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FILE NUMBER

DIRECT DIAL (202)789-3476

October 13, 1992

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: *Written Ex Parte Communication*
PR Docket No. 92-80

Dear Ms. Searcy:

I am writing on behalf of The Wireless Cable Association International, Inc. ("WCA") and pursuant to Section 1.1206(a)(1) of the Commission's Rules to provide the Commission with the two enclosed copies of a written *ex parte* communication delivered today to the Chiefs of the Mass Media Bureau, the Private Radio Bureau and the Mass Media Bureau's Video Services Division.

Respectfully submitted,

Paul J. Sinderbrand

Enclosures

cc: Ralph A. Haller
Roy J. Stewart
Barbara Kreisman

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FILE NUMBER

DIRECT DIAL (202)789-3476

October 12, 1992

HAND DELIVERED

Mr. Ralph A. Haller
Chief, Private Radio Bureau
Room 5002
2025 M Street, N.W.
Washington, D.C. 20554

Mr. Roy J. Stewart
Chief, Mass Media Bureau
Room 314
1919 M Street, N.W.
Washington, D.C. 20554

Re: *PR Docket No. 92-80*

Gentlemen:

Since we last met, I have had an opportunity to meet with the Executive Committee of The Wireless Cable Association, Inc. ("WCA") to reconsider WCA's position on the proposal advanced in the *Notice of Proposed Rule Making* to dismiss all pending Multipoint Distribution Service ("MDS") applications. WCA is certainly sensitive to the logistical problems the Commission would face in attempting to process the approximately twenty thousand pending MDS applications under the technical rules WCA believes the Commission must employ. Therefore, WCA is now prepared to support a carefully crafted policy towards the dismissal of pending applications if that would permit retention of the current technical rules. However, WCA remains concerned that, unless carefully handled, the dismissal of pending MDS applications could substantially retard the growth of the wireless cable industry.

Most importantly, WCA would object to any mass dismissal of pending applications that have been tentatively selected for grant in a lottery. The Executive Committee has confirmed my preliminary view that the industry would suffer grievous harm if tentative selectees are dismissed. As a practical matter, the industry views winning a

lottery as tantamount to securing a conditional license. While tentative selectees are too often the subject of petitions to deny, the vast majority of those petitions have been found to be without merit. WCA believes that most of the petitions to deny pending against the current group of tentative selectees fall within that category. Similarly, WCA understands that the staff has refused to grant conditional licenses to some tentative selectees because the initial lottery-winner for the authorization has petitioned for reconsideration of the dismissal of its application. As WCA explained in its Comments and Reply Comments, WCA believes that, by and large, these petitions for reconsideration are without merit and can be readily dismissed under existing MDS precedent. *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).

Because being chosen as a tentative selectee is tantamount to receiving a conditional license for those applicants that are sincere, wireless cable operators frequently enter into leasing arrangements with tentative selectees, pay substantial signing fees (often non-refundable), negotiate arrangements to accommodate grandfathered Instructional Television Fixed Service ("ITFS") licensees on the E and F Group channels, secure tower space and transmission equipment, and expend significant sums in securing additional channels in the same market. If the tentative selectees are dismissed, those efforts may prove wasted and the introduction of wireless cable into the affected markets substantially delayed. The risk of significant delay is most severe in the major markets -- markets where ironically enough the need for an effective competitor to franchised cable is greatest.

Similarly, WCA would urge the Commission to retain pending applications for modification of facilities, assignments of licenses and transfers of control of licensees and applications for permanent authorization of facilities that are currently being operated pursuant to special temporary authorization. There are relatively few of these applications pending, they generally are not subject to petitions to deny, and they tend to be important to the future of wireless cable in the affected markets. As the Commission recognized when it exempted these sorts of applications from the current filing freeze, they can be essential to the development of wireless cable in a market. Dismissing these applications would gain the Commission little, but at great cost to affected wireless cable operators who would have to suffer the expense and delay associated with preparing replacements.

While retaining these applications is critical, WCA believes that additional steps are necessary to protect the interests of legitimate wireless cable operators from the adverse impact of mass application dismissals. As you know, prior to the adoption of a "first come, first served" processing system for MDS applications, legitimate wireless cable operators would find their applications overfiled by hundreds of mill-generated applications during the sixty day cut-off period. Since "first come, first served" went into effect in November 1990, a wireless cable operator has been able to reveal open markets in applications, without fear of overfilings. Those applications are now a matter of public record, and if the Commission dismisses those applications now, there is a substantial risk that the application mills will file mutually exclusive applications the day the current freeze is lifted.

Thus, WCA believes it is essential for the Commission to adopt rules designed to frustrate the filing of mill-generated applications once the freeze is lifted. Eliminating all pre-lottery settlements (whether full market or partial) will help deter the mills. Adoption of a rule banning a person from having any interest in mutually exclusive applications should also prove effective, as would adoption of a requirement that applicants demonstrate a firm financial commitment for construction of the proposed facility.

In addition, WCA urges the Commission to adopt a proposal WCA first advanced in its Reply Comments -- barring new MDS licensees from leasing their facilities to wireless cable operators. *See* WCA Reply Comments, at 11 n. 25. While existing licensees and tentative selectees should be grandfathered, there is no reason why the Commission should permit speculators to file applications at this time, secure in the knowledge that if they win the lottery they can lease their stations to legitimate wireless cable operators. Bar leasing, while retaining restrictions on assignments and transfers of control, and the Commission will significantly reduce the opportunities for speculators to profit from the filing of MDS applications. In conjunction with a ban on leasing, and to further promote the accumulation of channels by those most likely to provide an effective alternative to cable, the Commission should restrict eligibility for new MDS facilities (at least during an initial filing window) to those who already are the licensee, tentative selectee or lessee of at least four MDS channels in the market. The Commission adopted a similar requirement in General Docket No. 90-54 in connection with its authorization of commercial licensing of Instructional Television Fixed Service channels, and it appears to have effectively eliminated insincere applications. *See* 47 C.F.R. § 74.990(c).

Perhaps the most important factor behind WCA's willingness to support the dismissal of pending non-tentative selectee applications is that it will greatly increase the utility of granting WCA's requests for a modified protected service area ("PSA") definition. In response to the *Notice of Proposed Rule Making* in this docket and in a petition for reconsideration in General Docket No. 90-54, WCA has pending proposals to amend the PSA definition to deter the filing of "greenmail" applications. WCA has demonstrated that the current fifteen mile PSA does not adequately protect many wireless cable subscribers from interference. If most of the pending MDS applications are dismissed, it will be substantially easier for the Commission to afford existing facilities the protection they deserve, since new applicants would be required to honor the modified PSA. The Commission can take no better step towards deterring "greenmail" applications then to adopt WCA's proposed revisions to the protected service area definition.

Finally, WCA must reiterate its view that, no matter how the Commission chooses to address the MDS processing backlog, priority should be given to processing those applications most likely to yield wireless cable facilities quickly. WCA's proposed market-by-market approach, under which expedited processing would be afforded to all pending applications in a market upon the commitment of the wireless cable operator to construct and commence operations within six months, will provide the Commission with the most "bang" for its processing "buck".

Between the Commission's efforts in General Docket No. 90-54 and Congress' enactment of the Cable Television Consumer Protection and Competition Act of 1992, wireless cable is poised for dramatic growth. WCA believes that if the proposals set forth above for revising the MDS application process are adopted, the Commission can avoid inadvertently stunting that growth. WCA appreciates your efforts to promote the development of wireless cable, and looks forward to working with you and your staffs as this proceeding continues.

Very truly yours,

Paul J. Sinderbrand

cc: Barbara Kreisman