

FCC MAIL SECTION

Federal Communications Commission

FCC 97-111

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

In the Matter of)
)
Emergency Motion of the Wireless Cable) GN Docket No. 96-228
Association International, Inc. for a Stay)
of the Wireless Communications Service)
Auction and Associated Rules)

ORDER

Adopted: March 31, 1997

Released: April 1, 1997

By the Commission:

1. We have before us an Emergency Motion for Stay filed by the Wireless Cable Association International, Inc. (WCA) on March 10, 1997 ("Stay Request"). WCA seeks to stay the auction of 128 Wireless Communications Service ("WCS") licenses scheduled to begin on April 15, 1997. WCA relies on the four prong test for issuance of a stay set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*,¹ as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*² For the reasons discussed below, we hereby deny the Stay Request.

2. Background. The Omnibus Consolidated Appropriations Act, 1997³ directs the Commission to reallocate the use of frequencies at 2305-2320 MHz and 2345-2360 MHz to wireless services that are consistent with international agreements concerning spectrum allocations, and to assign the use of such frequencies by competitive bidding pursuant to Section 309(j) of the Communications Act of 1934.⁴ The Appropriations Act also requires the Commission to commence the competitive bidding for the assignment of the frequencies no later than April 15, 1997, and to conduct the competitive bidding in a manner that ensures that all proceeds of the bidding are deposited no later than September 30, 1997.⁵ Pursuant to

¹ 259 F.2d 921 (D.C. Cir. 1958).

² 559 F.2d 841 (D.C. Cir. 1977). Under this test, a stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay.

³ P.L. 104-208, 110 Stat. 3009 (1996) ("Appropriations Act").

⁴ See Appropriations Act, Section 3001(a).

⁵ See Appropriations Act, Sections 3001(c), (d).

the directives of the Appropriations Act, on February 19, 1997, the Commission adopted a Report and Order reallocating 30 megahertz of spectrum in the 2.3 GHz band and setting forth a competitive bidding plan designed to make the spectrum available, via simultaneous multiple round electronic auction, for any fixed, mobile, radiolocation and broadcasting-satellite (sound) use.⁶ The Commission also has announced that applications to participate in the WCS auction will be due on March 25, 1997,⁷ and that competitive bidding for the WCS licenses will commence on April 15, 1997.⁸

3. The Multipoint Distribution Service ("MDS") and the Instructional Television Fixed Service ("ITFS") operate in the 2150-2162 and 2500-2690 MHz bands.⁹ After the comment period for the WCS proceeding had closed, several parties filed *ex parte* statements expressing concern that WCS transmissions would interfere with MDS/ITFS receiving installations and generally requesting that the Commission limit WCS radiated power to 20 watts equivalent isotropically radiated power ("EIRP"), unless the WCS licensee obtains an interference consent agreement from the existing MDS and ITFS licensees.¹⁰ Noting that the interference impact of WCS operations on MDS/ITFS is unclear without a clear sense of what particular services WCS licensees will provide and how soon these will be operational, the Commission believed it would be premature at the time of the *Report and Order* to consider specific interference protection for MDS/ITFS. The Commission also observed that the record on this issue was incomplete in that concerns of the MDS/ITFS community were first raised in late filed *ex parte* comments and thus no potential WCS applicants had a full opportunity to respond to those comments. The Commission further noted that the conversion by the MDS/ITFS industry to newer downconverters, a process that has already begun, might obviate WCS interference problems. The Commission therefore declined to impose any technical restrictions on WCS licensees aimed at protecting the MDS/ITFS services unless or until it had a more precise understanding of the nature and extent of problems that might actually arise.¹¹

⁶ See *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")* GN Docket No. 96-228, *Report and Order*, FCC 97-50, 62 Fed.Reg. 9636 (rel. February 19, 1997) ("*Report and Order*").

⁷ See "Auction of Wireless Communications Service (WCS)," Public Notice, DA 97-386 (rel. February 21, 1997), at 2.

⁸ *Id.* at 1. See also *Report and Order* at ¶ 171.

⁹ See 47 C.F.R. Part 21, Subpart K and Part 24, Subpart I. MDS in the 2596-2644 MHz band is sometimes referred to as the Multichannel Multipoint Distribution Service, or "MMDS."

¹⁰ See *Ex Parte* Statements of BellSouth (filed January 30, 1997), WCA (filed January 31, 1997), and the National ITFS Association (filed February 6, 1997).

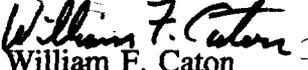
¹¹ See *Report and Order* at ¶ 157.

4. On March 10, 1997, WCA filed its Stay Request, together with a Petition for Expedited Reconsideration of the *Report and Order*. The Stay Request seeks that the Commission stay "the rules and policies adopted in the Commission's *Report and Order* . . . , as well as the April 15, 1997 commencement date for the auction of [the WCS licenses], until such time as the Commission has issued a decision on WCA's contemporaneous Petition for Expedited Reconsideration ("Petition") of the *Report and Order*."¹² WCA's Petition seeks the imposition of a 20 watt EIRP limit on WCS licensees prior to auction of the WCS licenses.¹³

5. Discussion. Upon examination of the Stay Request, we find that we cannot grant WCA's motion because of the strictures imposed by the Appropriations Act. In essence, WCA requests that we defer the commencement date of the WCS auction -- a date that has been statutorily prescribed. The Appropriations Act indicates that "[t]he Commission shall commence the competitive bidding for the assignment of the frequencies . . . no later than April 15, 1997."¹⁴ Where congressional intent is clear, the Commission has no discretion to depart from that intent.¹⁵ We believe that Congress has spoken on the precise issue in question -- the commencement date of the WCS auction -- and the Appropriations Act does not afford us discretion to defer the commencement of the WCS auction beyond that date. We therefore deny WCA's Stay Request.

6. Conclusion. We are unable to grant WCA the relief that it seeks because the Appropriations Act does not afford the Commission the authority to defer the commencement date of the WCS auction. For this reason, WCA's Emergency Motion for Stay IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

¹² Stay Request at 1.

¹³ See Petition at 1, 18.

¹⁴ Appropriations Act, Section 3001(c).

¹⁵ See *Chevron, U.S.A., Inc. v. National Resources Defense Council*, 104 S.Ct. 2778, 2781 (1984):

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.