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August 11, 1994

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VIA UPS NEXT DAY AIR

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW Room 222
Washington, DC 20554

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Dear Mr. Caton:

Enclosed for filing please find the original and nine (9) copies of a Petition for Reconsideration MM Docket No. 93-106.

Please acknowledge your receipt of these documents by file-stamping the enclosed copy of this letter and returning it to me in the enclosed self-addressed stamped envelope.

If you have any questions regarding this matter, please feel free to call me.

Sincerely,

WILLOUGHBY, HOEFER & SIMMONS, P.A.


Alvis J. Bynum, Jr.

AJB/cfg
enclosure

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AUG 12 1994

Before the

FEDERAL COMMUNICATIONS COMMISSION FCC MAIL ROOM

Washington, DC 20554

In the Matter of)
)
 Amendment of Part 74 of) MM Docket No. 93-106
 Commission's Rules Governing)
 Use of the Frequencies in)
 the Instructional Television)
 Fixed Service)
 _____)

PETITION FOR RECONSIDERATION

Wireless Broadcasting Systems of America, Inc. ("WBS"), by and through its attorneys, hereby files this Petition for Reconsideration in response to the Report and Order in MM Docket No. 93-106 (Released July 6, 1994).¹

WBS is the successor in interest to certain of the assets of WJB-TV Limited Partnership ("WJB"). WJB participated in this proceeding by filing comments on June 14, 1993 and reply comments on July 29, 1993. In addition, WJB filed comments on October 28, 1993 in response to the compromise entered into between the Wireless Cable Association International, Inc., the National ITFS Association, and several other educational entities.

WJB's original comments dealt largely with, and its comments on the compromise dealt exclusively with, a single issue - that of the ability of an educator to recapture simultaneous usage

¹ The Report and Order appeared in 59 Fed. Reg. 35635 on July 13, 1994. Pursuant to Section 1.106(f) of the Commission's Rules, this petition is timely filed.

of ITFS channels, notwithstanding any agreement between the parties to the contrary. As a practical matter, the existence of this right negates the benefits of the Commission's Order, as wireless cable operators simply cannot assume the risk that an educator will reclaim simultaneous airtime, thus disrupting commercial programming and alienating subscribers. Many operators will simply disdain the channel loading option altogether, resulting in a throwback to the old days of shared usage on each channel, a situation that everyone agrees is undesirable. See Report and Order at Paragraph 3.

Background

WBS is the operator of wireless cable television systems located in Ft. Pierce and Melbourne, Florida and in Sacramento, California. These systems collectively serve approximately 30,000 subscribers.

Like most wireless cable television operators, WBS leases excess airtime capacity on ITFS channels in the markets that it serves. In order to construct a competitive wireless cable system and therefore justify making the investment necessary to develop a market, WBS has no choice under current technology but to seek excess capacity from ITFS licensees. Its ITFS lessors predominantly are state universities, community colleges, and school boards. Each of these lessors has received and continues to receive a generous package of grants, equipment and/or royalties

from WBS in return for the use of their excess airtime capacity. In the case of most of these entities, the ITFS stations would not have been built had it not been for the contributions of WBS.²

Analysis

Most wireless cable operators compete for customers with entrenched, hard-wire cable systems. In most cases, these systems offer forty, fifty, or even more channels of programming. Currently, wireless systems cannot match this quantity; in fact, there are only a maximum of thirteen commercial channels that are available to wireless operators. For wireless systems to compete, or even to exist, they must obtain usage of additional spectrum, at least under current technology.

The use of excess capacity on ITFS channels is presently the only method by which wireless operators can assemble this needed capacity. The use of these channels is absolutely critical to the success of virtually every competitive wireless cable system in the country. Before any operator would ever spend the millions of dollars and countless hours necessary to develop and construct a system, it would need the assurance that this capacity is and will continue to be available. If the operator knew that this

² Indeed, the Commission recently noted that "the wireless cable lessee almost always pays for the construction of the ITFS facility." See Order and Further Notice of Proposed Rulemaking in MM Docket No. 93-24 (Released July 6, 1994) at Footnote 5.

capacity might cease to be available, it would probably not be able to undertake the construction of a system.

Section 74.931(e) of the Commission's rules generally requires an ITFS licensee to utilize twenty hours per channel per week and to retain the right to recapture an additional twenty hours per channel per week. Licensees are generally free to negotiate the specific arrangement that is most beneficial to them, so long as they comply with this rule. Unfortunately, the new channel loading rules eliminate this flexibility, requiring that licensees retain a right to recapture simultaneous airtime on each of their channels, even if the licensee does not need or want this ability. Specifically, the Report and Order provides:

"... a licensee has the unabridgeable right to recapture simultaneous use of airtime on the number of channels for which it is authorized. This right, according to the compromise, cannot be contractually diminished and any lease agreement attempting to do so will be overridden by this restriction."

These twenty (20) hours, if claimed simultaneously, could completely disrupt commercial usage of the channels, especially if they were claimed at certain peak viewing periods. In essence, if a commercial channel is not available when viewers wish to watch it, it has little value to the wireless system. Disruptions in a programming schedule tend to alienate customers, placing the wireless system at a severe competitive disadvantage. Consequently, simultaneous usage, even on a part-time basis, substantially reduces the value of the remaining leased capacity.

This rule could also have a severe negative impact on educational lessors. Most excess capacity lease agreements extend for ten years and require substantial expenditures by the commercial lessee at the outset. Under these circumstances, capacity that can be simultaneously lost after only one year is obviously of very limited value to wireless operators; consequently, operators will be willing to provide much less compensation in order to acquire it. The shortfall, which could be substantial, would have to be borne by the educators.

Requiring that educators be able to reclaim simultaneous usage, despite contractual provisions to the contrary, removes the flexibility to develop an agreement based on a particular educator's needs and objectives. Because of the mandated right of recapture, operators such as WBS, when negotiating compensation packages, will be forced to treat every educator as if it intended to use all of its capacity simultaneously. Educators that have not yet developed a substantial need for capacity, but that need assistance to develop their ITFS systems, will not be able to command the level of compensation that is now available. In effect, as a result of this mandated right, these educators will be paying (through reduced compensation) for something that they may not want and may not be able to use.

Furthermore, the rule assumes that the ITFS licensee or applicant is unable to determine what is in their best interest. The flexibility, for example, to negotiate for the usage of two channels on a full-time basis, which may satisfy the educator's

needs, may not be available if the educator must recapture simultaneous usage on the other two channels.

The negative effects on ITFS licensees could be especially severe on those who need ITFS capacity the most, including large publicly-funded institutions. Many of these schools are facing severe budget shortfalls. If the level of funding that they receive from wireless operators is reduced or lost, these entities may be unable to fund construction and operation of their stations. This is an unfortunate irony in that the very ITFS stations that cannot be built might have ultimately allowed the licensees to reach a greater number of students on a cost-effective basis.

In summary, WBS believes that the mandated right to recapture simultaneous usage will have negative effects on both wireless operators and educators, specifically:

1. operators may not be able to adopt channel loading, simply because the economic risk of doing so - i.e., the creation of an automatic right on the part of the lessor to claim simultaneous usage at a later date - outweighs the advantages.

2. ITFS licensees who are fortunate enough to find operators willing to enter into agreements will likely receive far less in terms of financial and technical assistance. In essence, this right to recapture will substantially reduce the desirability and value of the ITFS channels to commercial operators.

Consequently, WBS respectfully prays that the Commission, on reconsideration, will amend the new rules to allow the parties

to negotiate where and when the recaptured capacity will be aired and not mandate that the right to simultaneous recapture be preserved in every case. If the parties are given the flexibility to tailor their agreements according to their needs, they will ultimately reach an arrangement that maximizes the value to both sides and to the benefit of the public interest. Unfortunately, the new channel loading rules do not provide this flexibility, and as a result, will likely prove detrimental to everyone.

Respectfully submitted this 11th day of August, 1994.

**WIRELESS BROADCASTING SYSTEMS OF
AMERICA, INC.**



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