

wholesale. The Petitioners' views on those issues are set forth in detail in the Petition and in the Comments and Reply Comments they submitted in response to the *Public Notice*,<sup>30/</sup> and need not be repeated in depth here. Instead, the bulk of these comments will be devoted to those instances where the Commission has rejected proposals advanced in the Petition, has raised questions regarding proposals advanced in the Petition, or has sought comment on issues not previously addressed by the Petitioners.

## II. DISCUSSION.

### A. **The Commission Must Not Again Allow Development Of MDS And ITFS To Be Held Hostage To Application Processing Delays.**

Without doubt, the most troubling element of the *NPRM* is the Commission's tentative rejection of the licensing system proposed in the Petition.<sup>31/</sup> From its birth in 1983 to date, the wireless cable industry has been hamstrung by a seemingly endless series of application processing backlogs -- backlogs that prevented the industry from taking advantage of its best opportunities to emerge as a viable competitor to cable. While backlogs in the processing of uncontested MDS applications have been substantially reduced of late, delays in the processing of most other applications are crippling many wireless cable system operators.<sup>32/</sup>

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<sup>30/</sup> See Comments of the Petitioners, File No. RM-9060 (filed May 14, 1997) [hereinafter cited as "Petitioners' Comments"]; Reply Comments of Petitioners, File No. RM-9060 (filed May 29, 1997) [hereinafter cited as "Petitioners' Reply Comments"].

<sup>31/</sup> See Petition, at ¶¶ 49, 53, 56.

<sup>32/</sup> The situation is particularly acute with respect to ITFS applications, where a substantial number of the applications filed during the October 1995 and October-December 1996 filing windows remain pending. According to a study recently conducted by Hardin & Associates, Inc., of the approximately 1,000 applications for new or modified ITFS facilities submitted during the

The Petitioners will be the first to concede that their proposed approach to the processing of advanced technology applications<sup>33/</sup> is a kluge that would not be anyone's first choice were unencumbered spectrum being licensed. However, the approach advocated by the Petitioners represents the best proposal to date for expediting the introduction of innovative technologies in the heavily encumbered MDS and ITFS bands without further processing delays, while at the same time avoiding interference to incumbent facilities. Not surprisingly, adoption of the Petitioners' approach is a critical component of the NIA/WCA Joint Proposal, which calls upon the Commission to "adopt rules providing for the expedited processing and automatic granting of applications to introduce advanced technologies on MDS and ITFS channels . . . ."

The problem, in a nutshell, is that the demand for facilities of the sort proposed by the Petition will far out-strip the ability of the Commission's existing MDS and ITFS application processing staffs to engage in detailed technical review of complex applications.<sup>34/</sup> This is not

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October 1995 window, over 60% remain pending. Although the MDS application processing environment is less problematic than that for ITFS, the Petitioners believe that it still takes too long for the Commission to resolve contested matters. For example, many BTA auction winners have found that their ability to add channels has been hampered by Commission delays in confirming that licenses that had been awarded under the lottery system have been forfeited because the licensee failed to construct in timely fashion -- a situation which should free the channels in issue for award to the BTA auction winner.

<sup>33/</sup> For purposes of these Comments, the Petitioners will use the phrase "advanced technology application" to refer to an application proposing to convert a previously authorized facility to a cellular system or to return paths.

<sup>34/</sup> As is explained in the Petition and the complexity of the interference protection scheme largely results from the desire of the Petitioners to provide maximum flexibility to licensees without risking harmful interference to incumbents in MDS and ITFS spectrum that is heavily encumbered with proposed and existing facilities entitled to varying degrees of interference protection depending upon their service, their use, and their date of authorization. *See* Petition, at 33-34. While the

intended as a criticism of the Mass Media Bureau staff, which has labored long and hard to clear prior MDS and ITFS application backlogs. Rather, it is simply a recognition that the staff is too small to rapidly process the number of applications that the Petitioners expect to be filed (at least unless there is a radical change in the Commission's approach to MDS and ITFS application processing), and that the Commission lacks the resources to expand significantly the size of the staff. Upon adoption of flexible rules along the lines proposed in the *NPRM*, the Petitioners anticipate that over a thousand advanced technology applications alone will be filed during the proposed one-week filing window. If history is any guide, it could take years for the relatively small staff to process those applications under current policies.<sup>35/</sup>

For the reasons set out in the introductory section of these Comments, the Petitioners believe it is essential to both wireless cable operators and educators to expedite the authorization of advanced facilities without application processing delays. To speed the authorization, construction and operation of advanced facilities, the rules proposed by the Petitioners would eliminate the three

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approach advocated by the Petitioners could be simplified, such simplification would necessarily result in either over-protection of existing facilities and the preclusion of advanced services, or under-protection of existing facilities and the risk of interference. Neither of these alternatives, is particularly attractive to Petitioners. Moreover, none of the more simple approaches proposed to date would eliminate the delays the Petitioners anticipate from the flood of applications. Thus, even if the Commission adopts a less-complex method for performing interference analyses than that proposed by the Petitioners, there will still be a crying need for expedited authorization of proposed facilities.

<sup>35/</sup> For example, a similar number of applications for new or modified ITFS stations were filed during the October 1995 filing window. Despite the passage of more than two years, many of those applications remain pending. Indeed, it is that experience which leads the Petitioners to call for an elimination of the periodic filing window system for ITFS major modification applications and the use of a rolling one-day filing window approach similar to that proposed by the Petitioners for advanced technology applications. *See infra* at Section II.A.5.

greatest causes of application backlogs: (1) the staff's policy of conducting *de novo* analyses of the potential for interference from proposed facilities to previously-proposed stations; (2) the need for the staff to identify which applications filed during the same window are mutually-exclusive and then determine which of those mutually-exclusive applications are to be granted ; and (3) the use of infrequent filing windows that tend to overwhelm the Commission's resources. Notwithstanding the concerns expressed in the *NPRM*, the Petitioners continue to believe that adoption of their proposals is critical to the future success of the wireless cable operators and local educators alike. Indeed, unless the Commission makes radical changes in its application processing procedures, the resulting backlogs will sound a death knell for wireless cable and its much-needed financial and operational support of educators.

The lynchpin of the Petitioners' effort to eliminate delays in the offering of advanced service is their proposal of an approach under which most applications for advanced facilities could be filed at any time and would be automatically granted on the 61<sup>st</sup> day after appearing on public notice as accepted for filing. As contemplated by Petitioners, an application for advanced facilities would be placed on public notice by the staff after review as to completeness and a determination that all nearby previously proposed and licensed facilities have been analyzed for potential interference or have consented,<sup>36/</sup> but without extensive review and verification of the interference studies submitted

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<sup>36/</sup> In order for an application to be eligible to appear on public notice, it should have to be "substantially complete." To avoid any disputes as to what constitutes a "substantially complete" application under the new rules, the Commission should make clear at the outset that all of the detailed technical information required under the proposed rules must be provided, particularly all interference analyses and/or consents. A significant reason for the ITFS application processing delays encountered since the October 1995 filing window is the propensity of certain companies to submit applications that lack required interference analyses or consents from neighbors. Although

by the applicant. Because under the Petitioners' approach advanced technology facilities would not be entitled to interference protection from facilities proposed on the same day (or in the initial one-week filing window the Petitioners proposed in order to address the anticipated heavy demand), the staff would not need to determine whether any simultaneously-filed applications interfere with the application in issue and would not need to conduct a proceeding to select from among any that do. Potentially affected parties (all of whom must be served with a copy of the application) would have sixty days from public notice in order to formally oppose grant of the application. As proposed, if no potentially affected party objected, the application would be deemed automatically granted as of the 61<sup>st</sup> day following public notice, unless the staff exercised its authority under unusual circumstances to advise the applicant prior to the 61<sup>st</sup> day that its application will not be automatically granted, in which case the application would be subject to the normal processing

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the staff has recently started to dismiss such applications as soon as processing commences, in the past the staff apparently has at least in some cases informally notified counsel of missing consents and afforded an opportunity for submission. This approach has often led to substantial (and unfair) delays in the processing of other applications that were complete when filed. In addition, a substantial amount of time has been wasted by the Commission's staff and neighboring licensees because numerous defective ITFS applications were filed during the October 1995 window and then amended, often more than once, until the applicants eventually got them right. By contrast, MDS application processing procedures have not permitted post-filing submissions of curative amendments. See, e.g., *RuralVision Central, Inc.*, DA 97-2588, at ¶¶ 16-27 (rel. Dec. 16, 1997); *Wyse Wireless Partnership*, DA 96-899 (Vid. Ser. Div., rel. June 6, 1996); *14 Applications for Authority To Construct and Operate Multipoint Distribution Service Stations At Cheyenne, WY*, 10 FCC Rcd 11254 (1995); *15 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations On the E and F Group Channels At Bay City, TX*, 10 FCC Rcd 11244 (1995); *4,330 Applications for Authority To Construct and Operate Multipoint Distribution Service Stations At 62 Transmitter Sites*, 10 FCC Rcd 1335 (1994). Unless the Commission adopts a similarly strict approach for all applications submitted under the new rules, it will undoubtedly be inundated by deficient applications and subsequent amendments. Thus, the Petitioners are proposing severe restrictions on the submission of amendments to applications grantable under the proposed automatic grant procedures. See *infra* at II.A.3.

routine.<sup>37/</sup> In addition, adversely affected parties could petition for reconsideration of any automatic grant within the 30-day provided under Section 1.106 of the Rules, and the Commission would retain the 40-day period provided for under Section 1.117(a) of the Rules to reconsider any automatic grant on the Commission's own motion.

While the Commission acknowledges that the Petitioners' approach represents a "promising start,"<sup>38/</sup> the *NPRM* raises a series of concerns regarding the proposal and tentatively rejects those very elements that are most important to the elimination of delays in the inauguration of service. Yet, as will be demonstrated below, the Commission's concerns can be alleviated while still achieving the objective of expedited application processing.

1. *The Elimination Of Routine Staff Interference Analysis Will Expedite The Inauguration Of New Services, Without Increasing The Risk Of Interference.*

In crafting their proposal, the Petitioners carefully balanced the need to assure interference protection in crowded spectrum against regulatory delays associated with extensive Commission review and confirmation of complex interference analyses. The proposed approach frees Commission resources from routine processing for other more important tasks (such as resolving

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<sup>37/</sup> The Petitioners recognize that it may be necessary for the staff to delay the automatic grant of applications in circumstances where international agreements require prior coordination, an environmental assessment is required under Section 1.1307 of the Rules, Federal Aviation Administration coordination is required, or a radio quiet zone may be affected. *See, e.g.,* 47 C.F.R. § 101.1009(a) (requiring the individual licensing of LMDS facilities only under such circumstances); *see also 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*, 10 FCC Rcd 13821, 13823 (1995)[hereinafter cited as "*MDS Auction MO&O on Reconsideration*"]. However, the Petitioners anticipate that the vast majority of the applications that will be filed under the proposed rules will not fall into those categories.

<sup>38/</sup> *See NPRM*, at ¶ 46.

contested cases more rapidly than is presently possible), while still providing a vehicle for assuring all licensees protection against interference.

At the outset, it must be emphasized that in proposing that the staff no longer routinely review the interference analysis that will accompany applications for authority to implement advanced technologies, the Petitioners have hardly ignored the need for protection against interference. After all, the Petitioners include companies that are prepared to invest hundreds of millions of dollars in advanced technologies should the rules proposed in the Petition be adopted. Not surprisingly, they have taken great strides to assure that an investment of such magnitude will not be jeopardized by interference from others.

In considering whether the Petitioners' proposed rules afford adequate interference protection, the Commission should bear in mind that these rules still require: (a) the preparation of complex applications demonstrating compliance with detailed technical rules; (b) service by the applicant of those applications on potentially affected licensees; (c) the filing of those applications with the Commission; (d) a staff determination that all neighboring facilities have either consented to the application or have been analyzed for protection from interference; (e) the release by the Commission of a public notice announcing the filing; (f) a 60-day period thereafter for the submissions of petitions to deny or other formal objections;<sup>39/</sup> (g) a 30-day period under Section

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<sup>39/</sup> The Commission's proposal either to provide a 120-day period for filing petitions to deny or to liberally extend the proposed 60-day period to 120 days upon request of an ITFS licensee is an example of the misplaced paternalism towards ITFS that, if implemented, will only compound the problem of application processing delays, harming those ITFS licensees that will benefit from the proposed rules. *See NPRM*, at ¶ 52. What the *NPRM* ignores is that under the Petitioners' proposal, incumbents actually will have in excess of 120 days for the filing of petitions to deny when the greatest number of applications for advanced facilities are filed -- during the initial one-week period.

1.106 of the Rules for the filing of petitions for reconsideration of any automatic grant; and (h) a 40-day period under Section 1.117(a) of the Rules during which the Commission on its own motion can reconsider any grant. Moreover, as the Petitioners made clear in their Reply Comments in

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Because of the high demand for advanced facilities, the Petitioners have proposed a one-week filing window be opened the first time applications are accepted. Under the proposal, the Commission would announce those substantially complete applications tendered during the one-week period, and the applicants would have a 60-day opportunity to resolve conflicts, so long as they comply with the interference protection rules and do not increase interference to any facility proposed during the one-week window. At the close of this 60-day amendment period, there would be a second public notice, opening a 60-day period for the filing of petitions to deny against the pending applications. Since neighboring licensees must be served with proposals at the time of filing, they will have two 60-day periods, plus whatever time it takes for the Commission to prepare the two public notices, in which to analyze potential interference. *See* Petition, at 36-38.

The 60-day period proposed by the Petitioners once the rolling, one-day filing window approach goes into effect — which is twice the current petition to deny period afforded ITFS licensees — was developed after extensive discussion with the leading consulting engineers for MDS and ITFS licensees alike. The Commission should keep in mind that under the current rules, an ITFS licensee is not even served with interference analyses when a new or modified cochannel or adjacent channel ITFS facility is proposed, and has just 30 days after public notice to secure a copy of the application, analyze the potential for interference and prepare a petition to deny. *See* 47 C.F.R. § 74.912. That 30-day period has proven adequate. Indeed, the *NPRM* runs counter to a decision made just two years ago the Commission eliminated rules that effectively gave ITFS licensees 120 days to object to cochannel and adjacent channel MDS applications, reducing the time period to 30 days. *See 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, & Cable Television Relay Service*, 10 FCC Rcd 7074, 7090 (1995)[hereinafter cited as “*Gen. Dockets 90-54 and 80-113 Second Order on Reconsideration*”]. Other than during the first filing window, there simply is no reason why an ITFS licensee should require a full four months after an application proposing advanced facilities appears on public notice (which will not occur until some time has passed since the licensee was served with the application) to perform an analysis.

connection with the *Public Notice*, any impermissible harmful electrical interference that does result from new operations following an automatic grant must be cured immediately.<sup>40/</sup>

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<sup>40/</sup> See Petitioners' Reply Comments, at 26-29. The Petitioners are pleased that the Commission agrees with their observation that because the interference protection rules are based on certain assumptions, such as receive antenna height and gain and discrimination characteristics, the licensee of a new MDS or ITFS station will not always be required to cure actual interference caused by the commencement of operations. See *NPRM*, at ¶ 44; Petitioners' Reply Comments, at 27-29. However, the Petitioners are concerned that the Commission may have gone too far in asserting that so long as these assumptions are met, it will always be the responsibility of the newcomer to cure interference. For example, when the Commission first licensed MDS stations on the E and F Groups, it grouped applicants for a given channel group for lottery by Standard Metropolitan Statistical Area ("SMSA") for administrative convenience, resulting in the licensing of stations that often caused cochannel and/or adjacent channel interference to stations applied for in the initial window. See *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 F.C.C.2d 1203, 1265 (1983)[hereinafter cited as *Gen. Docket No. 80-112 Report and Order*"]. Licensees of those stations are permitted to interfere with each other and, indeed, can make modifications so long as they do not increase interference. See *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*, 5 FCC Rcd 6410, 6412 (1990)[hereinafter cited as "*PR Docket No. 90-54 Report and Order*"]. In other cases new facilities were constructed so close to others that they suffer interference from pre-existing facilities. In such situations, the licensee is said to have accepted interference and generally cannot object to modifications of the interfering station that do not increase the area in which interference occurs. See *Amendment of Parts 21, 74, and 94 of the Commission's 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 Service*, 98 FCC 2d 68 (1984). Petitioners see no reason to change that policy. Similarly, the increase in the protected service area from a 15 mile radius to a 35 mile radius has resulted in many cases where interference is suffered within a station's protected service area. Again, the Commission's general policy is to permit modifications to the interfering station so long as those modifications do not increase the area in which interference is suffered. See *Gen. Dockets 90-54 and 80-113 Second Order on Reconsideration*, 10 FCC Rcd at 7083-84 (1995); *Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, 11 FCC Rcd 18839, 18853 (1996) [hereinafter cited as the "*Digital Declaratory Ruling*"]. That policy should be retained *vis a vis* interference from advanced technologies.

While the proposed application processing rules are perhaps unusual for the Mass Media Bureau, they are based upon licensing systems for other services being adopted by the Commission to expedite service. In a wide variety of situations involving services such as LMDS, WCS, GWCS and 39 GHz that will compete with wireless cable operators in the video, voice and data markets, the Commission has moved towards licensing schemes that allow licensees to construct and operate new or modified facilities within their authorized geographic service areas without even the submission of an application, subject only to compliance with minimally-intrusive interference

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Moreover, the Commission should make clear that “impermissible” interference does not include interference caused to a receive location that became entitled to protection after the advanced technology facility was developed. In an *ex parte* presentation to the Commission after the release of the *NPRM*, CTN has proposed that upstream transmissions in the 2.5 GHz band be allowed only on a secondary basis. *See* Wallace Letter, at Attachment IV.D.2. Such an approach would be totally unacceptable. The financial community is hardly going to fund the hundreds of millions of dollars the wireless cable industry needs to build out advanced MDS/ITFS systems if the upstream portion of systems may be required to cease operating in order to protect an isolated ITFS facility proposed after-the-fact. If return paths in the 2.5 GHz band are secondary, they will not be built. And if they are not built, the financial and operational support that the wireless cable industry provides hundreds of ITFS licensees is likely to come to an end. Thus, the Commission should retain its current “first come, first served” approach to interference protection and only require the licensee of an advanced technology facility to protect from co-channel and adjacent channel interference those receive locations entitled to protection at the time of the filing of the advanced technology application.

Finally, the Commission should make clear that where the newcomer is responsible for curing interference, the incumbent must fully cooperate and make reasonable modifications to its own facilities at the expense of the newcomer where such modifications eliminate the harmful interference. The Commission’s rules already require ITFS licensees to make certain modifications where necessary to avoid interference (*see* 47 C.F.R. §§ 74.903(a)(2) and 74.986, and any licensee suffering unanticipated interference should be required to make those and other modifications (such as installation of shielding or channel retuning) at the newcomer’s expense where such modifications cure the unpredicted interference caused by a newcomer. *See also infra* at pages 104-115.

protection rules.<sup>41/</sup> The proposals advanced in the Petition are drawn from those precedents, utilizing the MDS/ITFS protected service area (“PSA”) as the geographic service area in which each MDS and ITFS licensee would have the ability to more flexibly modify facilities.<sup>42/</sup> Given that the Commission has recognized the need for competitive services to have substantially similar licensing

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<sup>41/</sup> See, e.g., *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 12 FCC Rcd 12545, 12647 (1997)(permitting most new and modified LMDS facilities to be implemented without prior Commission approval following coordination)[hereinafter cited as “*LMDS Second R&O*”]; *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, 12 FCC Rcd 2732, 2764 n. 157 (1997) (eliminating need for individual site licenses for certain paging facilities)[hereinafter cited as “*Paging Second R&O/FNPRM*”]; *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40 GHz Bands*, ET Docket No. 95-183, FCC 97-391, at ¶ 69 (rel. Nov. 3, 1997) (allowing 39 GHz service to commence without Commission approval upon completion of expedited coordination process)[hereinafter cited as “*39 GHz Order*”]; *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd 10785, 10841-65 (1997) (permitting flexible use and operation of WCS facilities subject to compliance with technical limitations and international coordination requirements)[hereinafter cited as “*WCS Report and Order*”]; *Allocation of Spectrum Below 5 GHz Transferred From Federal Government Use*, 11 FCC Rcd 624, 633 (1995) (allowing flexible use of GWCS subject to interference standards)

<sup>42/</sup> Because the Petitioners anticipate that ITFS licensees who are not affiliated with wireless cable operators, and therefore do not have a PSA, will desire to employ advanced technologies, the rules proposed in the Petition deem all ITFS licensees to have a thirty-five mile radius PSA for purposes of determining the location and technical characteristics of their response stations and boosters. See Petition, at Appendix B, pp. 47, 57 (proposed Sections 74.939(c)(3)(A) and 74.985(a)). However, in deference to the long-standing opposition of the ITFS community to the awarding of PSA protection to ITFS licensees that do not lease excess capacity, the Petitioners have not proposed that such licensees be entitled to actual protection from harmful interference within a PSA. See *PR Docket No. 90-54 Report and Order*, 5 FCC Rcd at 6419.

regimes so as to assure a level playing field, the case for adoption of the licensing system envisioned by the Petition becomes compelling.<sup>43/</sup>

Adoption of the proposals advanced in the Petition to minimize application processing delays is appropriate not just because the proposed rules are similar to those in place for competing services, but because it is a better approach to spectrum management. The public interest benefits of eliminating individualized prior Commission approval of facilities, even when spectrum is encumbered, are well-documented.<sup>44/</sup> For example, earlier this year the Commission noted that:

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<sup>43/</sup> See, e.g. *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 7988, 8043 (1994)[hereinafter cited as "*CMRS Third Report and Order*"]; *Paging Second R&O/FNPRM*, 12 FCC Rcd at 2748.

<sup>44/</sup> As the Commission itself recognized earlier this year:

The Commission has adopted or is considering wide-area geographic licensing in encumbered services in the following proceedings: Amendment of Part 90 of the Commission's Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Services, Third Report and Order and Fifth Notice of Proposed Rulemaking, PR Docket No. 89-552. FCC 97-57 (released Mar. 12, 1997) (220 MHz Third Report and Order); Amendment of the Commission's Rules Regarding Multiple Address Systems, Notice of Proposed Rulemaking, WT Docket No. 97-81, FCC 97-58 (released Feb. 27, 1997) (MAS NPRM); *Paging Second Report and Order*, 12 FCC Rcd 2732; Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, First Report and Order, Eighth Report and Order and Second Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1996) (800 MHz SMR *Order* and *NPRM*); Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639 (1996) (900 MHz SMR *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, Report and Order, 10 FCC Rcd 9589 (1995) (MDS Report and Order).

Under a geographic licensing approach, licensees can build and modify their systems in response to market demands without having to come to the Commission for additional authorizations. Thus, such an approach speeds the licensing process and reduces the need for multiple filings to serve a single geographic area (which are required under a site-specific licensing approach). In addition, geographic licensing is administratively more efficient and less burdensome because licensees are required to file fewer license applications and, thus, the Commission has fewer applications to process.<sup>45/</sup>

Along the same lines, as the Commission recently explained in adopting a flexible licensing system for the Specialized Mobile Radio (“SMR”) service:

Geographic area licensing will increase the flexibility afforded to licensees to manage their spectrum, and will reduce administrative burdens and operating costs by allowing licensees to modify, move, or add to their facilities within specified geographic areas without need for prior Commission approval.<sup>46/</sup>

Similarly, earlier this year the Commission proposed a geographic licensing system for Multiple Address Systems (“MAS”), reasoning that:

We have concluded in other services that licensing based on pre-determined service areas — geographic area licensing — poses significant advantages over site-based licensing for entities providing subscriber-based services because of the greater operational flexibility it gives licensees and the greater ease of administration for the Commission.<sup>47/</sup>

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*Section 257 Proceeding To Identify and Eliminate Market Entry Barriers For Small Businesses*, 7 CR 1112, 1141 n. 242 (P&F 1997) [hereinafter cited as “*Section 257 Report*”].

<sup>45/</sup> *Section 257 Report*, 7 CR at 1141.

<sup>46/</sup> *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 8 CR 809, 818 (P & F 1997) [hereinafter cited as “*800 MHz SMR Second Report and Order*”].

<sup>47/</sup> *Amendment of the Commission's Rules Regarding Multiple Address Systems*, 12 FCC Rcd 7973, 7981 (1997).

Given the persuasive arguments that the Commission has voiced recently for the use of licensing systems that minimize administrative burdens and delays from application processing, one would expect there to be a compelling reason for the Commission to reverse course in the *NPRM*. Yet, no such compelling reason is apparent from the *NPRM*. To the contrary, it appears that the primary reason the Commission is seeking to depart from these recent precedents is its concern that a small minority of ITFS licensees might be financially burdened by the proposed new application processing system.<sup>48/</sup> Yet, even were that true, it is hardly a reason to reject the Petitioners' proposed licensing approach. The possibility that a few ITFS licensees might have to devote additional resources under the rules proposed in the Petition pales in comparison to the substantial financial and operational benefits that the vast majority of ITFS licensees and the public will realize if those rules are adopted.<sup>49/</sup> As the Commission itself recognized under similar circumstances, "[w]e are not persuaded that we should forego the benefits of geographic licensing to accommodate the interests of a small minority of systems."<sup>50/</sup> More importantly, however, it simply is not true that any ITFS licensee will be jeopardized by adoption of the rules advocated by the Petitioners.

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<sup>48/</sup> See *NPRM*, at ¶ 50. In fact, because nearly all ITFS licensees are affiliated with wireless cable system operators who devote substantial resources to monitoring filings with the Commission and analyzing the potential for interference from proposed station, and because interference to the ITFS station will undoubtedly have an adverse impact on the wireless cable system, most ITFS licensees are fully protected. While Paragraphs 50 and 52 also suggest that the Commission is concerned that ITFS licensees will lack sufficient time to review applications submitted under the proposed rules, that concern is misplaced. See *supra* note 40 and *infra* note 68.

<sup>49/</sup> It cannot be stressed enough that if application processing delays impede the rapid deployment of advanced technologies, the significant financial and operational support wireless cable affords ITFS may come to an end.

<sup>50/</sup> See *800 MHz SMR Second Report and Order*, 8 CR at 818.

The Petitioners cannot stress often enough that, if their proposal is adopted, even those ITFS licensees who ignore the copies of applications for proposed nearby facilities (with the included interference analyses) that will be served upon them, who undertake no independent review of potential interference, and who allow to pass their opportunity to submit a petition to deny are still fully protected under the proposed rules. As the Petitioners made clear repeatedly, any facility operated pursuant to an automatically-granted authorization will be required to cure impermissible harmful electrical interference.<sup>51/</sup> Thus, even the handful of ITFS licensees that elect not to expend resources to monitor and evaluate proposed facilities for potential interference will be entitled to the same ultimate level of interference protection as those licensees that carefully monitor and evaluate developments.<sup>52/</sup>

Although the *NPRM* is not entirely clear, Paragraph 50 also appears to reflect a concern that ITFS licensees will lack sufficient information to analyze the potential for interference from an advanced facility proposed nearby, and therefore Commission involvement is needed. The Petitioners respectfully disagree. The proposed rules submitted with the Petition were carefully crafted so that the extensive applications will contain all of the information that any licensee requires

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<sup>51/</sup> See Petitioners' Reply Comments, at 26-27; *supra* at 23.

<sup>52/</sup> Ironically, they may be better protected under the proposed rules than they are today, for the Commission has established a presumption of no interference unless a petition to deny is filed. See *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 & Cable Television Relay Service*, 6 FCC Rcd 6764, 6772 n. 34 (1991). Admittedly, the implications of this presumption are not entirely clear, for the staff appears to conduct detailed examinations of the interference analyses accompanying applications whether a petition to deny is filed or not.

in order to evaluate the potential for interference to existing facilities.<sup>53/</sup> Of course, to the extent that any party to this proceeding can identify additional information that is needed to evaluate potential interference, the Petitioners would not object to the Commission revising the proposed rules to require that information to be included in applications.<sup>54/</sup> Given the recognized benefits of expedited licensing, it makes far more sense to require that applications be complete than to reject automatic licensing because the underlying application does not provide sufficient information.<sup>55/</sup>

In addition, Paragraphs 48 and 50 of the *NPRM* seem to suggest that the Petitioners' automatic grant proposal has been tentatively rejected because "educational institutions may find

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<sup>53/</sup> See *NPRM*, App. C, at C-9, C-16, C-29, C-27, C-38 (proposed Sections 21.909 (MDS response stations), 21.913 (MDS signal boosters), 74.939 (ITFS response stations) 74.936 (limits on emissions and bandwidth for ITFS facilities) and 74.985 (ITFS signal booster stations)).

<sup>54/</sup> The Petitioners strongly support the proposed establishment of a database containing the information necessary for third parties to determine how new facilities will affect existing or previously proposed stations. See *NPRM*, at ¶ 51. Indeed, the Petitioners would hope the Commission can move towards the electronic filing of MDS and ITFS applications and the establishment of a comprehensive database that could be updated and accessed in real-time. Upon the adoption of an electronic filing system, the Petitioners suggest electronically "time stamping" all filings, allowing the Commission to eliminate one-day filing windows and instead move to a first-come, first-served approach under which an applicant must protect all previously-proposed facilities, even if filed the same day. However, if electronic filing is implemented before the proposed rules are adopted, the Commission should retain the proposed one-week initial filing window to fairly meet the anticipated demand for advanced technology applications.

<sup>55/</sup> Indeed, if the application does not include sufficient information to determine a proposed facility's impact on its neighbors, Commission staff review as proposed in the *NPRM* is no cure. If the application is lacking critical information, how will the Commission's staff be able to review the application and determine the effect on incumbent facilities any better than the licensee? Obviously, staff review provides no additional level of protection if the staff lacks the information to make a reasoned assessment.

themselves pressured or coerced by neighboring licensees or strong wireless cable operators.”<sup>56/</sup> Apparently, the Commission is concerned that ITFS licensees will somehow be coerced into consenting to advanced technology applications or refraining from submitting petitions to deny such applications during the 60-day period, resulting in automatic grants. Yet, there is absolutely no factual basis in the record for suggesting that ITFS licensees are unable to look after their own best interests in granting consents or deciding whether to petition to deny.<sup>57/</sup> The Commission staff carefully reviews all ITFS excess capacity leases, and would undoubtedly reject any provision which gave a wireless cable operator undue control over the issuance of consents or the filing of petitions to deny. The Petitioners have proposed rules affording ITFS licensees a full and fair opportunity to petition to deny any application if they believe such action to be appropriate. Although, the Petitioners contemplate that MDS and ITFS licensees will generally find it in their best interest to enter into agreements designed to coordinate and control the potential for interference, ITFS licensees can be expected to exercise their right to petition to deny when necessary.

Indeed, for the *NPRM* to imply that the frequent use of consents and agreements among licensees to expedite application processing is somehow inconsistent with the public interest flies in the face of prior Commission pronouncements. As the Petitioners noted in their Reply Comments,

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<sup>56/</sup> See *NPRM*, at ¶ 50.

<sup>57/</sup> The only discussion in the *NPRM* is a reference to an unsubstantiated claim by Instructional Telecommunications Foundation (“ITF”) that it has been asked to execute consents that would have resulted in interference to ITF’s operations. See *NPRM*, at ¶ 85 n. 60. That ITF was able to identify the potential for interference and make the determination that it would not consent to that interference, even though requested to do so by its wireless cable affiliate, illustrates the freedom afforded ITFS licensees to consent, or not to consent, based upon their own assessment of their situation.

it is absolutely essential that licensees be permitted to consent to facilities that would not otherwise be permissible under the Commission's interference protection rules.<sup>58/</sup> With the numerous changes to the Commission's interference protection rules over the years — most importantly, the enlargement of the PSA from a 15 mile radius to a 35 mile radius — the vast majority of ITFS and MDS applications require consents to predicted interference. As adjacent markets are coordinated, it is commonplace for ITFS and MDS licensees to grant consents to applications in order to expedite the processing of applications and the launching of new services to the public. Were the Commission to bar such consents, it would make it difficult, if not impossible, to implement many of the proposals advanced in the Petition, as well as preclude many of the collocation and digital conversion projects currently underway in the industry.

Such granting of consents to promote new or improved services has been encouraged by numerous Commission policy pronouncements. For example, the Commission has reminded licensees that “[o]ur rules anticipate the cooperation of all parties to accommodate new system designs and, should disputes arise, we expect parties to resolve them in a manner that maximizes service to the public.”<sup>59/</sup> Similarly, the Commission has noted that “[t]he Commission has encouraged and will continue to encourage parties to enter into voluntary agreements regarding station modifications . . .”<sup>60/</sup> This approach has worked well -- as the Commission recognized just

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<sup>58/</sup> See Petitioners' Reply Comments, at 35.

<sup>59/</sup> *PR Docket No. 90-54 Report and Order*, 5 FCC Rcd at 6418.

<sup>60/</sup> *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*

two years ago when it adopted geographic licensing for new MDS stations, “[t]he record reflects that the success of the wireless cable industry thus far has been based upon negotiated agreements with neighboring system operators and strong partnerships with ITFS licensees.”<sup>61/</sup> Not surprisingly then, the interference protection rules adopted at that time were predicated on the proposition that “actual service areas can be tailored through voluntary agreements among the affected licensees.”<sup>62/</sup> Thus, it is curious that the Commission now appears to oppose the automatic granting of applications so that the staff can review the implications of those situations in which consent to interference is granted.<sup>63/</sup>

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*Television Fixed Service, and Cable Television Relay Service*, 6 FCC Rcd 6792, 6796 (1991)[hereinafter cited as “*Gen. Dockets 90-54 and 80-113 Second Report and Order*”].

<sup>61/</sup> *See 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, 9606 (1995)[hereinafter cited as “*MDS Auction Order*”].

<sup>62/</sup> *See id.*, at 9611. *See also* 47 C.F.R. § 21.937; *See 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. 13821, 13833 (citing to “the historical cooperation between the MDS and ITFS services” to assure that MDS BTA authorization holders are not unreasonably denied the opportunity to take maximum advantage of their authorizations)[hereinafter cited as “*MDS Auction Reconsideration Order*”]; *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, & Cable Television Relay Service*, 10 FCC Rcd 7074, 7086 n. 9 (1995)(citing cooperative spirit among MDS and ITFS licensees in explaining reduction of period for ITFS petitions to deny).

<sup>63/</sup> It should be emphasized that the Petitioners do not intend for the Commission to immunize any ITFS licensee who consents to such a substantial level of interference that it can no longer serve any legitimate educational objective. The Petitioners are aware of at least one situation in which the Commission has dismissed an application for a new ITFS facility that would have

In short, the Petitioners believe that the substantial benefits of automatically granting uncontested applications (subject to an obligation to cure immediately any impermissible interference that does result) far outweigh any of the concerns cited by the Commission for rejecting the proposal. As a practical matter, the prospect of having to shut down new facilities authorized by an automatic grant should incurable interference result will lead wireless cable operators to be quite conservative in their system design. Particularly because ITFS receive sites are registered with the Commission, system designers are well-positioned to assure that no interference does result from the automatic grant of unopposed applications.<sup>64/</sup> Moreover, by freeing the Commission's limited staff from the routine review of interference analyses in uncontested cases, the Commission will be better positioned to respond rapidly in those cases that are contested or if impermissible, interference results from the commencement of advanced operations.

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suffered such significant levels of interference that no legitimate educational objective could have been served by issuance of an authorization, and applaud that ruling. Along similar lines, if an ITFS licensee consents to such significant levels of interference that its facility can no longer serve legitimate educational purposes, perhaps its license should be canceled. However, it is the licensee granting the consent, not the licensee that benefits from the consent, who should be the target of the Commission's investigation, for it is the grantor that will no longer be able to meet its obligations under the Commission's rules. There is no reason to delay the licensing of the beneficiary of the consent.

<sup>64/</sup> Knowledge of the location of ITFS receive sites cannot only be applied in designing systems that avoid traditional cochannel and adjacent channel interference, but, as discussed in detail *infra* at page 92, can be applied to avoid interference resulting from downconverter overload.

2. *Grant Of All Applications Filed On The Same Day Will Eliminate Abuses, Conserve Staff Resources And Expedite The Initiation Of New Service Offerings.*

As discussed below, one of the fundamental reasons for ITFS application processing delays has been the use of periodic filing windows that dramatically increase the number of mutually-exclusive applications filed in any one window because the windows tend to be infrequent.<sup>65/</sup> Thus, the Petitioners have proposed a move to rolling, one-day filing windows that have been proven to expedite the inauguration of new services by minimizing the potential for mutually-exclusive applications to be filed on any given day. However, it is inevitable that the Commission will be flooded with advanced technology applications when the first of these rolling windows is opened (whether it is a single day or the initial one-week window the Petition proposes). Thus, an essential component of the Petitioners' approach to expediting service is their proposal that all substantially complete applications filed on the same day (or in the initial window)<sup>66/</sup> be grantable, even if the

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<sup>65/</sup> See *supra* at note 37 and page 49.

<sup>66/</sup> Although the *NPRM* notes that the one-day rolling filing window “presents a promising start,” it seeks comment on an argument by CTN that it will “create an undue burden on ITFS licensees, who may find themselves required to evaluate a continuing stream of applications.” See *NPRM*, at ¶ 46. The Petitioners believe that concern to be misplaced. As discussed in more detail *infra* at page 37, the Petitioners believe that infrequent filing windows tend to increase the number of filings with the Commission as applicants rush to submit proposals that are not fully developed prior to the close of the window, only to thereafter submit amendments, requests for special temporary authorization and other filings once their plans become more settled. At very worst, it is reasonable to assume that approximately the same number of applications for advanced facilities will be filed regardless of whether a rolling one-day filing window or a more traditional periodic filing window is used. With a filing window, however, all of those applications will be filed at once, while they will presumably be spread out over a longer period of time if a rolling one-day system is employed. Presumably, it is less burdensome on ITFS licensees if those applications are filed over an extended period of time, rather than all at once. If a periodic filing window is used, a significant number of people will be needed by ITFS licensees to properly review and evaluate the vast quantity of applications within the time afforded. If the proposed one-day filing window is used, however, fewer staff will be required, since fewer applications will be pending at any given time. Indeed, in recognition of the large number of applications likely to be filed initially, the Petitioners proposed an approach that will give interested parties more than 120 days to analyze and petition to deny

facilities proposed might cause interference to or suffer interference from other facilities also proposed on the same day (or in the initial window). In other words, while an applicant must protect previously proposed facilities under the Petitioners' approach, it is under no obligation to protect those proposed simultaneously. Adoption of this proposal will substantially advance the construction and operation of facilities by eliminating the need for the Commission to identify and choose among competing applications and by reducing the prospects for strike applications. Thus, the Petitioners are pleased that the Commission has sought comment on it.<sup>67/</sup>

First, and most significantly, adoption of the Petitioners' approach will avoid any need for the staff to identify those applications which propose facilities that will interfere with or suffer interference from other facilities proposed during the same filing period. The Petitioners believe that relatively few of the anticipated applications will propose facilities that interfere with other

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applications filed during the initial filing window. *See* Petition, at App. B, at 3-4 and *supra* note 39. Thereafter, however, the Petitioners believe that the filing volume will be reduced, and CTN's lawyers and consulting engineers should have no trouble addressing applications served on CTN's members.

Moreover, whatever drawbacks a rolling one-day filing window may have, it is far preferable to a periodic filing window approach. History has shown that despite the Commission's best intentions, periodic filing windows open with far less frequency than licensees need. For example, it has now been more than two years since the last opportunity to file applications for new ITFS stations. A vicious cycle ensues when filing windows are infrequent. Applicants flood the Commission with filings whenever a window is open in fear that it will be a long time before another window is opened; as a result of the sudden influx of applications, the Commission staff is overwhelmed, and it is a long time before the backlog is cleared and a new window can be opened. For the reasons noted above relating to the competitive demands of the marketplace, the wireless cable industry can hardly suffer such delays in the filing of applications when demand materializes. The proposed rules will allow the industry to respond rapidly to marketplace demands; eliminate that ability and the Commission will eliminate wireless cable as a viable alternative.

<sup>67/</sup> *See NPRM*, at ¶ 47.

simultaneously-filed proposals. Remember, each applicant for authority to modify a facility to incorporate advanced technologies must, absent consent, demonstrate that the advanced facility will maintain its power flux density within acceptable limits at the PSA boundary and must demonstrate protection to all previously-authorized facilities. This constraint significantly reduces the prospects for cochannel interference among neighbors. Nonetheless, given the complexity of the interference analyses that will be required where advanced technologies are proposed, it would be a daunting task for the Commission to identify applications proposing facilities that will interfere with simultaneously-proposed facilities (particularly when over a thousand applications are expected to be filed during the initial window and “daisy chains” are possible). As the Commission recognized when it adopted the MDS auction rules, to implement any licensing system which results in a larger number of mutually-exclusive applications and daisy-chains “would likely require significant Commission resources and a substantial amount of time.”<sup>68/</sup> By contrast, the Petitioners’ approach reduces processing time by eliminating the need to even identify competing applications.

Second, the Petitioners’ proposal avoids the need for the Commission to establish a mechanism for choosing from among competing applications. The *NPRM* inquires:

should [the Commission] adopt any sort of comparative criteria to guide its decisions? Should the staff adopt some type of point system to rate competing applicants?<sup>69/</sup>

Before submitting the Petition, the Petitioners struggled with these very issues. In the process, they discovered the insurmountable difficulties inherent in attempting to quantify the relative merits of

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<sup>68/</sup> *MDS Auction Order*, 10 FCC Rcd at 9606.

<sup>69/</sup> *See NPRM*, at ¶ 47.

the very different kinds of proposals that can employ advanced technologies. The Commission would, figuratively speaking, be required to compare not just apples and oranges, but an entire melange of fruits. For example, the Commission would be required to determine which is more in the public interest, a response station hub designed to serve one school district, or a booster station designed to provide downstream high speed Internet access to a different school district? What if the high speed Internet access service were targeted at thousands of businesses, rather than a relatively small number of schools? What if one proposal is advanced by an incumbent licensee, while the other is submitted by a BTA auction winner? What if one proposal seeks to cellularize in order provide a “video on demand” service, while a competing proposal seeks to cellularize to expand capacity for a high speed Internet access service? What if one competing proposal is the lynchpin of a broadband system in which all of the licensees in a market are participating, save the other competing applicant? The list of factors that should be considered in any qualitative analysis borders on the endless. The Petitioners’ proposal eliminates any need for the Commission to struggle with these issues.

Admittedly, adoption of the Petitioners’ proposal may result in the initial licensing of neighboring facilities that could interfere one to the other. However, that is not an unusual unheard of. For example, when the Commission developed a system of the initial licensing E and F Group MDS stations, it held a separate lottery for each channel group among all applicants proposing to locate within a given SMSA or within 15 miles of the SMSA boundary. The Commission recognized that although this would result in the authorization of stations that would cause cochannel and/or adjacent channel interference to each other, it avoided the “grid-lock” that would otherwise