

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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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)
And)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

MM Docket No. 94-131

DOCKET FILE COPY ORIGINAL

To: The Commission

PETITION FOR RECONSIDERATION

A/B Financial, Inc., et al., and Betty Brown, et al., ("Petitioners"),¹ by counsel and pursuant to 47 C.F.R. Section 1.106, hereby submit their Petition for Reconsideration of the Commission's decision with respect to the above-referenced proceeding.^{2 3} The Petitioners request that the Commission

¹ The class of Petitioners consist of those parties listed as Appellants in A/B Financial, Inc. et al., v. F.C.C., No. 95-1027 (D.C. Cir. filed January 8, 1995) and in Betty Brown, et al., v. F.C.C., No. 95-1404 (D.C. Cir. filed August 7, 1995) .

² Petitions For Reconsideration were required to be filed by August 16, 1995. See *Report and Order, 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 and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, FCC 95-230, released June 30, 1995 ("Report and Order"), published in the Federal Register at 60 FR 36737, July 17, 1995. Consequently, the instant Petition For Reconsideration is timely filed. See also Petition For Reconsideration filed by John D. Pellegrin, Chtd., with respect to the Commission's companion order establishing a new MDS protected service area, *Second Order on Reconsideration*, Gen. Docket Nos. 90-54 and 80-113, released June 21, 1995.

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clarify its definition of incumbents, as used as a term of art throughout the Report and Order, which established new rules with respect to the MDS service.⁴ Further, the Petitioners request that the Commission reconsider its definition of small business as established in the Report and Order. In support whereof, the following is respectfully submitted.

I. The Definition of "Incumbents" Is Unclear

In Paragraph 3 of the Report and Order, the Commission states:

In addition the rules we adopt require BTA authorization holders to honor the protected service areas of incumbent MDS operators within their BTAs. In a companion order, also adopted today, the Commission expanded the protected service areas of existing MDS stations. [Footnote omitted.] These various licensees and applicants that are authorized or proposed on or before June 15, 1995, including those stations that are subsequently modified, renewed or reinstated, are referred to throughout this Report and Order as "authorized or previously proposed facilities" or "incumbents."

However, in Paragraph 58 of the same Report and Order, the Commission states that:

Further, where there remains outstanding at the time of auction a pending application, petition for reconsideration, reinstatement request or application for review affecting any BTA, winning bidders would acquire any authorization conditioned upon the outcome of

³ Actual or potential applicants affected by a rules change are "aggrieved parties". *JEM Broadcasting Co., Inc. v. FCC*, 22 F. 3d 320, 326 (D.C. Cir. 1994). Consequently, Petitioners, whose appeal of MMDS application dismissals is currently pending in the United States Court of Appeals for the District of Columbia Circuit, have standing to file this Petition for Reconsideration. This Petition is joined in by United States Interactive & Microwave Television Association (USIMTA), a trade association, some of whose members are also appellants and petitioners as indicated above.

⁴ Throughout this petition, the term "MDS" will be used to refer collectively to the single channel (MDS) and multichannel (MMDS) MDS authorizations unless otherwise indicated.

Commission actions on such applications or pleadings. The Commission must clarify the inherent contradictions between the definitions of incumbent proffered in these two statements. In the first, the Commission appears to establish a date of June 15, 1995, as the demarcation for incumbents. Then in the second statement, the Commission invokes the auction date as establishing rights of previously proposed applications as incumbents.

Furthermore, nowhere is there any reference to applications which had been previously filed but which have been preliminarily dismissed but are currently the subject of appeals before the U.S. Court of Appeals for the District of Columbia Circuit. This oversight could potentially affect thousands of previous proposals, should Petitioners succeed with their appeals before the Court. Consequently, the Commission needs to clarify the status of these Petitioners as incumbents.⁵

II. The Commission's MDS Auction Rules Are Unauthorized

The Commission's MDS auction rules are an unauthorized extension of its authority under the Communications Act of 1934, as amended, for several reasons.

A. Auction Rules Exceed Statutory Authority

1. BTA Authorization Is Not a License

Section 301 of the Communications Act describes the Commission's licensing authority as extending to "control ... over

⁵ In addition to the confusion described above, the Commission nowhere addresses the role of ITFS applications in the definition of "incumbents". This would appear to be an important element of the definition of incumbent which ultimately will affect all MDS a licensees and applicants.

all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority..."

The Commission's MDS rules create a type of authorization which is not a license. There will be three types of MDS authorizations as a result of the new rules: (1) BTA Authorization - awarded to auction winner for the whole BTA; (2) Station license for each individual station within the BTA - post-auction license for each individual station within the BTA awarded to auction winner; and (3) Station License - for an MDS facility authorized or previously proposed predating the effective date of the new rules. Report and Order, ¶39.

The Commission clearly distinguishes the BTA authorization from MDS station licenses. A BTA authorization holder is not a Commission licensee for an MDS station. In fact, a BTA authorization holder is still required to file a separate application for each station license it wishes to receive for the operation of an MDS station within its authorized BTA. Id. Consequently, the Commission's issuance of an authorization which makes one eligible to file for a license does not in any way equal the issuance of a license itself. As a result, the Commission has exceeded its statutory authority by creating rules which allow it to issue blanket BTA authorizations which are not licenses.

Furthermore, the Commission itself has admitted there may not be any MDS channels available for licensing by the BTA

authorization holder in as many as 59 of the top 100 television markets. Report and Order, at ¶25. Yet, the FCC will still make BTA authorizations available in those markets through the auction, allowing one entity the ability to tie up future MDS channels, should they ever become available. The issuance of an authorization which may or may not become available in the future is not permitted under the Commission's statutory authority.

2. BTA Authorization Is Not Limited in Time

The new MDS rules provide a five-year construction period for the BTA authorization holder with respect to available MDS frequencies in the applicable BTA. However, nowhere do the new MDS rules appear to impose a limitation period in those instances where the construction requirements for MDS stations by the BTA authorization holder are met. This attempt to create an authorization which is not limited in time clearly exceeds the Commission's statutory authority.

3. BTA Authorization is an Illegal Restraint of Trade

Section 307 requires the fair, efficient and equitable distribution of radio service among the several states and communities. However, the new MDS regulatory scheme wherein one entity, and one entity alone, controls an entire geographic region's MDS service, plainly violates the strictures of Section 307. Furthermore, the Commission has created and facilitated anti-competitive monopolies in the form of the BTA authorizations, which constitute illegal restraints of trade, as follows:

A. Exclusivity

Never in the history of the Commission has the FCC afforded exclusive access to licenses in a pre-existing service over a wide geographic area, such as it has done with the new MDS rules. The BTA authorization holder will have exclusive authority to apply for any available MDS licenses, both now and in the future. This monopoly is particularly egregious, since the wireless cable industry stands poised on the brink of the era of digital compression. In the absence of the BTA authorization monopoly, a potential wireless cable operator could use digital compression to convert one four-channel group into a 30 to 40 channel system, with the "critical mass" of channels under current market conditions to offer a competing wireless cable service to the public. Under the Commission's new MDS rules, such competition will effectively and permanently be barred.⁶

B. Right of First Refusal for ITFS Leases

The Commission has extended the right of first refusal to the BTA authorization holder with respect to ITFS licensees and applicants seeking new ITFS authorizations which have entered airtime lease agreements. The ITFS applicant may only enter a lease agreement with the operator of its choice if the BTA authorization holder refuses to exercise its right of first refusal. The loss of an ITFS applicant's right to select the party with which it wishes to establish its working relation to construct and operate its station is clearly improper and has the very real

⁶ See "Wireless Coalition Petitions FCC For Digital Declaratory Ruling", Private Cable & Wireless Cable, August 1995 at p. 40.

potential to adversely affect existing license holders. The Commission's elevation of the ability of the wireless cable operator to amass a "full complement of channels" over the rights of the individual ITFS licensee to control its license as it sees fit turns the Commission's statutory authority on its head.⁷

Furthermore, only the BTA authorization holder will be eligible to apply for MDS use of ITFS frequencies pursuant to §74.990(a), which permits limited licensing of ITFS frequencies to wireless cable operators. This removes the incentive and opportunity for the development of any competitive wireless systems through the use of the available ITFS channels.

C. Undue Concentration of Competition is Improper

A recent trade publication article reports that the six largest wireless cable companies serve over 50% of the total subscribers to wireless cable nationwide, and the top ten companies control 66% of the subscribers nationwide.⁸ This already undue concentration of subscribers in a handful of wireless cable companies will only be exacerbated by the implementation of the new MDS rules as promulgated, since it will undoubtedly be only those handful of companies which will have the realistic ability to bid successfully for the majority of important BTA authorizations at auction. Consequently, the Commission must reconsider and correct the anticompetitive nature of the new MDS rules.

⁷ As noted above, this rationale is not justified in light of the recent development of digital compression technology.

⁸ "MMDS (Wireless Cable): a Capital Idea", Broadcasting and Cable, May 1, 1995.

4. Auction Rules Exceed Statutory Authority

The Commission's new rules with respect to MDS auctions violate Section 309(j) of the Communications Act, which establishes the parameters of the Commission's competitive bidding authority, in several respects.

A. Licenses Not Involved

The permissible uses in Section 309(j) to which bidding may apply refer only to uses involving Commission licensees.⁹ As noted above, it is possible that, in many instances, BTA authorization holders will not initially, or perhaps ever, receive Commission licenses for MDS stations.¹⁰ If no license is involved, the statutory language is clear that competitive bidding may not be used.

B. Regulatory Auction Objectives Not Met

Section 309(j) establishes clear and specific regulatory

⁹ Section 309(j)(2) states that:

A use of the electromagnetic spectrum is described in this paragraph if the Commission determines that--

(A) the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee--

(i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or

(ii) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate...

¹⁰ The "Statement of Intention of Use" for which the BTA authorization holder must file in lieu of an MDS license after the auction can in no way be deemed a substitution for a Commission license.

objectives for competitive bidding.¹¹ These objectives have not been met. The MDS service is a pre-existing service, not a "new" technology, product or service. As noted above, the new MDS rules stifle -- not promote -- competition. In addition, the new rules can hardly be considered an efficient use of the electromagnetic spectrum.

C. Statutory Rules of Construction Violated

Section 309(j)(6)(D) states that "Nothing in this subsection, or in the use of competitive bidding, shall --(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection." The BTA authorization holder will clearly own rights not afforded to any other MDS licensee holding licenses issued under previous MDS rules. This is a manifest violation of the statutory rules of construction regarding competitive bidding.

**III. The Commission's Definition of Small Business
Should be Changed**

¹¹ These pertinent objectives are:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women...

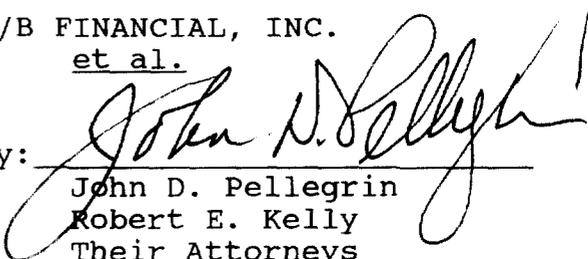
(D) efficient and intensive use of the electromagnetic spectrum.

In addition to the foregoing, the Commission has erred by expanding the definition of small businesses for MDS auction purposes from the \$6 million benchmark used by the Small Business Administration, to the definition used in the Personal Communication Service narrowband and broadband auctions.¹² In addition to giving existing wireless cable operators unprecedented monopoly power in the licensing scheme, the Commission has also awarded price discounts and financing to those companies, since virtually all will qualify as "small businesses" under the MDS auction rules. The rules as promulgated give further testimony to their substantive invalidity, and must be changed.

Wherefore, the foregoing premises considered, Petitioners hereby request that the Commission grant the foregoing reconsideration request.

Respectfully submitted,

A/B FINANCIAL, INC.
et al.

By: 

John D. Pellegrin
Robert E. Kelly
Their Attorneys

Law Offices of John D. Pellegrin, Chtd.
1140 Connecticut Avenue, N.W.
Suite 606
Washington, D.C. 20036
(202) 293-3831

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¹² The standard is \$40 million in annual average gross revenue for each of the three preceding years. See §21.961.