

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington DC 20554



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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of	)	
	)	
Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services	)	WT Docket No. 94-148
	)	
Amendment of Part 21 of the Commission's Rules for the Domestic Public Fixed Radio Services	)	CC Docket No. 93-2
	)	
McCaw Cellular Communications Inc. Petition for Rulemaking	)	<u>RM-7861</u>

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TO: The Commission

**PETITION FOR PARTIAL RECONSIDERATION**

CAI Wireless Systems Inc. ("CAI") hereby petitions for reconsideration of the above-captioned Report and Order<sup>1/</sup> to the extent of amending Section 101.603(b)(3) by adding the underlined material:

Stations licensed in this radio service shall not:

[ . . . ]

(3) Be used to provide the final RF link in the chain of transmission of program material to cable television systems, multipoint distribution systems or master antenna TV systems, except in the frequency bands 6425-6525 and 10,700-11,700 and 18,142-18,580 MHz and on frequencies above 21,200 MHz.

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<sup>1/</sup> Establishment of a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-148 et al., Report and Order, FCC 96-51 (released Feb. 29, 1996) ("Part 101 R&O").

In the alternative, CAI supports the elimination of Section 101.603(b)(3) in its entirety.<sup>2/</sup>

**I. THE RULE AT ISSUE IS AN UNNECESSARY BURDEN TO WIRELESS CABLE OPERATORS.**

CAI is one of the largest wireless cable operators in the United States, having acquired 32 BTA markets in the recently concluded MMDS auctions, and it is now building out a number of those BTAs. CAI is filing this Petition for Partial Reconsideration to give wireless cable operators greater flexibility in designing their systems. Specifically, under both the Commission's current Part 94 rules and the new Part 101 rules, wireless cable operators cannot use the 11 Ghz band to connect programming headends or satellite receive facilities with their main transmitters, even though that band is particularly attractive in terms of both equipment availability and the length of hops that can maintain reliable service.

Access to a range of microwave frequencies will also permit wireless cable systems to cover a BTA more economically while providing customized services to different portions of the BTA. For example, CAI's New York BTA is large, extending from the eastern tip of Long Island to lower New York State and portions of northern New Jersey. Multiple high power transmitters will be required to serve the area. And, some portions of the BTA are likely to prefer different broadcast stations and some different program services than other portions of the BTA. One way to provide this program diversity is to operate the individual

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<sup>2/</sup> The several references in the Notice to conforming the Part 94 and Part 21 rules provided ample notice to interested parties that limitations particular to one service or the other, such as the former Section 94.9(b)(3) (now Section 101.603(b)(3)), were subject to change in the proceeding. Establishment of a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, 10 FCC Rcd 2508 at ¶ 7 (1995) ("Notice"). Accordingly, this matter is properly before the Commission on reconsideration.

full-power transmitters as sub-headends, rebroadcasting most of the same programming but substituting some broadcast and other services of greater interest to that portion of the BTA.

Without the right to use the 11 GHz band, however, wireless cable operators will be required to lease fiber optic capacity at substantially greater cost, to design their system based on regulatory considerations rather than engineering and cost factors, or to use a common carrier to provide 11 GHz service. Any of these results is inconsistent with the basic objectives of this rulemaking, with the Commission's and Congress's desire to promote competition among multichannel video providers, and with the public interest. There is no valid policy justification for this result. The Commission should take the opportunity to eliminate this unnecessary regulatory obstacle.

## **II. SECTION 101.603(b)(3) IS INCONSISTENT WITH THE PURPOSES OF THE RULEMAKING.**

Section 101.603(b)(3), which applies to private microwave but not to common carrier operations, represents precisely the kind of regulatory distinction this rulemaking intended to eliminate. As the Commission stated in the Notice of Proposed Rulemaking: "The Part 21 and Part 94 rules need to be consolidated, conformed, and updated to allow the microwave industry to operate as efficiently as possible without being hampered by obsolete regulations."<sup>3/</sup> This theme was reiterated in the Report and Order:

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<sup>3/</sup> Establishment of a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, 10 FCC Rcd 2508 at ¶ 7 (1995). "The key objectives in this [Notice] are to restructure the fixed microwave rules so that they are easier for the public to understand and use, to conform similar rule provisions to the maximum extent possible, to eliminate redundancy, and to remove obsolete language." Id., 10 FCC Rcd 2508 at ¶ 1.

[P]rivate and common carrier microwave systems are often technically and operationally similar, but are now subject to differing regulation depending on whether an applicant files under Part 94 or Part 21 of the Commission's Rules. **The new consolidated Part 101 will eliminate this arbitrary distinction and further regulatory symmetry between common carrier and private operational fixed microwave services.**<sup>4/</sup>

However, Section 101.603(b)(3) is utterly inconsistent with these goals, perpetuating a distinction between private and common carrier services for no valid purpose.

In 1965, when the precursor to Section 101.603(b)(3) first took effect, common carrier and private services were wholly distinct, with no discernable overlap. Common carriers provided service to all takers under generally applicable tariffs; and private carriers handled only their own traffic. Today, of course, the situation is very different. Private carriers routinely sell capacity to others, often in direct competition with traditional common carriers, while the latter offer service under streamlined and custom tariffs that bear little resemblance to the traditional tariffs of the past.

Application of older Commission rules to these evolving real-world practices sometimes yield unnecessary anomalies. SMR providers connected to the public switched network and cellular carriers, for example, compete for many of the same customers, and for a time they did so under very different rules. Similarly, private carrier and common carrier paging providers offered virtually identical service, but to different categories of eligible customers and under different regulatory restraints. The Commission has since recognized

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<sup>4/</sup> Part 101 R&O at ¶ 5 (emphasis added).

and corrected these problems, which it recognized as presenting unnecessary barriers to competition.<sup>5/</sup>

Private and common carrier microwave services are subject to some comparable discrepancies, which the Part 101 proceeding was intended in part to resolve. But Section 101.603(b)(3), which applies only to private services, remains an anachronism. In practice, the rule forces users to make economic decisions based on idiosyncracies in the Commission's rules rather than on their own best business judgments. For example, in providing service to a video programmer, CAI was constrained to use the 11 GHz band to connect the programmer's satellite receive facilities and headend to a main transmitter, because 11 GHz was the only band that could reach the transmitter in a single hop and for which SNET microwave equipment was available. But Section 101.603(b)(3) barred CAI or the video programmer from providing the service directly. Instead, CAI had to create a separate affiliate as a legitimate common carrier, cause the affiliate to file a tariff, and have the affiliate enter into a service agreement with the video programmer. The cost, inefficiency, and inflexibility of this arrangement increase costs and raise prices to consumers, while producing no benefit in return. In short, the rule is contrary to the purposes of the rulemaking, disserves the public, and should be amended.

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<sup>5/</sup> Private Carrier Paging Licensees, 8 FCC Rcd 4822 at ¶ 5 (1993); Amendment of Part 90, 3 FCC Rcd 1838 at ¶¶ 33-35 (1988).

### III. **THERE IS NO JUSTIFICATION FOR SECTION 101.603(b)(3).**

#### A. **The Rationale for Limiting Video Delivery Below 21.2 GHz Has Gone Unexamined for 30 Years, and Never Applied to the 11 GHz Band.**

Limitations on the use of private microwave frequencies to deliver video signals have been in place since 1965; and each time the rules have been revised, the same limitations were duly carried over. But their rationale has never been revisited; and no rationale has ever been presented for subjecting the 11 GHz band to this restriction. Indeed, the application of these limitations to 11 GHz may be largely inadvertent.

In the early years of cable television, when private microwave was still regulated as part of the Business Radio Service, the rules provided:

Commencing November 22, 1965, applications for authorizations to construct new microwave point-to-point radio stations for relaying television, standard, or FM broadcast signals to community antenna television (CATV) systems, will not be accepted for filing in the Business Radio Service.<sup>6/</sup>

The rule was intended to forestall anticipated congestion from video services in the Business Radio microwave frequencies.<sup>7/</sup>

When the Private Operational Fixed Microwave Service was established ten years later, Section 94.9(b)(3) of the new rules duplicated the old Business Radio language with no

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<sup>6/</sup> 47 C.F.R. § 91.552(e) (1966). The effective date of this provision, November 22, 1965, is the same date the CARS rules first took effect. Licensing of Microwave Radio Stations Used to Relay Television Signals to CATVs, 1 F.C.C.2d 897, 916 (1965).

<sup>7/</sup> Id., 1 F.C.C.2d at 908

further discussion or analysis.<sup>8/</sup> The wording approached its modern form in 1983, in the reconsideration phase of a proceeding relating to MDS. The Commission there amended Section 94.9(b)(3) to prohibit the use of Part 94 frequencies

[t]o provide the final RF link in the chain of transmission of program material to cable television systems, multipoint distribution systems or master antenna TV systems, except in the frequency bands above 21,200 MHz.<sup>9/</sup>

The Memorandum Opinion and Order that promulgated this rule was almost wholly concerned with multidirectional transmission directly to subscribers, and barely mentioned point-to-point service. The Commission's immediate goal was to encourage overly large numbers of 2.5 GHz MDS applicants to migrate to 21,200-23,600 MHz.<sup>10/</sup> But the decision did not extend, or even mention, the 1965 rationale for limiting all point-to-point video delivery applications below 21,200 MHz -- much less articulate a new one -- even though 18 years had passed and the microwave landscape had undergone dramatic change. Rather, the new Section 94.9(b)(3) seems to have been intended merely to update the old version to cover MDS and SMATVs, while simultaneously promoting the move to 21,200-23,600 MHz.<sup>11/</sup>

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<sup>8/</sup> Establishment of a Private Operational-Fixed Microwave Radio Service, 52 F.C.C.2d 894, 923 (1975).

<sup>9/</sup> Methods of Transmitting Program Material to Hotels and Similar Locations, 99 F.C.C.2d 715, 733 (1983), reconsidering 86 F.C.C.2d 299 (1981).

<sup>10/</sup> Id., 99 F.C.C.2d at 726.

<sup>11/</sup> The 6.5 GHz exemption was added in 1987, and the 18 GHz exception in 1991. Spectrum Utilization Between 947 MHz and 40 GHz, 2 FCC Rcd 1050 (1987) (6425-6525 MHz); Video Entertainment Access to the 18 GHz Band, 6 FCC Rcd 1270 (1991) (18,142-18,580 MHz).

During this time, and until 1993, the 11 GHz band was allocated solely to Part 21. The band could be used for any purpose, including the "final RF link" for delivery to cable, MDS, and SMATV systems, so long as a common carrier provided the service. The co-allocation of 11 GHz to Part 94 came when the band was needed to accommodate users due to be ousted from 2 GHz to make room for PCS.<sup>12/</sup> This reallocation automatically made the 11 GHz band subject to the "final RF link" provision of Section 94.9(b)(3). But the Second Report and Order that reallocated 11 GHz did not even mention, let alone justify, the application of Section 94.9(b)(3) to 11 GHz.<sup>13/</sup> There is no indication that the Commission was even aware that this change would result in a licensee's being unable to use 11 GHz for delivery of its own video program material -- although, ironically, the same user could still hire a common carrier licensee to carry the same program material. And when the present proceeding carried over Section 94.9(b)(3) to the new Section 101.603(b)(3), there was again no comment or discussion of the rule's purpose.

In short, Section 101.603(b)(3) derives from a rule that has not been examined since 1965, notwithstanding a transformation in microwave usage patterns since then. Although the rule may once have been adequately explained for another generation, and for other frequency bands, there is no support for it in its administrative history that makes sense in today's very different regulatory and technological environment. Moreover, the Commission has never

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<sup>12/</sup> Redevelopment of Spectrum to Encourage New Technologies, 8 FCC Rcd 6495 (1993).

<sup>13/</sup> Id. See also Redevelopment of Spectrum to Encourage New Technologies, 7 FCC Rcd 6100 (1992) (Further Notice of Proposed Rule Making).

explained, let alone justified, the rule's application to the 11 GHz band. There is no basis for continued application of the rule in its present form.

**B. Section 101.603(b)(3) Would Perpetuate an Obsolete and Inefficient Style of Spectrum Management.**

Section 101.603(b)(3) is inconsistent with the Commission's policy of leaving resource allocation to the market, whenever possible, rather than directing it by Government fiat. That policy too has evolved dramatically since the origination of the rule, which occurred at a time when the Commission routinely micromanaged the spectrum. The present Part 90, with its allocations to dozens of different industries, is a memorial to that approach -- albeit one now being dismantled.<sup>14/</sup> The Commission has learned through decades of experience that matching slices of spectrum to individual applications is expensive in Commission resources and ultimately inefficient, because the adjustment to supply and demand is slow and inexact, if it occurs at all. The better method by far is to rely on supply and demand directly by leaving the allocation decisions to those actually using the spectrum, who are better situated to manage it efficiently to the common advantage.<sup>15/</sup> In this respect as well, Section 101.603(b)(3) is a now-obsolete anomaly that requires prompt correction.

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<sup>14/</sup> Replacement of Part 90 by Part 88, 10 FCC Rcd 10076, 10102 (1995).

<sup>15/</sup> Cf., Flexible Service Offerings in the Commercial Mobile Radio Services, 11 FCC Rcd 2445, 2447 9 (1966) (proposing flexible regulatory scheme to eliminate need for rule making or multiple waivers whenever providers wish to respond to customers' changing needs); Establishment of New Personal Communications Services, 7 FCC Rcd 5676, 5692 (1992) (PCS broadband licensees to have flexibility to channelize frequency blocks to accommodate technologies and services they wish to provide).

## CONCLUSION

Certainly as applied to the 11 GHZ band, and perhaps in its entirety, Section 101.603(b)(3) hinders the video industry without providing a concomitant benefit. The rule frustrates the announced purpose of this proceeding to reconcile the Part 94 and Part 21 rules. It flies in the face of Commission policies on the equitable regulation of service providers and spectrum management, and is without support in the administrative history. The change requested here is in the public interest because it will improve efficient use of the spectrum without causing harm to any user.

Respectfully submitted,

  
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