FCC MAIL SECTION

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Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 96-130
Washington, D.C.

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In the Matter of Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service.	)	Gen. Docket No. 90-54 Gen. Docket No. 80-113
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

THIRD ORDER ON RECONSIDERATION AND ORDER TO CLARIFY

Adopted: March 22, 1996 Released: April 1, 1996

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. The Commission has before it three petitions for reconsideration of the *Second Order on Reconsideration* in Gen. Docket Nos. 90-54 and 80-113, 10 FCC Rcd 7074 (1995) ("*Second Order on Reconsideration*"), which revised the definition of the protected service area of Multipoint Distribution Service ("MDS")[1] stations. In the *Second Order on*

[1] Unless otherwise indicated, "MDS" includes single channel Multipoint Distribution Service stations and Multichannel Multipoint Distribution Service stations.

Reconsideration, the protected service area for MDS stations was enlarged from 710 square-miles (the area of a circle with a 15-mile radius) to approximately 3,848 square-miles (the area of a circle with a 35-mile radius). Also revised were the rules for serving interference studies upon potentially affected stations in the Instructional Television Fixed Service ("ITFS"). In addition, clarification was provided regarding frequency offset interference protection and the MDS cut-off rule. Three petitions for reconsideration of various aspects of the *Second Order on Reconsideration* were timely filed with the Commission. The reconsideration petitions include a request for clarification of certain provisions of the order and a request for reconsideration of a Commission public notice issued after the order was released, which cited the order. Two oppositions were received, and no replies were filed.

2. The petitions for reconsideration principally raise issues regarding the expanded protected service area for authorized and previously proposed MDS stations. The major factors that prompted adoption of the expanded protected service area in the *Second Order on Reconsideration* included: (1) the many MDS operators that have been serving areas larger than the 710 square-mile service area formerly provided by the MDS rules; (2) the technological innovations in reception equipment that have contributed to a significant increase in the geographic area to which reliable MDS service can be provided; and (3) the potential overcrowding of the MDS spectrum that would result from continued use of the smaller service area. *See Second Order on Reconsideration* at 7077-78. We also noted that the desirability of an expansion of the protected service area had been enhanced by two separate rulemakings: a 1995 ITFS rulemaking which established a fixed 35-mile distance as one of several criterion for ITFS receiver site protection,[2] and the *Report and Order* in *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,* 10 FCC Rcd 9589 (1995) ("*MDS Report and Order*"), *recon. granted in part and denied in part, Memorandum and Order on Reconsideration, Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service*

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[2] *Report and Order, Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service,* 10 FCC Rcd 2907, 2921 (1995) ("*ITFS Filing Procedures Order*"). A combination of ITFS and MDS frequencies are used to provide a video entertainment service popularly known as "wireless cable." The rules for these two services were initially developed independently. However, with the increasing combined use of both service frequencies to provide a single video service to consumers and to provide a competitor to wired cable operators, coordination of the rules and policies for both services has been encouraged. *See Notice of Proposed Rulemaking and Notice of Inquiry, Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules, Pertaining to Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service,* 5 FCC Rcd 971 (1990).

and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, FCC 95-445, MM Docket No. 94-131 and PP Docket No. 93-253 (released October 27, 1995), in which the Commission established competitive bidding procedures to select among mutually exclusive MDS applications. *See Second Order on Reconsideration* at 7079.[3]

3. In addition to resolving the petitions for reconsideration filed in response to the *Second Order on Reconsideration* in this order, we, on our own motion, provide clarification of certain provisions set forth in the *MDS Report and Order,* including the interference study requirements for pending ITFS applications and the 30-day period for the filing of either a MDS long-form application or a statement of intention by winning bidders in the MDS auction. We also provide guidance in respect to the instances that permit a winning bidder in the MDS auction to file a statement of intention for an encumbered BTA. *See* 47 C.F.R. § 21.956(a), Appendix C, *MDS Report and Order,* 10 FCC Rcd at 9702. We deal first with the petitions for reconsideration filed in response to the *Second Order on Reconsideration.*

II. DISCUSSION

4. **Effective Date of *Second Order on Reconsideration.*** A petition for reconsideration was filed by the Law Offices of John D. Pellegrin, Chartered ("Pellegrin"), on "behalf of clients," in which Pellegrin seeks clarification of the effective date of the revision of 47 C.F.R. § 21.902(d), which expanded the protected service areas for MDS stations, as provided in the *Second Order on Reconsideration.* In the *Second Order on Reconsideration*, the effective date of the revision of § 21.902(d) was stated as the "60th day after publication of a summary of [the] order in the *Federal Register.*" *Second Order on*

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[3] In the *Second Order on Reconsideration,* we noted that "[i]n view of the competitive bidding procedures we are adopting . . . , we have decided that it is even more important that an MDS station's protected service area boundary be 'easy to use and understand so that the spectrum use rights of licensees are clear.'" *Second Order on Reconsideration* at 7079 (citing *Amendment of Parts 21, 74 and 94 of the Commission Rules and Regulations with regard to the technical requirements applicable to the Multipoint Distribution Service, the Instructional Television Fixed Service and the Private Operational-Fixed Microwave Service (OFS)*, 98 FCC 2d 68, 105-106 (1984)). As part of the new licensing scheme, the Commission developed a plan under which MDS authorizations would be auctioned for geographic areas called Basic Trading Areas (BTAs). High bidders in the auction would be entitled to seek authorizations to construct MDS stations on any usable channels within their BTAs. Previously proposed and authorized MDS stations within the BTAs would continue to provide service within the expanded 35-mile protected service area provided in the *Second Order on Reconsideration.*

Reconsideration at 7096.[4] A summary of the *Second Order on Reconsideration* was published at 60 Fed. Reg. 36,736 (July 18, 1995). Pursuant to 47 C.F.R. § 1.4(e) and (j), the 60th day after July 18, 1995 is September 18, 1995.

5. Pellegrin concedes that September 18, 1995, is the effective date for this specific § 21.902(d) revision. However, Pellegrin claims that, although the effective date of the expanded protected service area can be discerned from reading the text of the order itself, clarification is sought in light of the use of dates other than September 18, 1995, in the *MDS Report and Order*. We confirm Pellegrin's understanding that the *Second Order on Reconsideration* provided that the effective date of the revision of § 21.902(d), which expanded protected service areas for MDS stations, was September 18, 1995.

6. **Delay of the Effective Date of *Second Order on Reconsideration*.** Pellegrin also requests that the Commission postpone the effective date of the revision of § 21.902(d) to a minimum of 120 days after the July 18, 1995, publication date of the summary of the *Second Order on Reconsideration* in the *Federal Register*. The effective date suggested by Pellegrin would be November 15, 1995, 36 days after the October 10, 1995, deadline for the filing of applications to participate in the MDS auction and two days after November 13, 1995, the first day of competitive bidding in the MDS auction.[5] Pellegrin argues that, due to limited engineering resources, additional time is needed to prepare modification applications which would be filed with the Commission prior to September 18, 1995. Pellegrin concludes, without elaboration, that a later effective date "will not delay any prospective MDS auction."

7. In selecting an effective date for the revision of § 21.902(d), the Commission balanced two goals: (1) affording the expanded protected service area to previously proposed and authorized stations as soon as possible; and (2) providing additional time to file modification applications under the former protected service area rules. The effective date was fully considered in the *Second Order on Reconsideration*. We also note that the record strongly supported the selection of an effective date prior to the first application filing opportunity provided under the new competitive bidding licensing procedures. The party who filed the petition for partial reconsideration that initiated the *Second Order on Reconsideration*, argued persuasively that the expanded protected service area should become effective before the Commission lifted the freeze on the filing of new applications.[6] Pellegrin

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[4] 47 C.F.R. § 1.427(a) provides that "[a]ny rule issued by the Commission will be made effective not less than 30 days from the time it is published in the Federal Register."

[5] *Public Notice, FCC Announces Auction of Multipoint Distribution Service,* Report No. AUC-95-06 (released September 5, 1995) (*"MDS Auction Public Notice"*), at 1-2.

[6] *See* December 13, 1991 Petition for Partial Reconsideration of the Wireless Cable Association International, Inc. ("WCA"). In its December 13, 1991 petition, WCA argued:

did not file an opposition or any type of response to that petition for partial reconsideration.[7] In addition, the majority of the parties filing responses to a 1993 public notice, in which we announced our then-future intention to lift the freeze on the filing of new MDS applications,[8] also requested that the effective date of any expanded protected service area be prior to the Commission's lifting of the freeze on the filing of new applications.[9] Pellegrin also did not file a response to this *1993 Public Notice,* although responses were encouraged.[10] The Commission announced on September 5, 1995, that the filing deadline for short-form applications (FCC Form 175-M) to participate in the MDS auction would be October 10, 1995.[11]

8. Moreover, we find that the September 18, 1995, effective date of the expanded protected service area did provide an adequate amount of time for conditional licensees and licensees to prepare and file modification applications based on the former 710 square-mile protected service area. The release date of the *Second Order on Reconsideration*, June 21,

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> The current [protected service area] is a ticking time-bomb set to explode in the wireless [cable] industry's future. So far, the Commission's temporary freeze on new MMDS applications has protected wireless cable operators from the inadequacy of the [protected service area] definition. Once that temporary freeze is lifted, the only protection a wireless cable system operator will have to protect its subscriber base against harmful interference is the [protected service area] definition -- a definition that is woefully inadequate.

WCA Petition for Partial Reconsideration at 2-3.

[7] *See Second Order on Reconsideration* at 7075 n. 1.

[8] *Public Notice, MDS/MMDS Applications Filing Freeze,* Mimeo No. 34165 (released July 28, 1993) ("*1993 Public Notice*").

[9] *See* Response of WCA to *1993 Public Notice* at 8-15; Response of the Coalition of Wireless Cable Operations to *1993 Public Notice* at 10. *See also* Response of United Telephone Mutual Aid Corp., *et al.* to *1993 Public Notice* at 4. Parties filing comments in response to the Notice of Proposed Rulemaking for the *MDS Report and Order*, which raised the issue of interference protection, also requested an effective date prior to the lifting of the freeze against the filing of MDS applications for new stations. *See* Comments of WCA to NPRM for *MDS Report and Order* at 10-25; Reply Comments of CAI Wireless Systems, Inc. at 2; Reply Comments of Hardin and Associates, Inc. at 2-3; and Reply Comments of Heartland Communications at 2.

[10] The public was asked to file responses to the MDS issues raised and the approaches and resolutions suggested in the notice. *1993 Public Notice* at 2.

[11] *MDS Auction Public Notice* at 2.

1995, provided licensees with nearly three months within which to file modification applications. In response to Pellegrin's claim that a "log jam of orders for consulting services" will be created due to the "short FCC deadline" and the limited number of qualified consulting engineers who can prepare the engineering analyses required for modification applications, WCA asserts that it has "informally canvassed consulting engineers and wireless cable operators and has uncovered no evidence that those who acted promptly in response to the release of the [order] are encountering the difficulties in securing consulting services that [Petitioner] predicts."[12] Indeed, Pellegrin's complaint was voiced by no other commenter. Thus, we find Pellegrin's claims of hardship to be speculative and belied by the evidence before us.

9. MDS conditional licensees and licensees were in no way prohibited from filing MDS modification applications after September 18, 1995. No freeze has been imposed upon the filing of MDS modification applications. A conditional licensee or licensee may file an application requesting the same type station design, location or status modifications that were permissible prior to the September 18, 1995, effective date of the § 21.902(d) revision provided in the *Second Order on Reconsideration*. We, therefore, reject Pellegrin's argument that the effective date may not have provided licensees an adequate amount of time to prepare modification applications. Pellegrin has failed to persuade us to reverse our earlier determination and further delay implementation of this new interference protection standard.

10. We also reject Pellegrin's arguments that postponing the effective date would not have delayed the MDS auction. Although delaying the effective date of the revision of § 21.902(d) to expand the MDS protected service area would not have made it technically impossible to begin the MDS auction on November 13, 1995, it would have made it commercially impracticable. We do not agree with Pellegrin's characterization that the Commission adopted a "caveat emptor" policy for the MDS auction. The record reflects that the Commission advised potential bidders in the MDS auction that they were responsible for investigating the status of markets due to the heavily encumbered nature of the service. Over the past several months, we have repeatedly encouraged interested bidders to thoroughly review all Commission orders, public notices, MDS file information and other documentation prior to making a final determination to bid on authorizations for BTAs.[13] Because high bidders in the auction must choose transmitter sites and design stations so as to protect each point within the protected service area of all previously proposed and authorized stations from harmful interference, it is important that the § 21.902(d) revision which expanded the MDS protected service area become effective on a date well before the first day of bidding. Delaying the effective of date of the expanded service area to a date beyond the first day of

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[12] WCA Opposition to Pellegrin Petition at 3.

[13] *See, e.g., MDS Report and Order* at 9604; *MDS Auction Public Notice* at 4; MDS Bidder Information Package at 21-22.

bidding in the MDS auction would cut against the goal of market certainty and would be incongruent with the auction licensing scheme. Accordingly, and for all the reasons discussed, we deny Pellegrin's request for a delay of the effective date of the revision of § 21.902(d) to expand the protected service area for MDS stations.

11. **Filing of Applications for New ITFS Stations.** On August 3, 1995, the Commission announced by public notice that the Mass Media Bureau would accept ITFS applications for major modifications for a limited period of time from August 3, 1995, through September 15, 1995.[14] In a separate petition for reconsideration, Pellegrin requests that for applicants who would file pursuant to 47 C.F.R. § 74.990(a), the Commission permit the filing of applications for new ITFS stations during this filing window for modification applications by defining the term "major change" to include new applications filed pursuant to § 74.990(a).

12. It appears, however, that Pellegrin's request for an opportunity to file applications for new ITFS stations was addressed and resolved by the public notice released the day after the August 3, 1995, public notice was issued. On August 4, 1995, the Commission announced by public notice that the Mass Media Bureau would open a window from October 16, 1995, through October 20, 1995, for the filing of applications for new ITFS stations.[15] All those eligible to file applications for new ITFS stations, including those filing pursuant to 47 C.F.R § 74.990(a), were permitted to file during that time. Therefore, Pellegrin's concern about having a filing opportunity before the issuance of the first BTA authorization has been addressed. We, therefore, dismiss as moot Pellegrin's reconsideration petition on this issue as the relief sought was previously granted.

13. **Strict application of requirements for ITFS requests for extension of time to construct.** The Commission announced in the *Second Order on Reconsideration* that it would strictly scrutinize requests for extensions of time to construct ITFS and MDS stations in order to address concerns over the "economic blackmail"[16] that allegedly occurs when

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[14] *Public Notice, Notice of Limited Period to File Instructional Television Fixed Service Applications for Major Changes in Existing Facilities*, Report No. 23564A (released August 3, 1995).

[15] *Public Notice, Notice of Instructional Television Fixed Service Filing Window From October 16, 1995 Through October 20, 1995,* Report No. 23565A (released August 4, 1995).

[16] In response to the *1993 Public Notice*, WCA commented:

> [A] few . . . entities are abusing the ITFS interference protection rules . . . and proposing stations that appear to have no other purpose than to frustrate the ability of wireless cable systems in adjacent communities to add ITFS stations to their systems. Clearly, the word is out that the interference protection rules permit economic blackmail. . . . [T]he legitimate wireless

construction permittees and conditional licensees repeatedly delay station construction over substantial periods of time, while demanding protection from potential harmful electromagnetic interference caused by subsequently proposed neighboring licensees. *Second Order on Reconsideration* at 7081. The Law Firm of Schwartz, Woods & Miller ("Schwartz, Woods"), on behalf of its ITFS clients, requests reconsideration of this policy as it applies to ITFS extension applicants, suggesting that the Commission has not set out a public interest reason sufficient to justify the new strict review policy.[17] Schwartz, Woods argues that the Commission has recognized that, due to the nature of educational institutions, it generally takes ITFS construction permittees longer than it would commercial entities to raise funds for construction, thereby causing a delay in completion of construction.[18] ITFS construction permittees rely heavily upon MDS operators for construction financing, Schwartz, Woods argues, and MDS operators frequently delay ITFS construction financing until their own MDS systems generate profit. Therefore, Schwartz, Woods asserts, ITFS construction extension applications should be routinely granted.

14. Section 73.3534(c) of the Commission's rules provides that:

> Applications for extension of time to construct . . . Instructional TV Fixed stations will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the permittee, or upon a specific and detailed showing . . . sufficient to justify an extension.

47 C.F.R. § 73.3534 (1994). As recently as February 1995, in an ITFS rulemaking order, we explained with greater particularity the type of showing an educator must make to obtain an extension of time within which to construct, including showings that: "(1) construction is complete and testing of facilities has begun; (2) substantial progress has been made; or (3) reasons clearly beyond the applicant's control, which applicant has taken all possible steps to resolve, have prevented construction." *ITFS Filing Procedures Order*, 10 FCC Rcd at 2921. In denying a request to shorten the 18-month ITFS station construction period to 12 months in order to prevent speculative filings, we responded that application of our existing rules have "operated sufficiently to prevent abuses by frequency speculators." *Id.* Our statement in the *Second Order on Reconsideration* that we intend to strictly apply the ITFS extension requirements merely underscores our previous statements.

> cable operator will have to reach an accommodation if it is to continue providing a viable service to the public.

Comments of WCA to the *1993 Public Notice* at 9.

[17] Schwartz, Woods filed the petition on behalf of 26 educational institutions, many of which hold multiple ITFS station licenses. *See* Schwartz, Woods Petition at Attachment A.

[18] *See* Schwartz, Woods Petition at 13.

15. It has long been Commission practice to consider a request for extension of time within which to construct ITFS stations "on its merits." *Applications of Public Broadcasting Service*, 96 FCC 2d 555, 558 (1983). In keeping with the priorities of maximum utilization of ITFS frequencies and expeditious licensing of ITFS stations, *Amendment of Part 74 of the Commission's Rules and Regulations in regard to the Instructional Television Fixed Service,* 98 FCC 2d 925, 935 (1984), we will continue to process or grant ITFS extension requests that meet the requirements of § 73.3534. When we stated that the requirements for ITFS extensions of time to construct would be strictly applied, we did not change our rules to heighten the requirements for extension requests. The Commission will continue to apply our extension rules fairly, including denying and dismissing those applications that do not demonstrate compliance with our rules.

16. Schwartz, Woods argues that the *Report and Order, Amendment of Parts 2, 21, 74 and 94 of the Commission's 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 (1983) ("*MMDS Allocation Order*") recognizes the Commission's responsibility to take into consideration funding complexities when reviewing extension requests. However, the Commission was actually discussing the rationale for creating a spectrum reserve for ITFS and was not discussing the reasons ITFS construction extension requests should be granted. *MMDS Allocation Order*, 94 FCC 2d at 1224-25. Nevertheless, we agree that public funding complexities are the type of circumstances, when proven by a specific and detailed showing as required by § 73.3534, that are likely to be sufficient to support grant of an extension request. Indeed, a public educational institution which is denied funding by a state legislature should provide a detailed and specific showing of the circumstances and a showing that the lack of funding is beyond its control (*e.g.*, that it submitted a budget request). In the alternative, an educator can submit a showing that it attempted to solicit funding from other sources by providing copies of grant proposals.

17. Schwartz, Woods argues that the greatest difficulty in meeting ITFS construction requirements results from financing arrangements with MDS operators. However, MDS operators are accustomed to construction requirements and extension request standards that are more stringent than the ITFS requirements.[19] Therefore, MDS operators should be cooperative in ensuring that ITFS permittees meet construction deadlines, especially if the MDS operator's lease arrangement will be impacted by denial of an ITFS extension request, which subsequently results in a cancellation of the ITFS authorization for failure to construct. As we stated in the *ITFS Filing Procedures Order*, 10 FCC Rcd at 2907, it is our intention to

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[19] The MDS station construction period is 12 months. 47 C.F.R. § 21.43(a)(2). Lack of financing is specifically listed in the MDS rules as an unacceptable basis for a grant of a extension request. 47 C.F.R. § 21.40(b). In addition to other showings, MDS licensees must, with every extension request, submit a verified statement outlining the actions taken to construct the facility. *Id.*

continue to follow our existing processing standards and methods, which complement our new wireless cable licensing scheme and related new procedures. We intend to grant ITFS requests for extension of time within which to construct ITFS stations that meet the stated standards, and deny those that do not. We, therefore, deny Schwartz, Woods' request to exempt ITFS stations from our policy of stricter application of the requirements for extension requests.

18. **Other Issues and Clarification of the *MDS Report and Order*.** Finally, on our own motion, we amend our rules to require service of new MDS station applications (long-form applications) filed by BTA and Partitioned Service Area authorization holders, as well as modification applications filed by incumbent MDS licensees, upon ITFS applicants with applications pending. In the *Second Order on Reconsideration*, we changed the date on which MDS long-form applications must be served upon ITFS licensees and construction permittees to on or before the date an application is filed. *Second Order on Reconsideration* at 7089-90. In the *MDS Report and Order*, we adopted a rule that prohibits BTA and Partitioned Service Area authorization holders from proposing and operating stations that would cause harmful electromagnetic interference to ITFS station sites (and these stations' protected service areas) proposed in pending ITFS applications. *See* 47 C.F.R. § 21.938(b)(3), Appendix C, *MDS Report and Order* at 9696. We did not in either order, however, require that MDS applicants prepare studies of the potential interference to facilities previously proposed in ITFS applications, or serve ITFS applicants with a copy of the long-form applications and interference studies. We take this opportunity to amend § 21.902 to require such service and to require the preparation of studies of the potential interference to the facilities proposed in pending ITFS applications by BTA and Partitioned Service Area authorization holders filing long-form applications and by incumbent MDS applicants filing modification applications. We believe that this ITFS service requirement will further our goal of providing notice to all parties potentially affected by new or modified MDS facilities. *See MDS Report and Order* at 9624 (MDS applicants required to prepare interference analyses and serve them on "potentially affected parties").

19. Also on our own motion, we correct 47 C.F.R. § 21.956(a) to clarify that the period within which a winning bidder in the MDS auction must file either an initial long-form application or a statement of intention after being notified of its status as a winning bidder is 30 business days. Section 21.956(a) provides that the period is "30 days" from the time a bidder is notified of its status as a high bidder, 47 C.F.R. § 21.956(a), Appendix C, *MDS Report and Order* at 9702, whereas the text of the *MDS Report and Order* provides that the period is "thirty business days." *MDS Report and Order* at 9655-56. Through this amendment, we clarify that only business days will count toward the completion of this 30-day filing period.

20. We next provide guidance regarding the filing of a "statement of intention." In particular, we want to give examples of situations in which the Commission will consider a BTA so heavily encumbered that the winning bidder for that BTA would not be required to file a long-form application for a new MDS station within the prescribed 30 business day

period, but rather would be permitted to file a statement of intention, describing the encumbrances and the plan to make possible the filing of a long-form application. *See* 47 C.F.R. § 21.956(a) in Appendix C, *MDS Report and Order* at 9702. In the *MDS Report and Order*, we noted that:

> [A] number of BTA service areas may be so encumbered that the winning bidder for such a BTA may be unable to file a long-form application proposing another MDS station within the BTA while meeting the Commission's interference standards as to all previously authorized or proposed MDS and ITFS facilities . . . . The winning bidder for a BTA service area so heavily encumbered that it believes it cannot file an acceptable long-form application proposing an MDS station with average transmitted power within its BTA . . . . must file with the Commission, in lieu of a long-form application for an MDS station license, a statement of intention with regard to the BTA service area, showing the encumbered nature of the BTA, identifying the incumbents, and describing in detail its plan for obtaining the previously authorized or proposed MDS stations within the BTA.

MDS Report and Order at 9656-57. The degree to which encumbrances preclude new MDS stations in a BTA varies widely and depends on factors such as the size and shape of the BTA, proximity of accessible transmitting antenna sites to unserved communities in the BTA, and proximity to neighboring MDS and ITFS facilities in adjacent BTAs, which also must be protected. Additionally, terrain conditions are an important factor, as are the relative locations of multiple protected areas slicing through a BTA, perhaps preventing the use of antenna cross polarization as an interference abatement technique. Thus, we cannot, nor do we wish, to prescribe rigid technical criteria from which we would accept or reject statements of intention. Rather, each statement of intention will reflect the unique geographic and demographic conditions in that BTA, and the existing and proposed use of MDS and ITFS channels in that region. We will examine statements of intention on a case-by-case basis, working with auction winners to obtain any needed clarification or supporting documentation.

21. We believe it would be helpful for the Commission to offer examples of what we would normally consider to be heavily encumbered situations for which we would likely approve statements of intention. BTA auction winners for whom these situations apply need only document their applicability. This approach will simplify the showing in statements of intention, easing the burden on applicants and the Commission's MDS processing staff. We offer as an example of an encumbered BTA for which a statement of intention could be filed one that is entirely covered by the 56.33 kilometer (35 mile) service area of a previously authorized or proposed ("protected") cochannel or adjacent channel incumbent MDS or ITFS facility, which will preclude the use of a least one of the 13 MDS channels. We will also consider a BTA to be heavily encumbered where all communities in the BTA are located: (1) within 64.4 kilometers (40 miles) of the 56.33 kilometer (35 mile) service area of a protected MDS or ITFS facility or within 64.4 kilometers of the boundary of an adjacent BTA not held by the same BTA winner, *or* (2) within 24.4 kilometers (15 miles) of the

56.33 kilometer (35 mile) service area of a protected station operating on an adjacent D- or G-group channel; *provided further*, that there are no intervening terrain barriers that would completely shield such protected service areas or adjacent BTAs. A BTA winner may file a statement of intention if the use of at least one MDS channel is precluded by such encumbrances throughout that BTA. We note that the 64.4 kilometer distance is merely a guideline, and, as such, does not necessarily preclude the filing of statements of intention where the service areas of protected stations are further away from a BTA. We chose this distance because it is the distance to the otherwise unobstructed horizon for a transmitting antenna height of 159 meters (522 feet), an ample antenna height for serving most communities.[20] The 24.4 kilometer (15 mile) distance guideline for adjacent channels assumes line-of-sight transmissions within a protected 56.33 kilometer (35 mile) service area, copolarized antennas, and a desired-to-undesired signal strength ratio of 0 dB. These conditions would be met, for example, from an MDS station radiating 350 watts toward the protected service area and protecting a weak desired signal level of -108 dBw. Obviously, as the distance from the protected area increases beyond 24.4 kilometers, there is greater flexibility to operate an MDS facility without causing adjacent channel interference.

22. Our distance guidelines notwithstanding, there may be situations where communities in a BTA are located more than 64.4 kilometers from protected service areas, but cannot be adequately served without possibly interfering with other MDS or ITFS operations.[21] BTA auction winners may use any means to show the preclusive effects of encumbrances in such cases. A statement of intention may be supported by showing that any one of the MDS channels could not be used by a new station to serve a community in that BTA. The BTA auction winner's analysis may include desired-to-undesired signal strength calculations, using the authorized or previously proposed facilities of protected stations. A BTA winner may assume that any hypothetical station it would operate would require sufficient power and antenna height to not only serve a community, but also support an economically feasible operation. A BTA winner who is also an incumbent MDS operator in the same BTA may use the authorized parameters of the incumbent system to show that it could not add an additional channel to that system.[22] In addition to interference-related encumbrances, BTA winners (particularly for the smaller BTAs) might be able to show that no reasonable facility could be operated in conformance with the limiting signal strengths at the BTA boundaries. *See* 47 C.F.R. § 21.938, Appendix C, *MDS Report and Order* at

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[20] Site location and antenna height are the major MDS station design factors that determine the line-of-sight distance to the horizon, beyond which the potential for interference is greatly reduced.

[21] A community in an area characterized by large heights above average terrain may be an example of such a situation.

[22] We note that any such additional channel would be encompassed by the BTA authorization, and the protected service area for that channel would extend to the borders of the BTA.

9696.

23. There may be situations where there are one or more communities within a BTA for which an MDS station could be constructed and operated on all MDS channels in full compliance with the Commission's MDS interference rules (excluding channel 2 outside of the cities where its use is permitted, *see* 47 C.F.R. § 21.901), but that the winning bidder is unable to provide service for other reasons.[23] In such cases, the winning bidder's statement of intention should detail those reasons, together with factual documentation.

24. With regard to the showings in support of statements of intention, we would like to clarify that, at a minimum, specific and detailed narrative descriptions are required and must include the information and supporting documentation outlined in the *MDS Report and Order*, 10 FCC Rcd at 9657, including identification of encumbering stations or applications for all MDS channels (even though the statement of intention may be filed if only one channel is encumbered). Statements of intention that detail a winning bidder's objective to purchase previously authorized or proposed stations and/or ITFS leases within a BTA should include such information as the estimated date for conclusion of negotiations and consummation of sales, and should identify the parties with whom the winning bidders are engaged in negotiations. We encourage BTA auction winners to file maps, charts, diagrams, sketches, technical analyses or any other documents that, together with the narrative descriptions, would best explain the status of a BTA and the BTA winner's plan for initiating service in the BTA.

25. We emphasize that we do not want statements of intention to become a regulatory burden for BTA auction winners or the Commission's MDS processing staff. We will make every effort to issue BTA authorizations on the basis of factually supported statements of intention, and, as deemed necessary, we may request additional information from a BTA winner, such as a map of the BTA showing the protected circles of encumbering MDS and/or ITFS facilities. We note that the five-year build-out period for the BTA begins with the granting of the BTA authorization, whether such authorization is granted on the basis of a long-form application or a statement of intention. *See MDS Report and Order* at 9613; 47 C.F.R. § 21.930, Appendix C, *MDS Report and Order* at 9692. We believe that the running of the five-year build-out period from the date of the BTA authorization grant will encourage auction winners who obtain BTA authorizations by initially filing statements of intention to resolve encumbrances, file long-form application(s), and initiate service in their BTAs in a timely fashion.

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[23] For example, any such MDS facility complying with our interference rules would be too small to serve the community effectively, or the community or other populated area might be too small to support an economically viable wireless cable system.

III. FINAL REGULATORY FLEXIBILITY ANALYSIS

26. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981)), the Commission's final analysis is as follows:

27. **Need and purpose of this action:** This third reconsideration order upholds the Commission's decision to make effective on September 18, 1995, revisions of the rule governing the Multipoint Distribution Service, in order to expand the area within which MDS stations will be protected from harmful electromagnetic interference, and to increase the efficiency of processing MDS applications. This action also maintains the Commission policy of strict application of the requirements for requests for extensions of time within which to construct ITFS stations. In adopting this order, the Commission's goals of promoting efficiency in the allocation, licensing and shared use of the electromagnetic spectrum are furthered.

28. **Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:** There were no comments submitted in response to the Initial Regulatory Flexibility Analysis and none in connection with this third reconsideration order.

29. **Significant alternatives considered:** The Commission considered all the alternatives raised by petitioners and discussed herein. In response to these petitions, we decided to maintain the September 18, 1995, effective date of the expanded protected service areas provided to MDS stations in order to enhance the potential for effective competition with traditional wireline cable systems. On reconsideration, it was also requested that we reverse our policy of strict application of the requirements for requests for extensions of time within which to construct ITFS stations. We decided to maintain our strict application policy.

30. The Secretary shall send a copy of this *Third Order on Reconsideration*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act.

IV. ORDERING CLAUSES

31. In view of all the foregoing, we affirm our adoption of the *Second Order on Reconsideration*. Reconsideration of the order is not justified. Accordingly, IT IS ORDERED that pursuant to the authority contained in §§ 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and § 1.429(i) of the Commission's rules, 47 C.F.R. § 1.429(i), and for the reasons set forth above, petitioners' requests for reconsideration ARE HEREBY DENIED IN PART, and DISMISSED AS MOOT IN PART, as discussed herein. Clarification of the *Second Order on Reconsideration*, where requested, has been provided.

32. IT IS FURTHER ORDERED that Sections 21.902(i) and 21.956(a) of the Commission's rules, 47 C.F.R. §§ 21.902(i) and 21.956(a), ARE AMENDED, as discussed herein and as provided in Appendix B hereto.

33. IT IS FURTHER ORDERED that the rule amendments set forth in Appendix B WILL BECOME EFFECTIVE 60 days after their publication in the Federal Register, except that the new or modified paperwork requirements contained in Section 21.902(i), 47 C.F.R. § 21.902(i), which are subject to approval by the Office of Management and Budget ("OMB"), will go into effect upon OMB approval.

Federal Communications Commission

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

PLEADINGS WERE FILED BY THE FOLLOWING PARTIES:

1. The Law Offices of John D. Pellegrin, Chartered ("Pellegrin")
2. The Law Firm of Schwartz, Woods and Miller ("Schwartz, Woods") on behalf of its ITFS clients, Arizona State University, Board of Trustees of Community Technical Colleges, Boston Catholic Television Center, California State University - Fullerton, Catholic Diocese of Youngstown, Connecticut Public Broadcasting, Daytona Beach Community College, Detroit Educational Television Foundation, Fifteen Telecommunications, Inc., Mid-South Public Communications Foundation, Mississippi Authority for Educational Television, Mississippi EdNet Institute, Inc., Monterey County Office of Education, New Jersey Public Broadcasting Authority, North Carolina Agricultural and Technical State University, North Carolina State University, Northern California Educational Television Association, Oregon Public Broadcasting, San Jose State University, Santa Clara County Office of Education, University of North Carolina at Charlotte, University of North Carolina Center for Public Television, University of North Carolina General Administration, WHYY, Inc., Winston-Salem State University, WJCT, Inc.
3. The Wireless Cable Association International, Inc. ("WCA")

APPENDIX B

I. Part 21 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 21- DOMESTIC PUBLIC FIXED RADIO SERVICES

1. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102, as amended; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 602; 47 U.S.C. 552, 554.

2. Section 21.902(i) is amended at subparagraphs (1) and (2) to read as follows:

§ 21.902 Frequency interference.

* * * * *

(i)(1) For each application for a new station, or amendment thereto, or modification application, or amendment thereto, proposing Multipoint Distribution Service (MDS) facilities on the E, F, or H channels, filed on October 1, 1995, or thereafter, on or before the day the application or amendment is filed, the applicant must prepare, but is not required to submit with its application or amendment, an analysis demonstrating that operation of the MDS applicant's transmitter will not cause harmful electrical interference to each registered receive site of any existing D, E, F, or G channel Instructional Television Fixed Service station licensed, with a construct permit, or proposed in a pending application on the day such MDS application is filed, with an ITFS transmitter site within 50 miles of the coordinates of the MDS station's proposed transmitter site.

* * *

(2) For each application described in (i)(1) of this paragraph, the applicant must serve, by certified mail, return receipt requested, on or before the day the application or amendment described in (i)(1) of this paragraph is initially filed with the Commission, a copy of the complete MDS application or amendment, including each exhibit and interference study, described in (i)(1) of this paragraph, on each ITFS licensee, construction permittee, or applicant described in (i)(1) of this paragraph.

3. Section 21.956(a) is amended to read as follows:

§ 21.956 Filing of long-form applications or statements of intention.

(a) Within 30 business days of being notified of its status as a winning bidder, each winning bidder for a BTA service area will be required to submit either: (1) an initial long-form application for an MDS station license, along with any required exhibits; or (2) a statement of intention with regard to the BTA service area, along with any required exhibits, showing the encumbered nature of the BTA, identifying all previously authorized or proposed MDS and ITFS facilities, and describing in detail the winning bidder's plan for obtaining the previously authorized and/or proposed MDS stations within the BTA. * * *

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