-station separation standards, to impose limitations on the height above average terrain ("HAAT") of MDS transmission antennas, and to require MDS licenses to provide far greater protection to ITFS receive sites than currently is required. Even if implementation of such rules would ease the processing backlog (and WCA has doubts that it would), WCA can state without reservation that their adoption would have a serious adverse impact on the industry.

Of course, WCA agrees with the Commission that the emergence of wireless cable is being slowed somewhat by a backlog of MDS applications.[7] Where WCA and the Commission part company, however, is with regard to the fundamental premise underlying the *NPRM* that the Commission's MDS and ITFS interference protection rules are a substantial cause of this backlog and must undergo material change to foster the growth of wireless cable.

---

[7]*See NPRM, supra* note 1, at 3-4.

As WCA will discuss more fully in Section II, there are two primary causes for the MDS processing backlog: (1) understaffing of the Common Carrier Bureau's Domestic Radio Branch; and, most significantly, (2) the emergence of MDS application mills. In Section III, WCA will discuss the proposals advanced in the *NPRM* to frustrate the filing of speculative applications, and will propose additional methods that WCA believes will further stem the tide of illegitimate MDS applications. In Section IV, WCA will demonstrate that the flexibility inherent in the Commission's current ITFS and MDS interference protection rules has generally served the industry well, and that radical changes in those rules such as proposed in the *NPRM* will have a devastating impact on the development of wireless cable systems, particularly in the major markets. Simply stated, the quick fixes of the *NPRM*, if implemented, would do more harm than good.[8]

---

[8]Typical of the misplaced reliance on easy solutions is the solicitation in the *NPRM* of on comment on whether "it would simply be preferable to return all pending applications and establish a new window for acceptance of MDS applications." *NPRM, supra* note 1, at ¶ 29. Adoption of such an approach would be a disaster for the wireless cable industry.

All across the country, existing wireless cable systems are making plans to add additional channels and new systems are being planned on the basis of MDS applications that are presently on file. For all the difficulties the Commission is having in processing the pending MDS applications, operators are generally able to determine from the Domestic Radio Branch's informal inventory of pending MDS applications with a high degree of accuracy which applications will be granted. Accordingly, substantial planning is made and airtime leasing contracts entered into even before conditional licenses are issued. Were the Commission to dismiss all of the applications pending before it, the Commission would moot a substantial amount of this planning, substantially slowing future development of the industry.

(continued...)

Therefore, WCA urges the Commission to focus its efforts in this proceeding on plugging the regulatory holes that have encouraged application mills, on making relatively minor adjustments to its rules to expedite and improve wireless cable service without adversely impacting the public as proposed by WCA in Section VI, on streamlining the regulatory environment by combining ITFS and MDS regulatory responsibility in a single branch as discussed by WCA in Section VII, and on developing a systematic approach to processing the application backlog that currently exists as proposed by WCA in Section V.

In considering the remainder of these comments, and in addressing the issues raised in the *NPRM*, WCA would urge the Commission to keep one consideration paramount -- expediting the issuance of MDS licenses will do absolutely nothing to help the wireless cable industry, and could substantially harm it, unless three fundamental criteria are met:

---

[8](...continued)
In addition, dismissing all pending applications and opening a new filing window would create a field day for speculators and greenmailers. Remember, the whole purpose of the Commission's "first come, first served" application processing system was to prevent greenmail applications once a wireless cable operator publicly identified its spectrum needs by submitting its own MDS applications. Wireless operators by the dozens have on file with the Commission applications that reveal a significant amount about their plans and their needs. To dismiss those applications and open a new filing window is to invite speculators and greenmailers to file applications for no other purpose than to frustrate these legitimate wireless cable operators who revealed their business plans in good faith reliance on the cut-off protection afforded by "first come, first served" processing.

- Each newly-licensed MDS facility for a given area can be collocated with the other facilities that will comprise that area's wireless cable system;[9]

- Each newly-licensed MDS facility is adequately protected from harmful electrical interference; and

- Each newly-licensed MDS facility provides to nearby cochannel and adjacent channel stations appropriate interference protection.

Simply, the fundamental flaw in the *NPRM* is that it gives primacy to speed of application processing, rather than to the quality of the wireless cable service to the public that will result once those applications are granted. Unless the rules adopted in response to the *NPRM* fulfill the three criteria set forth above, MDS licenses will be worth little more than the paper they are printed on. WCA submits that adoption of the proposals it advances in the following pages will not only expedite the issuance of MDS authorizations, but, more importantly, will improve the quality of service that wireless cable operators can offer to their subscribers.

---

[9]As the Commission is well aware, the "colocation of facilities is essential if wireless cable is to become a viable multichannel service provider." *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6472, 6474 (1990).

II. THE MDS APPLICATION PROCESSING BACKLOG HAS BEEN CAUSED BY CHRONIC UNDERSTAFFING OF THE DOMESTIC RADIO BRANCH AND THE EMERGENCE OF MDS APPLICATION MILLS, NOT THE COMMISSION'S INTERFERENCE PROTECTION RULES.

A. The Current Backlog Has Been Caused By Understaffing And The Activities Of The Application Mills.

Prior to the creation of the MDS in 1983, the Domestic Radio Branch was processing just a relatively few single channel MDS applications each year. Yet, despite the filing of close to 20,000 multichannel MDS ("MMDS") applications in September 1983 and the dramatic increase in workload that resulted, until recently the number of staffers assigned to MDS application processing in the Domestic Radio Branch was permitted to shrink to a level far smaller than it was prior to the 1983 application frenzy. And, during the nine years since the MMDS was created, the few staffers nominially assigned to processing MDS applications have often been delegated to other tasks. By the time Chairman Sikes became cognizant of the problem and arranged for increased staffing, the backlog had reached epic proportions. It is little wonder, then, that the Domestic Radio Branch historically has been so woefully slow in processing MDS applications.[10]

---

[10]In the *NPRM*, the Commission suggests that the use of comparative hearings to select from among mutually exclusive MDS Channel 1, 2 and 2A applicants has been material factor in the backlog. *See NPRM, supra* note 1, at 4 n.13. While it appears that only a relatively few number of mutually exclusive applications for these channels are pending, WCA agrees with the Commission that random selection procedures, rather than comparative hearings, are a more appropriate mechanism for awarding MDS Channel 1, 2 and 2A authorizations.

The problems associated with the understaffing of the Domestic Radio Branch have been exacerbated by the so-called "application mills." As the Commission recognizes in the *NPRM* and as has been reported in the press,[11] application mills have been drumming up an unprecedented number of applications for new MMDS facilities. P.T. Barnum must have been right when he declared that "there's a sucker born every minute," for thousands of MDS applications generated by the application mills have been filed with the Commission since the phenomenon began in 1990. It is, in the words of the *New York Times*, "a speculative frenzy that is likely to cost naive investors dearly."[12] The North American Securities Administrators Association has declared that wireless cable application fraud is the "fastest growing investment telemarketing scam in

---

[11]*See, e.g.* Carnevale, "Fraud Complaints Grow in Young Wireless-Cable Field," *Wall St. J.*, at B2 (June 24, 1992)[hereinafter cited as "Fraud Complaints Grow"]; Crenshaw, "No Jackpot in This Lottery," *Washington Post*, at H3 (April 19, 1992); Vranizan and Lansner, "Fraud Hits Wireless Cable TV," *Orange County Register*, Business 1 (May 31, 1992)[hereinafter cited as "Fraud Hits"]; Flint, "Wireless Cable Lotteries Attacked By FTC," *Broadcasting*, at 42 (April 20, 1992); Higgins, "Regulators Target Wireless Cable Mills", *Multichannel News*, at 1 (Nov. 4, 1991)[hereinafter cited as "Regulators Target Wireless Cable Mills"]; Andrews, "Investing In New TV Field Brings Scrutiny," *N.Y. Times*, at 25 (Sept. 2, 1991)[hereinafter cited as "Investing In New TV Field Brings Scrutiny"]; Higgins, "Wireless Mills Assets Frozen, Then Thawed by Court," *Multichannel News*, at 43 (Nov. 11, 1991)[hereinafter cited as "Wireless Mill Assets Frozen"]; "High-Tech Pie In The Sky?," *Business Week*, at 41 (May 6, 1991); "Wireless Cable Marketers Must Change Ads Claims For Applications," *Communications Daily*, at 4 (April 26, 1991); "MMDS Marketer Subject to New Restraining Order," *Communications Daily*, at 2 (April 5, 1991); "FTC Charges Wireless Cable Marketer With Fraud in Application Sales," *Communications Daily*, at 2 (April 2, 1991); "MMDS Application Sellers Hit in Alaska and Hawaii," *Communications Daily*, at 5 (March 13, 1991).

[12]"Investing In New TV Field Brings Scrutiny," *supra* note 11.

the U.S."[13] Although it is impossible to tell with any precision, recent press reports suggest that MDS application mills may have collected upwards of $75 million to date.[14] And, as WCA has learned from conversations with victims of the application mills, many mills appear to have targeted relatively unsophisticated investors who can ill-afford to file speculative MDS applications.

For well over a year, WCA has been pressing federal and state authorities to protect the public from the unscrupulous application mills. WCA has been working extensively with, among others, the Federal Trade Commission ("FTC"), the Department of Justice, the Securities and Exchange Commission and the National Association of Attorneys General to put an end to this massive fraud. Already, Alaska, Arizona, Hawaii, Massachusetts, Michigan, Mississippi and North Dakota have ordered application marketers to cease doing business within their borders, to stop misleading promotional efforts and/or to make formal securities offerings that disclose all potential risks.[15] The FTC has scored similar successes against the application mills it has targeted. However, the wheels of justice have turned slowly and the most brazen application mills appear undeterred.

---

[13]"Wireless Cable Application Fraud," *Communications Daily, at 8 (April 7, 1992).*

[14]*See* "Fraud Complaints Grow," *supra* note 11, at B2; "Fraud Hits," *supra* note 11, at 1; "Regulators Target Wireless Cable Mills," *supra* note 11, at 46.

[15]*See* "Many USIMTA Members Linked to Firms Investigated by FTC, Others," *Communications Daily*, at 1-2 (May 22, 1992); "Investing In New TV Field Brings Scrutiny," *supra* note 11, at 25.

As WCA demonstrated in the Petition for Rulemaking that commenced this proceeding, the application mills have done more than just victimize their customers -- they have overburdened the Commission's MDS application processing system, delaying the introduction of wireless cable service to the public in many areas of the country.[16] Even with recent staffing increases, the Domestic Radio Branch simply lacks the manpower to rapidly process the volume of mill-generated applications it was receiving prior to the total freeze on new MDS applications announced in the *NPRM*.[17] The inability of the Commission to process MDS applications in timely fashion is posing serious problems for the wireless cable industry, for it makes it significantly more difficult for wireless cable operators to secure the channel capacity they need in order to provide a viable service to the public.

First, the sheer volume of applications means that none are processed in timely fashion as a matter of course. Unfortunately, not all of the pending applications are speculative filings generated by application mills; many are applications proposing facilities that are critical to legitimate wireless cable system operators. The Commission's recent rule changes, combined with the recent successful launches of new systems, have led to more time-critical applications being filed by wireless cable

---

[16]Petition of WCA for Rulemaking, RM-7909 (filed Dec. 12, 1991)[hereinafter cited as "WCA Petition"].

[17]*See NPRM supra* note 1, at ¶ 19.

operators than ever before.[18] However, absent time-consuming and expensive lobbying of the Commission's processing staff, the Eighth Floor, and sometimes even Congress, these critical applications tend to get buried in the avalanche of mill-generated filings. A wireless cable operator must constantly press in order to secure the timely processing of any time-sensitive application. Even then, application processing is taking many months longer than it did before in the pre-mill days. While the Domestic Radio Branch staff generally attempts to be responsive to the needs of wireless cable operators, its efforts are inevitably hampered by the number of mill-generated filings.[19]

Second, the numbers of applications being filed by the mills makes it impossible for the staff to even place new applications in the Commission's unofficial inventory of pending applications in timely fashion, much less process then. As a result, prospective wireless cable system developers are unable to design new systems with any

---

[18]These are generally for applications for modifications of licensed facilities to co-locate and/or increase power, amendments to pending lottery-winning applications to co-locate and/or increase power, applications for new stations and applications seeking consent to the assignment of licenses to the wireless operator.

[19]As is discussed *infra* at Section VI.A, the impact of delays in getting applications on public notice was recently magnified many-fold. In its *Order on Reconsideration* in General Docket No. 90-54, however, the Commission amended Section 21.902 of the Rules so that a MMDS applicant cannot even serve potentially affected ITFS applicants or licenses with interference analyses until after the Commission gives public notice that the application is not mutually-exclusive with other applications. From that point, ITFS interests have 120 days to petition to deny. While WCA has petitioned for reconsideration of that aspect of the *Order on Reconsideration*, it is obvious that delays in placing applications on public notice will now directly extend the time an applicant must wait for a grant. *See* WCA Petition for Partial Reconsideration, *supra* note 4, at 16-20.

degree of certainty that those efforts will yield results, for they cannot determine what facilities have been previously proposed and must be protected. It happens too often that a prospective wireless cable operator will spend several thousands of dollars to engineer a system and prepare and file applications, only to discover that its applications are untimely with respect to mill-generated filings submitted earlier, but which had not yet appeared in the Domestic Radio Branch's inventory of pending MMDS applications.

Third, at present the Domestic Radio Branch does not make MMDS applications available for public inspection once they are listed on the inventory of pending MMDS applications, but instead waits until they are formally accepted for filing. Yet, it is taking months, if not years, for many MDS applications to be accepted for filing. As a result, the developer of a wireless cable system often finds it must protect previously proposed stations, but cannot review the applications for those stations to determine what, if any, system design changes are necessary. The technical flexibility inherent in the Commission's interference protection rules often permits a wireless cable operator to design around speculative, mill-generated applications, but engineering solutions can only be invoked if the operator can review the mill-generated filings.

B. The Commission Can Take Immediate Steps To Minimize The Adverse Impact Of The Freeze Without The Need Of Formally Adopting New Rules.

WCA believes that while adoption of the rule revisions advanced in WCA's Petition for Rulemaking and below to frustrate the application mills should prevent the current situation from reoccurring, that is little solace to one who is attempting to develop

a wireless cable system today. Unfortunately, there is no painless solution -- the thousands of pending applications simply must be processed, added to the Commission's data base, made available for public inspection and subjected to the lottery procedure.[20] By immediately adopting the proposals advanced in the remainder of this Section I, none of which require the formal adoption of new rules, the Commission can begin the process of expediting processing and alleviate some of the burden that the mills have put on legitimate wireless cable operators.

The first order of business must be to add all of the pending applications to a definitive computerized database and to maintain the currency of the database. In light of these considerations, WCA strongly supports the Commission's willingness to utilize excess staff at its Gettysburg facility to create an accurate database of MDS and ITFS applications.[21]

Once that database has been prepared, all pending applications should be subjected to the Common Carrier Bureau's existing computer program designed to screen out those MDS applications that fail to qualify for an exemption from the 1983 MDS filing freeze under the standards adopted in the Commission's April 20, 1988 *Public*

---

[20]As discussed *supra* at note 8, implementation of the suggestion in the *NPRM* that all pending applications be dismiss would do grevious harm to the wireless cable industry.

[21]WCA urges the Commission to make certain, however, that the database is sufficiently comprehensive that all technical data relevant to the conduct of interference analyses under the current rules are included. Otherwise, if the Commission elects to retain the current interference protection rules as WCA proposes, the database may require extensive modifications.

Notice.[22] The application mills, in particular, have generated thousands of MDS applications that fail to qualify for an exemption from the freeze. Just by utilizing that program, identifying the violators, and returning the offending applications that do not seek a waiver,[23] the Commission can substantially reduce the MDS application backlog.

Development of the database alone, however, is not enough. After releasing the database and subjecting it to public scrutiny along the lines proposed in the *NRPM*,[24] the Commission must also expedite the ability of the public to review pending applications. As noted above, the Domestic Radio Branch has been maintaining a computerized data base of pending applications, including applications that have yet to appear on public notice. While a printout of that data base is available for public inspection, no application on that listing is made available for public inspection until after public notice has been given that the application has been accepted for filing. As a result, the printout is of limited utility -- the database does not include all of the information engineers need to analyze the impact of nearby stations on their own station

---

[22]*See* "Common Carrier Bureau Opens Filing Period For Multichannel Multipoint Distribution Service Applications", *Public Notice*, 3 FCC Rcd 2661 (1988).

[23]WCA believes that waivers of the terms of the April 20, 1988 *Public Notice* should be sparingly granted, except where it can be demonstrated that the application in question proposes a facility that is either replacing a facility that was conditionally licensed but then never constructed, or is collocating with another authorized or properly proposed MMDS station.

[24]*See NPRM, supra* note 1, at ¶ 22. WCA believes, however, that the entire database should be subjected to review, not just the MDS portion. The entire purpose of developing a definitive database that can be relied upon will be undermined if ITFS entities can thereafter complain that the database is inaccurate.

designs or *vice versa*. The time has come to change the Branch's policy and permit public inspection of all pending applications, regardless of whether public notice of acceptance for filing has been given. Such a change will permit applicants for new or modified facilities to expedite review all of the known applications for stations that must be protected, and thereby expedite the introduction of new services to the public.

The Commission's goal must ultimately be to subject the pending MDS applications to the lottery process and award licenses. However, Congress has required that every application be reviewed and found acceptable for filing prior to inclusion in a lottery, although it has given the Commission latitude to determine the level of review that must be afforded before an application can be accepted for filing.[25] Under Section 21.20, Part 21 applications are generally subject to extensive pre-acceptance review "unless the Commission shall otherwise permit."[26] Obviously, if the general rule is followed here, thousands of man-hours will be consumed before a single lottery can be held. Therefore, WCA suggests that the Commission "otherwise permit" and accept all MMDS applications tendered for filing without prejudice to post-lottery review. No doubt such an approach will permit ungrantable applications to participate in the lottery

---

[25]*See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 48 Fed. Reg. 49,309, 49,311 (1983).

[26]*See* 47 C.F.R. § 21.20 (1991).

process. However, accepting an application for filing does not prevent the Commission from later determining on post-lottery review that it is defective.

In any case, but particularly if the Commission gives a less critical review to applications before conducting lotteries, the Commission should also modify the manner in which it conducts MMDS lotteries. In the past, the Commission has chosen a single winner, without back-ups. As a result, when a tentative selectee's application was dismissed for failure to comport with the Commission's rules and policies, the staff was required to go to the time and expense of conducting another lottery. Because the Commission apparently is able to conduct only a handful of lotteries each year, channels lay fallow in numerous markets for many years, awaiting the conduct of another lottery.

Particularly given the serious questions being raised concerning the quality of the workproduct being marketed by some of the application mills, it is likely that many of the tentative selectees selected in the future will be dismissed. To avoid the cost and delay attendant to the holding of additional lotteries, the Commission should, at the first lottery for a given channel group for a given market, select in rank order a tentative selectee and alternative tentative selectees in much the same manner proposed in the *NPRM*.[27]. Such a procedure is already utilized by the Common Carrier Bureau and the Private Radio Bureau for selecting from among mutually exclusive applicants in other

---

[27]*See NPRM, supra* note 1, at ¶ 23.