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WILKINSON, BARKER, KNAUER & QUINN, LLP

Washington, DC
Frankfurt, Germany

2300 N Street, NW
Washington, DC 20037-1128

telephone: 202.783.4141
facsimile: 202.783.5851

September 4, 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: NOTICE OF EX PARTE COMMUNICATION

Dear Ms. Salas:

Late yesterday, the undersigned engaged in a telephone conversation with Susan Fox, Senior Legal Advisor to Chairman William E. Kennard, on behalf of the group of over 110 participants in the wireless cable industry that submitted the petition for rulemaking that commenced this proceeding (the "Petitioners") regarding the *Notice of Proposed Rulemaking* in the referenced proceeding.

The purpose of the conversation was to discuss the Petitioner's fear that delays in the deployment of wireless broadband services over Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") will occur unless the Commission streamlines its approach to the processing of all major modification applications, regardless of whether they are for MDS or ITFS stations and regardless of whether they propose upstream facilities or downstream facilities. It was noted that in order to deploy two-way broadband wireless services, not only will some channels need to be converted to use for upstream use, but other of the facilities that comprise the system will also need to be modified. It was pointed out, by way of example, that an existing transmission tower may not be able to accommodate the addition of upstream reception equipment, forcing a relocation to another site. Because service to the public cannot commence until the Commission authorizes all of the necessary facility changes, the Petitioners have proposed at pages 36-55 of their Comments in response to the

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Notice of Proposed Rulemaking a series of rule revisions designed to minimize regulatory delay. In particular, the Petitioners discuss at pages 52-55 specific procedures drawn from Wireless Telecommunications Bureau and MDS precedent for the processing of ITFS major modification applications that do not result in the radiation of excessive energy outside of the ITFS service area. For convenience, a copy of those pages is attached. It was emphasized that adoption of these proposals will avoid the need for auctions to select from among mutually-exclusive ITFS major modification applications (as recently decided in MM Docket No. 97-234) and the delays that the Commission contemplates while awaiting Congressional clarification as to whether ITFS auctions comport with Congressional intent.

Please contact the undersigned should you have any questions regarding this *ex parte* presentation.

Respectfully submitted,



Paul J. Sinderbrand

Counsel to the Petitioners

Attachment

cc: Susan Fox

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.^{65/} 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)^{66/} be grantable, even if the

^{65/} See *supra* at note 37 and page 49.

^{66/} 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.^{67/}

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

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.

^{67/} 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.”^{68/} 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?^{69/}

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

^{68/} *MDS Auction Order*, 10 FCC Rcd at 9606.

^{69/} *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

result if the staff were required to identify and resolve daisy chains of mutually-exclusive applications.^{20/} More recently, the Commission took a similar approach in crafting rules governing the licensing of individual MDS stations to BTA authorization holders. Under Section 21.938 of the Commission's Rules, a BTA authorization holder proposing a new MDS station need only demonstrate that its facility will not result in a power flux density in excess of -73 dBW/m² at the boundary of the BTA in order to meet its obligations to the holder of the neighboring BTA authorization. As the Commission itself acknowledged when it adopted Section 21.938, it is certainly possible that where MDS stations are located near to, but on opposite sides of, a common BTA boundary, they will actually interfere with one another, even though they both comply with the -73 dBW/m² power flux density benchmark.^{21/} The Commission recognized, however, that:

a host of interference abatement techniques could be employed to prevent interference near BTA boundaries. Admittedly, this approach relies more on operator interference agreements and the honoring of another's interference rights than it does on applying rigid interference standards in the processing of applications. . . . [A]s we have indicated, given the nature and history of the service, as well as the likelihood that auction participants will be experienced in conducting negotiations, we believe that we can prevent unwanted interference by relying primarily on negotiated agreements and voluntary compliance with our interference right-of-ways, which we will enforce as necessary.^{22/}

The same holds true here. As with MDS BTA authorizations, applicants for advanced technology facilities generally are required to maintain their emissions within a power flux density

^{20/} See *Gen. Docket No. 80-112 Report and Order*, 94 F.C.C.2d at 1262-65; *PR Docket No. 90-54 Report and Order*, 5 FCC Rcd at 6412.

^{21/} See *MDS Auction Order*, 10 FCC Rcd at 9616.

^{22/} *Id.*

at the boundary of their PSAs.^{23/} To the extent that interference will result among simultaneously proposed facilities nonetheless, the Petitioners anticipate that the neighbor/applicants will work cooperatively in order to resolve any incompatibilities. Indeed, they are required to so under Sections 21.902(b), 21.938(a) and 74.903(c) of the Rules. To facilitate that cooperation, the Petitioners have even proposed that the initial filing window be followed by a 60-day negotiation period during which applicants can amend their proposals in order to reduce interference without fear of being precluded by a subsequent filing. Again, the Commission has previously relied upon the historical cooperation among MDS and ITFS licensees, and there is a every reason to believe such cooperation will continue where those receiving licenses under the proposed rules truly desire to provide service.

A secondary benefit of the Petitioners' proposal is that it not only works when both applicants truly desire to provide service, but also yields an appropriate result when one of the applicants is engaged in "greenmail." Although the Commission has previously taken steps to preclude the filing of applications for new MDS stations intended to "greenmail" wireless cable operators,^{24/} it still is not unheard of for an MDS or ITFS licensee to submit an application for a facility that it has no intent of constructing, but which will result in mutual-exclusivity with a neighbor's proposal. Such "strike applications" are designed to delay the processing of the neighbor's application, positioning the filer to extract financial or other consideration from the

^{23/} See *NPRM*, at App. C, at C-7, C-8-9, C-27 (proposed Sections 21.905, 21.908* and 74.936).

^{24/} See *PR Docket No. 92-80 Report and Order*, 8 FCC Rcd at 1445-48.

neighbor. The MDS rolling one-day filing window and the ITFS filing window rules were both adopted for the specific purpose of deterring such conduct.^{25/} Because both proved effective, the Petitioners have proposed an initial window for the filing of advanced technology applications, followed by a rolling one-day filing window system. Unfortunately, these steps alone will not be entirely successful in deterring strike applications.

Because of the importance of advanced technology services to the future of wireless cable, greenmailers will be able anticipate that applications for advanced facilities will be filed during the first filing period, whether it is a single day or a longer window. Thus, greenmailers will be able to submit preemptive strike applications during the same window, resulting in mutual-exclusivity under the traditional rules. Indeed, one national ITFS licensee has already indicated that it intends to submit applications during the initial period in order to frustrate efforts by wireless cable operators to employ advanced technologies on channels licensed to other licensees in the markets where this national filer is licensed.

Adoption of the Petitioner's approach to the licensing of all facilities proposed at the same time will deter such preemptive strike applications by making it impossible for a strike applicant to delay the inauguration of service by a neighbor. Both the legitimate applicant and the strike applicant will receive authorizations under the Petitioners' proposal, allowing the legitimate applicant to move forward with the rapid introduction of service. It is for this reason that the Petitioners vehemently oppose the suggestion in Paragraph 47 of the *NPRM* that if applications

^{25/} See *PR Docket No. 90-54 Report and Order*, 5 FCC Rcd at 6424; *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, 10 FCC Rcd 2907, 2909 (1995) [hereinafter cited as "*ITFS Filing Window Order*"].

propose interfering facilities are filed, the Commission "simply freeze the applications until the parties are able to resolve their differences."^{76/} To do so is to play directly into the hands of those strike applicants who would delay service to the public for private gain.

Admittedly, that the greenmailer also secures a license under the Petitioners' approach will pose a risk to the legitimate operation for the duration of the greenmailer's construction authorization, as the greenmailer could cause interference to its neighbor by actually constructing and operating a facility. However, since it is likely that in many cases the predicted interference from the greenmailer would only occur over a portion of the legitimate operator's service area, the legitimate operator can immediately begin providing service in the area where no interference is predicted without risk to those subscribers and await the expiration of the strike applicant's authorization before serving the area where interference is predicted. The Petitioners suspect the risk of actual interference from greenmailers to be relatively limited. History has shown that greenmailers are loathe to actually construct facilities, so the theoretical risk of interference will be limited to the duration of the construction authorization.^{77/}

^{76/} NPRM, at ¶ 47.

^{77/} The Petitioners believe that as a *quid pro quo* expedited licensing applicants should be ready, willing and able to construct advanced facilities upon receipt of an authorization. Therefore, in order to deter the filing of strike applications, the Petitioners believe that extensions of construction authorizations for advanced facilities should be granted most sparingly. As the Commission has previously recognized, limiting extensions of the time afforded parties to construct is one of the most effective mechanisms available for reducing strike applications. See *Gen. Dockets 90-54 and 80-113 Second Order on Reconsideration*, 10 FCC at 7081; *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*, 11 FCC Rcd 17003, 17009 (1996).

3. *The Commission Should Restrict Amendments To Applications Eligible For Automatic Grant.*

Although the Petition provided in certain respects for the processing of amendments to advanced technology applications,^{78/} the *NPRM* solicits comment on how the Commission's rules should be further revised to provide for the amendment of applications for booster stations and response station hubs.^{79/} Simply put, the Petitioners believe that because the rules proposed in the Petition will result in expedited application processing, the filing of amendments during that application processing should be deterred.

There can be no doubt that the filing of amendments to pending applications is responsible in part for the backlog of ITFS applications. No matter how well-conceived ITFS applicants' plans were in October 1995 when many pending applications were filed, it is not unreasonable for needs to have changed over the 2+ years since. Thus, it is not surprising that many pending ITFS applications have been amended, some more than once.^{80/} Yet, every amendment imposes burdens on the Commission's limited staff (which may have to re-do a substantial amount of processing that has already taken place) and on the licensees of and applicants for neighboring facilities, which must determine whether the amended application will cause impermissible harmful interference.

^{78/} See Petition, App. B, at 19, 29, 49-50 and 59 (proposed revisions to Sections 21.909(e), 21.913(d), 74.939(d), 74.985(d)).

^{79/} See *NPRM*, at ¶ 56.

^{80/} Of course, as noted *supra* at note 36, many amendments are not the result of reasonable changes in plans, but instead reflect an effort to correct applications that should not have been filed in the first place. Limiting applications eligible for automatic grants to those that are substantially complete when filed, and thereafter restricting amendments, should deter a recurrence of that behavior.

Because the rules proposed by the Petitioners will eliminate lengthy delays between the filing of applications and their grant, the balance between the benefits of amendments and the burdens they impose will change. As the Commission recognized when it adopted the current ITFS filing window system, the filing of amendments often requires a time-consuming re-analysis of the amendment's effect.^{81/} It could prove quite burdensome on neighboring licensees if an applicant taking advantage of the expedited processing rules could amend an application while the 60-day petition to deny period is running without adverse ramifications, since the neighbor would have to review that amendment and prepare any necessary petition to deny within a very short time period. Thus, the Petitioners believe that while technical amendments^{82/} generally should be permitted at any time, any technical amendment to a pending application eligible for automatic grant should be considered "major" and result in the application being considered "newly-filed" except as set forth below.^{83/} Non-technical amendments to applications eligible for automatic grant should be classified under Sections 21.23 and 74.911 of the Commission's existing rules for determining whether an amendment is sufficiently serious in nature that the application should be deemed newly-filed.

^{81/} See *ITFS Filing Window Order*, 10 FCC Rcd 2910.

^{82/} For purposes of this proposal, the phrase "technical amendment" refers to any change in the technical specifications of the proposed facility, to any new interference analysis or any revision to an interference analysis submitted with the application, or the submission of any interference consent from a neighboring licensee.

^{83/} The facility proposed by an amended application should not be entitled to protection from interference by a facility proposed after the initial application (presuming, the subsequent application established protection to the facility proposed in the initial application, as would be required). In such a case, the facility proposed in the amended application must accept any interference that is caused by the subsequent proposal, and must protect the subsequently-proposed station from interference.

If an amendment to an application eligible for automatic grant results in it being considered newly-filed, the Petitioners believe the amendment must be treated essentially as a new application -- it must be served on neighbors, appear on public notice commencing another 60-day period for petitions to deny, established protection from interference to all facilities proposed prior to the amendment (even if such facilities were proposed after the initial application) and accept interference from proposals advanced on or before the amendment date.

Admittedly, this approach will require greater care on the part of applicants in the preparation of applications. However, that is appropriate. As discussed above at note 36, in exchange for the benefits of expedited processing, applicants should be required to submit applications that are substantially complete when filed and include all of the technical information required by the proposed rules. Rather than follow the current practice of encouraging large numbers of amendments that ultimately slow the processing of applications, the Commission should implement a system that rewards those who take the time to prepare complete and accurate applications.

The only exception should be the one proposed in the Petition -- under the proposed language of Sections 21.27(d) and 74.911 after the initial filing window, 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 and amend their proposals, so long as they complied with the interference protection rules and did not increase interference to any facility proposed during the one-week window.^{34/} The advantage of this 60-day period is that it allows

^{34/} See Petition, at 36-38.

conflict resolution without the fear that while settlement discussions are underway some third party will file a new application that will then have to be protected in crafting a settlement. At the close of this 60-day amendment period, there would be a second public notice, and an opportunity for petitions to deny against all of the applications filed during the one-week filing window, as amended. Thus, the major reason for not allowing amendments to applications for automatic grant -- depriving neighbors of 60 days in which to petition to deny -- is not present with respect to amendments filed during this special opportunity.

4. *The Commission Should Employ A Rolling One-Day Filing System For ITFS Major Modifications, Just As It Does For MDS Applications.*

Although the Petition did not suggest any revisions to the Commission current window filing system for the processing of traditional ITFS applications, the Commission has "solicit[ed] comment on whether we should retain our current periodic filing window system used for ITFS applications."^{85/} In the Petitioners' view, the Commission could substantially expedite the initiation of competitive wireless cable services over leased ITFS excess capacity by moving to a rolling, one-day filing window system for the processing of applications for authority to modify ITFS stations akin to that in place for MDS applications, and by adopting provisions for the expedited review and automatic grant of those applications.

When the Commission switched from using an A/B cut-off list to filing windows to control the filing and processing of ITFS applications, the Commission anticipated that the new system

^{85/} See NPRM, at ¶ 46.

would "allow us to better control the flow of applications and improve processing efficiency."^{86/} However, history has shown that the periodic filing window system for ITFS applications has not achieved the objective of expediting ITFS applications processing. While logic suggests that the window filing system should result in faster processing when compared with the A/B cut-off list system it replaced, ITFS applicants and their wireless cable affiliates alike have found that it still takes far too long for ITFS applications to be processed to grant.

Although this failure can be traced to many causes, by far the most significant is that the Commission simply has not been able to devote the personnel resources necessary to expeditiously process the quantity of applications being submitted under the filing window system. This, in turn, is due in large part to the fact that ITFS filing windows are opened so infrequently that the Commission's limited resources are overwhelmed by the substantial number of applications filed when a window is opened. For example, the first ITFS filing window in October 1995 saw over one thousand applications filed, largely reflecting a pent-up demand following a lengthy freeze.^{87/} This was far more applications for new stations and for major modifications of authorized stations than the Commission's limited staff could process efficiently, and hundreds of those applications

^{86/} *ITFS Filing Window Order*, 10 FCC Rcd at 2907.

^{87/} When the Commission first proposed the adoption of an ITFS filing window system on February 11, 1995, it imposed a freeze on the filing of applications for new ITFS stations or for major modifications to authorization facilities that lasted until October 1995, save for a brief period in mid-1995 during which major modification applications were accepted. See *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, 8 FCC Rcd 1275, 1277 (1993)[hereinafter cited as "*ITFS Filing Window NPRM*"]; "Notice of Limited Period to File Instructional Television Fixed Service Applications For Major Changes in Existing Facilities." *Public Notice*, Report No. 23564A (rel. Aug. 3, 1995).

remaining pending today, more than two years after the close of the window. When the Commission finally opened a second window in October 1996, it severely restricted the types of applications that could be filed in order to avoid overloading the staff once again.^{88/} Because it has now been more than two years since the Commission has accepted applications for many types of major modifications and for new ITFS stations, it is likely that the current limited staff will again be overwhelmed by applications unless substantial changes are made to the ITFS application processing system.

Since staffing is unlikely to increase to the levels necessary to eliminate the unacceptable ITFS application processing delays, dramatic revisions to the Commission's rules to allow the limited staff to timely process the anticipated onslaught of applications are called for. The use of filing windows as a mechanism to regulate the flow of ITFS applications is itself part of the problem, for the current system tends to increase dramatically the number of applications that are filed during any given window, to cause the filing of numerous additional documents outside of filing windows that the staff must address, and to expand the number of applications that are mutually-exclusive and must be subjected to a time-consuming selection process.

The Number Of Applications Filed In Any Window Expands When Infrequent Filing Windows Are Employed. As discussed *supra* at note 66, history has shown that despite the Commission's best intentions, periodic filing windows open with far less frequency than licensees need. As a result, a "gold rush" mentality takes hold -- applicants propose to construct facilities that

^{88/} See "Mass Media Bureau Announces Commencement of Sixty (60) Day Period for Filing ITFS Modifications and Amendments Seeking to Co-Locate Facilities With Wireless Cable Operations," *Public Notice*, DA 960-1724 (rel. Oct. 17, 1996).

they are not yet certain they want, for fear that it will be years before another opportunity to file will arise. The result is a self-fulfilling prophecy; because of the sudden influx of applications, the Commission staff is overwhelmed, and as a direct result, it truly is a long time before the backlog is cleared and a new window can be opened. By contrast, when a rolling one-day filing window system is employed, applicants are not under the same pressure to submit applications prematurely and the total number of applications should be reduced.

Processing Delays Caused By The Flood Of Applications During Any Given Window Lead To Numerous Amendments. As discussed *supra* at page 44, infrequent filing windows and application processing delays also have tended to result in numerous amendments to applications. No matter how well-conceived an application was when it was filed, circumstances inevitably change when applications are left pending for years and amendments are necessary to address those circumstances. Moreover, as discussed *supra* at note 36, amendments are often necessary because incomplete applications are filed during windows out of fear of missing a scarce filing opportunity. Regardless of why an amendment is needed, every amendment imposes burdens on the Commission's staff and on the licensees of and applicants for neighboring facilities. Although no statistics are readily available, the Petitioners believe that far fewer MDS applications are being amended than ITFS applications, a fact the Petitioners attribute largely to the use of a rolling one-day filing window system for MDS applications.

Infrequent Filing Windows Inevitably Lead To Requests For Special Temporary Authorizations That Result In Double-Processing. One of the by-products of infrequent filing windows is that, as marketplace demand evolves, wireless cable operators frequently find that major

modifications are required to facilities, but no filing window is imminent. In such cases, licensees routinely request and receive special temporary authorizations ("STAs") from the Commission staff. While this practice is a necessary evil under the current regulatory regime, it is extremely inefficient because it requires the staff and neighboring licensees to review the STA request when filed, and then be burdened again when an application for permanent authority to implement the modification is filed during a subsequent window. When the Commission abandoned its A/B cut-off list system for processing applications, it did so in large part because:

The cut-off procedure has become inefficient, requiring an initial processing of a substantial number of applications simply to place them on an "A" cut-off list, with little benefit. Because each application must be processed a second time for legal and technical analysis, we are confronted with time-consuming double processing, which is an inefficient use of Commission resources.^{89/}

Ironically, the periodic filing window system still results in inefficient double-processing because of the number of STAs that must be sought.^{90/} By contrast, because of the use of a rolling one-day filing window system for MDS major modifications, there are far fewer STA requests submitted by MDS licensees and far less double-processing of proposals.

Filing Windows Increase The Number Of Mutually-Exclusive Applications. By its very nature, an infrequent periodic filing window system will tend to increase the number of mutually-

^{89/} *ITFS Filing Window NPRM*, 8 FCC Rcd at 1276.

^{90/} It is worth noting that because so many licensees must secure STAs, the filing window system does not serve one of its primary objectives – stopping strike applications by cutting-off applications as they are filed. *See id.* at 1276; *Gen. Dockets No. 90-54 and 80-113 Report and Order*, 5 FCC Rcd at 6424. Because a STA request necessarily "telegraphs" a licensee's plans for filing during the next window, it becomes much easier for a disingenuous application to propose a competing application during that window.

exclusive applications the Commission must contend with as compared with a rolling, one-day filing window system. Indeed, the Petitioners are unaware of any mutually-exclusive applications submitted since the Commission commenced using the rolling one-day filing window system for MDS (save for those cases under the lottery system where application mills intentionally submitted mutually-exclusive applications on the same day in order to increase their ability to sell identical applications to multiple victims). As a result, there are situations where the MDS channels have been licensed in the configuration desired by the wireless cable operator, but the ITFS channels are awaiting resolution of mutually-exclusive cases that would not have arisen had a rolling one-day filing window been in effect. In the past the Commission has strived to make certain that no potential ITFS applicant is cut-off from applying for new facilities without having had a fair opportunity to apply for available spectrum. Given that the ITFS spectrum has been available now for more than three decades and has largely been licensed in all but a few areas, that concern should no longer be paramount. To the contrary, particularly since applicants to modify ITFS facilities must demonstrate that they will maintain their power flux density within certain bounds 35 miles from the transmit site, modification applications cannot have have a significant preclusive effect on licensing of new stations anymore.^{21/}

5. *To Avoid Delays In The Processing Of ITFS Applications In The Future, The Commission Should Adopt Rules That Permit Expedited Processing of Major Modification Applications.*

Because the marketplace demands that wireless cable operators have the flexibility to rapidly respond to demands for new service, the wireless cable industry can no longer suffer delays in the

^{21/} See *MDS Auction Reconsideration Order*, 10 FCC Rcd at 13828.

processing of ITFS major modification applications of the sort that have plagued the industry for years. A move towards a rolling, one-day filing window system for ITFS applications will certainly help. However, that change alone will not have the desired effect unless other changes to the way the Commission processes ITFS applications are also implemented.

The Petitioners anticipate that once the Commission again allows the filing of ITFS major modification applications, a sufficiently large number of such applications will be filed that there is a substantial risk of again overwhelming the processing staff unless changes are made to the way in which applications are processed. The problem is essentially the same as discussed above with respect to applications for advanced technology facilities — the staff simply is not large enough to timely review all of the applications, verify the accuracy of the accompanying interference analyses, determine which applicants are mutually-exclusive with other applicants, and determine which of the mutually-exclusive applications should be granted. Thus, the Petitioners believe the Commission should not only move to a rolling one-day filing window for major ITFS modification applications, but should couple that change with rules similar to those proposed for expediting the processing of advanced technology applications. Specifically, provided that they do not propose a power flux density in excess of -73 dBw/m² at the boundary of their PSAs, future modification applications should be automatically granted if they are not the subject of a petition to deny within 60 days of appearing on public notice, and they should be entitled to grant regardless of whether they cause interference to or suffer interference from any other application filed on the same day (or during the initial filing window).

As with applications for advanced technology systems, this proposal effectively affords ITFS stations a geographic service area and the flexibility to modify their facilities within that area with far less regulatory delay than under current approaches. This proposal is a logical outgrowth of the Commission's prior determination that ITFS facilities proposed prior to September 15, 1995 are restricted from exceeding a power flux density in excess of -73 dBw/m^2 at the boundary of their PSAs.^{92/} It recognizes that so long as the power flux density remains within limits, the potential for cochannel interference is minimized and therefore modifications can be processed employing an expedited system. Yet, it must be emphasized that all incumbents remain entitled to 45 dB/0 dB D/U interference protection and that any facility that is constructed as a result of an automatic grant will be required to cure impermissible harmful interference that results from the facility.

To implement the proposed system, the Petitioners suggest that the Commission devote its ITFS application processing resources during the pendency of this proceeding to clearing the backlog of pending applications to the greatest extent necessary. While the Petitioners appreciate that the Commission has chosen not to grant any mutually-exclusive applications for new ITFS stations pending resolution of the issues raised in MM Docket No. 97-234, the staff can in the interim clear away large numbers of other pending applications that would otherwise have to be protected in the design of advanced technology systems. Once final rules are adopted in this docket, the Commission should then schedule an initial one-week filing period similar to that discussed in the Petition, but instead of limiting it to just the filing of advanced technology applications also permit ITFS major

^{92/} See *MDS Auction MO&O on Reconsideration*, 10 FCC Rcd at 13828-29.

modification applications.^{23/} Once that window closes, the Commission should proceed with a review for completeness, issue a public notice commencing a 60-day period for resolution of conflicting applications and then, issue a subsequent notice starting a 60-day period for petitions to deny. Any application that is not subject to a petition to deny or notice from the staff that it will not be automatically granted should then be deemed granted as of the 61st day after the commencement of the petition to deny period. The Commission can then open a window for the submission of applications for new ITFS stations (assuming that by such time the issues in MM Docket No. 97-234 have been resolved).

B. The Commission Should Limit Unlicensed Response Stations To 2 Watts Transmitter Output Power And 33 dBW EIRP Per 6 MHz Channel.

Under the rules proposed in the Petition, no limits were placed on the power of response stations authorized to operate without a specific license. The *NPRM*, however, proposes to limit to 18 dBW EIRP the power of response station transmitters permitted under a blanket license, while allowing higher power facilities to be separately authorized on a site-specific basis.^{24/} Although the Petitioners do not oppose the Commission's proposal to limit the power of response stations that can

^{23/} As noted *infra* at page 112, that window should be timed so that any proponent of a Commission-coordinated channel retuning will have an opportunity to provide the affected ITFS licensee with the requisite notice and will be able to submit any resulting application during the initial filing window.

^{24/} See *NPRM*, at ¶ 42. The *NPRM* indicates that this EIRP limit would only apply to "response station transmitters in cellularized systems." *Id.* However, it makes little sense to restrict the power of response stations and cellularized systems, and not similarly restrict response stations that communicate with a single response station hub within the market. Therefore, the Petitions suggest that whatever power limit is imposed on response stations authorized under blanket licensing, be applied to all such response stations.