GARDNER, CARTON & DOUGLAS

1301 K STREET, N.W.

SUITE 900, EAST TOWER

WASHINGTON, D.C. 20005

(202) 408-7100

FACSIMILE: (202) 289-1504

WRITER'S DIRECT DIAL NUMBER
THOMAS J. DOUGHERTY, JR.
(202) 408-7164

CHICAGO, ILLINOIS

January 23, 1995

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

Re: COMMENTS ON NOTICE OF PROPOSED RULEMAKING
IN MM DOCKET NO. 94-131 & PP DOCKET NO. [redacted]

Dear Mr. Caton:

Transmitted herewith are an original and 14 copies of the Comments of American Telecasting, Inc. submitted in response to the above-referenced Notice of Proposed Rulemaking. A form of Document Index Terms is attached to these comments for your convenience in routing these comments.

Please contact the undersigned if additional information on these comments is desired.

Respectfully submitted,

Thomas J. Dougherty, Jr.
Counsel for
American Telecasting, Inc.

cc: Hon. M. Reed Hundt
Hon. James H. Quello
Hon. Andrew C. Barrett
Hon. Susan Ness
Hon. Rachelle B. Chong
Mr. Blair Levin
Ms. Pete Belvin
Mr. Keith Townsend
Ms. Jane Mago
Mr. James L. Casserly
Ms. Barbara Kreisman
Mr. Robert M. Pepper
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Ms. Jerianne Timmerman

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

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OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service	)	MM Docket No. 94-131
	)	
and	)	
	)	
Implementation of Section 309(j) of the Communications Act-Competitive Bidding	)	PP Docket No. 93-253

DOCKET FILE COPY ORIGINAL

Directed To: The Commission

COMMENTS OF AMERICAN TELECASTING, INC.

AMERICAN TELECASTING, INC.

Thomas J. Dougherty, Jr.
GARDNER, CARTON & DOUGLAS
1301 K Street, N.W.
Suite 900 East Tower
Washington, D.C. 20005
(202) 408-7100

Its Attorney

January 23, 1995

SUMMARY

American Telecasting, Inc. ("ATI") is the nation's largest wireless cable operator. ATI is interested in this proceeding because of its pressing need for additional channel capacity to compete against cable TV and DBS.

ATI believes that the Commission should open a "first window" during which only those entities with access to 9 of more MDS/ITFS channels in a market would be able to apply for MDS channels in the market. This "first window" approach would best satisfy the Commission's goals of putting the MDS channels in the hands of legitimate wireless cable operators and of relieving their channel starvation handicap. This approach does not sacrifice auction revenues that may be paid by legitimate bidders. Moreover, it largely excludes the filing mills and the scam artists from the process.

ATI does not favor making the MDS channels available during the "first window" or thereafter on any "area-based" system, such as the ADI or the BTA, for the following reasons.

It simply is too late in the licensing process to attempt to conform wireless cable to such an allocation system. Wireless cable operators need channels where they have systems, and the location of those systems is inconsistent with "area-based" licensing.

ATI does not believe that employing "area-based" licensing will redound in higher auction bids. For example, area-based licensing will reduce the value of the MDS channel to the wireless cable operator.

Moreover, area-based licensing offers no application processing efficiencies. Area-based licensing cannot supplant the need to license on the basis of the existing interference protection rules because there are so many pending MDS applications and existing MDS licenses which must be protected from interference.

After the "first window," the Commission should promulgate rules expanding and refining the wireless cable protected service area as proposed by the Wireless Cable Association International. After those rules become effective, the Commission should begin to accept new MDS station applications from all eligible filers.

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Implementation of Section 309(j) of the Communications Act-Competitive Bidding	)	PP Docket No. 93-253

Directed To: The Commission

COMMENTS OF AMERICAN TELECASTING, INC.

AMERICAN TELECASTING, INC. ("ATI"), by its counsel an pursuant to Rules 1.415 and 1.419, hereby submits the following comments on the Notice of Proposed Rulemaking (the "NPRM") released on December 1, 1994 in the above-captioned dockets (FCC 94-293).

I. ATI AND ITS INTEREST IN THIS PROCEEDING

ATI, through its various subsidiaries, is the largest wireless cable operator in the United States. Over its six year history, ATI's subsidiaries have acquired channel rights by licensing and leasing, and by acquiring lease and license rights from third parties. As a result of those efforts, ATI's subsidiaries now have 37 wireless cable systems, in operation or planned for near-term operation, having over 8 million homes within their collective signal reach. To accomplish that result, ATI has acquired from legitimate

public and private sources over $150,000,000 which has been spent in or is committed to ATI's wireless cable operations.

In our industry, the focus is upon price, service, transmission quality and product. What products can be delivered is limited by channel capacity and, in the wireless cable business, channel capacity limitations are the most pronounced and vexing competitive handicaps. Like other wireless cable operators, ATI has spent a considerable amount of money procuring enough MDS and ITFS channel capacity to operate wireless cable systems which can compete against entrenched cable TV companies and DBS. But, our channel aggregation efforts have been thwarted by MDS and ITFS new station application acceptance freezes of longer duration than anticipated. Added to that is the debate of whether we can continue to compete with analog technology which provides us with no more than 13 full-time channels and an additional 20 part-time channels.

As a result, we have focused our developmental efforts upon digital modulation.[1] It holds the best hope for overcoming the channel limitation problem in the long-term. But, while the channel capacity expansion benefits of digital modulation may be available quite soon, it will cost significantly more to employ digital than analog technology during the 3 to 5 year period after its commercial introduction.[2] During that time frame, there

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[1] Our most prominent and notable efforts in that pursuit have occurred within a non-profit alliance, founded by ATI, of industry leaders who have voluntarily given their time and money to test and to develop wireless cable digital transmission technology so that our industry can improve its ability to compete against mature cable TV systems, DBS and others who might offer multichannel video programming. The alliance is among ATI, Andrews Corporation, EMCEE Broadcast Products, Zenith Electronics and California Amplifier, Inc. Together, those five companies offer expertise from industry leaders in service, transmitters, transmission antennas, reception products and coding technology. The alliance has worked hard at its subject area since its inception. It has already advanced the digital modulation art and is confident of developing many more advancements of that art in the near future.

[2] We anticipate that the digital set-top converter, alone, will cost between $300 and $350, which is a 200% increase in the converter box price.

will not be a rapid shift to digital technology, but a transition to its use, because of the high cost-for-product tradeoff of early generation digital equipment. For the many wireless cable operators, like ATI, who have an investment in analog equipment, the added costs involved in converting existing analog systems to digital will require a lengthy transition period. For those reasons, the industry must continue to add channels to add programming services needed to compete more effectively with cable TV and DBS. ATI, thus, remains vitally interested in gaining access to additional MDS channel capacity rapidly, and without unnecessary costs. Accordingly, ATI is interested in the NPRM and its outcome.

II. COMMENTS ON THE NPRM

A. Introduction and Focus.

1. Proper Goals of This Proceeding.

The NPRM's proposal to lift the freeze on the filing of applications for new MDS station licenses holds the promise of greatly improving the competitive posture of wireless cable operators. Whether that promise will be realized, and the extent to which it is realized, depend upon how the freeze is lifted. The Commission's goals in lifting the freeze, in turn, should determine the means employed to license new MDS channels.

The NPRM confirms the Commission's commitment to the goal of allowing wireless cable "operators to enhance their service more rapidly, providing more competition to wired cable."[3] The NPRM recognizes that wireless cable system development has been hampered by the lack of sufficient channel capacity.[4] The

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[3] NPRM, at ¶ 1

[4] Id. at ¶ 2.

Commission attributes this problem to licensing delays caused by applications filed by speculators[5] and legal protests clogging the Commission's application processing system.[6] Thus, the NPRM's proposals are "designed to avoid" those problems.[7] Thereby, the NPRM seeks to meet the "goal in instituting this proceeding [of] ... development of the wireless cable industry and to continue our efforts to coordinate the processing of MDS and ITFS applications."[8]

We exhort the Commission to keep that focus; to judge its proposals and those submitted by commentators by asking the question "does the proposal help us achieve those goals, and if so, is it the best means for doing so?"

2. A Desire to Maximize Auction Revenue Should Not Guide This Proceeding.

(a) The Influence of the Auction Must Be Limited to Breaking Application Deadlocks.

To the extent that the NPRM is concerned with the concept of adopting "filing procedures consistent with our competitive bidding procedures..." the Commission may risk the tail waging the dog. Competitive bidding is a means of breaking application deadlocks which might otherwise disrupt orderly licensing. Competitive bidding is not the goal, just a remedy, and the Commission is not empowered to make allocation

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[5] Id. at ¶ 4.

[6] Id. at ¶ 5.

[7] Id.

[8] Id. at ¶ 2.

decisions just to promote competitive bidding. Thus the competitive bidding statute admonishes the Commission that its authority to auction spectrum shall not:

> "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings...."[9]

Moreover, promoting application mutual-exclusivity is directly contrary to the Commission's chief goal in this proceeding of allowing wireless cable "operators to enhance their service more rapidly...."[10] Application mutual-exclusivity slows processing and promotes the development of a marketplace for MDS channels which includes greed-driven scam artists who exploit the American Dream.

(b) Promoting Application Mutual-Exclusivity Will Not Increase Legitimately Earned Auction Revenue.

Moreover, there is little legitimate cash benefit to the U.S. Treasury of promoting MDS application mutual-exclusivity. We reached this conclusion, in part, because we expect that the universe of legitimate entities willing to bid for any particular MDS channel will be limited in most cases to one entity or a small group of entities. In simple microeconomic terms, we expect demand to be low relative to supply. We recognize, however, that as few as two bidders could elevate the auction price of a channel to significant levels. But, we do not expect very high auction bids from legitimate wireless cable entities because the value of the additional MDS channels is in the marginal revenue they allow the operator to earn in a highly competitive marketplace. Those expectations are discussed below.

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[9] 47 U.S.C. § 309(j)(6)(E).

[10] NPRM, at ¶ 1.

We expect the field of legitimate[11] bidders for a channel to be limited in most cases to those few who have wireless cable operations in the market (or fairly advanced plans to launch wireless cable operations in the market) where the channel will be licensed. The reason for that conclusion is that the MDS channels, standing alone, do not provide sufficient channel capacity to operate a commercially viable wireless cable service. The MDS E, F, H, 1 and 2A[12] channels are but 13 of the 33 channels employed in a wireless cable system. And those 13 commercial channels, used alone, can only transmit 12 channels of cable programming. A complement of 12 programming networks cannot be expected to compete against cable TV systems having usually 3 or more times that channel capacity or to compete against Direct Broadcast Satellite service offering 150 channels of digitized programming. Thus, it is not rational to view the MDS channels available in a market as a separate business, as one would view a PCS allocation, but as an appendage that gains its value from being attached to other ITFS and MDS channels so that the operator will have at least 19 or 20 collocated channels.[13]

At present, wireless cable operators lease a majority of their MDS channel capacity from licensees. But, those who would wish to lease MDS channel capacity to

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[11] We have used the adjective "legitimate" to exclude the scam artists who have been so prominent in wireless cable.

[12] The MDS channel 2A is limited to a 4 MHz bandwidth, which is insufficient to carry a color FM TV signal with associated audio. With few exceptions, the MDS channel 2 is allocated only within 10 miles of the reference coordinates of the 50 largest metropolitan areas. We doubt that any of those allocations are available for application.

[13] It is the consensus of experienced wireless cable operators that, as a general rule, a wireless cable operator cannot hope to operate a successful system with less than 19 or 20 channels. Of course, those are minimum numbers of channels. Depending upon various marketplace factors, the number of channels actually required to compete for subscribers may be much more. The advent of DBS with its large channel capacity may raise that consensus minimum channel complement threshold.

wireless cable operators cannot be expected to participate in auctions which include incumbent operators or those who are amassing channel capacity to become wireless cable operators. The reason for this conclusion is that the proposed channel capacity lessor knows that the incumbent wireless cable operator will out-bid the proposed lessor. The lessor cannot afford to bid more for a channel than the operator because the lessor is a middle-man who must rely upon lease revenues from the operator to obtain a return on the lessor's investment. So, why waste time seeking a license for MDS channels if there already is someone in the market with access to a substantial number of the ITFS channels or a combination of ITFS and MDS channels?

Indeed, the maximum bid of a prospective channel capacity lessor for a MDS channel or group of MDS channels will be extremely low. Because expectations of lease revenues set the value of a MDS channel for the proposed channel lessor, limitations on the expected revenues translate into limitations on the amount the lessor would be willing to pay the Federal Government for the MDS channel. In this regard, and with rare exception, the amount received for the lease of channel capacity is typically 12.5¢ per channel, per subscriber, per month. As explained in the footnote to this sentence, when one considers realistic expectations of that lease revenue, we believe that it would be rare indeed for a bidder seeking a channel or channels for lease revenues to bid any more than $50,000 per MDS channel, or $200,000 for a four-channel MMDS license or $650,000 for the rare group of 13 MDS channels.[14]

[14] The proposed channel lessor would value the channels on the basis of a net present value which discounts lease receipts over a reasonable period of time to a net value of the right to earn those lease payments. If a 5 year period is assumed for valuation purposes (as is typical for projections of performance in a competitive industry), the amount of the lease payments the lessor would expect to receive for a MDS channel over that period would be the product of (i) the number of months (60) in the period, (ii)12.5¢, and

Still, we anticipate that some commentators will argue that they can operate a potentially success wireless cable business with just a few of the MDS channels. We expect as much from the boiler-room operators. They may attempt to bolster their case by arguing that they can employ digital compression to expand the small number of available MDS channels into a viable business. We urge the Commission not to be swayed by such unrealistic claims. There are few, if any, populated areas left in the country where all MDS channels remain available for filing. We believe that the Commission's data base will show that there are few markets where even as few as 8 MDS channels could be opened for application,[15] and those markets truly are rural. To rely upon digital transmission to convert 8 or fewer channels into a rural business is not rational. So new is digital to wireless cable that the Commission's rules do not even contemplate its use. Digital equipment manufacturers are still in the developmental stages. When reliable digital equipment is available, we expect that cost considerations

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(iii) the average number of subscribers served over the period. If a subscriber count of 10,000 is expected in the five year period, then the average number of subscribers is 5,000. Thus, the total lease payments for the capacity of a MDS channel over the five year period would be $37,500. If a five year subscriber growth to 20,000 is assumed, then the total lease revenues for the MDS channel increases to $75,000. If the subscriber growth is 30,000 in the measurement period, then the gross revenues from capacity leasing increase to $112,500. Having determined a total value, then one must determine what a reasonable person would pay now for the right to earn those amounts over a five year period through the income earned in a competitive industry. That "net present value" is the highest bid that a proposed MDS channel lessor will make for the channel. Given that a five year period is involved, that there is extreme competition for households, that there is no assurance that the bidder's payment to the U.S. Treasury will be repaid, and considering returns available on other investments, we would expect bidders to use approximately a 25% yearly discount to determine the net present value of the MDS channel. In other words, we would expect bidders to require an anticipated yearly return on the investment of 25%. That is conservative, insofar as the bidder would not even receive a repayment of its channel purchase price for four years. Using that discount factor, the net present value of a MDS channel is $16,644 if a 10,000 subscriber level is anticipated; $33,289 if a 20,000 subscriber level is anticipated; and $49,933 if a 30,000 subscriber level is anticipated.

[15] We are assuming that an area is open for a MDS channel application if a station providing at least 10 watts of transmitter output power over the 710 square mile protected service area could be licensed. The minimum of 10 watts is reasonable because, below that power, it is not realistic to expect quality service throughout the protected service area.

will limit its use in the short-term.[16] Thus, to consider MDS channels available in a market a realistic wireless cable business opportunity in their own right is not generally supportable. If the Commission intends to serve its primary goal of allowing "operators to enhance their service more rapidly, proving more competition to cable,"[17] it should not cater to speculative plans for wireless cable systems that must depend upon high cost digital technology to convert a few channels into a high cost business in a low return rural area.

Consolidating MDS channels from various geographic areas into one auction will not result in added auction revenue. The Commission would find such an auction method a means of enhancing revenue only when there is an "interdependency" between and among MDS channels. "Interdependency" means that the channels are substitutes for each other. But, MDS channels are not substitutes or complements for each other, like cellular channel blocks or PCS channel allocations. Wireless cable operators want channels where they are developing wireless cable operations and they need all of the channels they can procure at those locations. A wireless cable operator, like ATI, that obtains a channel outside of its wireless cable markets can only lease the capacity of the channel to the wireless cable operator in that market, and that operator can afford to bid more for that channel than the net present value of the channel's expected lease revenue over a reasonable period of time. The MDS channels are but appendages to wireless

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[16] As stated above, the cost of the digital set-top converter alone will be 100 to 120% more than the cost of the analog converter. Added to that cost is the great cost of digital source coding. The cost is reduced when it the coding is done by the satellite program supplier, because the cost can be spread over all users of the cable programming delivered by that satellite. Still, the additional cost is sizable.

[17] NPRM, at ¶ 1.

cable businesses, and not the foundation for the business standing alone. They are not "interdependent" and, for that reason, consolidated auctions involving applications for MDS channels for unrelated geographic areas will not promote auction revenue.

The only entities who might offer sizable dollars for MDS channels are those who make their income, not from service revenues, but from securities scams exploitive of the American public. And these scam artists can make so much money by false promises of the earning power of MDS that they will be able to go "head-to-head" in an auction against an incumbent or expectant wireless cable operator and win the auction. One typical means of exploiting the licensing process uses "boiler-room" telephone direct marketing to convince the sea of gullible Americans that MDS channels have values which are wholly fantastic. Those companies will find it profitable to bid, for example, $1,000,000 for a 4 channel MMDS license for a small community like Rome, Georgia. Such a bid would, in virtually all cases, exceed the amount that the incumbent wireless operator could afford to allocate to the license and would greatly exceed the value of the revenues that could be earned by leasing to a wireless operator. But, the unscrupulous boiler-room company can easily convert that $1,000,000 investment into many times that value by, for example, (1) forming a limited liability company, (2) selling the license to the limited liability company for $4,000,000, and (3) selling ownership in that limited liability company to unsuspecting consumers. Those quixotic purchasers of limited liability company ownership interests will be led to accord such an extraordinary value to the license through incompetent (but convincing) comparisons of the 24 MHz bandwidth of the four-channel MMDS station to the PCS spectrum that has been auctioned for over

10 times that amount, by hyperbolic claims of the wonders of digital technology, and by reciting the prices paid per subscriber for cable TV companies. This scenario is not merely a logical prediction of an outgrowth of auctioning MDS spectrum; rather, it is a real, present problem that has absorbed millions of dollars of the enforcement resources of the Securities and Exchange Commission, the Federal Trade Commission and many State securities and consumer protection agencies.

Quite aside from the horror created for those duped out of their life-savings by unscrupulous promoters, these schemes also deter efforts by the Commission and legitimate wireless cable operators to put the MDS channels to use serving the public. A group of investors who have been misled to believe that their four-channel MMDS license is worth $4,000,000 just will not lease the capacity for a monthly royalty equivalent to 10¢ per channel, per subscriber. No wireless cable operator who expects to stay in business will be able to satisfy the myopic income expectations of such investors.

Prohibitive regulation will not deter the parasites of the industry.[18] They will always devise means of avoiding the effect of regulation. The only predictable effect of prohibitive regulation is the collateral impact of restricting legitimate business efforts of legitimate players in the industry. Only eligibility restrictions which favor the real wireless cable operators and an expansion of the wireless cable protected service area[19]

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[18] Take the example described above of the boiler-room telephone marketer that buys a MMDS license at auction for $1,000,000 and resells it to a limited liability company created by the marketer for $4,000,000. The obvious regulatory response would be to prohibit short-swing sales of licenses purchased at auction. But, that prohibition would not stop the dishonest marketer. Instead, that marketer could employ any of a variety of related schemes to reap its ill-gotten gains. For example, the marketer might create an agreement with the limited liability company whereby the marketer receives a commission for obtaining the license for the limited liability company.

[19] This proposal is pending before the Commission in the form of a Petition for Partial Reconsideration in Gen. Docket 90-54 filed by the Wireless Cable Association International on December 13, 1991.

will deter those who use FCC licenses as bait to prey upon the savings of the American public.

In Part B, below, ATI describes an allocation and auction methodology which will put the MDS channels into the hands of the existing system operators quickly, will substantially limit the involvement of filing mills and "confidence" companies in the licensing process and will otherwise best promote the Commission's goals in this proceeding.

B. The Public Interest Would Be Served By Adopting a Modified Version of the "First Window" Proposal.

1. Summary.

We suggest that the Commission begin to accept new MDS applications in a window open only to entities having leases or licenses for nine or more MDS/ITFS channels, that will be used along with the new MDS channels. During this window period, no other new MDS station license applications would be accepted for filing.[20]

This is a variant of the "first window" approach suggested in the NPRM. ATI first suggested this approach and its benefits in its "Petition for Limited Modification of the MDS Application Acceptance Freeze" filed on February 4, 1994 ("Freeze Petition"). The Freeze Petition, which remains pending, requests the Commission to modify the MDS application filing freeze to accept applications for new MDS station licenses from those who have access to the spectral capacity of nine or more ITFS/MDS channels, that will be used with the new MDS channels. We believe that the Freeze Petition concept continues

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[20] The Commission should continue, in due haste, to process pending new station applications and pending and new modification applications.

to have merit and should be adopted, with the refinements suggested in these comments, as the "first window" approach. For that reason, a copy of the Petition is appended to these comments as **Appendix A**. We also recommend the use by "first window" filers of "long-form" applications which demonstrate compliance with the existing engineering and eligibility rules and the window eligibility rules. We believe that the Commission should not accept new MDS station applications other than "first window" applications for a year.[21]

2. Rationale.

This "first window" approach meets more of the goals and concerns underlying and guiding this proceeding than any other proposal. It will have the effects:

(i) of quickly putting the greatest number of vacant MDS channels in the hands of real wireless cable operators;

(ii) of denying eligibility to those whose purposes in filing are purely speculative;

(iii) of excluding from the licensing process the ignorant whose hopes to "get-rich-quick" are fueled by greedy application filing mills and consultants;

(iv) of excluding those who would use a license in fraudulent securities sales schemes riding the wave of hyperbolic claims of the value of a MDS channel;

(v) of allowing floundering, struggling or planned, but channel starved, systems to have the hope of one day earning a return on investment; and

(vi) of exerting downward pressure on excessive cable rates and to begin forcing cable systems to think of the subscriber first.

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[21] We do not mean to suggest that cut-off rights of "first window" applications would be determined by consolidating all applications filed during the window. Quite to the contrary, we would expect the Commission to apply its existing cut-off rule to "first window" proposals. Thus, two applications must be filed on the same day to enjoy equal cut-off rights and consolidation in an auction proceeding. Expanding the cut-off window beyond the one-day window would merely expand the number of mutual-exclusive situations, thereby slowing application processing.

During the "first window," the Commission could focus its efforts on licensing those entities it truly would prefer to license.

This approach favors incumbent wireless cable operators, and those whose channel acquisition plans are advanced, over those who may have wireless cable plans which are not advanced very far. Favoring existing operators and those who have amalgamated a large number of channels is in the public interest because those entities have already made substantial financial investments in wireless cable. Their investment is at risk and, to the extent that it is not being used in an operating system for lack of competitively sufficient channel capacity, that investment is unattractive. Granting incumbents long awaited and first priority channel relief will accelerate their competition to cable TV and will give them a chance to earn a return on their embedded equity. Those results give wireless cable's image a sourly needed boost on Wall Street,[22] thereby attracting more new capital. Ultimately, competition to cable TV and the offer of new and innovative service choices to consumers would be accelerated.

3. Specific Aspects of Proposal.

(a) The Nine Channel Eligibility Standard.

The 9 channel eligibility standard narrows the field of eligible parties in any geographic area to those who have shown a commitment to the aggregation of channel capacity for the purpose of launching a wireless cable operation. As expressed in the Freeze Petition, the number 9 would tend to exclude most entities who have sought MDS

[22] Wireless cable stocks have been severely depressed since last summer and, as a result, wireless cable companies have been unable since that time to access the public equity markets. On average, the listed wireless cable company common stocks have fallen in value by 1/3 during that short period of time. The charts in **Appendix B** show this decline in trading prices.

licenses through the hope of getting rich by selling the licenses for excessive and unrealistic amounts of money. Lowering that eligibility number would unnecessarily tend to grant eligibility to a host of entities having no more than speculative intent. Raising the threshold eligibility number correspondingly excludes many legitimate wireless cable operators. The Freeze Petition addresses this point thoroughly and we encourage the Commission to review it. In addition, and not mentioned in the Freeze Petition, the 9 channel threshold eligibility standard would encourage those with unused channel capacity to join together and to commit themselves to launching wireless cable operations.

The determination of how many channels there are available to an entity to confirm its eligibility to file in the "first window" is a question of fact that should be guided by well-conceived rules to prevent fraud and to help wireless cable operators obtain needed channel capacity.[23] Keeping in mind that many legitimate operators intend to move their channels prior to launching service and that many still are in the process of aggregating channel capacity at one site, ATI believes that it would be both unrealistic and counterproductive to require the channels creating eligibility to be licensed at one

[23] In counting the number of channels which create eligibility for the window, we suggest rules prohibiting attempts to artificially manufacture eligibility by "double counting" channels. An example of "double counting" would be to use the same nine channels licensed to the filer in Hagerstown to create eligibility to file an application for a MDS channel west of Hagerstown by 19 miles and for a MDS channel east of Hagerstown by 19 miles. The proposed "double counting" rule should count the capacity of a MDS channel or an ITFS channel licensed under Rule 74.990 as one channel toward the 9 channel eligibility threshold only if the channel were licensed to the filer or the entire spectral capacity of the main channel (other than VBI and minor subcarriers) were leased to the filer. In the instance of ITFS channel capacity, we would expect the filer to have a lease for the excess channel capacity of the channel which allows the operator to use at least 20 hours of the time of that channel each week. To deter fraud, we suggest that the Commission count only that ITFS channel capacity that is under lease and, if there is more than one lease of the capacity of any particular channel, we suggest that the Commission attribute eligibility only to the lease which accords the greatest amount of time on that channel to a lessee.

location and to require the entity to propose the licensing of the new MDS channels at that one site. Instead, the Commission could better adapt its rules to marketplace realities by allowing for a presumption that all channels creating eligibility will be used together with the newly sought channels when the channels creating eligibility are licensed to, or have cut-off and unopposed applications for, sites that are within 20 miles of the proposed site of the newly sought MDS channels. To fortify that presumption, the Commission could require the successful applicant to meet certain license conditions designed to ensure that the applicant uses the newly licensed MDS channels in conjunction with the 9 or more MDS/ITFS channels which created the applicants eligibility. One such approach would be to give the successful applicant no more than 6 months after the grant of its MDS license to file (or cause to be filed) all applications required to collocate the new MDS channels and the 9 or more MDS/ITFS channels that afforded eligibility for the new MDS channels. That requirement could be backed by the requirement that the successful MDS applicant cause each such channel to be built at the common transmitter site within 6 months of the grant of the collocation authority application for that channel. If either of those requirements were not met, then a condition on the new MDS station license would state that the license would automatically forfeit.[24]

Regardless of the approaches to counting channels toward an eligibility standard, we believe that it is necessary for the Commission to **require** applicants to prove their access to the number of channels required for eligibility. Otherwise, fraudulent filings

[24] The Commission typically imposes conditions on MDS licenses which must be met within a set time to avoid the automatic forfeiture of the license.

would pollute the application process. Indeed, it would be impossible to audit eligibility without such proof. Thus, we propose rules requiring applicants to list each license and to file each lease by which eligibility is created. The filing of such contracts is required now. So, there is little appreciable paperwork burden created by the foregoing proof proposal.

(b) Allocation Method.

We do not favor "first window" licensing on any geographic boundary basis. Geographic boundary, or "area-based," licensing such as exists for cellular mobile radio. Our reasons are as follows:

First, the "area-based" licensing concept must be overlaid upon an existing allocation scheme that is entirely inconsistent with the area-based approach. To allocate MDS channels on some geographic boundary basis would be inconsistent with the fact that the existing channels which create eligibility for the MDS channels and which must be collocated with the MDS channels were not licensed on any such area-based system. Rather, they have been licensed to points selected by the licensee and the wireless cable operator based upon coverage considerations which are entirely unrelated to political boundaries and artificial economic and coverage zones such as BTAs and ADIs.[25] Any

[25] For example, ITFS stations will tend to be located near schools they were built to serve. Many times, ITFS licensees and wireless cable operators who support them in the excess capacity lease arrangement negotiate site and transmitter characteristics based upon a balancing of many interests, such as service to subscribers and schools. Those negotiations are not concerned with political boundaries or the locations of ADIs. As another example, wireless cable operators often select coverage areas based upon the absence of cable penetration, the presence of poor cable service or other business reasons which have no correspondence to political boundaries or to artificial economic zones. As a final example, some legitimate wireless cable operators would be rendered ineligible for MDS channels in areas actually served by those operators because those operators have chosen the optimal transmitter site for serving the market which is outside of the market area where those new MDS channels would be licensed.

method of making vacant MDS channels available to incumbent wireless cable companies must accommodate what the wireless operator has done to date, and should not rely upon simple allocation concepts that ignore that history and that are inconsistent with the current needs of a channel starved industry.

Second, the area based licensing concept would rely upon definitions of area boundaries that have nothing to do with wireless cable service principles developed in the actual experience of wireless cable operators. The ADI, for example, has been created by Arbitron to define areas within which television broadcasting stations compete for viewers. ADIs tend to be vastly larger than the 710 square mile protected wireless cable service areas, most ADIs covering over 5,000 square miles and containing multiple wireless cable markets (such as the Tampa, FL ADI). ADIs can be larger because of the better propagation characteristics of television stations and the fact that cable carriage extends the reach of television station signals. Licensing on the basis of ADIs will leave many, large areas without MDS channels. MSAs also have nothing to do with wireless cable service areas and are determined by consolidating counties where there are population concentrations. MSAs could be much larger or much smaller than wireless cable areas of operation. BTAs are equally a poor allocation methodology for wireless cable.

Third, the Commission will probably find that there is little benefit at this juncture to using the ADI, the MSA, the BTA or any other non-communication boundary definition for the acceptance of applications for new MDS stations. Most of the channels for those areas are licensed or are subject to pending application. The other potential benefit--the use of a short form application--is illusory. To conclude that short-form

applications serve a useful purpose, there must be no substantial chance that a subsequent filing of a "long form" application will disclose interference problems which effectively preclude licensing. Given the number of licensed or applied-for MDS stations, that assumption is precarious at best. Certainly, no prudent person seeking a channel would rely upon that assumption. Rather, such a person would commission an allocation study to ensure that the MDS plans are feasible.

Fourth, for the Commission to set dates that frequencies will be open for filing in an area-based licensing scheme is to encourage speculation. People will be motivated to file for an allocation even though they have no present, firm plans for using it, just so that they do not let a potential opportunity pass. Such schemes also would arbitrarily determine where wireless cable service would be offered and when it would be offered. The Commission would greatly disservice the industry by such an approach. Instead, the people who are to take the business risk should decide the definition of their service area and when they will serve that area.

Fifth, the Commission will find the task of identifying channels and the areas where they are available for application to be vexing, inordinately time-consuming and arbitrary. The boundaries of areas cannot be those of ADIs, BTAs or any other predetermined system of subdividing the United States. The existence of pending MDS station applications and licensed stations precludes that alternative. Instead, the Commission would be forced to conduct elaborate interference studies to identify the areas within which channels are available. That task would take years to complete. Moreover, such studies would require the Commission to assume, somewhat arbitrarily, the technical facilities that would be proposed for the vacant MDS channels. After

completing that process, the Commission would then have to decide which channels would be consolidated for area-based filing purposes. Again, that decision would be relatively arbitrary.

Sixth, area-based licensing serves the false premise that MDS channels have value standing alone. As explained above, MDS channels do not make a viable wireless cable system, but complement other channels to make a wireless cable system.

Seventh, area-based MDS licensing is contrary to the Commission's "goal in instituting this proceeding ... to continue our efforts to coordinate the processing of MDS and ITFS applications."[26] Area-based licensing for MDS further distinguishes the allocation and licensing processes for MDS and ITFS. In addition, it makes it even more unlikely that the MDS and the ITFS channels (which are adjacent in frequency) will be collocated as required for them to be used together.

Considering the foregoing, we believe that the Commission should not vary its allocation rules during the "first window." If a wireless cable operator wants a new MDS channel at the operator's chosen transmitter site, then the operator should be free to apply at that site subject to demonstrating interference protection to all previously licensed and proposed channels. Changing the allocation rules for the "first window" filers can only complicate their efforts to obtain access to the MDS channels they need.

The requirement to file a long form application showing complete protection to all previous proposals will ensure that the Commission is not faced with a host of proposals that, while motivated to provide service, simply cannot be licensed due to important

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[26] NPRM, at § 2.

interference concerns. There are way too many licensed and previously proposed channels in the United States for the Commission to expect short-form applications to have any value.

We believe that the integrity of the MDS and ITFS services require the discipline of the existing interference protection rules. Simplifying the engineering rules for the purpose of ease of auctioning would place the concept of the auction above sound spectrum allocation principles. Keeping in mind that the auction is available just to resolve application mutual-exclusivity--in short, it is a means to an end and not an end in and of itself--the Commission should not abandon or vary its interference protection standards to assist or to support the ease of auctioning. Any sacrifice of sound allocation principles for the sake of promoting auctions would have a substantial, negative impact on service long after the auction process and whatever benefits it may have produced are forgotten. Moreover, the promotion of auctions would appear to promote securities scam schemes which would supply the additional auction revenue only to saddle the SEC with the burden of spending public funds to chase down the scam artists.

(c) Duration of "First Window".

We suggest that the Commission restrict new MDS channel applications to "first window" eligibles for a one year period. During this period, most legitimate operators should be able to establish their "first window" eligibility, and to prepare and file MDS license applications. We do not suggest that the "first window" would be a cut-off period open for a year. Rather, we encourage the Commission to apply its existing cut-off rule to "first window" filings.