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

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JUN 30 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
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Amendments of Parts 1, 2, and 21 of the Commission's Rules Governing Use of Frequencies in the 2.1 and 2.5 GHZ Bands	)	PR Docket No. 92-60

ORIGINAL FILE

ERRATUM

Asheville (E) Wireless Cable Partnership, Bowling Green (F) Wireless Cable Partnership, Canton (F) Wireless Cable Partners, and Randall L. Woods (collectively "Joint Commentors"), by their attorneys, hereby correct their Joint Comments filed on June 29, 1992, in the above-captioned proceeding.

The Joint Comments filed contained an incorrect page 2. Joint Commentors are submitting a correct page 2 herewith and respectfully request that this correct page be substituted for the page 2 contained in its June 29th Joint Comments. For convenience, a complete copy of the Joint Comments containing the corrected page 2 is attached hereto. No changes have been made to the Joint Comments other than to substitute the correct page 2.

Respectfully submitted,

ASHEVILLE (E) WIRELESS CABLE PARTNERSHIP, BOWLING GREEN (F) WIRELESS CABLE PARTNERSHIP, CANTON (F) WIRELESS CABLE PARTNERSHIP, RANDALL L. WOODS

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June 30, 1992

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Before the
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Washington, D.C. 20554

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

JOINT COMMENTS OF
ASHEVILLE (E) WIRELESS CABLE PARTNERSHIP
BOWLING GREEN (F) WIRELESS CABLE PARTNERSHIP
CANTON (F) WIRELESS CABLE PARTNERSHIP
AND
RANDALL L. WOODS

Submitted by:

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June 29, 1992

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SUMMARY

The Joint Commentors wholeheartedly support the Commission's stated goals as set forth in NPRM. The Joint Commentors favor the proposals in the NPRM: 1) to shift MDS regulations to the Mass Media Bureau; 2) to create a consolidated ITFS/MDS data base; 3) to preclude state entry, exit and rate regulation of MDS; and 4) to reduce the existing backlog by conducting lotteries in lieu of comparative hearings.

The Joint Commentors oppose the proposal to eliminate the present carrier/interference ratio standard and to replace it with either a strict mileage separation standard or a mileage separation height/power table. The disruption this proposal will cause to wireless cable by eliminating the potential for additional channel capacity far outweighs any limited administrative convenience it creates for FCC staff in processing. Once the Commission completes the consolidated ITFS/MDS data base, the Commission will be able to formulate a simple and workable computer program enabling its processing staff to apply the current C/I ratio standard accurately and expeditiously.

If the Commission does move to either the proposed strict mileage separation standard or the proposed mileage separation table, it should apply the new standard only to future applications, not to those pending prior to the issuance of the NPRM. Retroactive application of a new interference standard to dismiss pending applications for mere administrative convenience

would be arbitrary and capricious and will, no-doubt, result in protracted litigation.

The Joint Commentors vigorously oppose the proposal to allow any newly constructed MDS system to be shut down summarily and indefinitely upon complaint by an ITFS operator. ITFS operators are sufficiently protected by requiring that in the event of harmful interference the MDS licensee pay the reasonable cost of upgrading ITFS equipment, and by holding out the prospect of post-hearing revocation of the license of any recalcitrant MDS licensee.

The Joint Commentors believe that if the Commission goes forward with its proposed revamping of MDS rules with the modifications suggested in these Comments, the Commission will have advanced in a material way the viability and competitiveness of wireless cable as a vehicle for delivery of video programming to the home.

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

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

JOINT COMMENTS OF
ASHEVILLE (E) WIRELESS CABLE PARTNERSHIP
BOWLING GREEN (F) WIRELESS CABLE PARTNERSHIP
CANTON (F) WIRELESS CABLE PARTNERSHIP
AND
RANDALL L. WOODS

Asheville (E) Wireless Cable Partnership, Bowling Green (F) Wireless Cable Partnership, Canton (F) Wireless Cable Partners, and Randall L. Woods (collectively, "Joint Commentors"), by their attorneys and pursuant to Section 1.419 of the Commission's rules, hereby submit their comments in response to the Notice of Proposed Rulemaking, FCC 92-173, released May 8, 1992 ("NPRM"), in the captioned proceeding. In support whereof the following is shown:

The Joint Commentors support the stated goals enunciated by the Commission in the NPRM, that is, the promotion and encouragement of the development of a viable and competitive wireless cable video entertainment delivery industry across the United States, as well as the fostering and development of Instruction Television Fixed Services by educational institutions. As discussed below, many of the proposals set forth by the Commission in the NPRM will forward the Commission's stated goals, either as proposed or with slight modifications. However, some of the proposals set forth in the NPRM will work against the results

which the Commission seeks to achieve. These Comments will suggest alternatives which, if implemented by the Commission, can assist in bringing about a comprehensive framework of rules and policies regulating wireless cable operations and benefiting consumers nationwide.

I. Introduction.

The Joint Commentors are composed of recent entrants to the wireless cable industry. They have committed their time, capital and resources to begin implementation of viable wireless cable enterprises in numerous communities across the country.[1] The Joint Commentors are MDS tentative selectees and have pending applications for vacant B, C and D Group ITFS channels, as well as available H Group channels. Thus, the Joint Commentors have made considerable expenditures and spent considerable time not only in prosecuting their respective applications, but also in attempting to accumulate sufficient channel capacity to create viable wireless cable systems in their respective markets. The combined population of the markets of the Joint Commentors is well over 200,000. Some of the proposed service areas are not adequately served by traditional wired cable systems or are in the grip of a cable monopoly. It is only the efforts of the Joint Commentors that hold out the prospect of delivery of the multichannel video news and entertainment menu

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[1] The Joint Commentors are currently developing wireless cable operations in the following markets: Asheville, NC; Bowling Green, KY; Canton, OH; and, Tyler, TX

that those who reside in large urban areas have come to expect in our homes.

The Joint Commentors obviously have a very strong interest in the rules and regulations of the Commission which affect the wireless cable industry. The rules proposed by the Commission would have a substantial effect on the ability of the Joint Commentors to construct and operate successfully in the public interest.

II. Background.

The NPRM proposes far-reaching changes to the rules, policies and guidelines that govern the processing of Multipoint Distribution Service ("MDS") applications, the licensing of MDS stations and the subsequent operation of such facilities.[2] The proposals in the NPRM are of critical importance to the future operations of the Joint Commentors.

During the last several years the wireless cable industry, which utilizes MDS stations and the excess air time of Instructional Television Fixed Service ("ITFS") stations to deliver video programming to the home, has undergone an enormous change. The wireless cable industry has successfully combined channels allocated to MDS/ITFS services to form wireless cable systems providing high quality, line-of-sight television service of up to

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[2] The term MDS is used to refer collectively to the single channel (MDS) and multi-channel (MMDS), multipoint distribution service facilities.

33 channels.[3]

Typically, wireless cable operations offer subscribers a mix of local and distant broadcast stations and satellite-delivered programming services identical to those offered by conventional cable television. Although the technology for wireless cable systems has been available for many years, a variety of factors have recently converged making the industry much more attractive to investors and operators alike. Factors contributing to the current expansion of wireless cable operations include: Congressional calls for competition to cable; an increase in the availability of programming for wireless cable systems; and, perhaps most importantly, an increased flexibility in the Commission's rules and policies to encourage the development of wireless cable systems as a viable competitor to cable service.

Wireless cable can serve areas where traditional cable is not operating or is not likely to be established. More and more, wireless cable systems are reaching cable disenfranchised Americans who will never be served with a large variety of television programming. In addition, because wireless cable operates over the air and requires no capital for laying cable, wireless operators can typically charge prices to subscribers at or below those charged by traditional cable operators, and thereby offer consumers a check upon the monopoly prices charged by wired cable systems.

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[3] Additional channels can be added through the use of enhanced reception of local off-air signals.

Technologically, the quality and reliability of wireless cable surpasses that of traditional cable, since the picture quality from microwave is typically better than that provided via coaxial cable. Additionally, wireless cable signals are not affected by the signal degradation or power outages that occur with traditional cable service. With all of these advantages that wireless cable has vis a vis conventional coaxial cable service, it is a service which fulfills a tremendous public demand and serves an important public interest. One of the main reasons for increased consumer interest in wireless cable is that flexibility in Commission rules has permitted wireless cable systems to offer the kind of cable look-a-like service that consumers want.

Proposals in the NPRM would substantially affect the ability of wireless cable companies to compete with cable and thus are of enormous concern to the Joint Commentors. These comments are offered to provide the Commission with the input of industry members desiring to bring the educational and entertainment benefits of subscription television to television-disenfranchised members of the public and to offer an alternative to those members of the public who do not want to be a part of the cable monopoly.

III. Changing the Present Interference Standards Would Wreak Havoc on Efforts to Assemble Large Blocks of Wireless Cable Channels and Thereby Severely Handicap the Industry.

The NPRM, at ¶12, proposes new rules to completely replace and pre-empt the existing interference protection criteria for MDS applicants. Presently, interference protection policies require MDS applicants to submit detailed analyses of the potential for

harmful interference to co-and adjacent-channel MDS and ITFS stations pursuant to Section 74.903 of the Rules. Once a showing is made demonstrating noninterference to existing co- and adjacent-channel stations in a given area, an application can be granted. The advantage of this system is that it affords each licensee a high degree of flexibility in designing its system.

However, the NPRM proposes to eliminate the current noninterference standard and replace it with a strict mileage separation standard requiring that proposed facilities be located at least 80 kilometers from all existing and previously applied for co-channel stations, and at least 50 kilometers from all such adjacent-channel stations. Applicants would no longer be allowed to engineer their systems to provide 45 db desired-to-undesired signal (C/I) ratio of co-channel interference protection or the 0 db desired-to-undesired signal (C/I) ratio of adjacent channel interference provided in Sections 74.903(a) and (b) of the Rules. The purported advantage of the proposed alternative to current regulations is that the use of the standard separation requirement would permit expedited processing of pending applications, as it would eliminate the need to analyze, in-depth, the applicant's technical proposal and interference showing.

The Joint Commentors strongly urge the Commission to reject the adoption of any specific separation standards such as those delineated in the NPRM. The adoption of rigid separation requirements would inhibit the development of competitive wireless cable systems in the name of expedited processing of applications.

However, if the wireless cable industry is hobbled by strict separation requirements, the expedited processing of applications will be a hollow victory indeed. As discussed herein, treating pending and future applications under a new standard will mean that many existing operators cannot add channel capacity. Since most licensees depend on the ability to add more channel capacity to remain competitive, the Commission's proposal could stifle industry growth.[4]

From a practical standpoint, changing the interference criteria merely for administrative convenience would be a nightmare. Imagine a new licensee on channel Block-E who wants to develop a market where other applicants have F-channel and H-channel applications pending. The Block-E licensee will negotiate channel lease agreements with the F-channel and H-channel tentative selectees. Because a four-channel system cannot survive in the marketplace, the subsequent grant of the F-channel and H-channel licenses would be critical to the E-channel licensee. Shifting to the proposed strict mileage separation standard, could result in dismissal of the pending F-block and H-block applications due to failure to meet the new separation standard. Like dominoes falling, this will result in the demise of the E-Block licensee as a result of his failure to establish a system with sufficient channel capacity to compete in the marketplace. And this will

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[4] Channel capacity can be added either by applying for other channel blocks or by leasing capacity from licensees of those other channel blocks, but either way, <u>someone</u> (either the wireless operator or another applicant) would have to be eligible to be licensed.

occur even though there is no real-world harmful interference to any protected F-block or H-block licensees or applicants located within the mileage separation area.[5]

Realistically, there is no need to change the present criteria in order to increase processing speed. The current interference analysis standard can be rendered more workable from the application processing standpoint by modifying the Commission's approach to processing. Initially, the use of fixed separation standards will not necessarily result in expedited processing of MDS applications. There will still be considerable disagreement over whether stations to be protected are entitled to such protection, whether they are properly licensed or registered receive sites, and if licensed and registered, whether they are bona fide receive sites.

Rather, a more workable solution would be the same scenario the Commission currently follows in the processing of noncommercial FM applications. Under Section 73.509 of the Rules, an applicant for a noncommercial FM station can "drop-in" a station where it can demonstrate compliance with the Commission's interference standards. As a processing matter, when such applications are received in the Mass Media Bureau, the staff enters the technical information into its data base and runs it through its computer program to determine whether or not the technical proposal complies with Commission rules. This same system can work effectively with

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[5] This illustration applies with equal force to the Commission's proposal to establish a mileage separation standard coupled with a height/power short-spacing rerating table.

MDS applications.[6]

The Commission is proposing to overhaul and update its entire MDS and ITFS data bases and to consolidate them into one data base. See NPRM at ¶22.[7] With this accurate, up-to-date data base, the Commission can then prepare a computer program, similar to the one utilized in the noncommercial FM arena, in order to determine whether or not a given technical proposal meets the Commission's existing interference standards. The first step in processing any pending or future MDS or ITFS application would be to run it through an MDS computer program to determine whether or not it meets the current protection standards set forth in the rules. Noncomplying applications would be dismissed. This is a workable solution which can effectively reduce the backlog of applications, yet preserve the flexibility wireless cable operators require in order to be able to establish viable systems.

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[6] Even in the commercial FM band the Commission has recognized that the spectrum will be utilized more effectively and that service will best be provided to the public if it allows applicants to demonstrate non-interference through engineering analysis rather than rigid spacing criteria. See, Section 73.215 of the Rules. Commercial FM engineering analyses performed pursuant to that rule not only take into consideration contour overlap, but terrain shielding and other factors that are particularly pertinent to a line-of-sight microwave service such as MDS and ITFS.

[7] The NPRM proposes to put the MDS portion of this consolidated data base out for public comment as to its accuracy. Any entity that is either incorrectly reflected on or omitted from the data base would be afforded a limited opportunity to demonstrate that it should have been included. The Joint Commentors wholeheartedly support creation of this data base. However, the entire data base should be put out for public comment, including the ITFS portion.

IV. If The Proposed Separation Standard Is Adopted, It Should Not Be Applied Retroactively.

The NPRM suggests, at ¶25, that existing applicants for MDS channels would be required to certify, by a specified date, satisfaction of the new separation standards with respect to both existing co-channel and adjacent channel licensees, as well as all previously filed pending applications. Applications filed or tentative selectees selected prior to the effective date of the new rules would not be summarily dismissed for failure to demonstrate compliance with these new standards; however, the new standards would be applied to the these applicants and tentative selectees retroactively with a window period during which amendments could be filed to bring such applications into compliance. Those tentative selectees and applicants which fail to comply with the proposed fixed separation standards would be dismissed.

Similarly, applications filed prior to the effective date of the new rules would not be summarily dismissed for failure to have demonstrated satisfaction of the separation standards with respect to all previously applied for co-channel and adjacent channel stations. Rather, all MDS applications for co-channel or adjacent channel stations inside the required separation distances from previously applied for stations would be considered mutually exclusive if timely filed. Depending on the initial date of filing, such applications could be subject to lottery pursuant to 47 C.F.R. §1.972.

Essentially, the Commission would dismiss applications (including those already designated tentative selectee) which could

not be amended to meet the proposed separation standard even though such applications were in compliance with all existing rules when filed. Additionally, applications which were not previously mutually exclusive under the existing rules could be deemed mutually exclusive under the proposed fixed mileage separation. The effective result of such a policy would be to subject lottery procedures to applications which are not, under a real-world interference analysis, mutually exclusive. This will result in fewer rather than greater numbers of MDS applications being granted. It will also prevent conditional licensees for one channel group from obtaining licenses for additional channel groups. Thus, it will limit the establishment of new MDS facilities providing service to the public.

The NPRM relies on United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) for support that such a retroactive application of the new separation standard is permissible. However, Storer, supra, does not establish an absolute right of an agency to impose rules retroactively. Rather, the Storer Court analyzed the effect of retroactive application of the particular rule at issue and examined the circumstances surrounding retroactive imposition of that rule.[8]

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[8] In the Storer case, which dealt with the institution of the Commission's multiple ownership rules, the Court was heavily persuaded by the fact that applicants filing applications before the rule change had done so with knowledge of the Commission's expressed antipathy to concentration of control of broadcast facilities.

Ironically, the Court in Storer, supra, reiterated that in the Communications Act Congress sought to create regulations to protect the public "with careful provisions to assure fair opportunity for open competition in the use of broadcast facilities". 351 U.S. at 203. The proposed separation standard would do just the opposite: it would limit competition by prohibiting the establishment of facilities where actual interference-free operation inside the proposed separation area can be accomplished through efficient system design.

Case law subsequent to Storer has held that the retroactive application of new rules by an agency is generally disfavored because of the devastating impact it can have on those who reasonably relied on the prior rules. Thus, the agency must demonstrate that the retroactive application of a new rule is necessary and outweighs the harm caused by imposition of new and unexpected liabilities and obligations. See, e.g., National Ass'n of Indep. Tel. Producers & Distrib. v. FCC, 502 F.2d 249, 255 (D.C. Cir. 1974); and NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974). Likewise, in General Telephone Co. v. U.S., 449 F.2d 846 (5th Cir. 1971), the court found that where the retroactive application of the rule is proposed, the retroactivity must be necessary and reasonable and its effect may not be egregious.

Such a showing cannot be made in this instance. The Joint Commentors who timely filed applications under existing rules should be protected from the imposition of the new separation standards when application of such standards would have the harsh

result of subjecting their applications to dismissal. The retroactive application of the new rule is not reasonable regarding the real-world interference levels experienced by MDS and ITFS facilities -- it is rather a matter of administrative convenience. In this case, the administrative convenience factor does not outweigh the imposition of new and unexpected liabilities and obligations on the applicants affected.[9]

Joint Commentors have expended substantial resources in engineering, legal, site acquisition and financial commitment fees to prepare and file not only their E- and F-group applications but often also 1, 2, 2A, B, D or H-channel applications as well, after being named tentative selectee for the E- or F-group. They did so in reliance on the Commission's rules. Tentative selectees in particular have pursued finalization of site agreements and financial arrangements, selection of equipment, implementation of staffing plans and in general all of the preparation for the anticipated construction of facilities. To subject such tentative selectees and conditional licensees to possible application dismissal is so unduly burdensome as to outweigh any perceived administrative convenience that might result from a strict separation standard.

The Commission itself has referred to wireless cable as the most viable competitor to conventional cable television service and

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[9] This is especially relevant in this case where the level of administrative convenience resulting from the new separation standard is speculative at best and where other more reliable processing techniques are available for determining co- and adjacent channel interference.

has encouraged investment in the industry. To change the rules mid-stream in a manner that so adversely affects such applicants is unreasonable.

The dubious nature of the perceived benefits of retroactive application of the new separation standard cannot outweigh the enormous burden of such a standard on the applicants and the harsh result of application dismissal if the standard is not met. Retroactive application of this new rule can only lead to protracted litigation from dismissed applicants, which will needlessly drain Commission resources and result in further delay in the MDS and ITFS licensing process. It would in fact frustrate one of the major purposes of the NPRM, which is to alleviate the licensing backlog and streamline the processing procedure.

V. Giving ITFS Licensees the Power to Shut Down Newly Initiated MDS Facilities Based on Interference Claims Will Cripple the Wireless Cable Industry.

The NPRM, at ¶15, proposes to condition each and every MDS license upon "meeting these [ITFS interference] criteria in actual practice." In explaining what this condition would entail, the NPRM, at n.29, proposes that each MDS licensee be required to contact every ITFS co-channel or adjacent channel licensee within 112 kilometers (70 miles) or 80 kilometers (50 miles), respectively, of the MDS transmitter site at least fourteen days prior to commencing operations and to notify each such ITFS licensee of the exact time that operations will begin. If no interference occurs to the ITFS operator, or if the ITFS operator fails to complain, the Commission proposes that after 30 days the

MDS license would become unconditional with the respect to the need to protect ITFS co- or adjacent channel licensees. During this "trial" 30-day period the MDS operator would be required to make every effort to ensure that the ITFS operator is aware of the actual hours of operation. Further, if the ITFS operator alleged that interference was occurring, the Commission proposes that it have authority to require the MDS operator to cease operating immediately without a hearing.

The proposals to require fourteen days advance notice and to make every reasonable effort to ensure that the ITFS operator knows the MDS system is operating are not objectionable in themselves. But the proposal to condition every MDS license coupled with a "no-hearing" cessation-of-operation procedure undermines the ability of a commercial MDS operator to institute service. First and foremost, this proposal introduces an unacceptable element of uncertainty into a commercial operation. After spending hundreds of thousands or millions of dollars for head-end equipment, receivers, construction, installation, promotion and all the other expenses entailed in launching a new business, the wireless cable operator could be shut down within hours of initial operation, based on the unverified claim of interference by an ITFS operation.

The proposal concedes to ITFS operators a level of control over commercial MDS operations that any prudent financial institution or other member of the investment community would find unacceptable. It permits the ITFS operator to determine whether or not interference has occurred once an MDS operator has launched

operations and furthermore permits the Commission to terminate a licensee's operation without a hearing as to the quality or level of alleged interference. In other words, this proposal permits summary shutdown of a system for which a lender may have lent hundreds of thousands, even millions, of dollars.[10]

Although the Commission proposes that the interference be measured at the output terminals of the ITFS receive antenna and suggests that the MDS licensee would be required only to reduce power to the required levels, the quality and nature of radio interference is not an exact science. In the real world, two engineers measuring interference levels at the out-put terminals of the same ITFS receiving antenna could come to different conclusions about the level of interference. This proposal would permit ITFS operators to shut down commercial operations while the gray area of the exact nature and extent of the alleged interference is explored and litigated.

Once the ITFS operator meets an initial "burden" of going forward to demonstrate interference from an MDS licensee, the burden of disproving such interference would shift to the MDS licensee. Again, whether or not the ITFS licensee has met the initial showing required and whether or not the MDS licensee has taken the necessary steps to eliminate the interference is an art, not a science.

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[10] It is likely this regulation would present considerable difficulty to banking regulators who must determine whether or not the loans made by institutions are reasonable and prudent.

Although the Commission proposes to sanction any ITFS operator that fails to cooperate fully in verifying or reducing perceived interference by allowing interim resumption of MDS service, the time and manpower to police such a system would be a drain on Commission resources that it can ill afford. There is no standard set forth concerning what constitutes "cooperation" by the ITFS operator. And even "uncooperative" ITFS operators would receive protection based on measurements using equivalent antennas in the immediate area of the involved ITFS receive antenna.[11]

Unfortunately, the proposed no-hearing cessation requirement could be subject to abuse from middle-men who hold out the prospect of the development of ITFS systems to unwitting educational institutions and then, utilizing the institution's eligibility to obtain ITFS channels, subsequently use those channels as a bargaining chip to coerce legitimate wireless cable operators. Complaints of this type of behavior have already surfaced at the Commission.[12]

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[11] The NPRM does note elaborate on whether such measurements would be made by the MDS operator or by staff of the FCC's Field Operations Bureau. (Presumably they would not be made by staff of the "uncooperative" ITFS operator, although the NPRM is silent on this point.) If the measurements must be made by FCC staff and if MDS operators are required to operate at some power level below that specified in the license or cease operation altogether pending the scheduling of a staff inspection, the MDS operator will be unduly hamstrung. The complications presented by implementing any "uncooperative ITFS operator" procedure are such that they independently militate against adoption of the "no-hearing" cessation proposal.

[12] See, March 20, 1992 letter to Charles W. Kelly, Esq., Chief, Enforcement Division, Mass Media Bureau, requesting the institution of a Section 403 inquiry into the conduct of Rural (continued...)

Providing all ITFS registered receive sites in existence at the time the MDS transmitter is licensed actual interference protection in accordance with Section 74.903(a)(2), but without the summary cessation-of-MDS-service condition, assures the ITFS licensee of interference-free operation, while balancing the need of the wireless cable community for stability and certainty in continuing operations once a system has been constructed and commenced service to the public. Currently, interference that becomes detectable only after a system becomes operational has been resolved for the most part without interjection of strict Commission standards. Continued cooperation between ITFS users and commercial operators will ensure that ITFS operations remain interference-free. The ITFS operators are sufficiently protected by requiring the MDS licensee to pay for reasonable equipment modifications, and regulating recalcitrant MDS operators with the prospect of license revocation after a full hearing.

The desire of ITFS operators to a lease excess channel capacity to commercial facilities has evolved into a closer working relationship between the educational and commercial users of the microwave spectrum. As wireless cable becomes a viable alternative

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[12](...continued)
Vision, an ITFS lessee of excess capacity that is alleged to have utilized its relationship with ITFS licensees to abuse the Commission's processes. See also, Petition to Deny filed January 13, 1992, In Re Applications of Lonoke School District, File No. BPLIF-910909DA; Beebe Public Schools, File No. BPLIF-910909DB; Pulaski County School District, File No. BPLIF-910909DC; Jacksonville Christian Academy, File No. BPLIF-910909DD; and, Little Rock School District, File No. BPLIF-910909DE; and, Joint Petition to Deny In Re Application of McGregor Independent School District, File No. BPLIF-910604DD, filed March 19, 1992.

and increasingly desirable service, the interrelationship of the ITFS and MDS users will grow stronger as the two services recognize their mutual dependence and cooperate to achieve their mutual goal of interference free operations. Continuing to allow informal resolution of interference after MDS operation had commenced gives both of these users a significant level of protection while subjecting neither to unworkable regulation.[13]

VI. The Commission Should Combine Application Processing for MDS and ITFS in a Single Branch of the Mass Media Bureau.

In the NPRM, the Commission proposes various alternatives for the relocation of MDS processing, including the Private Radio Bureau's Licensing Division in Gettysburg, Pennsylvania, the Mass Media Bureau and the Common Carrier Bureau, as well as a division of processing between the Private Radio Bureau on the one hand and either the Common Carrier Bureau or Mass Media Bureau on the other. The Joint Commentors strongly support the proposal to relocate MDS processing and regulation to the Mass Media Bureau.

The MDS and ITFS services are inextricably tied together. From a practical standpoint, almost all MDS operators need to have at least part time use of ITFS channels in order to have sufficient channel capacity to deliver a competitive video entertainment package. Moreover, MDS operators are an important and often essential source of capital for the construction of ITFS systems.

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[13] It is noted that in its Order on Reconsideration, Gen. Docket Nos. 90-54, 80-113, 6 FCC Rcd. 6764 (1991), the Commission specifically rejected institution of a formal procedure for resolution of interference between ITFS and MDS operations.

Both services share the same 2596 to 2644 MHz band utilizing the same type of equipment. The propagation characteristics are identical. Since the Mass Media Bureau already regulates the ITFS, it is the best choice to also regulate the MDS.

Much of the past failure to construct MDS systems must be attributed to the inability of MDS construction permittees and conditional licensees to obtain grant of additional MDS and ITFS capacity in the same market, resulting in a lack of adequate channel capacity.[14] If the same branch of the Mass Media Bureau were to regulate both ITFS and MDS, it is much more likely that the timing of the grant of construction permits or conditional licenses for both MDS and ITFS channels in the same geographic area would occur simultaneously, or at least in close chronological proximity. It is imperative that the Commission achieve such congruence in the timing of grants if the Commission is to foster a viable wireless cable video entertainment industry.[15] For this reason, relocation

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[14] Significantly, most construction permits and conditional licenses that expired were issued to applicants from the 1983 filing window. Those permittees/licensees did not enjoy the increased regulatory flexibility that has contributed to wireless cable's growth. Indeed, many of them were prohibited from owning both the E-group and F-group licenses, or otherwise aggregating channels.

[15] Currently a wireless cable company aggregating E and F channels could have numerous different deadlines for the construction of the various E, F, H and commerical ITFS channel groups. Requiring operators to construct four channel groups (or single H channels) by different deadlines is an enormous unnecessary financial burden that serves no purpose. Immediate relief of this problem is warranted. Initially, the Commission could extend any existing licensee's construction deadlines to coincide with the last construction deadline of any pending channel group application the licensee is subsequently issued in a given market.