

applicant should be required to afford interference protection even to ITFS receive sites that are never registered, or are only registered after the MDS applicant has submitted its application.⁴³ The disastrous impact adoption of such a novel policy would have on the wireless cable industry should be apparent -- any ITFS operator that is cochannel or adjacent channel with a MDS facility could force the wireless cable operator utilizing that station to cease or make material modifications to its operations at any time by registering a strategically located receive site.⁴⁴ As concerned as WCA is about the impact of even a thirty-day post-licensing test period will have on the ability of wireless cable to attract financing, the Commission can imagine what effect permanent secondary status for the MDS would have. Therefore, WCA urges the Commission to confirm that MDS and ITFS interference protection priorities will be set by application date.

In sum, although not the speediest system imaginable, the current reliance on pre-licensing interference analysis works well for both MDS and ITFS entities. Experience has shown that the pre-licensing interference protection analysis is extremely conservative. It is telling indeed that in the seven years since the Commission began licensing MDS facilities, WCA is not aware of a single instance in which the Commission was required to formally or informally intercede in a post-licensing

⁴³See, e.g. Bay Area Comments, *supra* note 3, at 7; NIA Comments, *supra* note 3, at 9; IHETS Comments, *supra* note 3, at 26.

⁴⁴Any thought the Commission may have that such fears are groundless can be alleviated by reviewing the comments cited *supra* at note 2 and in the many adversarial proceedings pending before the Mass Media Bureau involving strike ITFS applications.

interference dispute.⁴⁵ Rather than replace that system for one that adds unacceptable uncertainty to the wireless cable regulatory environment, the Commission should focus its attention on developing the comprehensive ITFS receive site database that will permit the processing staff to conduct computerized interference studies at lightening speed.

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.

A. The Commission Should Reject USIMTA's Effort To Eliminate "First Come, First Served" Application Processing.

As WCA noted in its Comments:

The Commission has already taken the first essential step towards mitigating the adverse impact of application mills on wireless cable operators. The emergence of the MDS application mills exacerbated what had always been a problem for those attempting to secure channel capacity for a wireless system -- the overfiling of applications. Simply put, for years there had been a small cadre of unscrupulous individuals who would monitor the Commission's public notices and, when the Commission announced that it had accepted an application for a new MDS station, would file a competing application within the cut-off period. Needless to say, these individuals never had any interest in actually developing a wireless cable system; they were merely looking to extort a financial settlement from the wireless cable operator that filed the initial application and need the authorization. As the application mills began to spring up, they too seized upon the opportunities presented by Commission rules permitting overfilings. Eventually, a situation developed where any MDS

⁴⁵As a result, WCA must object to the proposal by one group of educators that the Commission not only retain the current system of pre-licensing interference analysis, but also adopt a formal rule providing ITFS licensees a 120 day period once the MDS station commences operating in which to employ "automatic MDS shutdown procedures." See Mendez Comments, *supra* note 4, at 9. Such an approach is entirely unnecessary, and will only further raise concerns in the minds of potential investors regarding the stability of wireless.

application appearing on public notice was virtually certain to be overfiled by mill-generated filings.

With the initial *Report and Order* in General Docket No. 90-54, the Commission took a major step towards eliminating the problems caused by the application mills. In that decision, the Commission amended Parts 1 and 21 so that, ever since the new rules became effective on October 31, 1990, an application in the MDS has been cut off from mutually exclusive applications at midnight of the day that the application is filed. Those new rules have proven successful -- legitimate wireless system developers can now file necessary MDS applications free from the fear of over-filing.⁴⁶

Given the success of the "first come, first served" processing scheme in mitigating the direct harm that application mills and other unscrupulous entities were causing legitimate wireless cable operators, it is remarkable that USIMTA is once again seeking a return to the sixty day cut-off rule that proved so troublesome to wireless cable operators and was so beloved by the unprincipled.⁴⁷ Even more remarkably, USIMTA offers not a single argument, much less a cogent one, as to how rescision of "first come, first served" processing would advance the Commission's goal in this proceeding of "reduc[ing] the delays associated with the processing of applications for stations in the [MDS]."⁴⁸

USIMTA's failure, however, comes as no surprise; USIMTA's proposal is a transparent attempt to provide further opportunities for application mills to hawk their wares to a gullible public in greater volumes. In fact, as the Commission found in the

⁴⁶WCA Comments, *supra* note 3, at 24-25 (footnotes omitted).

⁴⁷See USIMTA Comments, *supra* note 23, at 14.

⁴⁸NPRM, *supra* note 1, 7 FCC Rcd at 3266.

Report and Order in General Docket No. 90-54, it is "first come, first served" MDS application processing that best serves the public interest by assuring that the finder of a filing opportunity reaps the benefits.⁴⁹ And, the Commission confirmed that conclusion just months ago when, in its *Order on Reconsideration* in General Docket No. 90-54, it found devoid of merit a petition for reconsideration of the "first-come, first-served" filed by USIMTA and others.⁵⁰ USIMTA offers no reason for the Commission to reverse course, and none exists.

B. Adoption of USIMTA's Proposed Qualification Requirements Would Not Serve The Public Interest.

Equally devoid of merit is USIMTA's call for the imposition of new qualification requirements on MDS applicants. For example, USIMTA would have the

⁴⁹*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, 6424 (1990). SAFE has proposed that the Commission abandon its interference protection system for prior coordination. See SAFE Comments, *supra* note 5, at 5-6. Following prior coordination procedures, however, would force potential applicants to reveal their plans long before they could secure cut-off protection, threatening a return to the very kinds of over-filings that caused the Commission to adopt the "first come, first served" rule in the first place.

⁵⁰*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*, 6 FCC Rcd 6764, 6776-6780 (1991)[hereinafter cited as "*Docket 90-54 Reconsideration Order*"]. Indeed, USIMTA has gone so far as to seek review by the United States Court of Appeals for the District of Columbia Circuit of the *Order on Reconsideration*. See *United States Independent Microwave Television Association v. FCC*, No. 91-1637, (filed December 20, 1991).

Commission ban the tentative selectee chosen in one lottery from participating in any subsequent lottery until it receives its conditional license, constructs the station, and operates it for some unspecified "reasonable period."⁵¹ Adoption of such a proposal, however, would stifle the legitimate activities of wireless cable operators who are developing systems in two or more markets simultaneously. Such multiple system operators are becoming more prevalent in the wireless cable industry, as success in one market eases the difficult task of securing financing for additional markets. Given the Commission's goal of expediting the initiation of wireless cable services across the country, it would be bizarre indeed to impose barriers to the simultaneous development of several markets by legitimate multiple system operators.

USIMTA offers no public policy that would be advanced by adoption of its proposal and WCA can only speculate as to USIMTA's motivation. If, however, USIMTA is implying that the failure of an applicant that is the tentative selectee or conditional licensee in one market to construct and operate is somehow evidence that the applicant will not construct and operate a facility in a second market, USIMTA has again missed the mark.⁵² In fact, there can be a myriad of legitimate reasons why a tentative selectee or conditional licensee has not constructed facilities in one market -- reasons that

⁵¹See USIMTA Comments, *supra* note 23, at 12.

⁵²Such a rationale, of course, does not explain why USIMTA would require operation for an unspecified "reasonable period" before a licensee could participate in additional lotteries. Once a licensee has placed its station in operation, the length of time it has been operating says absolutely nothing about the prospects that the licensee will actually construct and operate facilities in another market.

have no bearing whatsoever on that entity's willingness or ability to construct and operate in a second market. To cite just a few of many possible explanations, the processing of the tentative selectee's application may be slowed due to the MDS application backlog. Or, there may be a frivolous petition to deny pending that the staff has yet to address. Or, equipment delivery delays may be slowing construction by a conditional licensee. In short, delays in the initiation of service may be caused by circumstances totally outside the control of the tentative selectee/conditional licensee and have no bearing on how that tentative selectee/conditional licensee will perform in another market.

USIMTA similarly goes too far when it calls for disqualifying any entity that has previously forfeited a MDS conditional license from securing new MDS authorizations.⁵³ Contrary to what USIMTA suggests, forfeiture of a conditional license in the past is not necessarily predictive of whether an entity will perform in the future. In particular, WCA believes that adoption of USIMTA's proposal would be unduly punitive towards those who filed applications during the September 1983 filing window. The Commission must recognize that there have been significant unanticipated developments between the time applications were filed in 1983 and finally granted (the first were granted in late 1985 and many remain pending today). During that period there have been sea changes in the multichannel video marketplace. Franchised cable penetration soared during that period, and markets that were largely uncabled in 1983 were wired. In 1983, it was perceived that a four channel MDS system could compete

⁵³See USIMTA Comments, *supra* note 23, at 11.

against franchised cable. However, by the time MDS conditional licenses began being issued, it became clear that far more than four channels were necessary. In many markets, a conditional licensee found that additional channels either were unavailable due to Commission processing delays or too expensive, and was forced to forfeit its conditional license through no fault of its own. Indeed, if one examines the pattern of MDS conditional license forfeitures, it is apparent that in most cases the FCC had only granted one of the two MMDS channel groups in the market, making it impractical to develop a viable wireless cable system.

In short, barring those who have forfeited a conditional license from securing further authorizations would be unjust, particularly given the Commission's culpability in the processing of applications in timely fashion. While WCA has little sympathy for those who warehouse spectrum, it urges the Commission to take care not to penalize those who made good faith attempts to develop facilities in an inhospitable regulatory environment but ultimately failed due to the Commission's inability to make sufficient channel capacity available in timely fashion.

C. The Commission Should Not Condone Failures To Respond To Requests For Information.

No doubt, during the late 1980s one of the greatest sources of delay in the processing of MDS applications stemmed from the Commission's policy of sending so-called deficiency letters to tentative selectees whose lottery-winning applications were not in full compliance with the rules. Unfortunately, although those deficiency letters

generally required curative amendments to be filed within thirty days, many tentative selectees discovered that the Domestic Radio Branch staff was stretched so thin that nobody was monitoring for compliance. Thus, in some quarters it became a matter of routine to ignore deadlines established in deficiency letters. Ultimately, however, the staff caught on to this ploy, and dismissed the offending applications. In many cases, only after being advised of such dismissal did the offending applicant provide the Commission with the curative amendment, along with a petition for reconsideration of the dismissal and/or a petition for reinstatement.

In its Comments, WCA noted how the pendency of those petitions was frustrating the development of wireless cable, as they were perceived by the Domestic Radio Branch as precluding it from conducting a new lottery.⁵⁴ However several entities that have had MMDS applications dismissed for failure to respond to staff deficiency letters ask the Commission in virtually identical pleadings to reinstate all dismissed applications so long as curative amendments were filed no later than thirty days after the dismissal.⁵⁵ While it is true, as these entities claim, that "adopting this

⁵⁴See WCA Comments, *supra* note 3, at 20-21.

⁵⁵See Comments of Virginia Communications, Inc., PR Docket No. 92-80, at 11-12 (filed June 29, 1992); Comments of Walter Communications, Inc., PR Docket No. 92-80, at 11-12 (filed June 29, 1992); Comments of BF Investments, Inc., PR Docket No. 92-80, at 17-18 (filed June 29, 1992); Comments of Line of Site, Inc., PR Docket No. 92-80, at 11-12 (filed June 29, 1992); Comments of Multi-Micro, Inc., PR Docket No. 92-80, at 17-18 (filed June 29, 1992); Comments of Hubbard Technologies, Inc., PR Docket No. 92-80, at 11-12 (filed June 29, 1992); Comments of Video/Multipoint, Inc., PR Docket No. 92-80, at 11-12 (filed June 29, 1992); Comments of Paul
(continued...)

procedure would significantly reduce the number of pending reinstatement requests," WCA believes that a more important consideration -- respect for the Commission's processes -- must take precedence.

Time and again, the Commission has refused to reinstate MDS applications dismissed for failure to timely respond to a deficiency letter. *See, e.g., Video/Multipoint, Inc.*, 6 FCC Rcd 5125 (1991); *Belwen, Inc.*, 5 FCC Rcd 7112 (1990); *VisionAire, Inc.*, 5 FCC Rcd 521 (1990); *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519 (1990); *Fortuna Systems Corporation*, 3 FCC Rcd 5122 (1988). The Commission's reasoning for refusing reinstatement has been simple:

The Communications Act manifests a congressional view that the FCC must have full access to relevant information The statutory plan is not for carriers to determine what information is to be furnished and when. It is for this Commission to do so. The FCC is a relatively small, overburdened agency. If it does not receive full cooperation from its regulatees when it needs relevant information, it cannot discharge its statutory responsibilities.

Multi-Point Television Distributors, Inc., 5 FCC Rcd 519, 520 (1990), quoting *By Direction of the Commission Letter to US West*, 60 Rad. Reg.2d 8 (P&F 1985).

That reasoning is as valid today as ever. To grant these entities' request for amnesty for their blatant failures to respond to deficiency letters would undermine

⁵⁵(...continued)

Communications, Inc., PR Docket No. 92-80, at 11-12 (filed June 29, 1992); Comments of MWTV, Inc., PR Docket No. 92-80, at 11-12 (filed June 29, 1992); Comments of Paul Communications, Inc., PR Docket No. 92-80, at 11-12 (filed June 29, 1992); Comments of Mettler Communications, Inc., PR Docket No. 92-80, at 11-12 (filed June 29, 1992).

respect for the Commission's processes and send a wrong signal to those regulated by the Commission. Short term application processing benefits simply do not justify rewarding those who have made a practice of refusing to timely respond to Commission requests for information.

V. THE COMMISSION SHOULD ADVANCE THE PROPOSAL TO ELIMINATE CHANNEL MAPPING.

In response to the *NPRM*, several commenting parties have proposed that the Commission modify its rules governing minimum ITFS programming requirements so that the licensee of a multichannel ITFS facility can meet its cumulative requirement utilizing just one channel.⁵⁶ Under the Commission's present rules, an ITFS licensee is required to transmit twelve hours per week per channel of educational programming during its first two years of operation, and twenty hours per week per channel thereafter. Under the proposal advanced in response to the *NPRM*, the licensee of a new four channel ITFS station, for example, could satisfy its twelve hour per week per channel minimum use requirement by transmitting forty-eight hours per week of educational programming on a single channel.

At present, ITFS licensees and wireless cable operators frequently utilize expensive channel mapping technology to provide viewers with the impression that all of

⁵⁶See, e.g. Choice TV Comments, *supra* note 13, at 16-17.

the ITFS programming is transmitted over just a few channels.⁵⁷ They do so because, to the extent possible, educators want all of their ITFS programming on channels devoted to education and wireless cable operators want all of their commercial programming on channels devoted to commercial programming. However, channel mapping is not cost-free; it can add hundreds of thousands of dollars to the cost of a wireless cable system that must be passed on to consumers and reduce the amount of funding leasing ITFS entities can utilize for programming. Not only must expensive computerized switching equipment be installed at the wireless cable headend to accommodate channel mapping, but every television set of every subscriber and ITFS receive site (even those that are "cable ready") must be attached to its own "black box" that maps the transmission on each frequency to the correct channel on the viewer's set.

In short, by permitting ITFS licensees to consolidate their ITFS programming on fewer than all of their channels, the Commission will avoid forcing the ITFS and wireless cable community to employ otherwise unnecessary channel mapping technology and, in the process, eliminate the avoidable costs that educators and wireless cable subscribers ultimately must bear. Therefore, WCA believes that the public will best be served by permitting an ITFS licensee to consolidate all of the programming it

⁵⁷In its *Order on Reconsideration* in General Docket No. 90-54, the Commission specifically authorize ITFS licensees to structure their programming schedules in a manner that will accommodate the use of channel mapping technology. *Docket No. 90-54 Reconsideration Order, supra* note 50, 6 FCC Rcd at 6774.

transmits in satisfaction of the Commission's essential use and minimum use requirements on fewer than all of its channels.

Of course, WCA recognizes that this proposal may be considered to be outside the scope of the *NPRM*. WCA nonetheless endorses it and calls upon the Commission to issue a *Further Notice of Proposed Rule Making* in the near future, to the extent required, so that this proposal can be incorporated into the rules.

VI. CONCLUSION

Once again, WCA salutes the Commission's efforts to address the backlog of MDS applications caused by the application mills. By adopting the proposals WCA has advanced in its Petition for Rulemaking, in its Comments, and in this pleading, the Commission can assure that the application mills will no longer flood the Commission with speculative MDS applications.

As the comments submitted in response to the *NPRM* conclusively demonstrate, radical changes to the Commission's ITFS and MDS interference protection rules will not solve the current application backlog, at least not without adding a myriad of other problems. Once again, WCA must stress that by taking more modest regulatory action, by streamlining the wireless cable regulatory bureaucracy, and by developing a system of prioritizing pending applications so that the applications for facilities most

likely to be employed by wireless cable operators gain priority, the Commission can slowly but surely eliminate the backlog, without putting the future of the nascent wireless cable industry at risk.

Respectfully submitted,

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July 14, 1992