

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

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AUG 30 1993

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~~
MDS/MMDS Processing

COMMENTS

THE UNITED STATES INTERACTIVE
AND MICROWAVE TELEVISION
ASSOCIATION

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COMMENTS

The United States Interactive and Microwave Television Association, (USIMTA) pursuant to the Commission's Rules, hereby submits Comments In response to the Public Notice, (the Notice) released by the Commission on July 28, 1993 in this proceeding. USIMTA is disappointed that the Commission, after long promising an end to its nearly 17 month MMDS filing freeze, is considering backing away from its most recent self-imposed thawing deadline of September 30th.

USIMTA recognizes, however, the ominous human and financial obligations that have been assumed by the Commission as it continues to process the more than 18,000 MMDS license applications that have passed through its doors. Our Comments will offer suggestions, especially in the face of recently passed auction legislation, for efficiently overcoming these burdens.

USIMTA understands that the Commission has little choice with regard to the distribution protocol for MMDS licenses but we suggest that it is in its best interest to negotiate around the congressional auction requirement in as many markets as possible. We believe that in order to

facilitate this goal, the Commission should revisit its February, 1993 decision to ban full-market settlement groups for MMDS applications.

I. Introduction and Statement of Interest

The United States Interactive and Microwave Television Association is a Washington, DC based trade association that represents the microwave and interactive television industries. Our interest in this proceeding stems from the many MMDS, OFS and ITFS applicants that comprise a majority of our membership. Our membership also includes, but is not limited to, system operators, license holders, engineering companies, equipment vendors, communication attorneys and programmers.

II. Discussion

A. The Commission's hands are, regrettably, now tied to auctions.

An optimal solution for the thawing of the filing freeze must be considered in light of the new spectrum auction provisions recently passed as part of the Clinton Budget. The Commission's Notice was apparently drafted without regard to the possibility that the spectrum might be subject to competitive bidding. The regulatory quagmire with which we are now faced, however, must be approached in the context of this brave new auction world.

It is lamentable that the Congress has, in its well-intended but ill-conceived provisions, allowed the Commission so little discretion in establishing the distribution protocol for emerging technologies that utilize the electromagnetic spectrum. The Bill, in fact, directs the Commission to submit all new spectrum license applications that fall under broad guidelines to a competitive

bidding process. Our reading suggests that any spectrum in any market that contains mutually exclusive applications and is to be used for subscriber fee-oriented services will be subject to auction.

B. MMDS serves in a vital role as the primary competition to franchised cable.

USIMTA reminds the Commission that the importance of a successful MMDS industry is in the competition that it provides to the incumbent cable providers. This goal served as the driving force behind the passage of the Program Access provision in last year's cable re-regulation act. It is widely expected that the Commission will require eighteen months or more to establish and implement a structure for spectrum auctions, and it will need to complete these rule-makings and reallocate its resources before it can even begin to contemplate such an action.

Congress designed the Program Access and Rate Regulation provisions of the act to be temporary, to expire as competition entered into the market. One need not remind the Commission of the headaches that these provisions have caused them, and that they now need more attorneys and office space just to satisfy their new requirements. Without MMDS and other technologies that can immediately compete against cable operators, the FCC will continue to expend much of its time and resources regulating the industry. By promoting competition, the Commission can save itself this outlay and rely on the market-place for regulation.

C. Financing for MMDS licensees is scarce.

Recently, in a Notice of Proposed Rulemaking, (PR Docket No. 92-80, FCC 92-123, FN. 32, P.H.: Released May 8, 1992), the Commission has commented that of the 900 MMDS

licenses granted to date, over 600 have had to forfeit their authorization due to a failure to construct. While these licensees have been labeled "speculators" by the Commission, few can argue that these selectees did not desire to construct a system and to go into business. In the majority of instances, these licensees simply could not get the requisite financing to build-out their systems. This illustrates a fundamental problem with subjecting MMDS applications to an auction process. An inverse relationship exists between the available financing for MMDS system development and the proportion of an entity's scarce financial resources that it must use to purchase a license.

Unlike a new technology like Personal Communications Services,(PCS) MMDS is not an industry that will enjoy price inelasticity. Because the price of its primary competition, the local cable system is generally well known, a MMDS operator is bound by a price ceiling above which he is not competitive. MMDS licensees, therefore, will not have the ability to absorb the cost of acquiring a license, if they expect to offer their services at prices comparable to those of the local cable interest. The Commission should recognize the obvious benefits of strong competition in an industry that already commands a disproportionate share of its regulatory resources.

D. Settlement groups will uniquely serve the public interest as they will allow the Commission to bypass auctions, ensure competition and save it the prohibitive costs of defending their ban.

USIMTA suggests that the Commission, in negotiating a solution to this quagmire, embrace "full-market" settlement groups as the savior to our industry. The Commission is bound, under the new law, to employ auctions any time a market boasts mutually exclusive applications for a license, (this assumes, of course, that the operator intends to profit from fee-oriented subscribership). As we have stated, an auction process will render the MMDS industry

uncompetitive at a most unfortunate time for both the FCC and the public. By reversing its earlier decision banning full settlement groups, the Commission can ensure that many important markets will form these alliances, effectively narrowing the field to a single application. The Commission will, therefore, be able to ensure that consumers are protected from the historic monopolistic activities of franchised cable, while it cuts its own costs of regulation. These are two goals clearly in the public interest.

USIMTA has argued since the imposition of this retroactive ban, that it would have no effect but to discourage the public's faith in governmental regulations. Additionally, we have suggested that it has questionable constitutional support, and will cost the Commission untold human and financial resources in their future efforts to defend it. The Commission itself has even recognized the industry benefits of allowing MMDS applicants to enter into settlement groups, when it expressly incorporated this right into their Rules governing MMDS service. Section 21.33(b) was added to the Rules by the Commission in the MMDS Second Report and Order, ___, FCC2d ___, 57 RR2d 943 (1985). In section VII Miscellaneous Issues, under the heading "A. Settlements", the Commission stated:

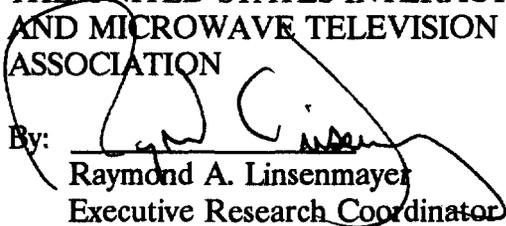
The Commission recently adopted this proposal in the Cellular Lottery Order, 49 FR at 23, 638, to allow settling parties their cumulative probability to reflect any partial settlements. We see no reason why we should not adopt the same policy here. Settlements are in the public interest, because they reduce or eliminate administrative burdens, delay and expense. In addition, they allow many different parties to contribute and to participate in MMDS service. Affording settling parties their cumulative probability in a lottery serves the public interest especially where only tow carriers can be licensed in each market." 57 RR 2d 9343 at 955. (Footnote omitted.)

III. Conclusion

USIMTA strongly suggests that the Commission revisit its decision to ban full-market settlement groups for MMDS applications. We believe that this course will allow the Commission to bypass auctions, ensure industry competition and save it the costs of defending their Constitutionally questionable ban.

Respectfully submitted,

THE UNITED STATES INTERACTIVE
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