

ORIGINAL

DOCKET FILE COPY ORIGINAL RECEIVED

FEB 18 1999

FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY

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

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

To: The Commission

REPLY TO OPPOSITIONS
TO PETITION FOR RECONSIDERATION OF
THE SAN FRANCISCO-SAN JOSE EDUCATOR/OPERATOR CONSORTIUM

The San Francisco - San Jose Educator/Operator Consortium (the "Consortium"),¹ by counsel and pursuant to Section 1.429(g) of the Commission's Rules, hereby replies to the Oppositions to its Petition for Reconsideration ("Petition") of certain rules adopted in the *Report and Order*, FCC 98-231, released September 25, 1998 (the "*Order*").

Introduction

In its Petition, the Consortium advocated changes to three of the rules adopted in the *Order*. First, as have other parties to this proceeding,² the Consortium asked the Commission to

¹ Due to time constraints, The Regents of the University of California - on behalf of the University of California, Berkeley and University of California, San Francisco is not joining in this Reply.

² See, e.g., Petition for Reconsideration filed by the Petitioners at 17-19; Petition for Reconsideration filed by BellSouth Corporation and BellSouth Wireless Cable, Inc. ("BellSouth Petition") at 2-7 ; and Petition for Reconsideration filed by the National ITFS Association at 8. See also Opposition to Petition for Reconsideration filed by Cisco Systems, Inc. at 6.

to process ITFS "major change" applications according to the streamlined procedures applicable to booster station and response station hub applications. Second, the Consortium urged the Commission to adopt procedures for the expeditious resolution of claims asserting actual interference. Third, the Consortium sought elimination of the notice provisions of Sections 21.909(n) and 74.939(p) in favor of a service requirement. On each of these issues, and in consideration of the Oppositions filed in this proceeding, the Consortium continues to believe that its proposed rule changes should be adopted by the Commission.

I. IN REGULATING INTERFERENCE COORDINATION, THE COMMISSION SHOULD RETAIN ITS STREAMLINED PROCESSING RULES AND ADOPT PROCEDURES FOR THE EXPEDITED POST-GRANT RESOLUTION OF CLAIMS OF ACTUAL INTERFERENCE.

A. Commission Resources Should Not Be Expended On Review Of Applications For Predicted Interference.

Although Instructional Telecommunications Foundation, Inc. ("ITF") and Catholic Television Network ("CTN") purport to support the extension of streamlined processing rules to ITFS "major change" applications,³ the substance of their oppositions contradict this conclusion. ITF, with the general support of CTN,⁴ draws a different definition of "streamlining" that would be applied to major change applications as well as any booster station and response station hub applications. Stripped of rhetoric, ITF's proposal represents a giant leap backward for the rapid deployment of advanced ITFS and MDS systems.

One of the most important changes in the new rules is the dramatic shift from microscopic

³ See, e.g., ITF Opposition at 2, n.2.

⁴ See Response of CTN at 20-21.

Commission review of applications to a certification process. The linchpin of this approach is cooperation on system design and interference issues. As the Commission correctly noted, "the viability of the services depends on the parties working together in good faith, a situation that reinforces the appropriateness of a certification system in this context."⁵

Apparently, ITF disputes this premise.⁶ Instead of relying on the ability of parties to cooperate and resolve interference issues privately, ITF proposes an elaborate scheme that would require Commission staff to review each application for electrical mutual exclusivity and other defects. For defective applications, Commission staff would issue a "deficiency letter" to the applicant providing for a cure period. For mutually exclusive applications, Commission staff would notify the parties that their applications are in conflict. Applicants would retain the right to file petitions to deny and notify the Commission of cases of "apparent" mutual exclusivity.⁷

Aside from the potential procedural problems,⁸ deficiency letters have historically proved to be ineffective, serving only to unnecessarily delay licensing and service to the public. For the initial MDS lotteries that began in the mid-1980s, Commission staff issued deficiency letters

⁵ *Order* at 36.

⁶ *See* ITF Opposition at 3 ("it is unrealistic to expect voluntary settlement of all such complicated mutual exclusivities simply because licenses are granted automatically").

⁷ *Id.* at 5.

⁸ For instance, it is possible that Commission staff would issue a deficiency letter and receive a petition to deny the same application, with the same problem identified in each. Would the filing of the petition cut off the right to cure? Or would the timely cure of the deficiency letter be *prima facie* evidence that the petition is without merit? In addition, what would be the scope of defects that could be cured? In these circumstances, it is clear that Commission staff should not review applications and seek correction at the same time private parties have a right to seek outright dismissal of the application.

identifying specific items in the tentative selectees' applications that required correction or completion. In many cases, through extensions of time, tentative selectees did not receive authorizations until many years later or ultimately, their applications were dismissed. This process didn't work then and it won't work now.

Even more troubling is ITF's proposal for the Commission to review each and every application for mutual exclusivity and, ultimately, choose from among applications under the then-current licensing mechanism.⁹ The problem with this plan is that it does not distinguish between acceptable interference and harmful interference. For instance, two applicants filing on the same day may propose predictable interference to each other that both deem acceptable.¹⁰ Under ITF's proposal, these parties would have to wait for a resolution by the FCC or enter into a formal settlement.

It is perhaps for this very reason that ITF prefers Commission resolution of interfering proposals by auction. But auctions will not work. First, the auction rules do not contemplate ITFS booster stations and response stations, begging the question as to how an auction would be conducted. Second, auctions may preclude the coordinated deployment of advanced systems, in light of the fact that MDS stations can be proposed under BTA authority but ITFS stations must take the substantial risk that they will be outbid.

ITF's plan to "streamline" faces the very real possibility that it will flatline the deployment of advanced ITFS and MDS services. The better course would be for the Commission to retain

⁹ Presumably, this licensing mechanism would be auctions.

¹⁰ As examples, the area of interference may be in an unpopulated area or may be operationally acceptable (*i.e.*, 44 dB co-channel protection), especially in a digital environment.

the two-way processing rules adopted in the *Order*, and extend those procedures to ITFS major change applications.

B. The Commission Should, However, Adopt Procedures For The Expedited Resolution Of Complaints Of Actual Interference.

There is little disagreement among the parties to this proceeding that Commission intervention may be required to resolve interference conflicts. As discussed in Part I above, Commission staff review of applications prior to grant to determine the presence of predicted interference is time-consuming, ineffective and wasteful. However, once stations have been placed in operation, it is appropriate for the Commission to adjudicate quickly those few instances of actual harmful interference.

In its Petition, the Consortium endorsed the plan recommended by BellSouth for the resolution of "documented complaints" of interference. The Consortium notes that, in its Opposition, BellSouth incorporated elements of CTN's plan to resolve some interference claims in a matter of a few days. Under the modified plan, the Commission could, upon clear and convincing proof, order the immediate cessation of transmissions from a station causing interference, until there is a formal adjudication of the complaint. As CTN states, the prompt remedy of interference "is of the utmost importance to ITFS licensees, to whom lost airtime can mean disruption of their educational mission."¹¹

The Consortium believes that this plan strikes the appropriate balance for resolving interference. Where the Commission is convinced that interference is being caused by a specific

¹¹ CTN Response at 16.

station, it can take quick action without permanently prejudicing the party. Then, following the filing of an opposition and reply, and after a settlement period, the Commission would make a final determination.

II. THE COMMISSION SHOULD ELIMINATE THE "NOTIFICATION ZONE" NOTICE PROVISIONS IN FAVOR OF A SERVICE REQUIREMENT.

In its Petition, the Consortium identified the anti-competitive, overly burdensome and unnecessary notice requirements of Sections 21.909(n) and 74.939(p), which require response station hub licensees to provide detailed notices to ITFS licensees with receive sites in the 1,960 "notification zone" 20 days prior to the initiation of service on a response station transmitter. Instead, the Consortium proposed that response station hub applicants serve copies of their applications on all ITFS licensees in the notification zone at the time the application is filed. CTN challenges this proposal on grounds that the Consortium's proposal does not provide sufficient information as to the location of response station transmitters that could cause interference.¹²

CTN's objections are unfounded. From a response station hub application, there is ample information for an ITFS licensee to determine the source of interference. The location and directional path of response station transmitters can be gleaned from the geographic location and other technical parameters of the application.

CTN also unfairly minimizes the burdens associated with the detailed notice requirements it favors.¹³ In point of fact, there is a huge difference between, on one hand, serving a copy of the application on affected parties at the time of filing and, on the other hand, sending certified

¹² *Id.* at 8.

¹³ *Id.* at 9.

mail notices for the potentially thousands of response stations that provide service. If an ITFS licensee is receiving so many notices, how can it reasonably determine which response station is actually causing the interference?

The approach urged by the Consortium puts all licensees on notice that a two-way system is in the area. This notice should be sufficient to give the licensee a point of contact to resolve interference concerns. To the extent the notice requirement is retained, the Consortium urges the Commission to clarify that the notice requirement may be waived by the ITFS licensee.

Conclusion

For the reasons discussed above and in its Petition, the Consortium urges the Commission to adopt its proposed rule changes in order to more effectively advance the objectives of the *Order*.

Respectfully submitted,

**THE SAN FRANCISCO-SAN-JOSE
EDUCATOR/OPERATOR CONSORTIUM**

By: 

Robert J. Rini
Rini, Coran & Lancellotta, P.C.
1350 Connecticut Avenue, NW, Suite 900
Washington, DC 20036
(202) 296-2007

February 18, 1999

Its Attorneys

CERTIFICATE OF SERVICE

I, Yvett J. King, with the law firm of Rini, Coran & Lancellotta, P.C., do hereby certify that the foregoing "Reply to Oppositions to Petition for Reconsideration" were served on the below listed parties by First Class U.S. Mail this 18th day of February, 1999.

Wayne Coy, Jr., Esq.
Cohn and Marks
1920 N Street, N.W., Suite 300
Washington, D.C. 20036
(Counsel to The National ITFS Association)

William D. Wallace, Esq.
Michael G. Grable, Esq.
Crowell & Moring, LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 2004
(Counsel to Catholic Television Network)

John B. Schwartz, President
Instructional Telecommunications Foundation, Inc.
P. O. Box 6060
Boulder, CO 80306

Paul J. Sinderbrand, Esq.
William W. Huber, Esq.
Wilkinson, Barker, Knauer & Quinn, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037-1128
(Counsel to Petitioners)

Robert F. Corazzini, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street N.W., Suite 200
Washington, D.C. 20006
(Counsel to C&W Enterprises, Inc., UT Television
Region IV Educational Service Center, George Mason University
Instructional Foundation, Humanities Instructional TV Educational
Center, Inc. Valley Lutheran High School, Indiana Higher
Education Telecommunications Systems, Views On Learning, Inc.,
Butler Community College, Denver Public Schools and Minnesota
Public Radio)

Kevin J. Kelley
Senior Vice President External Affairs
QUALCOMM Incorporated
2000 K Street, N.W., Suite 373
Washington, D.C. 20006

William B. Barfield
Thompson T. Rawls, II, Esq.
BellSouth Corporation
1155 Peachtree Street, N.E., Suite 1800
Atlanta, GA 30309

Steven A. Lancellotta, Esq.
E. Lawrence Zolt, Esq.
Rini, Coran & Lancellotta, P.C.
1350 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
(Counsel to Spike Technologies, Inc.)


Yvette J. King