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June 10, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Amendment of Parts 21 and 74 To Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees To Engage In Fixed Two-Way Transmissions -- MM Docket No. 97-217 and RM-9060: EX PARTE COMMUNICATION*

Dear Ms. Salas:

I am writing on behalf of the over 110 parties that filed the Petition for Rulemaking that commenced this proceeding (collectively, the "Petitioners") to clarify the record in response to the recent filing of notices that representatives of the Catholic Television Network ("CTN") engaged in *ex parte* communications with Anita Wallgren, Legal Advisor to Commissioner Ness, Rick Chessen, Senior Legal Advisor to Commissioner Tristani, and Roy Stewart, Keith Larson, Barbara Kreisman, Charles Dziedzic, Clay Pendarvis, Michael Jacobs and David Roberts of the Mass Media Bureau on May 26, 1998.

Although the Petitioners disagree with much of what appears in the materials distributed at those meetings, this letter is intended to address just one issue -- CTN's opposition to the Petitioners' proposal that the Commission be empowered to order MDS and ITFS licensees to retune to comparable facilities on other MDS or ITFS channels in order to promote the development of return path applications. The Commission should recognize that this is not a "new proposal," as characterized by CTN. Admittedly, the Petitioners recently submitted on an *ex parte* basis specific proposed revisions to Parts 21 and 74 that would permit the submission of applications proposing Commission-supervised retuning,[1/] However, those specific proposed rules merely reflect the proposal advanced

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[1/] *See* Letter from Paul J. Sinderbrand to Magalie Roman Salas, MM Docket No. 97-217 (filed

(continued...)

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by the Petitioners in their January 8, 1998 Comments in response to the *Notice of Proposed Rulemaking* in this proceeding. Copies of pages 105-114, in which the Petitioners advanced their proposal, are enclosed for reference. In the interest of brevity, the Petitioners will not here repeat the arguments advanced in those pages in support of their proposal, other than to note that the proposal is consistent with retuning rules adopted in other similar circumstances.[2/]

Please direct any inquiries regarding this *ex parte* submission to the undersigned.

Respectfully submitted,

Paul J. Sinderbrand

Counsel to the Petitioners

Enclosure

cc: Hon. William E. Kennard
Hon Susan Ness
Hon. Harold Furchtgott-Roth
Hon. Michael K. Powell

[1/] (...continued)
May 15, 1998)(Proposed revised Sections 21.901(b)(7) and 74.902(k)). Although the Petitioners had intended for the proposed rules to be equally applicable to MDS and ITFS licensees, due to an inadvertent transcription error, the proposed revision to the MDS rule, Section 21.901(b)(7), erroneously provided that "[t]he Commission shall require that an *ITFS* station retune to other ITFS or MDS channels in the 2500-2686 MHz band . . .." (emphasis added). The correct provision should have read that "[t]he Commission shall require that an MDS station retune to other ITFS or MDS channels in the 2500-2686 MHz band . . .". With this editorial change, the proposed MDS and ITFS rules become mirror images, as intended by the Petitioners. The Petitioners regret any inconvenience this error may have caused.

[2/] It should be recognized that while the Petitioners have generally proposed rules for streamlined processing of most MDS and ITFS applications, the Petitioners have proposed that retuning proposals receive a higher level of staff attention. *See* Petitioners Comments, at 114 n. 180; Petitioners Reply Comments, at 24.

Hon. Michael K. Powell
Hon. Gloria Tristani
Susan Fox
Jane Mago
Anita Wallgren
Helgi Walker
Rick Chessen
Roy Stewart
Barbara Kreisman
Charles Dziedzic
Michael Jacobs
Keith Larson
David Roberts

Nonetheless, the Petitioners would not object were the Commission to require that the licensee of a response hub licensed to operate in the 2.5 GHz band notify all MDS and ITFS licensees in the band that could be affected by operation of the response hub at least 30 days prior to commencing operation of the response hub. For purposes of this proposal, the licensees entitled to notice would be any licensee with a PSA overlapping the response service area of the hub in any part and any ITFS licensee serving a ITFS registered receive site within the response service area of the hub. This notice would allow licensees an adequate opportunity to notify their receive sites of the potential for BDC overload and to put into place specific procedures for addressing any interference that is observed.[162]

E. The FCC Should Coordinate The Retuning Of MDS And ITFS Stations To Other MDS Or ITFS Frequencies In The 2.5 GHz Band When The Commission Determines That Such Change Will Facilitate The Introduction Of Advanced Technology.

As the *NPRM* recognizes, the Petitioners do not believe that any MDS or ITFS licensee should be required to cellularize its system against its wishes.[163] Nor, for that matter, do the Petitioners believe that any licensee should be required to convert its facilities to return path, superchannel or subchannel use against its wishes. However, the CTN Request raises the spectre that one licensee could unreasonably frustrate the introduction of advanced technologies in a market. Designing and operating two-way systems that will function properly and without interference in

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[162] The 30-day notice period is identical to the notice that a WCS licensee must give to MDS and ITFS licensees that might suffer BDC overload from the commencement of WCS operations. *See WCS Reconsideration Order*, 12 FCC Rcd at 3985.

[163] *See NPRM*, at ¶ 81.

markets where *all* licensees are participating will be difficult enough. Unfortunately, despite the requirements of Sections 21.902(b)(2), 21.938(a) and 74.903(c) that licensees make good faith efforts to coordinate frequency usage, too many MDS and ITFS licensees and applicants who are not affiliated with wireless cable operators have abused the Commission's interference protection rules to unreasonably frustrate the development of new or modified facilities by their neighbors. As it considers the CTN Request and other proposals, the Commission must take care to avoid empowering any one licensee in a market with the ability to unreasonably frustrate the introduction of new technologies by its neighbors. While adoption of the rules and policies proposed in the following two sections will not fully eliminate the potential for abuse, it will reduce it.[164/]

While for the reasons noted above the Petitioners disagree with the fundamental premise underlying the CTN Request (*i.e.* that downconverter overload will present a serious problem that can only be solved through refarming and limiting return paths to the G and H Group channels), the Petitioners do agree with CTN that the creation of contiguous channel blocks for return path transmissions through the retuning of MDS and ITFS stations to other frequencies within the MDS/ITFS band presents a very valuable tool (although not the only tool) towards minimizing any interference that will result from return path transmissions.

Obviously, it will be difficult to design systems that assure upstream transmissions will protect adjacent channel downstream transmissions from interference, so the fewer situations where

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[164/] To further deter abuses that delay the processing of applications and unnecessarily burden staff resources the Petitioners reiterate their request that the Commission emphasize its intention to impose appropriate sanctions when frivolous petitions to deny or similar pleadings are filed. *See* Petition, at 36, (*citing* "Commission Takes Tough Measures Against Frivolous Pleadings," *Public Notice,* FCC 96-42 (rel Feb. 9, 1996).

upstream and downstream uses are adjacent to each other, the better. Indeed, the comments submitted in response to the *Public Notice* by Schwartz, Woods & Miller on behalf of numerous ITFS licensees (collectively, the "SW&M ITFS Parties") propose that the Commission permit the trading of frequencies within the ITFS and MDS allocations to reduce the risk of harmful interference from the introduction of advanced technologies.[165] The rules proposed by the Petition afford ITFS licensees the ability to trade licenses across channel groups in order to promote the use of a contiguous block of adjacent channels for return paths,[166] and the Petitioners supported the proposal advanced by the SW&M ITFS Parties because it would expand this approach to include the potential for placing ITFS licensees on channels currently available solely for MDS use.[167] Not surprising, the NIA/WCA Joint Proposal also explicitly endorses the adoption of a rule that would allow an ITFS licensee to swap channels with any other ITFS or MDS licensee in the market, and calls upon the Commission to provide expedited processing of applications proposing such swaps.

However, the Petitioners must disagree with CTN's proposal that "refarming" should only occur where the G Group ITFS licensee voluntarily agrees. As CTN concedes, "a shifting of

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[165] *See* Comments of Schwartz, Woods & Miller, File No. RM-9060, at 6 (filed May 14, 1997)("In some cases, an exchange of ITFS channels where the "wireless cable" entrepreneur pays the costs of relocation so that traditional operations can be moved to channels with less potential for interference may be more useful than a forced participation in a digital video project.")[hereinafter cited as "*SW&M Comments*"].

[166] *See Petition*, App. B, at 36 (proposing revisions to § 74.902(d)).

[167] *See* Petitioners' Reply Comments, at 29. Moreover, as is discussed *infra* at page 153, the trading of channels can also be a valuable tool by which an ITFS licensee can assure its ability to provide interference-free downstream capacity even upon the termination of any excess capacity lease.

frequencies should not represent a hardship" to any licensee.[168] Given the acknowledged ease of retuning ITFS and MDS transmitters to other frequencies in the 2.5 GHz band, the Petitioners believe that the Commission should coordinate the retuning of any MDS or ITFS licensee to other frequencies in the 2.5 GHz band at the cost of the proponent of such retuning when the Commission finds that doing so promotes the introduction of advanced technologies in a spectrally efficient manner.[169] Neither the G group licensee, nor any other licensee, should be able to deny wireless cable operators, educators and consumers the benefits of advanced technology by unreasonably refusing to modify their own facilities.

The Commission already requires ITFS licensees to modify their facilities in order to promote the most efficient use of the spectrum under certain circumstances.[170] For the Commission

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[168] *Id.*, Joint Engineering Exhibit, at ¶ 6.

[169] In the case where a licensee retunes, its new channels should be regulated under the same rules as its former channels. For example, if a G-Group ITFS licensee swaps channels with the licensee of MDS channels E1-2 and F1-2, the G-Group should be regulated as MDS channels, while the E1-2/F1-2 license should be an ITFS authorization. In order to avoid any unfairness, an ITFS licensee who retunes to the E or F Group channels should not be subject to the restrictions on grandfathered ITFS licensees imposed on ITFS licensees authorized to operate on the E and F Group channels prior to May 26, 1983. *See Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules and Regulations With Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service; Inquiry into the Development of Regulatory Policy with Regard to Future Service Offerings and Expected Growth in the Multipoint Distribution Service and Private Operational Fixed Microwave Service, and into the Development of Provisions of the Commission's Rules and Regulations With Regard to the compatibility of the Operation of Satellite Services with Other Services Authorized to Operate in the 2500-2690 MHz band; Amendment of Parts 1 and 21 of the Commission's Rules and Regulations With Regard to Using Random Selection Procedures to Select Permittees in the Multipoint Distribution Service*, 98 FCC 2d 129 (1984).

[170] *See* 47 C.F.R. § 74.986. *See also Gen. Dockets No. 90-54 and 80-113 Second Report and Order,* 6 FCC Rcd at 6796-97 (1991)("Parties are sometimes unable to agree, however, rendering

to coordinate the retuning of MDS and ITFS stations to other frequencies in the 2.5 GHz band in order to promote the most efficient use of spectrum would hardly be unique in the annals of the Commission.[171] Indeed, for the Commission to mandate that an MDS or ITFS licensee retune to other frequencies in the 2.5 GHz band would represent a minor intrusion compared to the many cases where the Commission has required licensees to make major changes in operating frequencies in order to promote the most efficient usage of the spectrum.[172] For example, the Commission has

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potentially beneficial modifications impossible.")

[171] *See, e.g., Broadcast Corporation of Georgia (WVEU-TV)*, 96 F.C.C.2d 901 (1984)(adopting a plan that required mobile radio licensees to change their authorized frequencies at the cost of the licensee of WVEU-TV (Atlanta, GA) when such changes were necessary to allow WVEU-TV to operate at full power without interference to the land mobile licensees); *Amendment of Section 73.202, Table of Assignments, FM Broadcast Stations*, 8 F.C.C.2d 159 (1967)(requiring WNRE (Circleville, OH) to switch from channel 285A to channel 296A in order to accommodate introduction of new station using channel 285A at Columbus, OH).

[172] *See, e.g. Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 7 FCC Rcd 6886 (1992)(adopting rules requiring licensees in the 1850-1990, 2110-2150 and 2160-2200 MHz bands to relocate to higher bands or other media to accommodate emerging technologies); *Amendment to the Commission's Rules Regarding A Plan for Sharing the Costs of Microwave Relocation*, PR Docket No. 93-144, Gen. Docket No. 93-252, PP Docket No. 93-253, FCC 97-223 (rel. July 10, 1997)(revising 1850-1990, 2110-2150 and 2160-2200 MHz relocation rules to accelerate deployment of emerging technologies); *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum At 2 GHz For Use By the Mobile-Satellite Service*, 12 FCC Rcd 7388 (1997)(addressing relocation of users of 1990-2025 MHz and 2165-2000 MHz band to permit innovative mobile satellite services); *Amendment of the Commission's Rule to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate The 24 GHz Band For Fixed Service*, 12 FCC Rcd 3471 (1997)(requiring all DEMS licensees to relocate to 24 GHz band to promote efficient use of 18 GHz band). For similar reasons, in those services where frequency coordinators are employed, the Commission has vested those coordinators with the discretion to ignore an applicant's request for specific channels and assign other channels where appropriate to maximize spectral efficiency. *See Frequency Coordination in the Private Land Mobile Radio Services*, 103 F.C.C.2d 1093, 1108-09 (1986).

already adopted rules requiring grandfathered point-to-point ITFS licensees to migrate from the E group and F group channels to entirely different frequency bands under certain circumstances.[173] More recently the Commission re-affirmed its decision to require any incumbent licensee in the 816-821/861-866 MHz Specialized Mobile Radio Service ("SMR") band to retune to other SMR frequencies when it is requested to do so by the Economic Area ("EA") licensee for that band, the EA licensee agrees to pay the reasonable costs associated with the retuning, and comparable facilities are available.[174] The Commission recognized that "while voluntary negotiations are important and to be encouraged, mandatory relocation is necessary to achieve the transition to geographic area licensing and to enhance the flexibility of EA licensees on the upper 200 channels."[175] Along similar lines, Commission recently explained its decision to mandate the retuning of an FM broadcast station as follows:

> The Commission recognizes that a channel shift by an existing licensee can be disruptive to the station's operation. However, we have consistently found that the public interest arising from the initiation of a new service outweighs the disruption to the existing station.[176]

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[173] *See PR Docket 90-54 Report and Order,* 5 FCC Rcd at 6414-15.

[174] *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band,* 12 FCC Rcd 9972, 9984-91 [hereinafter cited as "*800 MHz Reconsideration Order*"] *(affirming Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band,* 11 FCC Rcd 1463, 1507-10 (1995)).

[175] *800 MHz Reconsideration Order*, 12 FCC Rcd at 9984.

[176] *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Smith and Reno, Nevada, Susanville and Truckee, California)*, 12 FCC Rcd 10218, 10220 (1997), *citing Ava, Branson and Mountain Grove, Missouri,* 10 FCC Rcd 13035 (1995).

If the Commission can routinely order broadcasters to retune, despite the substantial advertising and promotional investment broadcasters make in promoting their frequency to the public, the Commission can certainly order non-broadcast MDS and ITFS licensees to swap frequencies. While voluntary retuning negotiations along the lines advocated by CTN are to be promoted, the Commission should not permit any licensee's unreasonable refusal to retune to deter the introduction of innovative new wireless cable services.

In order to avoid disputes over retuning, the Petitioners believe the Commission should adopt clear and concise procedures to guide the parties during voluntary negotiations and govern the resolution of disputes that cannot be resolved without Commission coordination.

Consistent with the Commission's approach elsewhere, the Petitioners are of the view that retuning should be required only where the requesting party can demonstrate to the Commission the availability of "comparable facilities" in the 2.5 GHz band. Obviously, no licensee should be required to operate from a different channel if it can demonstrate to the Commission that the retuning would have a material adverse impact on its operations. For these purposes, Petitioners propose that "comparable facilities" generally should be deemed available where it is possible for the existing facility to retune to other MDS or ITFS channels in the 2.5 GHz band while still enjoying a 45 dB desired-to-undesired ("D/U") signal ratio from co-channel operations and a 0 dB D/U signal ratio from adjacent channel operations.[177]

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[177] In demonstrating that the 45 dB/0 dB standard can be achieved, the requesting party should be permitted to propose receive antenna upgrades and the replacement of obsolete pre-May 26, 1983 downconverters, just as any applicant can today pursuant to Section 74.903(a) of the Commission's Rules. Moreover, the Petitioners believe that an exception to the 45 dB/0 dB requirement should exist to address those situations where the licensee being asked to retune has

In order to avoid unnecessary burdens on the Commission's staff, the Petitioners believe retuning proposals should be subject to private negotiations before being brought to the Commission. To accomplish that objective, the Petitioners propose a three-step process for handling retuning proposals – (1) notice; (2) negotiations; and (3) Commission intervention.

> (1) Notice – The requesting party should be required to provide the licensee with written notice requesting that the licensee retune to other channels in the 2.5 GHz band, agreeing to pay all costs associated with such retuning,[178] and demonstrating that comparable facilities are available.
>
> (2) Negotiations – Service of the notice should commence a period during which the parties can negotiate arrangements for retuning. At any time more than thirty (30) days after service of the notice, either party may terminate negotiations. If the negotiations lead to a voluntary agreement, the licensee can then file an application with the Commission proposing to change to other channels, which application will be treated like any other major modification application. If the negotiations are terminated without an agreement being reached, the proponent of the retuning proposal can then refer it to the Commission for resolution by submitting an application in the name of the licensee proposing a change in channels along with

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either explicitly or implicitly accepted a lower D/U ratio. In those cases, comparable facilities should be deemed present where the D/U ratio will not be reduced in any portion of the MDS or ITFS protected service area (if one exists) or, in the case of an ITFS license, at any registered receive site entitled to protection. *See Digital Declaratory Ruling,* 11 FCC Rcd 18853-54; *Gen. Dockets 90-54 and 80-113 Second Order on Reconsideration;* 10 FCC Rcd at 7083-84; *Amendments of Part 21, 43, 74, 78 and 94 of the Commissions Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz bands*, 6 FCC Rcd 6764, 6798 (1991) [hereinafter cited as "*Gen. Docket No. 90-54 Order on Reconsideration*"] (holding that point-to-point ITFS licensees being migrated from E and F group channels are not entitled to greater signal quality than they had enjoyed prior to migration).

[178] As CTN acknowledges, the costs associated with retuning are likely to be minimal because most transmitters in use today can be readily retrofitted at reasonable cost to operate on any channel in the 2.5 GHz band. *See* CTN Request, Engineering Statement, at ¶ 6. In addition, in those few cases where licensees do not use broadband downconverters capable of receiving the entire 2.5 GHz band, it may be necessary to replace existing downconverters with downconverters capable of receiving the channels to which the transmitters will be retuned. While the requesting party should be required to ensure a seamless transition to the new channels, the licensee should be required to cooperate in a reasonable manner in connection with the transition.

any other contingent applications necessary to effectuate the returning (such as a proposal by another licensee to retune its channels to make channels available for the proposed mandatory retuning). Although an application by an ITFS licensee to change channels is generally considered to be major change applications that can only be filed during a filing window, if the Commission continues to accept major modification applications only during periodic filing windows, applications filed in connection with a voluntary or Commission-coordinated retuning should be accepted at any time and cut-off from competing applications as of the close of business on the day of filing. However, because the Commission must determine whether comparable facilities are available before a request for a Commission-coordinated retuning can be granted, applications filed by the proponent of retuning without the licensee's consent should not be eligible for an automatic grant.

(3) Commission Intervention – Upon termination of negotiations and referral, the staff of the Video Services Division should expeditiously determine whether the conditions for retuning (availability of comparable facilities and an offer to pay the cost of retuning) have been satisfied and, if so, should order the prompt retuning of the subject station at the cost of the proponent.

In implementing this approach, the Commission needs to carefully coordinate the effective date of its new rules with respect to the proposed initial filing window for advanced technology applications. Specifically, the Commission should make certain that any new retuning rules become effective sufficiently in advance of the initial filing window that there will be an opportunity for the proponent of any Commission-coordinated retuning to provide the requisite notice, conduct the mandatory negotiations and then file any applications during the initial filing window. In addition, the Commission should permit the filing of applications for the implementation of advanced technologies during the initial window or thereafter that are contingent upon the grant of proposals for retuning filed at the same time. Since retuning may prove an essential predicate to the ability of an applicant for an advanced technology facility to comply with the Commission's interference protection requirements, that applicant would be severely disadvantaged if it had to await the grant

of an application for retuning (which telegraphs to the world its intentions regarding advanced technologies) before submitting its proposal to implement the advanced technology.

F. The Commission Should Reject ITF's Proposal To Eliminate Section 74.986 Of The Rules.

Reacting to a filing by Instructional Telecommunications Foundation ("ITF") in response to the *Public Notice*, the Commission has sought comment on "ITF's request that we prevent the filing of involuntary modification applications that jeopardize existing and future instructional service."[179] While the Petitioners appreciate that an affiliate of ITF has recently been embroiled in a battle over a proposed involuntary modification and may honestly believe the rule was wrongly invoked for its particular case, the involuntary modification rules play a valuable role in assuring that no ITFS licensee can unreasonably prevent neighboring MDS and ITFS stations from deploying an advanced technology. Thus, Petitioners strongly urge the Commission to retain Section 74.986 of the Rules.[180]

In adopting Section 74.986, the Commission properly recognized that:

> the Commission has encouraged and will continue to encourage parties to enter into voluntary agreements regarding station modifications and we expect that most modification arrangements will be voluntary in light of the obvious advantages of cooperation for all involved. *Parties are sometimes unable to agree, however,*

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[179] *NPRM*, at ¶ 81 n. 55. The Petitioners are surprised and concerned that the *NPRM* appears to find significance in ITF's unsubstantiated allegation that one wireless cable operator has breached its contract with ITF. *See id.* at ¶ 85 n. 60. Suffice it to say that more than one wireless cable operator believes that its ITFS affiliates have breached their contractual agreements, particularly in refusing to consent to routine transactions until paid monies to which they are not contractually entitled. Where such breaches occur, the appropriate remedy is in the courts, not before the Commission.

[180] The Petitioners appreciate that involuntary modification applications tend to be controversial in nature and therefore suggest that the Commission exclude involuntary major modification applications from those eligible for automatic grant under the Petitioners' proposal.

bcc: Ticket II Task Force