

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

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JUL 14 1992

In the matter of

Amendment of Parts 1, 2, and 21 of the
Commission's Rules Governing Use of the
Frequencies in the 2.1 and 2.5 GHz Bands

) FEDERAL COMMUNICATIONS COMMISSION
) OFFICE OF THE SECRETARY

) PR Docket No. 92-80
) RM 7909
)

**ORIGINAL
FILE**

REPLY COMMENTS

**THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.**

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	iii
I. INTRODUCTION	1
II. THE COMMISSION SHOULD ADOPT WCA'S ENTIRE PROGRAM TO COMBAT THE APPLICATION MILLS.	8
A. The Commission Must Ban Both Full And Partial Market Settlements If It Is To Deter The Application Mills.	9
B. While The Commission Should Permit The Filers Of Pending Applications To Enter Into Settlements, It Should Modify The Settlement Procedures To Expedite Reduction Of The Backlog.	11
C. The Comments Evidence Strong Support For Enlargement Of The MDS Protected Service Area As A Mechanism For Deterring Speculative Applications.	14
III. THE COMMISSION'S PROPOSED MODIFICATIONS TO THE MDS/ITFS INTERFERENCE PROTECTION RULES ARE CONTRARY TO THE BEST INTERESTS OF BOTH THE WIRELESS CABLE AND THE EDUCATIONAL COMMUNITIES.	16
IV. SEVERAL OF THE NEW PROPOSALS ADVANCED IN RESPONSE TO THE NPRM WILL FRUSTRATE THE EXPEDITIOUS PROCESSING OF MDS APPLICATIONS OR ARE OTHERWISE DEVOID OF MERIT.	21
A. The Commission Should Reject USIMTA's Effort To Eliminate "First Come, First Served" Application Processing.	21
B. Adoption of USIMTA's Proposed Qualification Requirements Would Not Serve The Public Interest.	23
C. The Commission Should Not Condone Failures To Respond To Requests For Information.	26
V. THE COMMISSION SHOULD ADVANCE THE PROPOSAL TO ELIMINATE CHANNEL MAPPING.	29

VI. CONCLUSION 31

EXECUTIVE SUMMARY

The initial comments evidence a remarkable unanimity of opinion regarding both the pros and the cons of the proposals advanced by the Commission in its *NPRM*. Consolidation of MDS and ITFS application processing and regulation in a single Bureau of the Commission drew widespread support. Similarly, the development of a consolidated and comprehensive MDS/ITFS database and the institution of procedures to assure more rapid notice to the public when applications are filed were cheered. The Commission's proposal to amend Sections 21.901(d)(2) and 21.901(f)(2) to prohibit any entity from holding an interest in multiple, mutually-exclusive applications drew unanimous support, as did the *NPRM*'s suggestion that lotteries be employed to select from among mutually exclusive applicants for MDS Channels 1, 2 and 2A in order to expedite application processing. There was also substantial support among those commenting for the de-licensing of very low power signal boosters. Even the Commission's proposal to require ITFS entities to submit petitions to deny MDS applications within the same time frame applicable to others was unanimously supported.

However, there was consistent opposition expressed to other elements of the Commission's plan to expedite MDS application processing. Most importantly, the Commission's ill-conceived proposal to eliminate the current MDS interference protection rules in favor of station-to-station separation standards (even with a derating table) was scorned as depriving applicants of the technical flexibility that has played a critical role in the development of wireless cable systems to date. For much the same reason, the proposed imposition of a restriction on transmission antenna height measured by height above average terrain drew jeers from those submitting comments on the issue. Likewise, no commenting party supported the Commission proposed blanket return of all pending MDS applications, and there was no meaningful support for the concept of awarding licenses based on political MSA and RSA boundaries. Those commenting on the issue also expressed grave concern that the Commission will inadvertently harm the efforts of legitimate wireless cable operators if it adopts draconian restrictions on assignments and transfers of control.

If this proceeding is to result in any significant gains in the speed of MDS application processing, however, the Commission must act to ban both full and partial market settlements. As the comments submitted in response to the *NPRM* make clear, the prospects for settlement are the engine powering the application mill train. Moreover, the Commission should once again reject efforts by USIMTA to return to the sixty-day MDS cut-off rule that was so beloved by application mills, and so reviled by the wireless cable community. Similarly, USIMTA's self-serving proposals for revised qualification requirements should be rejected as devoid of merit. Equally devoid of merit

is the call of some for blanket amnesty for applicants who failed to respond in timely fashion to MDS deficiency letters.

The Commission should refrain from significantly modifying the MDS/ITFS interference protection rules along the lines proposed in footnote 29 of the *NPRM*. Neither the wireless cable nor the educational community has embraced the Commission's proposal -- to the contrary, they have derided it as unworkable. The current interference protection rules, with minor revisions, have proven effective. The old saying "if it ain't broke, don't fix it" is particularly appropriate with respect to this contentious issue.

Finally, the Commission should advance the proposal to allow ITFS licensees to meet their minimum use and essential use requirements on a consolidated basis utilizing fewer than all of their channels. Such a rule change will result in significant cost savings to wireless cable operators and ITFS licensees, resulting in lower costs to subscribers and increased financial support for educational programming.

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REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submits its reply to the comments filed in response to the *Notice of Proposed Rule Making* ("*NPRM*") in the captioned proceeding.¹

I. INTRODUCTION

If one thing is certain from the comments submitted in response to the *NPRM*, it is that the Multipoint Distribution Service ("*MDS*") application processing system is in disarray, and the application mills are primarily to blame.² Yet, it is

¹See *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*, 7 FCC Rcd 3266 (1992)[hereinafter cited as "*NPRM*").

²The comments also evidence a growing frustration on the part of the wireless cable community with a few entities that appear to be engaged in an abuse of the Commission's Instructional Television Fixed Service ("*ITFS*") excess capacity leasing rules through the unprincipled manipulation of unsuspecting local schools. See, e.g. Comments of Emerald Enterprises, Inc, PR Docket No. 92-80, at 12 (filed June 29, 1992)[hereinafter cited as "*Emerald Comments*"]("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 the accede to absurd lease demands"); Comments of Fletcher, Heald & Hildreth, PR Docket No. 92-80, at 9 (filed June 29, 1992)[hereinafter cited as "*FH&H*"]

(continued...)

equally certain that massive revisions to the interference protection rules applicable to the 2.1 GHz and 2.5 GHz bands is not the solution. By and large, those commenting in this proceeding evidence a remarkable degree of unanimity regarding the pros and the cons of most of rule changes proposed by the Commission to deter speculative applications and address the backlog of unprocessed applications.

While the remainder of these reply comments will be devoted to addressing the few topics of controversy and responding to proposals advanced by others on which WCA previously has not had an opportunity to comment, it is certainly worth noting that the parties responding to the *NPRM* spoke virtually as one in supporting many of the proposals advanced in the *NPRM*. For example, the consolidation of MDS and ITFS application processing and regulation in a single Bureau of the Commission drew

²(...continued)

Comments"]("Anyone who has substantial experience in the wireless cable industry knows of RuralVision, its abuses of process in ITFS applications filed by its proxy school systems, and other ITFS speculators who make filings to extort money from serious wireless cable operators."); Comments of WJB-TV Ft. Pierce Limited Partnership and WJB-TV Melbourne Limited Partnership, PR Docket No. 92-80, at 10 (filed June 29, 1992)[hereinafter cited as "WJB Comments"]. While WCA believes that it is beyond the scope of the *NPRM* to directly address this problem through new rules, WCA concurs with the suggestion by one commenting party that the Commission "return to the old aggressiveness with which the Commission pursued those who abuse its processes." FH&H Comments, *supra* at 27. Just as the Commission's lackadaisical approach during the initial days of MDS application mills caused the mills to become even more bold, so too is the Commission's failure to aggressively pursue allegations ITFS application abuse giving those who engage in that abuse a sense of invulnerability.

widespread support,³ despite concerns regarding the staffing of the Bureau that is chosen.⁴ Similarly, the development of a consolidated and comprehensive MDS/ITFS database and the institution of procedures to assure more rapid notice to the public when applications are filed were universally cheered,⁵ although valid questions were raised as

³See, e.g. Comments of the National ITFS Ass'n, PR Docket No. 92-80, at 3-5 (filed June 29, 1992)[hereinafter cited as "NIA Comments"]; Comments of Arizona Board of Regents for Arizona State University, *et al.*, PR Docket No. 92-80, at 10 (filed June 10, 1992)[hereinafter cited as "Arizona Comments"]; Comments of Indiana Higher Education Telecommunication System, *et al.*, PR Docket No. 92-80, at 27 (filed June 29, 1992)[hereinafter cited as "IHETS Comments"]; Comments of Roman Catholic Communications Corporation of the Bay Area, PR Docket No. 92-80, at 9 (filed June 19, 1992)[hereinafter cited as "Bay Area Comments"]; Comments of WCA, PR Docket No. 92-80, at 74-77 (filed June 29, 1992)[hereinafter cited as "WCA Comments"]; Comments of Federal Communications Bar Ass'n, PR Docket No. 92-80, at 11-12 (filed June 29, 1992); WJB Comments *supra* note 2, at 3-4; Comments of Fed. Communications Bar Ass'n, PR Docket No. 92-80, at 11-14 (filed June 29, 1992)[hereinafter cited as "FCBA Comments"].

⁴Of all of the parties commenting on this issue, only Ana G. Mendez Educational Foundation, *et al.* ("Mendez") expresses any concern about combining MDS and ITFS processing; even then, Mendez ultimately does not object to consolidation in the Distribution Services Branch provided that the Commission augments the Branch's staffing and processing resources. See Comments of Mendez, PR Docket No. 92-80, at 6 (filed June 29, 1992)[hereinafter cited as "Mendez Comments"].

⁵See, e.g., WCA Comments, *supra* note 3, at 15; FCBA Comments, *supra* note 3, at 6-9; Comments of Baypoint TV, Inc., PR Docket No. 92-80, at 9. Spectrum Analysis & Frequency Engineering, Inc. ("SAFE") has proposed that the Commission utilize some method of electronic filing to eliminate the need for manual entry by the Commission of critical data into the MDS/ITFS application database. See Comments of SAFE, PR Docket No. 92-80, at 8-10 (filed June 29, 1992)[hereinafter cited as "SAFE Comments"]. While WCA is concerned that some of the specific proposals advanced by SAFE may prove problematic because hard copies of applications would not be filed, WCA certainly would not object to a requirement that each paper application be accompanied by a standard MS-DOS compatible floppy disk in a standard data format containing all technical information on the application. If such an approach would assist the Commission in expediting the processing of applications, it has WCA's full support.

to both whether the database currently being developed by the Commission will contain sufficient information to be meaningful⁶ and why the *NPRM* proposed to withhold the ITFS portion of the database from public comment.⁷ The Commission's proposal to amend Sections 21.901(d)(2) and 21.901(f)(2) to prohibit any entity from holding an interest in multiple, mutually-exclusive applications drew unanimous support,⁸ as did the *NPRM's* suggestion that lotteries be employed to select from among mutually exclusive

⁶In its comments, Mendez expresses concern that the Commission's recent efforts to secure information regarding ITFS stations for inclusion in the database are flawed because the Commission has not sought to collect all of the information necessary to conduct interference calculations. See Mendez Comments, *supra* note 4, at 10-11. WCA agrees. And, on a related topic, WCA is concerned that the MDS database being developed in Gettysburg does not include sufficient information regarding the design of transmit facilities to ultimately permit computerized application processing in the future. Unfortunately, because the Commission chose to design its database without first seeking input from the wireless cable and ITFS communities, the current database development effort may provide little in the way of benefits. WCA believes that the views expressed by one law firm in multiple comments supporting a database with minimal information miss the mark. The Commission's ultimate goal should be to automate MDS and ITFS application processing to the greatest degree possible. To do so requires that all parameters essential to interference calculations be entered into the database. If the Commission develops a comprehensive technical database regarding every licensed and proposed station in the 2.1 and 2.5 GHz bands, any increased time spent during the data entry phase will be offset by expedited application processing during the interference analysis stage.

⁷See WCA Comments, *supra* note 3, at 16 n. 24; Arizona Comments, *supra* note 3, at 11-12; Mendez Comments, *supra* note 4, at 11.

⁸See WCA Comments, *supra* note 3, at 31-33; Comments of Mitchell Communications Corp., PR Docket No. 92-80, at 4 (filed June 29, 1992)[hereinafter cited as "Mitchell Comments"]; Comments of Phase One Communications, Inc., PR Docket No. 92-80, at 11 (filed June 29, 1992)[hereinafter cited as "Phase One Comments"]; WJB Comments, *supra* note 2, at 9-10.

applicants for MDS Channels 1, 2 and 2A in order to expedite application processing.⁹ There was also substantial support among those commenting for the de-licensing of very low power signal boosters.¹⁰ And, even the Commission's proposal to require ITFS entities to submit petitions to deny MDS applications within the same time frame applicable to others was supported by every member of the wireless cable and educational communities that commented upon it.¹¹

Just as the commenting parties were virtually unanimous in their support of those aspects of the *NPRM* noted above, there was consistent opposition expressed to

⁹See WCA Comments, *supra* note 3, at 9 n.10; Phase One Comments, *supra* note 8, at 12-13.

¹⁰See WCA Comments, *supra* note 3, at 73-74; Mitchell Comments, *supra* note 8, at 5; Comments of the Consortium of Concerned Wireless Cable Operators, PR Docket No. 92-80, at 24-28 (filed June 29, 1992)[hereinafter cited as "Consortium Comments"]. While WCA generally agrees with the booster proposals advanced by the Consortium of Concerned Wireless Cable Operators ("CCWCO"), it takes exception to the suggestion that the only analysis that should be required prior to installing a booster is whether the power flux density of the booster exceeds -75 dBW/m² at the PSA border. Because the booster will generally be directing a signal along an azimuth other than that of the main station, it is possible that even a booster within a station's PSA will cause interference to a cochannel or adjacent channel receive site that is protected from interference by the main transmitter due to shielding or off-axis receive antenna discrimination. Thus, WCA believes that the installer of a booster should be required to conduct interference studies prior to installation, and should be required to certify to the Commission that such studies were conducted afterward. See Petition of California Amplifier, Inc. for Reconsideration, General Docket No. 92-80, at 9-11 (filed Dec. 3, 1990). In this manner, concerns such as those expressed by the Roman Catholic Communications Corporation of the Bay Area over the potential for interference from boosters can be allayed. See Bay Area Comments, *supra* note 3, at 6.

¹¹See e.g., WCA Comments, *supra* note 3, at 68-70; Mendez Comments, *supra* note 4, at 10.

other elements of the Commission's plan to expedite MDS application processing. Most importantly, the Commission's ill-conceived proposal to eliminate the current MDS interference protection rules in favor of station-to-station separation standards (even with a derating table) was scorned as depriving applicants of the technical flexibility that has played a critical role in the development of wireless cable systems to date.¹² For much the same reason, the proposed imposition of a restriction on transmission antenna height measured by height above average terrain drew jeers from those submitting comments on the issue.¹³ Likewise, no commenting party supported the Commission proposed blanket return of all pending MDS applications,¹⁴ and there was no meaningful support for the concept of awarding licenses based on political Metropolitan Statistical Area

¹²See, e.g. WCA Comments, *supra* note 3, at 49-56; Comments of the United States Small Business Administration, PR Docket No. 92-80, at 16-18 (filed June 29, 1992)[hereinafter cited as "SBA Comments"]; Comments of Hardin and Associates, Inc., PR Docket No. 92-80 (file June 29, 1992)[hereinafter cited as "Hardin Comments"]; Comments of Marshall Communications, Inc., PR Docket No. 92-80, at 7 (filed June 29, 1992)[hereinafter cited as "Marshall Comments"]; Comments of National Micro Vision Systems, Inc., PR Docket No. 92-80, at 6-7, 9 (filed June 29, 1992).

¹³See WCA Comments, *supra* note 3, at 59-64; Comments of Choice TV of Michiana, Inc., PR Docket No. 92-80, at 8 (filed June 29, 1992)[hereinafter cited as "Choice Comments"]; Emerald Comments, *supra* note 2, at 5; Marshall Comments, *supra* note 12, at 3-4; Comments of Tribune Broadcasting Company, PR Docket No. 92-80, at 4-5 (filed June 29, 1992)[hereinafter cited as "Tribune Comments"]; Mendez Comments, *supra* note 4, at 8; Hardin Comments, *supra* note 12.

¹⁴See Comments of Pioneer Telephone Cooperative, PR Docket No. 92-80, at 2-4 (filed June 29, 1992); Hardin Comments, *supra* note 12 at ¶ 10.

("MSA") and Rural Service Area ("RSA") boundaries.¹⁵ Those commenting on the issue also expressed grave concern that the Commission will inadvertently harm the efforts of legitimate wireless cable operators if it adopts draconian restrictions on assignments and transfers of control.¹⁶

In its Comments, WCA also advanced several proposals to expedite the processing of MDS applications beyond those proposed in the *NPRM*. The Commission should note that many others filed their own proposals similar to WCA's. For example, CCWCO joined WCA in advocating that Section 21.902(c) of the Rules be amended by eliminating the need for line-of-sight calculations to provide greater specificity as to the previously proposed facilities an applicant must analyze for potential interference.¹⁷

¹⁵Most of those commenting on the Commission's MSA/RSA proposal noted that while the use of political boundaries for service areas might be acceptable where service is provided over a network of relatively low power stations arranged in cellular fashion, wireless cable signals cannot be readily tailored not to cross MSA/RSA borders, particularly when facilities have already been constructed without regard for political boundaries. See, e.g. WCA Comments, *supra* note 3 at 49 n. 62; Hardin Comments, *supra* note 12, at ¶ 9; Comments of Dalager Engineering Company, PR Docket No. 92-80, at 3-4. Others noted that some MSAs and RSAs are so close to each other that licensing based on MSA/RSA definitions would be troublesome. See Comments of Phase One Communications, Inc., PR Docket No. 92-80, at 14 (filed June 29, 1992); Marshall Comments, *supra* note 12, at 7. The only two parties endorsing the Commission's proposal failed to address, much less refute, these arguments. See Tribune Comments, *supra* note 13, at 1-2; Comments of Galaxy Cablevision, L.P., PR Docket No. 92-80, at 3 (filed June 29, 1992).

¹⁶See WCA Comments, *supra* note 3, at 43-46; Consortium Comments, *supra* note 10, at 19-21; WJB Comments, *supra* note 2, at 9.

¹⁷See WCA Comments, *supra* note 3, at 70-72; Consortium Comments, *supra* note 10, at 6. While the Consortium proposes that only stations within 75 miles of that being
(continued...)

Similarly, others joined WCA's call for prioritizing MDS and ITFS application processing on a market-by-market basis to expedite the awarding of those licenses most needed by wireless cable operators.¹⁸

At this juncture, there is nothing more for WCA to add regarding these issues; the virtual unanimity of the commenting party speaks volumes. Therefore, WCA will devote the remainder of this reply to those proposals advanced in the *NPRM* that have engendered controversy, and to several proposals that have been advanced by others for the first time in the comments.

II. THE COMMISSION SHOULD ADOPT WCA'S ENTIRE PROGRAM TO COMBAT THE APPLICATION MILLS.

In its Comments, WCA advanced a four point plan for combatting the application mills that have become the scourge of the wireless cable industry. Under that plan, the Commission would: (1) ban full and partial market settlements among mutually exclusive MDS applicants; (2) amend Sections 21.901(d)(2) and 21.901(f)(2) to prohibit any entity from holding an interest in multiple, mutually-exclusive applications; (3) increase filing fees for applications for new MDS facilities and lower the fees for the

¹⁷(...continued)

proposed be analyzed, WCA suggests that its proposed 100 mile rule be adopted to provide an extra measure of safety. Such additional distance may be necessary where the previously licensed or proposed facility serves receivers that are located at a relatively high elevation compared to the proposed transmit antenna. In such case, the earth's curvature is less effective in blocking signals, and the potential for interference between co-channel stations is greater.

¹⁸See Consortium Comments, *supra* note 10, at 7-8.

filing of Certificates of Completion of Construction to deter speculators without adversely affecting *bona fide* applicants; and (4) amend the definition of the protected service area ("PSA") to deter speculative applications. As noted above, the second element of WCA's plan, which was fully endorsed by the *NPRM*, drew support from all of those commenting on it.¹⁹ WCA's proposed revision to the Commission's filing fee schedule, although not specifically commented upon, should not prove objectionable to legitimate wireless cable operators since it involves no increase in filing fees for stations that are actually constructed. In the following pages, WCA will address the comments submitted regarding the two other elements of its plan, the elimination of MDS settlement groups and the enlargement of the PSA.

A. The Commission Must Ban Both Full And Partial Market Settlements If It Is To Deter The Application Mills.

In its Petition for Rulemaking that commenced this proceeding and again in its Comments on the *NPRM*, WCA detailed why the Commission will never succeed in deterring the filing of speculative MDS applications if it does not ban full market settlements as well as partial market settlements.²⁰ In the interest of brevity, WCA will refrain from repeating that entire discussion here.

While WCA's proposal garnered widespread support,²¹ there were some

¹⁹See *supra* at iii, 4.

²⁰See WCA Comments, *supra* note 3, at 24-30.

²¹See, e.g. WJB Comments, *supra* note 2, at 12-13; Emerald Comments, *supra* note 2, at 8; SAFE Comments, *supra* note 5, at 8; Mitchell Comments, *supra* note 8, at 4; IHETS Comments, *supra* note 3, at 28; Comments of Baypoint TV, Inc., PR Docket No. 92-80, at 10 (filed June 29, 1992).

commenting parties who opposed any ban on settlements. Typical of the views expressed by those parties are the comments of United Management Services ("United"), a self-styled "MMDS 'Wireless' Settlement Facilitator." United opposes prohibiting settlement groups because "[t]hese people intend to spread their financial obligation among the partners, thereby, making it easier not harder to get significant debt funding for a Wireless system."²² What United and those with similar views forget is that any prospective applicant is free to form a corporation, partnership or other form of joint venture with others prior to filing an application in order to spread financial obligations, and will remain free to do so if WCA's proposal is adopted. The elimination of settlements will not preclude such activity. All a ban on settlements will do is provide applicants who are pre-disposed to joining with others an incentive to do so before mill-generated mutually exclusive applications are filed with the Commission -- applications that cause processing backlogs.

Significantly, commentators like United who oppose barring future applicants from engaging in settlements fail to address the fundamental premise of the proposal to

²²Comments of United Management Services, PR Docket No. 92-80, at 1 (filed June 29, 1992). Substantively identical views were expressed in "cookie-cutter" form comments received by the Commission from approximately 70 apparent MDS applicants. *See, e.g.* Response of Mikeal A. Hardin To FCC "Request For Comment", PR Docket No. 92-80, at 1 (filed June 9, 1992).

eliminate settlements -- that the MDS application backlog has been caused in large part because the application mills hold out the prospect of a full market settlement to their customers. As the United States Interactive and Microwave Television Association ("USIMTA") concedes in its comments with remarkable candor:

Almost invariably all the applications in a market are prepared by the same application preparer, who thanks to the Same Day Rule is able to offer customers an exclusive opportunity to apply for a single market. Under those circumstances there is a very good chance that if a settlement is permitted there will be a full market settlement.²³

USIMTA unwittingly proves WCA's point -- it is the prospect of a full market settlement that the application mills use to entice unwitting speculators to purchase hundreds of mutually exclusive applications for a single authorization. Eliminate the prospect of full market settlements, WCA submits, and the flood of speculative MDS applications will become a trickle.²⁴ Permit full market settlements, however, and the

²³Comments of USIMTA, PR Docket No. 92-80, at 13 (filed June 29, 1992)[hereinafter cited as "USIMTA Comments"].

²⁴WCA must respond to the suggestion advanced by clients of one law firm in almost identical comments that the Commission's one year holding period for MDS licenses secured by those claiming a preference dissuades insincere speculators. *See, e.g.* Comments of Simon A. Hershon and Mary D. Drysdale Tenants By The Entirety, PR Docket No. 92-80, at 7 (filed June 29, 1992). Since the Commission permits MDS licensees to lease their facilities to wireless cable operators, and since it has become standard in the industry for the wireless cable operator to foot the bill for constructing and operating any station it leases, it is disingenuous for these commentators to suggest that "MDS applicants have for the most part been operating under the belief that they must construct and operate each MDS system for which they (or a settlement entity that they might join) might be licensed." *Id.* To the contrary, those who file speculative applications can reap substantial financial rewards without having to expend funds to construct and operate a MDS station by entering into a leasing arrangement with a
(continued...)

torrent of mill-generated MDS applications will resume just as soon as the current, interim freeze is lifted.²⁵

B. While The Commission Should Permit The Filers Of Pending Applications To Enter Into Settlements, It Should Modify The Settlement Procedures To Expedite Reduction Of The Backlog.

Some who generally agree that the Commission should ban settlements have nonetheless opposed the proposal in the *NPRM* to restrict full market settlements involving currently pending applications, asserting that such settlements will ease the application processing backlog.²⁶ WCA reluctantly agrees. There appears to be little to gain by forcing existing settlement groups to disband or depriving the filers of pending applications an opportunity to negotiate full market settlements that could alleviate the MDS application backlog. As those involved in the filing of speculative applications

²⁴(...continued)

wireless cable operator that does not run afoul of the Commission's restrictions on the assignment of licenses by the claimants of lottery preferences.

²⁵WCA finds chilling USIMTA's prediction that banning settlements will not deter the application mills. See USIMTA Comments, *supra* note 23, at 13. WCA suspects that USIMTA's rhetoric is designed merely to advance its pro-application mill regulatory agenda. See "Many USIMTA Members Linked to Firms Investigated by FTC, Others," *Communications Daily*, at 1-2 (May 22, 1992). If USIMTA proves correct, however, it may be necessary for the Commission to adopt more drastic measures, such as requiring that MDS licensees utilize their facilities for their own purposes (rather than leasing) and imposing more draconian restrictions and/or transfer fees on the assignment of licenses. See, e.g. "Spectrum Licensing In The '90s: Can We Find A Way?", Remarks of Comm. Ervin S. Duggan before the American Mobile Telecommunications Association SMR Leadership Conference, at 7 (June 24, 1992).

²⁶See, e.g. SBA Comments, *supra* note 12, at 21.

pointed out in their comments, having just spent thousands of dollars per MDS application, the speculative applicants are not likely to withdraw their application, even if the Commission refunds the \$155 filing fee. Sadly, the damage to the MDS application processing system caused by these mutually-exclusive applications has been done, and the sooner the Commission can dispose of the applications on file the better. Indeed, the paperwork burden that would be imposed on the Commission's staff in connection with the dissolution of existing settlement groups and the return of filing fees could render any other benefits from barring settlements illusory.

However, if the Commission permits pending applicants to settle, WCA suggests two major revisions to the settlement process. First, unless the Commission adopts WCA's proposal that the Commission exercise its discretion under Section 21.20 of the Rules and accept all pending MDS applications for filing without extensive review (but subject to post-lottery analysis),²⁷ WCA would alter the current policy of barring applicants from entering into settlement groups until after their applications have been reviewed by the staff and accepted for filing.²⁸ The vast majority of the applications

²⁷See WCA Comments, *supra* note 3, at 17-18.

²⁸See "Domestic Facility Division Advisory For Multichannel Multipoint Distribution Service Applicants," *Public Notice*, Mimeo 13244 (rel. May 24, 1991). Some have cited to vague references in the *NPRM* which suggest that settlement groups can be formed today even before the Commission gives public notice that the underlying applications have been accepted for filing, the May 24, 1991 *Public Notice* notwithstanding. See, e.g. Comments of The S. Roberts Company, PR Docket No. 92-80, at 9 (filed June 29, 1992). Certainly, if the Commission decides to permit settlements among those with currently pending applications, it should clarify when those settlement groups can be formed.

that are currently on file, but have not yet been accepted for filing, involve situations where a mill has coordinated the simultaneous filing of tens, if not hundreds, of mutually exclusive applications for a single authorization. The Commission's current policy will force the staff to engage in extensive work to review and to accept these applications for filing -- work that is largely wasted once the inevitable settlement groups are formed.

Instead, to preserve staff resources, WCA would permit an applicant to enter into a settlement group at any time after its application is filed (regardless of whether the application has been reviewed and accepted for filing). WCA recognizes that the Commission's policy of barring the formation of settlements prior to application acceptance is an adjunct of its rule that only applications acceptable for filing may participate in a lottery.²⁹ Like the Commission, WCA wants to assure that no applicant who filed an unacceptable application is permitted to secure an interest in a conditional license through a settlement. Therefore, WCA suggests that once a settlement group prevails in a lottery or proffers a full market settlement, the Commission should then review all applications filed by settlement group members for acceptability. Should any of those applications prove not to be acceptable for filing, the applications of all members of the settlement group should then be dismissed. Such an approach would have a

²⁹*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, 57 Rad. Reg.2d 943, 949-950 (1985).*

dramatic prophylactic impact; no sane applicant will want to join a settlement group unless it is certain that all other members have filed acceptable applications.

Second, WCA would modify the current policies regarding the filing of settlement documents. At present, the Commission permits settlements to be filed with the Commission up to ten days in advance of the lottery date.³⁰ As a result, the Commission's staff has been inundated with eleventh hour settlement proposals. Attempting to revise its database to reflect all of the last-minute settlements, the staff has understandably made errors that have resulted in the improper calculation of lottery intervals and the invalidation of lotteries. WCA suggests that the Commission instead require settlement documentation to be filed no later than thirty days prior to any lottery so as to afford the staff ample time to prepare.

*C. The Comments Evidence Strong Support For Enlargement
Of The MDS Protected Service Area As A Mechanism For
Deterring Speculative Applications.*

In its Comments, WCA urged the Commission to modify the PSA definition set forth in Section 21.902(d) of the Rules in the manner proposed by WCA in its pending Petition for Partial Reconsideration in General Docket No. 90-54 in order to frustrate those who are inclined to file greenmail applications and expedite the processing of many MDS applications.³¹ As WCA demonstrated, the PSA definition

³⁰See, e.g., "Multichannel Multipoint Distribution Service Applications Accepted For Filing And Notification Of Lottery Date", *Lottery Notice*, Report No. MMDSL-42, at 2 (Rel. Dec. 13, 1991).

³¹See WCA Comments, *supra* note 3, at 35-43.

fails to adequately protect wireless cable subscribers from interference, and can be unduly difficult to apply where cardioid antennas are utilized. WCA was hardly alone in this regard -- Hardin and Associates, Inc. and CCWCO also called for the Commission in this proceeding to adopt WCA's proposal as a mechanism for deterring speculation and expediting application processing,³² while others proposed a somewhat different approach to PSA enlargement.³³

Any doubt the Commission may have had regarding the need for an enlarged PSA should be dispelled by the comments of WJB-TV Ft. Pierce Limited Partnership and WJB-TV Melbourne Limited Partnership ("WJB"). WJB's comments bring to light a case where by specifying an antenna height of only ninety feet (clearly too low to be employed in a legitimate wireless cable system), a MDS applicant was able to propose a station that did not have line-of-sight into the unduly small PSA afforded WJB under the Rules, but would clearly cause interference to WJB's subscribers.³⁴ This transparent attempt at greenmail can be made for one reason and one reason only -

³²See Hardin Comments, at ¶ 11.C; Consortium Comments, *supra* note 10, at 21-23.

³³Several parties represented by one law firm proposed that the 15 mile PSA be enlarged to 25 miles. *See, e.g.,* Emerald Comments, *supra* note 2, at 10. While WCA believes that such an approach would be superior to the current rule, WCA remains convinced that its proposal, which tailors the size of the PSA to the technical capabilities of the station and provides for simple PSA calculations when cardioid antennas are utilized, is superior.

³⁴See WJB Comments, *supra* note 2, at 5-6 n.1.

- the Section 21.902(d) definition yields a PSA that fails to include areas where residents can readily receive WJB's service.

The scenario painted by WJB illustrates WCA's point quite dramatically. So long as Section 21.902(d) defines a PSA that fails to protect those residing in areas that can receive a quality wireless cable service, there will be an incentive for the submission of greenmail applications. And, so long as that incentive exists, there will be those who will take advantage. At best, the Commission's staff will be required to expend numerous man-hours processing such applications until they can be dismissed as shams; at worst, the staff will grant such applications, the wireless cable operator will be required to pay greenmail, and the public will suffer either decreased service or increased rates. Neither prospect is desirable.

III. THE COMMISSION'S PROPOSED MODIFICATIONS TO THE MDS/ITFS INTERFERENCE PROTECTION RULES ARE CONTRARY TO THE BEST INTERESTS OF BOTH THE WIRELESS CABLE AND THE EDUCATIONAL COMMUNITIES.

As the Commission is well-aware, it is rare indeed that the wireless cable and educational communities agree on anything. One exception, however, is that they all reject the proposal, hidden in footnote 29 of the *NPRM*, to materially alter the nature of the interference protection that a MDS applicant must offer cochannel and adjacent channel ITFS facilities. In the hope of furthering its goal of expediting the initiation of wireless cable operations, the Commission has proposed to replace pre-licensing analysis of potential interference to ITFS facilities with a post-licensing testing schedule designed

to rapidly result in permanent MDS authorizations. Under that proposal, a MDS conditional licensee would be required to provide fourteen days advance notice to potentially affected ITFS licensees prior to the commencement of transmissions, and ITFS licensees would have thirty days after continuous transmissions commence to lodge interference complaints.³⁵ Neither the wireless cable nor the educational community, however, took solace in the Commission's proposal.

Footnote 29 appears premised on the proposition that MDS processing delays cannot be resolved so long as staff is required to engage in pre-licensing analysis of the potential for interference to ITFS receive sites. Yet, as WCA detailed in its Comments, that premise is wrong.³⁶ As WCA noted:

Because the MDS application processing staff does not have direct access to ITFS receive site information, there has been a processing lag. The solution, however, is to provide the MDS processing staff with access to a definitive database, not to abandon pre-licensing review of the potential for interference to ITFS receive sites in favor of a requirement that MDS conditional licensees protect actual ITFS receive sites installed at the time MDS operations commence.³⁷

The comments submitted in response to the *NPRM* further convince WCA of the merits of its position. The wireless cable interests demonstrated the adverse impact that the uncertainty regarding the permanence of MDS authorizations inherent in such an approach would have on their ability to secure financing until after the thirty day

³⁵See *NPRM*, *supra* note 1, 7 FCC Rcd at 3269 n.29.

³⁶See WCA Comments, *supra* note 3, at 23.

³⁷*Id.* at 56.

period in which ITFS licensees could effectively shut the system down.³⁸ Ironically, however, ITFS interests complained that the fourteen day pre-test notification period was too short,³⁹ and that the thirty-day period for submitting interference complaints is too brief due to vacation scheduling, the impact of climatic changes and the need of some ITFS licensees for monitoring large numbers of receive sites.⁴⁰ One ITFS commenting party goes so far as to suggest that the pre-test notification be extended to as many as 90 days and that ITFS licensees have as much as a full year to lodge interference complaints.⁴¹

WCA must admit -- there is a basis for the concerns being expressed by the ITFS community if the FCC is not going to engage in pre-licensing interference analysis (although the time frames bandied about by the ITFS community are clearly excessive). However, it should be obvious that wireless cable will never be able to attract the capital investment it needs to grow if MDS licenses are conditional for as many as fifteen months! If the Commission truly desires to aid the wireless cable

³⁸See, e.g. WCA Comments, *supra* note 3, at 56-57; SBA Comments, *supra* note 12, at 18-19; Consortium Comments, *supra* note 10, at 17.

³⁹See, e.g. NIA Comments, *supra* note 3, at 7; Arizona Comments, *supra* note 3, at 7; IHETS Comments, *supra* note 3, at 19.

⁴⁰See NIA Comments, *supra* note 3, at 8; Bay Area Comments, *supra* note 3, at 8; IHETS Comments, *supra* note 3, at 19-20.

⁴¹See Arizona Comments, *supra* note 3, at 7-8.

industry, it must recognize that MDS applicants will gladly accept a slight delay in pre-license application processing rather than be forced into months of post-licensing limbo.

Equally troubling to the wireless industry is the Commission's proposal to require a MDS conditional licensee to protect not only those ITFS receive sites registered prior to the time the MDS facility was proposed, but to also require protection to any receive site registered after the MDS facility was proposed, but prior to the time that MDS facility becomes operational.⁴² Adoption of such a rule would leave them open to blatant greenmail. ITFS receive sites could be proposed long after a MDS facility was proposed that could not be protected and would effectively render the previously-proposed MDS station inoperable.

While WCA recognizes the legitimacy of some of the complaints advanced by the ITFS community against the *NPRM*, WCA is troubled that some ITFS interests commenting in response to the *NPRM* are apparently utilizing this proceeding to render the MDS a secondary service *vis a vis* ITFS. WCA has consistently espoused the view that an applicant for a new ITFS or MDS facility should be required to afford interference protection to any ITFS or MDS facility that was previously proposed. That approach has been the bedrock of the Commission's policies towards interference protection. Now, however, some ITFS interests go so far as to suggest that a MDS

⁴²See, e.g. WCA Comments, *supra* note 3, at 56-59; FH&H Comments, *supra* note 2, at 22-23; Consortium Comments, *supra* note 10, at 16-18.