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May 16, 1994

DOCKET FILE COPY ORIGINAL

Mr. William Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: Ex Parte Contact

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Dear Mr. Caton:

MAY 16 1994

This is to inform you that on Thursday, May 12, a meeting was held with Jim Olson and Paul W. Gallant of the Cable Bureau, Bernard ~~Beard~~ <sup>FEDERAL COMMUNICATIONS COMMISSION</sup> and John Raines of Mitchell Communications Corporation ("MCC"), and Toni <sup>OFFICE OF SECRETARY</sup> Cook Bush of Skadden, Arps, Slate, Meagher & Flom, its attorneys.

During the meeting, we discussed the regulatory difficulties faced by the wireless cable industry generally and by MCC in particular. By addressing licensing issues, we also touched on matters raised in PR Docket No. 92-80 (MMDS licensing). Attached are copies of the materials we submitted to Mr. Olson and Mr. Gallant at the meeting. Also attached are copies of the materials we faxed to Mr. Olson and Mr. Gallant on Thursday, May 12, and Monday, May 16, as a result of the meeting.

We appreciate the Commission's concern and willingness to hear recommendations from MCC, a company which has endeavored to create competition for cable television.

Sincerely,



Antoinette Cook Bush  
Counsel for Mitchell  
Communications Corp.

Attachments

cc: Jim Olson  
Paul W. Gallant

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MAY 16 1994

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

M E M O R A N D U M

May 12, 1994

VIA FACSIMILE

TO: Jim Olson  
Paul Gallant

FROM: Toni Cook Bush

Re: Recent Extension of Construction and  
Operation Deadlines by FCC, Private  
Radio Bureau, in the 220-220 MHz Land  
Mobile Service and MMDS Public Notice

It was a pleasure to meet with you today on behalf of Mitchell Communications Company to discuss the regulatory difficulties faced by the wireless cable industry. In response to your request, attached is a copy of the recent Order released by the Private Radio Bureau ("PRB") concerning the extension of construction deadlines in the 220-222 MHz Private Land Mobile Radio Service ("220 MHz"), and a copy of the 1988 Public Notice that opened the MMDS filing windows.

To summarize the Order, PRB conditioned all grants of the non-nationwide 220 MHz licenses during the pendency of a related appeal before the D.C. Circuit Court. In addition, the concerned licensees were granted an automatic extended construction and operation deadline of 120 days from the date of the appeal's final disposition by the courts (rather than eight months after initial license grant under the rules). On March 18, 1994, the pending case was dismissed. Subsequently, certain parties requested a 240 day post-litigation deadline because the affected licensees had been highly reluctant to commit to financing and build-out costs while the licenses were shrouded in uncertainty before the courts. In its Order, PRB found that such arguments constituted good cause to extend the construction and operation deadline for the concerned licensees to 240 days beyond the release date of the Order.

If you have any questions, please call me.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

DA 94-276

In the Matter of )  
 )  
Amendment of Part 90 of the ) PR Docket No. 89-552  
Commission's Rules to Provide )  
for the Use of the 220-222 MHz )  
Band by the Private Land Mobile )  
Radio Services )

ORDER

Adopted: March 28, 1994 Released: March 30, 1994

By the Chief, Private Radio Bureau:

1. On July 30, 1992, certain aspects of the Commission's procedures for filing and acceptance of 220-222 MHz license applications were appealed to the United States Court of Appeals for the District of Columbia Circuit.<sup>1</sup> As a result, we conditioned all grants of 220-222 MHz licenses upon the outcome of this appeal. We granted each non-nationwide 220-222 MHz licensee, regardless of its initial authorization date, an automatic extended period of 120 days from the date of the appeal's final disposition by the courts, to construct and place its licensed facilities in operation.<sup>2</sup>

2. On March 18, 1994, the pending appellate case upon which we conditioned these license grants was dismissed.<sup>3</sup> This action initiated the 120-day extended construction period granted to each non-nationwide 220-222 MHz licensee.

3. On February 15, 1994, the law firm of Keller and Heckman, on behalf of various 220 MHz licensees, requested that the Commission extend the time to construct non-nationwide 220-222 MHz facilities from 120 days after resolution of Evans v. Federal Communications Commission to 240 days after its resolution. Keller and Heckman based this request on: (1) the unanticipated prompt appellate finality achieved by settlement of

<sup>1</sup> See Evans v. Federal Communications Commission, Case No. 92-1317 (D.C. Cir. filed July 30, 1992).

<sup>2</sup> See Public Notice, Lottery for 220-222 MHz Private Radio Land Mobile "Local" Channels, DA-1231, 57 Fed. Reg. 41935, 41936 (September 14, 1992).

<sup>3</sup> Order, Per Curiam, Evans v. Federal Communications Commission, Case No. 92-1317 (D.C. Cir. March 18, 1994).

this matter; (2) the probable inability of 220-222 MHz equipment vendors to accommodate, within a 120-day time frame, the thousands of equipment orders that are likely to be placed with the advent of a settlement; and (3) the likelihood that such an extension will result in the provision of 220-222 MHz local service to the public more quickly than through the automatic cancellation of existing licenses followed by the selection of new licensees.

4. Keller and Heckman indicated that most 220-222 MHz non-nationwide licensees "have been highly reluctant to commit to decisions on equipment purchasing, financing, system construction and management contracts while the air of uncertainty as to license retention created by the Evans case"<sup>4</sup> continues to prevail. Keller and Heckman stated that the requested extension would allow licensees the requisite time needed to address these matters.

5. Therefore, for good cause shown, IT IS ORDERED THAT the deadline for licensees to construct their non-nationwide 220-222 MHz facilities and place them in operation IS HEREBY FURTHER EXTENDED. All licensees of such stations authorized on or before the release date of this Order must construct their facilities and place them in operation on or before December 2, 1994.<sup>5</sup>

FEDERAL COMMUNICATIONS COMMISSION



Beverly G. Baker  
Deputy Chief, Private Radio Bureau

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<sup>4</sup> Request for Additional Time to Construct 220 MHz Private Land Mobile Radio Systems, filed by Keller and Heckman, February 15, 1994, at 2.

<sup>5</sup> All licensees of non-nationwide 220-222 MHz stations authorized after the release date of this Order must construct their facilities and place them in operation within eight months of the date of initial license grant. See 47 C.F.R. § 90.725(f).



# PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION  
1919 M STREET N.W.  
WASHINGTON, D.C. 20554

DA 88-562

News media information: 202/632-5060. Recorded listing of releases and texts: 202/632-0002.

## COMMON CARRIER BUREAU OPENS FILING PERIOD FOR MULTICHANNEL MULTIPOINT DISTRIBUTION SERVICE APPLICATIONS

Released: April 20, 1988

In accordance with Section 21.901(d)(4) of the Commission's Rules, 47 C.F.R. §21.901(d)(4), NOTICE is hereby given that commencing April 20, 1988 applications for the Multichannel Multipoint Distribution Service (MMDS), E-channel and F-channel group frequencies, may be submitted for filing for any location which is farther than 50 miles from any proposed location of MMDS applications pending on April 19, 1988 or MMDS licensed facility locations. These locations must be farther than 15 miles from the boundary of a statistical area for which there are MMDS applications pending on April 19, 1988. Applications filed must comply with the location restrictions contained in this Notice. We do not anticipate granting any waivers of this location requirement. Applications that fail to comply with this requirement will be dismissed as unacceptable for filing. In addition, applications submitted for filing must comply with the filing requirements of Parts 1 and 21 of the Commission's Rules, and Public Notices, released January 15, 1988, "Clarification of Part 21 Domestic Public Fixed Radio Services Application Forms and Other Procedures" (DA 87-1696, Report No. 1266, released January 15, 1988) and "Clarification of Part 21 Domestic Public Fixed Radio Service Filing Fee Requirements and Application Form Use" (DA 87-1695, Report No. 1265, released January 15, 1988). Applicants are reminded that many of the rules applicable to eligibility criteria and permissible service, filing, and licensing requirements pursuant to Part 21 of the Rules have been revised. See Revision of Part 21 of the Commission's Rules, 2 FCC Rod 5713 (1987) (Part 21 Revision Order) and Revisions to Part 21 of the Commission's Rules regarding the Multipoint Distribution Service, 2 FCC Rod 4251 (1987) (MDS Status Election Order).

Prospective MMDS applicants are advised of the following:

1. Filing Date. MMDS applications will be accepted for filing on April 20, 1988, and thereafter. This filing period will remain open until further notice by the Commission.

2. Service Areas. (A) Statistical Areas. Applicants must specify the proposed service area in Item number 5 (j) of FCC Form 435. In doing so, applicants should consult the list of classifications of the nation's

statistical areas compiled by the Office of Management and Budget, as revised on June 30, 1983. This list refers to certain identified geographic areas as either a Metropolitan Statistical Area (MSA), or Consolidated Metropolitan Statistical Area (CMSA), or New England County Metropolitan Area (NECMA). See Amendment of Parts 2, 21, 74 and 94 of the Commission 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, 94 FCC 2d 1203, 1263 n.43 (1983) (MMDS Allocation Order). Applications filed must be for a location which is farther than 50 miles from any proposed location of MMDS applications pending on April 19, 1988 or MMDS licensed facility locations. These locations must be farther than 15 miles from the boundary of a statistical area for which there are MMDS applications pending on April 19, 1988. Applications that fail to comply with the location requirements of this Notice will be dismissed as unacceptable for filing. In particular, those applicants proposing to locate transmitters in or within 15 miles of the border of an MSA, CMSA, or NECMA should list in Item number 5 (j) the first named city in the statistical area title as provided in OMB's list. Applications proposing to serve either an MSA, CMSA, or NECMA will be considered together, in accordance with the provisions of Section 21.901(d)(5). Each application will be entitled to comparative consideration or to be included in a lottery in only one such service area. Each applicant will be allowed to file only a single application for either the E-channel or F-channel group frequencies in each statistical area. See Section 21.901(d)(2).

(B) Non-Statistical Areas. In addition to those service areas provided in the OMB listing of MSAs, CMSAs, and NECMAs, applications may be filed for a service area not identified by OMB as either an MSA, CMSA, or NECMA. Applications filed must be for a location which is farther than 50 miles from any proposed location of MMDS applications pending on April 19, 1988 or MMDS licensed facility locations. These locations must be farther than 15 miles from the boundary of a statistical area for which there are MMDS applications pending on April 19, 1988. Applications that fail to comply with the location requirements of this Notice will be dismissed as unacceptable for filing. Applicants must provide in Item number 5(j) of FCC Form 435 the name of the primary service area. Issues of mutual exclusivity for applications not proposing to serve either an MSA, CMSA, or NECMA will be resolved using Part 21 rules other than Section 21.901(d)(5). Each applicant will be allowed to file only a single application for either the E-channel or F-channel group frequencies in each area. See Section 21.901(d)(2).

Failure to designate the service area in Item number 5(j) of FCC Form 435, in accordance with the above-described procedure, may result in the dismissal of the application as unacceptable for filing.

The OMB list of MSAs, CMSAs, and NECMAs is available for review in the Domestic Facilities Division Public Reference Room, Room 6318, 2025 M Street, N.W., Washington, D.C. 20554, or may be purchased from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. The title of the document is Metropolitan Statistical Areas, Order #PB 832 18891. The telephone number of NTIS is (703) 487-4650. In addition, a list of currently pending MMDS applications is also available for inspection in the Domestic Facilities Division Public Reference Room. The Reference Room is open to the public Monday - Thursday between the hours of 8:30-12:30 and 1:30-3:00. Inspection inquiries may be directed to James Yancey of our staff at (202) 634-1858.

3. Cut-off Date. The last date for filing conflicting (mutually exclusive) applications for comparative consideration or inclusion in a random selection process will be determined by procedures set forth in Section 21.31 of the Rules.

4. Permissible Service Operations. Pursuant to Section 21.900 of the Rules, MMDS applicants may provide service on either a common carrier or a non-common carrier basis. An applicant must specify at Item 2(a) of FCC Form 435 whether it intends to operate as a common carrier ("cc") or as a non-common carrier ("ncc"). Applicants who elect non-common carrier status will be subject to the Commission's Part 21 Rules, and to the general provisions of Title III of the Communications Act of 1934, as amended, applicable to persons applying for microwave radio station authorizations. Applicants who elect common carrier status will be subject to the Commission's Part 21 Rules, to the provisions of Title II of the Communications Act (including the Commission's non-dominant carrier policies), and to the provisions of Title III of the Act applicable to persons applying for microwave radio station authorizations.

5. Acceptable for filing. In order to be acceptable for filing, an application must be complete with respect to questions, informational showings, execution, or other matters of a formal character and substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements. Applications that fail to comply with these requirements will be considered defective and may be subject to dismissal, unless accompanied by a request for waiver of (or request as an exception to), in whole or in part, any specific rule, regulation, or requirement with which the application is in conflict. See Section 21.20 of the Rules; see also Section 21.13 of the Rules. Only applications that are in a condition acceptable for filing will be included in a random selection process. See Sections 21.31 and 21.33 of the Rules. Applicants are advised that "lead" applications will not be accepted. A separate FCC Form 435 must be filed for each service area along with the required exhibits. Cross-reference to "lead" applications will not be considered sufficient, and may result in the dismissal of the associated application as unacceptable for filing.

6. Interference Studies. At the time of filing, applicants must submit the following interference studies:

a. A written analysis demonstrating non-interference with all cochannel and adjacent channel Instructional Television Fixed Service (ITFS) licensees, permittees, or applicants with transmitters located within 50 miles of the applicant's transmitter, or a statement from the ITFS licensee, permittee, or applicant that it will accept whatever interference occurs. See Section 21.901(d)(1).

b. A written analysis demonstrating that the facility to be constructed will not cause harmful interference to existing cochannel or adjacent channel ITFS receive sites within 50 miles of the transmitter, or alternatively, must submit a statement from the ITFS licensee that the interference is acceptable. See Section 21.902(i).

c. A written analysis demonstrating non-interference with all cochannel and adjacent channel MMDS licensees, permittees, or applicants with applications pending on April 19, 1988 (including tentative selectees) with transmitters located or proposed to be located within 50 miles of the MMDS applicant's proposed transmitter. See Section 21.902.

7. Site Availability. Section 21.15(a) specifies that applicants proposing a new station location indicate whether the site is owned. If it is not owned, its availability for the proposed microwave radio station shall be demonstrated. Under ordinary circumstances, this requirement will be satisfied if the site is under lease or under written option to buy or lease. 47 C.F.R. §21.15 (a). MMDS applicants should note that, at the time of filing, it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. Subsequently, applicants chosen as tentative selectees in our random selection process must submit concrete evidence of site availability after their lottery selection. At that time, the submission of a lease or lease option agreement will satisfy that requirement. MMDS applicants not subject to our random selection process must submit a lease or lease option agreement as concrete evidence of site availability upon request. In addition, Section 21.40(b) provides that no extensions of time to construct a facility will be granted based upon lack of site availability.

8. Financial Certification. Section 21.17, as revised, requires that each application for a new license shall contain a certification that the applicant has or will have the financial ability to meet the expected costs of constructing the proposed facilities within the time allowed and the estimated operating expenses for a period of twelve months. Consequently, all applications shall include a financial certification statement (Exhibit T of FCC Form 435) in which the applicant certifies that it has, or has reasonable assurance that it will have, the ability to meet the expected cost of constructing the facilities within the construction period and the estimated operating expenses for twelve months. Applicants are reminded that Section 21.40(b) provides that construction periods may not be extended for delays caused by lack of financing.

9. Preferences. Two types of preferences may be awarded to MMDS applicants: (a) minority preferences, and (b) diversity preferences. Applicants who may be eligible to claim lottery preferences are required to submit a certification of preference for all applications for which a preference is being claimed. The factors used to determine if an applicant qualifies for either type of preference are explained in Section V of FCC Form 346, with one exception. Item 4, Section V, page 2 (FCC Form 346, page 7) does not reflect the fact that the Commission added MDS stations to the definition of the term "medium of mass communication". Thus, in determining eligibility for a diversity preference, applicants should consider their ownership interest in either single channel or multichannel MDS station licenses or construction permits in addition to the media listed on page 2 of Section V. Those media are a daily newspaper; a license or construction permit for: a television station, including low power and television translator station; an AM or FM radio broadcast station; a broadcast satellite transponder; or a cable television system.

For purposes of item 5 on page 2 of Section V (Form FCC 346, page 7) the service area of an MDS station is defined in Section 21.902(d) of the Commission's Rules. See Section 1.824 of the Rules, and Random Selection Lotteries, 93 FCC 2d 952 (1983). Such certifications must accompany the application at the time of filing. An applicant filing multiple MMDS applications may submit a single certification of preference (an original and a duplicate) if it is claiming the same preference for all its applications. If an applicant is claiming different preferences for its applications, it should submit a separate certification of preference (original and duplicate) for each set of applications for which it is claiming the same preferences.

10. Amendments. Applicants are requested not to submit any amendments before their applications have appeared on Public Notice as accepted for filing, unless asked to do so by the Commission's staff. Amendments should include the official FCC file numbers assigned to those applications. File numbers may be obtained from the Public Notices listing applications as accepted for filing. Sections 21.23 and 21.29 provide requirements for filing amendments to applications.

11. Filing Fee. Applicants are required to submit a filing fee of \$135.00 per application (FCC Form 435), pursuant to Section 1.1105. See also "Clarification of Part 21 Domestic Public Fixed Radio Services Filing Fee Requirements and Application Form Use" (DA 87-1695, Report No. 1265, released January 15, 1988).

12. Inspection and Copying. Applications will not be available for inspection and copying before they appear on Public Notice as accepted for filing. Copies of applications must be requested for public record duplication from the applicants or from the Commission's contractor, ITS, Inc. Suite 140, 2100 M Street, NW, Washington, DC 20037, (202) 857-3800.

For further information concerning this Public Notice, contact Theodore Waddell, or Charles Gratch of our staff at (202) 634-1706. Inspection questions may be directed to James Yancey of our staff at (202) 634-1858.

The MMDS Processing Logjam  
Thursday, May 12, 1994

**THE MMDS PROCESSING LOGJAM**

- Two Licensing Bureaus (CCB and MMB) process MMDS (or "wireless cable") applications.<sup>1</sup>
- An MMDS operator requires at least 20 channels to achieve "critical mass," i.e., a system that can be 1) effective competition to cable, 2) beneficial to the public, and 3) economically viable.
  - an MMDS operator must have its channel authorization applications processed by two or more bureaus to acquire 20 channels in one market.
  - MMDS operators cannot construct or operate a viable system until it first acquires 20 channels.
- The two bureaus process MMDS applications at different speeds without inter-bureau coordination.
  - For the MMDS operator, typically some channel authorizations are granted, while others remain unprocessed.
  - Operators must then determine whether to construct a system without knowing if it will obtain the authorizations for at least 20 channels.
  - Many authorizations expire while the operator awaits processing of the remaining necessary applications.
  - Consequently, operators cannot achieve critical mass.
  - When licensees fail to achieve critical mass, they lose their entire investment.
  - Many MMDS licensees are small businesses.

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<sup>1</sup> For purposes of this document, the term MMDS includes the associated service ITFS administered by the Mass Media Bureau.

The MMDS Processing Logjam  
Thursday, May 12, 1994

**PROPOSED SOLUTIONS**

- Suspend cancellation of MMDS licenses in markets where all channels have not been granted.
- Extend MMDS construction period to one year beyond the date the freeze is lifted.
- Reinstate MMDS licenses that expired during the freeze if those licenses were not mutually exclusive and where there is no MMDS operator in the market.
- Consider waivers from regulatory barriers, such as the freeze, to help foster competition for cable and thereby serve the public interest - a policy the Commission endorsed when it adopted MMDS.
- Replace strict application processing standard with the more reasonable standard currently used for the FM Radio Service and recently adopted for services subject to competitive bidding.
- Relax ban on interference - (50 mile restriction is not realistic particularly in rural markets, for example).
- Permit waivers of MSA spacing requirement where there is no interference and overlap is de minimus.

**BENEFITS**

- Would enhance competition in the delivery of video services..
- Would facilitate access to programming.
- Would reduce burdens on the FCC and improve service to the public.
- Would create jobs.