

PEPPER & CORAZZINI

L. L. P.

ATTORNEYS AT LAW

1776 K STREET, N.W., SUITE 200

WASHINGTON, D.C. 20006

(202) 296-0600

GREGG P. SKALL
E. THEODORE MALLYCK
OF COUNSEL

FREDERICK W. FORD
1909-1986

TELECOPIER (202) 296-5572

INTERNET PEPCOR@COMMLAW.COM

WEB SITE HTTP://WWW.COMMLAW.COM

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
ELLEN S. MANDELL
HOWARD J. BARR
MICHAEL J. LEHMKUHL *
SUZANNE C. SPINK *
MICHAEL H. SHACTER
PATRICIA M. CHUH
LEE G. PETRO *

* NOT ADMITTED IN D.C.

December 28, 1998

RECEIVED

DEC 28 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Re: **Petition for Reconsideration & Clarification of
Report and Order
MM Docket No. 97-217
File No. RM-9060**

Dear Ms. Salas:

Transmitted herewith on behalf of C&W Enterprises, Inc., is an original and five (5) copies of its Petition for Reconsideration & Clarification of Report and Order in MM Docket No. 97-217. Pursuant to the attached certificate of service, a copy of these Comments have also been hand delivered to the Chairman and each Commissioner. Should there be any questions concerning this material, please communicate directly with the undersigned.

Very truly yours,



Robert F. Corazzini
Counsel for C&W Enterprises, Inc.

Enclosure

No. of Copies rec'd 0+5
List ABCDE

RECEIVED

DEC 28 1998

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Parts 1, 21 and 74 to Enable)	MM Docket No. 97-217
Multipoint Distribution Service)	
And Instructional Television Fixed)	File No. RM-9060
Service Licensees to Engage in Fixed)	
Two-Way Transmissions)	

**PETITION FOR RECONSIDERATION AND CLARIFICATION
OF REPORT AND ORDER**

Comes now C&W Enterprises, Inc., ("C&W"),^{1/} by the undersigned counsel to present its request for clarification and reconsideration to the Federal Communications Commission of the above-captioned Report and Order. On September 25, 1998, the Commission released a Report and Order in this docket, Amendments of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, FCC 98-231 (rel. September 25, 1998) (hereinafter "Two-Way Order"). This Two-Way Order appeared in the Federal Register on November 25, 1998, providing a 30-day petition for reconsideration period that terminates on December 28, 1998. C&W presents the following requests for clarification and reconsideration regarding the Two-Way Order:

^{1/} C&W is a MDS licensee and wireless cable operator leasing channel capacity on MDS and ITFS stations and therefore, is an interested party in this matter. Accordingly, it has standing to bring this petition pursuant to Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d), and Section 74.912 of the Commission's rules and regulations, 47 C.F.R. §74.912.

I. MDS Signal Boosters

1. Section 21.913(b) of the Commission's rules should not limit the licensing of a high-power MDS signal booster station to MDS licensees or conditional licensees that are response station hub licensees, conditional licensees or applicants. Two-Way Order, § 21.913(b). Nor should the use of a high-power booster station be restricted to employ only digital modulation. Pursuant to its definition in Section 21.2 of the Commission's rules, a Signal Booster Station is "intended to augment service as part of a distributed transmission system where signal booster stations retransmit the signals of one or more MDS stations and/or originate transmissions on MDS channels." Two-Way Order, § 21.2. However, neither this definition nor the wording in the Two-Way Order requires that a booster station only be authorized to the licensee or permittee of a response station hub. It is believed that the Commission intended to continue to allow the use of high-power booster stations to all MDS licensees or conditional licensees but that the wording of the current rule unintentionally changed this intent.

2. Further clarification is also needed to determine whether currently licensed booster stations will be able to operate pursuant to the new two-way rules upon their enactment. Revised Section 21.913 will permit signal booster stations to originate programming, operate at a higher power level and to be afforded protection from other stations. Id. at § 21.913. To regulate currently licensed booster stations differently, particular as to interference protection, would only result in creating the unnecessary administrative burden of requiring booster stations authorized prior to the Two-Way Order to re-file for their currently authorized stations. Requiring such a filing may result in an inequity to ongoing operations if they result in mutually exclusive situations.

Therefore, it is requested that the Commission clarify that it intended for currently authorized signal booster stations to be able to operate pursuant to the new rules defined in the Two-Way Order.

II. 20-Day Notification Requirement by Response Stations

3. The 20-day notification requirement to a registered or previously proposed ITFS receive site prior to the activation of an MDS or ITFS response station required by Sections 21.909(n) and 74.939(p) of the Commission's rules should be eliminated as burdensome and anti-competitive. Two-Way Order, §§ 21.909(n) and 74.939(p). Such a requirement places an unrealistic burden on the wireless cable operator that prevents it from competing equally with other services. No other provider of technological services bears a comparable restriction. While other service providers can deliver their services within a few hours of an order being placed, wireless cable operators must inform potential customers that service will not be available for at least three weeks due to this one requirement, placing them at a huge disadvantage in the marketplace. C&W recognizes that such notice is beneficial in assisting ITFS licensees in tracking the source of interference to their receive sites if caused by downconverter overload. However, it is submitted that this reporting requirement can be revised to provide such timely protection yet not place such an unreasonable burden on the wireless cable operator.

4. Accordingly, it is proposed that MDS and ITFS licensees only be required to notify the ITFS licensee of a registered or previously proposed receive site located within 1960 feet of a response station within 24 hours of activation. Such notice should be

deemed acceptable if provided by facsimile or e-mail. By making this revision, wireless cable operators will be placed in a more pro-competitive stance in relation to other services yet ITFS licensees will be adequately informed of the construction of nearby response stations.

III. Channel Swapping and Shifting

5. The Commission should amend Sections 21.901(d) and 74.902(f) of its rules to allow any ITFS licensee to swap channels with any ITFS or MDS licensee regardless of whether one of the licensees utilizes digital technology or leases to a lessee that utilizes digital technology. There is no discernable rationale as to why channel swaps should be limited to only those channels associated with digital emissions. Analog systems would equally benefit from having the flexibility to swap channels. In addition, wireless cable operators planning two-way systems often need to swap channels in order to plan their new services prior to "utilizing" digital transmissions, as required by the new rules. Therefore, the Commission should allow channel swaps between all MDS and ITFS channels regardless of whether digital transmissions are employed in the market.

6. Likewise, the Commission should allow ITFS licensees to channel shift regardless of whether digital transmissions are being employed by the ITFS licensee or the operator to whom it leases its excess capacity.^{2/} It is illogical to apply one set of rules to an analog system and a second set to a digital system where there is no technical

^{2/} While the Two-Way Order would permit an ITFS licensee to channel shift if it is leasing its excess capacity to a wireless cable operator which utilizes digital transmissions, revised Section 74.931(d) only permits channel shifting to other MDS or ITFS channels if the ITFS licensee itself is operating digitally. Two-Way Order at ¶ 101.

basis to differentiate between the two. An analog wireless cable operator and ITFS licensee should have the same flexibility as a digital operator to shift the ITFS programming of an ITFS licensee onto another MDS or ITFS channel in its system. In order to fully promote the competitive posture of wireless cable, the Commission should permit the greatest flexibility to MDS and ITFS licensees in order to allow them to be guided by market demand rather than by administrative restraints. This includes the ability to channel shift despite operating in an analog mode.

IV. ITFS Major Change Applications

7. The Commission should allow the filing of any ITFS major change application, even those unrelated to two-way proposals, during the initial one-week filing window. Indeed, the need of wireless cable operators to make such modifications to remain competitive makes the opening of such a window imperative. While Section 74.911(e) of the Commission's rules specifically states that the one-week window shall be opened for the filing of "high-power signal booster station, response station hub, and I channels point-to-multipoint transmissions licenses," nothing prevents the Commission from simultaneously opening an ITFS window for major modification applications that are not directly related to two-way transmissions. 47 U.S.C. § 74.911(c) (1995). Such a window is essential to the development of existing wireless cable systems utilizing ITFS excess capacity from licensees that have not had the opportunity to modify since December, 1996.^{3/} Once the two-way window has been conducted, engineering such

^{3/} See Public Notice, DA 96-1724 (released October 17, 1996) ("Mass Media Announces Commencement of Sixty (60) Day Period for Filing ITFS Modifications and Amendments Seeking to Co-Locate Facilities with Wireless Cable Operators").

modifications may prove impossible. However, by conducting both filing windows simultaneously, all applicants will be similarly situated in that they all will be subject to resolving interference concerns together during the sixty day window following the tendering of filing of such applications. To conduct separate filing windows would be to unjustly favor one group of applicants over another, for which there is no rational basis.

8. Any ITFS major modification applications submitted during the initial one-week window or any rolling one-day filing window that cause mutual interference need not be considered as mutually exclusive and subject to auction. In fact, any obstacle that causes similar processing delays faced by the October, 1995 ITFS applications at this stage could result in the demise of the industry. Therefore, it is critical that the Commission eliminate any processing delay that threatens the forward momentum of this service. The auctioning of ITFS modification applications is one such obstacle that can be prevented. Pursuant to the Balanced Budget Act of 1997, which expanded the Commission's auction authority under Section 309(j) of the Communications Act, the Commission shall grant a license or permit to "a qualified applicant through a system of competitive bidding...[i]f... mutually exclusive applications are accepted for any initial license or construction permit." Balanced Budget Act of 1997, § 3002(a)(1), *codified as* 47 U.S.C. § 309(j) [emphasis added]. However, the Commission is not mandated by the terms of Section 309(j) to auction mutually exclusive modification applications. See In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, at ¶ 14 (rel. August 18, 1998) (the "Auction Order"). While the Commission states that it "may be appropriate in some cases to treat

a major modification as an initial application for competitive bidding purposes," that determination is subject to the Commission's discretion, and by its own admission, the Commission concedes that its conclusion is only due to "the absence of another viable method for resolving instances of mutual exclusivity in a timely and efficient manner." Id. at ¶ 16.

9. The two-way rules present such a solution to this predicament. According to the Two-Way Order, the Commission has deemed that "applications filed on the same day will not be treated as mutually exclusive by the Commission and that it will be the responsibility of the parties to resolve any conflicts." Two-Way Order at ¶ 65. Certainly, the FCC has the authority to determine that any ITFS major modification applications filed in the two-way initial window which interfere with each other will not be considered mutually exclusive but that conflicts are to be resolved through the efforts of the applicants.^{4/} By processing ITFS modification applications in accordance with the processing rules for two-way applications, the Commission promotes rapid deployment of service to the public and prevents the processing delays which are currently experienced by currently pending ITFS applications. In light of the state of the industry and the need to roll out such services immediately to remain competitive, it is essential that all applications requesting use of two-way transmissions be processed as expeditiously as possible. Therefore, the Commission should clarify that ITFS modifications submitted during the initial one week or any rolling one-day filing window will be subject to the two-way rules and not be subject to auction.

^{4/} The Commission considers the threat of having to immediately cease operations in event of interference to another party as sufficient motivation for applicants to resolve potential problems. Two-Way Order at ¶ 70.

V. Grandfathered Interference Rights of Incumbents

10. Clarification is also needed regarding the grandfathered interference rights of incumbent stations and how they relate to the filing of two-way applications. Currently, there exists a limited exception to protection of a 35-mile circle protected service area ("PSA"). Upon expansion of the former 15-mile PSA to a 35-mile area, the Commission grandfathered interference that may have been created due to this expansion. Accordingly, a modification application filed by a station which did not meet the Commission's 45/0 dB D/U standards due to expansion of PSAs would be acceptable if it maintains the current theoretical interference level and neither increases the amount of interference nor causes interference to new areas of the neighboring station's PSA. See Second Wireless Cable Reconsideration Order, 10 FCC Rcd. 7074, 7083 (1995). This standard was equally applied to applications for digital emissions. See Digital Declaratory Ruling, 11 FCC Rcd. 18839, 18853 (1996). It is now requested that the Commission clarify that this exception will apply to interference analyses submitted by applicants of response station hubs regarding upstream transmissions from response stations.

VI. Applicants for 125 kHz Channels

11. The Commission states in the Two-Way Order that "the use of any specific 125 kHz channel is completely at the discretion of the licensee...whose main station is associated with that particular channel." Two-Way Order at ¶ 59. However, the new rules implementing the regulation of such channels are less clear as to who may be the applicant for use of these frequencies. Id. at §§ 21.940 and 74.940. Therefore, it is

requested that the Commission revise these rules to clarify that only the current licensee will be permitted to file for use of these channels.

VII. Conclusion

12. In summary, C&W believes that only through the most flexible framework possible utilizing the least regulatory scheme necessary will both the distance education providers and the wireless cable system operators realize the maximum benefits of the era of new technology in which both must fully participate in order to recognize their distinct, yet obviously compatible, goals. ITFS and wireless cable operators should be free to structure their stations and systems in a way that meets their respective needs as solely determined by the parties. By removing the obstacles that have thwarted the development of wireless cable systems in the past, the Commission will provide a means by which this industry may finally thrive.

Respectfully submitted,

C&W Enterprises, Inc.

By



Robert F. Corazzini
Suzanne Spink Goodwyn
Counsel for C&W Enterprises, Inc.

PEPPER & CORAZZINI, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-0600
December 28, 1998

CERTIFICATE OF SERVICE

I, Robert F. Corazzini, on behalf of C&W Enterprises, Inc., certify that a copy of the foregoing Comments in Proposed Rulemaking were delivered by hand to the following on December 28, 1998:

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

Commissioner Michael K. Powell
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554


Robert F. Corazzini