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

JUL 14 1992

Federal Communications Commission
Office of the Secretary

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)

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

To: The Commission

ORIGINAL
FILE

REPLY COMMENTS OF AMERICAN TELECASTING, INC.

1. American Telecasting, Inc. ("ATI"), by its attorneys, and pursuant to Section 1.415(c) of the Commission's Rules, hereby submits its Reply Comments to the Notice of Proposed Rulemaking^{1/} ("NPRM") in the above-captioned proceeding, and the comments filed in response thereto, concerning proposed rule changes to expedite the processing of Multipoint Distribution Service ("MDS") applications.

I. INTRODUCTION

2. ATI operates three wireless cable systems in Colorado Springs, Colorado, Orlando, Florida and Fort Myers, Florida and has a number of additional systems under development. In addition, ATI is the licensee of several Part 21 facilities and has numerous applications for other such authorizations pending before the Commission. As such, ATI has a vital interest in the development of wireless cable. The current volume of MDS applications, the bulk of which has been generated by application mills, has

^{1/} FCC 92-173, released May 8, 1992.

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overwhelmed the Commission's limited resources and accordingly delayed the growth of the wireless cable industry. ATI's Reply Comments below concern the proposed rules, which can reduce speculative filings and, in turn, promote the development of the wireless cable industry.

II. THE COMMISSION SHOULD CONSOLIDATE ITS PROCESSING OF MDS AND ITFS APPLICATIONS AND ITS REGULATION OF SUCH FACILITIES

3. In reviewing its MDS processing and regulatory scheme, the Commission has proposed relocating those activities and consolidating them with its ITFS licensing and regulatory functions.² ATI supports the proposed creation of a consolidated database of MDS and ITFS applications and facilities and the implementation of processing under a single branch as a means to expedite service to the public and more efficiently utilize limited Commission staff resources. Such a database will alert potential applicants to currently operating and proposed stations which must be protected, rather than continue to subject them to engaging in the current guessing games as is currently required due to the absence of such a central repository of information. In addition, maintenance of such a database, would provide Commission staff immediate access to the data necessary to rapidly process such applications. Accordingly, the database must include all technical information essential for interference analyses purposes. ATI agrees with the Commission that the MDS portion of the database should be subject to public review and an opportunity afforded for

² NPRM at paras. 6, 22.

making the appropriate and necessary corrections.^{3/} However, in this regard, ATI also concurs with The Wireless Cable Association International, Inc. ("WCA"), which recommends in its June 29, 1992 Comments in the captioned proceeding that the ITFS portion of the database should similarly be subject to review and correction.^{4/}

4. With respect to the specific processing rules proposed in the NPRM and in the comments filed in response thereto, ATI supports WCA's proposal that, in each lottery, the Commission should name an alternative tentative selectee. Such action will avoid the necessity of and additional cost and delay associated with conducting additional lotteries in the event that the application of the tentative selectee is dismissed or denied.^{5/} Additionally, the Commission should discontinue its practice of allowing tentative selectees to amend their applications to come into compliance with the Commission's Rules (excluding, of course, those amendments filed as a matter of right, pursuant to Section 21.23(a)). Finally, ATI strongly supports WCA's recommendation that the Commission process the applications of legitimate wireless cable operators on a priority basis.^{6/} Adoption of these proposals would do much to speed up the application process and

^{3/} NPRM at para. 22.

^{4/} See Comments of The Wireless Cable Association International, Inc., PR Docket No. 92-80, RM 7909, at p. 16, dated June 29, 1992.

^{5/} See NPRM at note 30; Comments of WCA at p. 18.

^{6/} Comments of WCA at pp. 64-67.

expedite the commencement of wireless cable service, thus serving the public interest.

III. TO FOSTER THE GROWTH OF WIRELESS CABLE AND AVOID FURTHER APPLICATION BACKLOGS, THE COMMISSION SHOULD TAKE ACTION TO DETER APPLICATION MILLS AND THE SPECULATIVE FILINGS IN WHICH THEY TRADE

5. Reduction of the significant number of speculative MDS applications filed with the Commission will allow the expedited processing of legitimate applications, greatly fostering the development of wireless cable. ATI believes the following modifications to the Commission's Rules will assist the Commission in meeting that objective.

6. At the outset, the Commission has proposed prohibiting settlement agreements among MDS applicants, with the hope that such action will discourage speculative and insincere applications. ATI concurs. If the application mills can no longer guarantee their prospective clients interests in MDS licensees, the number of applications sold, prepared and filed by those mills will most certainly decrease. In turn, the speed with which legitimate applications are processed and granted will increase.

7. ATI also believes that, if the Commission revises its definition of the protected MDS service area, the filing of speculative applications will similarly decrease. As currently written, Section 21.902(d) allows MDS stations to be located too closely together, encouraging the filing of applications designed solely to gain the applicant a negotiating position designed to result in a profit by forcing a legitimate licensee to buy out the

closely-spaced station licensee. ATI supports the adoption of the definition of protected area as proposed by WCA,⁷ which would establish a fixed mileage criterion for the protected service area, based upon the individual station EIRP. Adoption of WCA's approach will eliminate such forced buyouts and, consequently, the incentive for insincere applicants that have no intention to offer service to the public flooding the Commission with cookie-cutter, mass produced applications.

8. The Commission has proposed certain revisions which ATI considers harmful to wireless cable service, namely the drastic changes to the interference protection requirements. ATI believes that, in general, the current rules appropriately strike a balance between a prospective licensee's need for flexibility in designing its system and the need of other licensees and applicants to be protected from harmful interference. ATI believes that adoption of the proposed arbitrary separation standards and the antenna height restriction would upset the current balance and consequently frustrate development of the industry.

9. The Commission has proposed replacing the current interference protection criteria with station-to-station separation standards as a means of reducing application processing time. Thus, the Commission believes that the need for its staff engineers to evaluate all of the technical materials submitted by applicants

⁷ See Comments of WCA at pp. 39-42.

under the current rules has delayed the licensing process.^{8/} Rather than positively effect the process, ATI believes the adoption of such arbitrary standards will retard and, in some markets, block the development of wireless cable systems. The proposed standards will no longer afford applicants the opportunity and flexibility to tailor their facilities to meet individual market conditions. In many cases, collocated additional channels essential to wireless cable will not be possible. Additionally, wireless systems may be precluded entirely in certain areas with pre-existing ITFS facilities. The Commission's attempt to establish a more efficient and expeditious MDS application process is commendable. However, it must not compromise quality for quantity: the Commission should maintain the current interference protection rules.^{9/}

10. In this regard, in its NPRM, the Commission proposed replacing the current requirements that an MDS applicant demonstrate that it is legally, financially, technically and otherwise qualified to render the proposed service, there are frequencies available for this purpose and the proposed station site is available to the applicant with a certification that the foregoing is true. While such simplification in the content of

^{8/} NPRM at para. 12.

^{9/} ATI agrees with WCA's contention that the application process could be expedited by revising Section 21.902(c) to clarify which facilities an MDS applicant must analyze in preparing its application. See Comments of WCA at pp. 70-72. In addition, the Commission would further promote efficiency by permitting the installation of low power signal boosters without prior authorization. The Commission should require only a notification concurrent with installation.

applications may theoretically expedite application processing by the staff, it may at the same time greatly encourage the submission of speculative applications by insincere applicants. One need only look to the Commission's experience after it made similar changes in its broadcast^{10/} and cellular rules^{11/} and the resulting effect on the volume of applications received by the so-called mills. Thus, any reduction in the time required to review each particular application attributable to the adoption of such certifications

^{10/} In Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits, 2 FCC Rcd 2122 (1987), the Commission observed, "after five years of experience with the financial certification requirement in lieu of documentation, it is clear that a number of broadcast construction permit applicants have certified their financial qualifications without any basis or justification. Such false certifications constitute abuses of the Commission's processes. They waste the resources of both the Commission and legitimate qualified applicants. As a consequence, the public may receive delayed service, substandard service, or no service at all." Id. See, also Revision of Application for Construction Permit for Commercial Broadcast Stations, 4 FCC Rcd 3853, 3855 (1989) ("we now believe that streamlining the application process may have facilitated the filing of applications by financially unqualified, sham and/or abusive applicants and made it more difficult to detect such applicants once they are in a comparative hearing.")

^{11/} In 1985, the Commission made more stringent the financial showing required of applicants for new cellular facilities to discourage "many purely speculative applications by thinly or noncapitalized entities seeking to 'win' the lottery having no interest in providing cellular service but seeking to profit from obtaining the license." Thus, in changing the cellular selection process from comparative hearings to lotteries, the Commission concluded that "in a lottery selection regime, a stricter financial demonstration requirement for cellular applicants will more efficiently and effectively assure that lottery entrants are bona fide applicants processing a demonstrated ability to construct and operate a high quality, competitive cellular system." Cellular Radio Lotteries, 101 FCC 2d 577, 590 (1985).

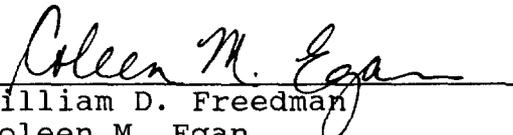
will surely be lost from the inadvertent encouragement of speculative applications resulting from such changes. ATI submits that adoption of the Commission's certification proposal may well add to the very problems that the subject rulemaking is designed to solve. If anything, to deter frivolous filings, ATI encourages the Commission to toughen the qualifications showings that an MDS applicant must make, such as its demonstration of its financial ability to construct and operate as proposed.

IV. CONCLUSION

11. ATI applauds the Commission's efforts to streamline and reorganize its rules in order to deter the filing of speculative MDS applications and to expedite processing of legitimate MDS applications. ATI respectfully requests that the Commission consider the foregoing Reply Comments in adopting its revised rules.

Respectfully submitted,

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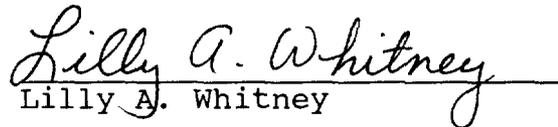
Its Attorneys

July 14, 1992

CERTIFICATE OF SERVICE

I, Lilly A. Whitney, a secretary in the law offices of Gurman, Kurtis, Blask and Freedman, Chartered, do hereby certify that I have on this 14th day of July, 1992, had copies of the foregoing "REPLY COMMENTS OF AMERICAN TELECASTING, INC." mailed by U.S. first class mail, postage prepaid, to the following:

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