

V. THE COMMISSION SHOULD ADOPT A UNIFORM SUBSTANTIAL SERVICE PERFORMANCE REQUIREMENT AND APPROPRIATE SAFE HARBORS FOR ALL MDS AND ITFS GSA LICENSEES

The proposed transition to a pure geographic licensing system for the 2.1 GHz and 2.5 GHz bands presents the need and opportunity to adopt appropriate performance requirements. Since site-specific applications will not be required for the vast majority of MDS and ITFS spectrum, the current approach of imposing relatively short construction deadlines on a facility-by-facility basis will no longer make sense.¹¹⁶ Rather clearly, the better approach is to do as the Commission has done with Part 27 and other wide-area licensing services – impose a requirement that the licensee demonstrate substantial service at the time of renewal, coupled with “safe harbors” designed to provide licensees with a measure of certainty and an appropriate period of time for service activation following adoption of the new rules, for those licensees with early forthcoming license expirations.”

¹¹⁶ See 41 C.F.R. §§ 21.43(a)(12 month MDS construction period); 73.3534(a)(18 month ITFS construction period).

¹¹⁷ There is ample precedent for applying that approach to the MBS, as well as non-MBS channels. Indeed, MBS licensing will be substantially like MDS BTA licensing is today – there will be a geographic area license holder, but it will be required to apply for site-specific authorizations. Although MDS BTA authorization holders today secure a separate license for each facility, those authorizations do not require construction of the facility by any particular date prior to the build-out date. If the Commission adopts the instant proposal, it should make clear that the construction periods contained within all outstanding MDS and ITFS conditional licenses have been superseded and that licensees have until their renewal performance certification dates to complete construction. This will not only eliminate any possible confusion, but will spare the industry of filing, and the Commission staff of processing, large numbers of construction deadline extension requests

If the Commission continues to impose construction deadlines on MDS and ITFS site-specific authorizations, then three revisions to its rules are essential. First, it should provide for a uniform construction period of two years for MDS and ITFS facilities. Subject to an exception for MDS licenses issued to BTA and PSA authorization holders, Section 21.43(a) establishes a 12-month construction period for all MDS stations. The construction period for ITFS stations, however, is 18 months per Section 73.3534(a). Since system operators invariably utilize a combination of MDS and ITFS channels simultaneously, it is most sensible to enforce the same construction period for both. WCA, NIA and CTN further believes that a longer construction period for both, *i.e.*, three years, which is the period adopted by the Commission for broadcast facilities, would be appropriate. As the Commission observed when it extended the construction period for broadcast stations to three years, a longer construction period conserves Commission resources by substantially reducing requests for additional time to construct. See 1998 *Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056, 23088-90 (1998). To further reduce the paperwork burden on the Commission’s staff, any new rule should be applied retroactively to authorizations outstanding at the time, providing all such authorizations a three-year construction period beginning on the effective date of the new rule; during the pendency of the proceeding, the Commission should defer consideration of construction extension requests (although allowing licensees to complete construction during the period in such cases where it makes sense to proceed).

Second, the Commission should revise Sections 21.40 and 73.3534 to permit extension of an MDS or ITFS authorization where substantial progress has been made towards construction of the MDS/ITFS operator’s entire system. Section 21.40(b) requires that an application to extend an MDS authorization must include a showing that (1) additional time is required due to circumstances beyond the applicant’s control or (2) there are unique and overriding public interest concerns that justify the requested extension. Section 73.3534(c) imposes a less stringent requirement on applications to extend ITFS authorizations, requiring only that the ITFS licensee provide a “sufficient justification for an extension”. However, individual MDS or ITFS authorizations are often part of an

A. Adoption Of A Performance Standard Coupled With Safe Harbors Will Serve The Public Interest

First and foremost, there is ample precedent for this approach. Indeed, the Commission has adopted this very same requirement for all Part 27 licensees, whether at 2.3 GHz, the Upper 700 MHz band, the Lower 700 MHz band, or the paired 1392-1395 MHz and 1432-1435 MHz bands and the unpaired 1390-1392 MHz, 1670-1675 MHz and 2385-2390 MHz bands.¹¹⁸ The Commission explained the public interest benefits of the substantial service/safe harbor concept in its 1997 decision to adopt that concept for WCS, a flexible use service that like MDS and ITFS can be used to provide a variety of video, voice and data services:

At the ten year period, we will require all licensees to submit an acceptable showing to the Commission demonstrating that they are providing substantial service. Licensees failing to demonstrate that they are providing substantial service will be subject to forfeiture of their licenses. We note that in the past we have defined substantial service as "service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal." For WCS, however, we believe that further elaboration on this standard in the form of examples of what might constitute substantial service is useful. Thus, for a WCS licensee that chooses to offer fixed, point-to-point services, the construction of four permanent links per one million people in its licensed service area at the ten-year renewal mark would constitute substantial service. In the alternative, for a WCS licensee that chooses to offer mobile

integrated network of multiple MDS/ITFS stations that will be at different stages of construction at any given time. In this situation, in addition to current grounds accepted as justification for extension, it is also appropriate to evaluate extensions for individual stations in the context of whether substantial progress has been made on the associated network as a whole; where such progress is shown to exist, the fact that the applicant has not progressed toward construction of any single station, or any particular channels of any station, should not be determinative. For example, if a licensee leases its MBS channels for downstream transmissions in an FDD system that utilizes multiple channels, and the system operator has built facilities operating on other channels since the construction authorization was secured for some other licensee in the same system, the licensee should be entitled to additional time to construct both MBS and non-MBS channels even though no progress was made on its facilities.

Third, for purposes of simplification, the Commission should eliminate the requirement in Section 73.3534(b) that ITFS extension requests be filed no less than 30 days prior to expiration of construction period. The MDS extension rule, Section 21.40, includes no such requirement. Again, to eliminate unnecessary differences between MDS and ITFS rules that serve the same purpose, WCA recommends that the 30-day requirement be deleted from Section 73.3534(b), so that the rules specifically permit that both MDS and ITFS extension requests to be filed at any time during the relevant construction period.

¹¹⁸ See *Upper 700 MHz Band First R&O*, 15 FCC Rcd at 505; *Lower 700 MHz R&O*, 17 FCC Rcd at 1079; *27 MHz R&O*, 17 FCC Rcd at 10011-12. See also *Rulemaking to Amend Parts 1, 2, 21, and 25 of The Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 12 FCC Rcd 12545, 12659-61 (1997), affirmed *Melcher v. FCC*, 134 F.3d 1143, 1161-2 (D.C. Cir. 1998); *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz*, 15 FCC Rcd 16934, 16950-52 (2000); *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, 12 FCC Rcd 18600, 18623-24 (1997).

services, a demonstration of coverage to **20** percent of the population of its licensed service area at the ten-year mark would constitute substantial service. In addition, the Commission may consider such factors as whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee's operations serve niche markets or focus on serving populations outside of areas served by other licensees. These safe-harbor examples are intended to provide **WCS** licensees a degree of certainty as to how to comply with the substantial service requirement by the end of the initial license term. This requirement can be met in other ways, and we will review licensees' showings on a case-by-case basis."

More recently, in applying this standard in the *27 MHz Proceeding*, the Commission recognized that "[c]ompared to a construction standard, a substantial service requirement will provide licensees greater flexibility to determine how best to implement their business plans based on criteria demonstrating actual service to end users, rather than on a showing of whether a licensee passes a certain proportion of the relevant population."¹²⁰ And, of particular applicability here (where incumbents with different sized GSAs will be dotted throughout the different size BTA authorizations issued for MDS and for ITFS channels), the Commission has recognized that where:

new licensees in different geographic areas will not be similarly situated due to varying levels of incumbency, specific benchmarks for all new licensees would be inequitable. In contrast, the substantial service standard provides us with flexibility to consider the particular circumstances of each licensee and how the level of incumbency has had an impact on the licensee's ability to build-out and commence service in its licensed area.¹²¹

The use of a standard that is evaluated on a case-by-case basis is particularly appropriate for MDS and ITFS licensees. Unlike most other services, MDS/ITFS system operators will be providing service using channels cobbled together from a variety of sources – their own BTA-authorized stations, incumbent MDS stations they own, and leased capacity of MDS and ITFS stations licensed to others. Thus, focusing merely on the population serviced via stations authorized pursuant to a particular license hardly tells the story as to whether the public is adequately served. Indeed, the Commission should recognize that in some cases the particular spectrum covered by one license, or certain channels authorized by a license, that is part of a larger operating system may not even be used at the time of renewal. Instead, it may be used in the system as a guardband – not used in the classic sense, but certainly a critical component of the system design. Or, the licensed spectrum may not be built-out, but instead may be held by

¹¹⁹ *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, 12 FCC Rcd 10785, 10843-44 (1997) (footnotes omitted).

¹²⁰ *27MHz R&O*, 17 FCC Rcd at 10011.

¹²¹ *Lower 700 MHz R&O*, 17 FCC Rcd at 1079.

the system operator for future use as the demands of the operating system expand. Or, alternatively, some systems may be constructed and used by particular constituents rather than the general population covered by a GSA. It is also essential that system operators just launching systems hold spectrum in reserve to address increases in demand and there is no valid reason to penalize MDS and ITFS licensees for providing that spectrum. Particularly with respect to licenses that come up for renewal in the early years of MDS/ITFS broadband deployment, a channel-by-channel evaluation will not provide an accurate assessment of service development. The flexibility inherent in the case-by-case application of the substantial service standard provides the Commission with a means of examining the entire picture, but the Commission must give the industry comfort now that it will view the broader picture.¹²²

B. The Commission Should Impose The Same Performance Requirement On MDS BTA Holders As Other MDS/ITFS Licensees

A migration of MDS BTA authorization holders from their present build-out requirement¹²³ to the substantial service approach is not only necessary to fulfill Chairman Powell's pledge to regulate like services similarly,¹²⁴ but it is entirely appropriate in light of the sea change in the MDS service over the past decade. When the Commission adopted rules in 1995 to govern the auctioning of MDS BTA authorizations, its objective was "to facilitate the development and rapid deployment of *wireless cable services*."¹²⁵ Soon after the MDS BTA

¹²² A substantial service standard will also afford the Commission an opportunity to tailor its review to the peculiar circumstances that may be confronting many MDS and ITFS licensees who face renewal over the next several years – spectrum that was used for video services or first generation broadband service during the license term may not be used at the time of renewal. Even today, many licensees are discontinuing video operations in contemplation of migrating to second generation broadband services once the Commission revises its rules. That is a sound practice that the Commission should encourage. There is no public interest benefit to preserving non-viable service offerings merely because renewal approaches and, to the contrary, such behavior will merely delay the deployment of the second generation broadband services. Moreover, Appendix B proposes a regime under which, once the new proposed rules go into effect, the transitional process may force the discontinuance of service in one or more markets in order to promote broadband deployment. Certainly a licensee who has been forced to cease operations should not be penalized at renewal when it was providing substantial service prior thereto. The simple fact is this – the evolution of MDS and ITFS to second generation broadband will not be easy, and it will not occur overnight. The Commission can assist this process by making clear that licensees that had been providing service, but happen not to be doing so at the time of renewal because they are evolving to new types of service offerings, will not be penalized. If nothing else, the Commission should make clear that during the next round of renewals, a licensee that had provided substantial service at any time during its prior license term should be entitled to renewal.

¹²³ Presently, Section 21.930(c)(1) of the Commission's Rules requires that "within five years of the grant of a BTA authorization, the authorization holder must construct MDS stations to provide signals pursuant to Sec. 21.907 that are capable of reaching at least two-thirds of the population of the applicable service area, excluding the populations within protected service areas of incumbent stations."

¹²⁴ See *infra* at note 62. Given the widespread use by the Commission of the substantial service standard, it is impossible to fathom any regulatory policy that would be advanced by subjecting MDS to one build-out standard and the other services discussed above to a far more liberal standard (particularly since the Commission has found that the more liberal standard actually better serves the public interest).

¹²⁵ *MDS BTA Auction Order*, 10 FCC Rcd at 9590. "Wireless cable" was defined as "the delivery of video programming to subscribers using MDS and/or ITFS channels." *Amendment of Parts 21 and 74 of the*

auction, several wireless cable system operators deployed new MDS stations authorized pursuant to BTA authorizations in order to add additional video programming to their then-existing multichannel video service offerings. However, as is discussed in detail *supra* in Section I, largely due to the emergence of DBS and digital cable, most wireless cable operators were unable to gain a foothold in the marketplace even with the new channels authorized through the BTA licensing system, the industry has taken substantial steps to evolve into the broadband wireless market, and is now looking to deploy the next generation of broadband wireless technology.

As a result, it comes as no surprise that most MDS BTA authorization holders, like many individual MDS and ITFS station licensees, have refrained from constructing the one-way video-oriented transmission facilities authorized by the Commission after the BTA auction.¹²⁶ Instead, they have taken a prudent course of action and deferred construction until they can deploy viable broadband systems.¹²⁷ Thus, most MDS BTA holders cannot comply with the current build-out rule unless they do what they have refrained from doing for years, *i.e.*, constructing the downstream video facilities that were authorized as a result of the long-form applications filed immediately following the MDS BTA auction. Not surprisingly, the Commission's Mass Media Bureau determined that this would disserve the public interest and thus extended the five-year BTA build-out period by two years -- from August 16, 2001 to August 16, 2003.¹²⁸ More importantly, in so doing, the Bureau acknowledged the concerns of MDS operators who believed that the extension was only an interim step and that the Commission ultimately should commence a rulemaking proceeding to adopt a substantial service renewal standard for MDS.¹²⁹

Indeed, the approach WCA, NIA and CTN advocate is nearly indistinguishable from the Commission's handling of the Interactive Video and Data Service ("IVDS") at 218-219 MHz. When Commission issued the initial IVDS licenses, it required each IVDS licensee to provide coverage to 10 percent of the population of its service area within one year of grant, 30 percent of the population of its service area within three years of grant and 50 percent of the population

Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, 9 FCC Rcd 7665, 7666 n.4 (1994).

¹²⁶ Under the Commission's rules, upon the close of the auction winning bidders were required to either apply for new stations within the BTA or demonstrate that they could not do so under the Commission's interference protection rules. *See* 47 C.F.R. § 21.956. Since at the time the MDS rules did not permit the sorts of facilities required to provide broadband services, the applications filed in the aftermath of the 1996 auction proposed facilities optimized for video services.

¹²⁷ No doubt many BTA authorization holders also are less willing to deploy facilities in light of the enormous regulatory uncertainty surrounding MDS spectrum over the past three years while the FCC is considered re-allocating the spectrum, first at 2.5 GHz and now at 2.1 GHz, for so-called "third generation" mobile services, without identifying comparable replacement spectrum or assuring the payment of full compensation. Under these circumstances, one can hardly fault MDS UTA authorization holders for refraining from construction.

¹²⁸ *Extension of the Five-Year Build-Out Period for BTA Authorization Holders in the Multipoint Distribution Service*, 16 FCC Rcd 12593, 12597 (2001). No extension was issued for those BTA holders whose build-out date is after August 16, 2003. *See id.* at 12596.

¹²⁹ *See id.* at 12597.

of its service area within five years of grant. The marketplace failure of IVDS, however, led licensees to request greater flexibility in the types of services that could be offered. In addition, IVDS licensees requested that the Commission adopt for IVDS a substantial service build-out benchmark on the then newly-adopted LMDS and WCS rules.¹³⁰ The Commission responded with its 1999 *Report and Order and Memorandum Opinion and Order* in WT Docket No. 98-169, where it (1) provided IVDS licensees the technical flexibility to provide a variety of new services, (2) permanently eliminated the three and five year construction requirements, and (3) replaced them with the same substantial service benchmark and safe harbors as were imposed on WCS and LMDS.¹³¹ There is no reason for the Commission not to take the same approach here.

In revisiting the MDS BTA build-out requirement, the upcoming rulemaking also affords the Commission an opportunity to clarify the definition of the service area that an MDS BTA authorization holder is required to analyze in demonstrating substantial service. Currently, Section 21.930(c) of the Commission's Rules requires the holder of an MDS BTA authorization to file with the Commission a showing demonstrating that it has met the BTA build-out requirement by providing signals "capable of reaching at least two-thirds of the population of the applicable service area, *excluding the populations within protected service areas & incumbent stations.*"¹³² A review of the history of the rule, however, makes it rather clear that the Commission's intent in adopting Section 21.930 was to include the protected service areas of incumbent stations within the control of the BTA holder when evaluating coverage.

When the Commission adopted Section 21.930, it was undisputed that the MDS was "a heavily encumbered service."¹³³ Indeed, the Commission recognized at the time that in most markets few channels were available for the auction winner, that in the majority of the top markets no MDS channel at all remained available, and that the "fixed 35-mile protected service areas of MDS incumbents . . . occupy substantial portions of most BTAs."¹³⁴ Because of the extent of such encumbrances, the Commission concluded that "a number of BTA service areas may be so encumbered that the winning bidder for such a BTA may be unable to file [an] application proposing another MDS station within the BTA while meeting the Commission's interference standards as to all previously authorized or proposed MDS and ITFS facilities."¹³⁵

The Commission anticipated, nonetheless, that MDS BTA holders would "be able to accumulate a sufficient critical mass of channels to launch a system in a market . . . through the

¹³⁰ For a full discussion of the history of IVDS and its evolution from strict construction benchmarks to the more flexible substantial service standard, see *Amendment & Part 95 & the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 15 FCC Rcd 1497 (1999).

¹³¹ *Id.* at 1535-40

¹³² 47 C.F.R. § 21.930(c)(1)(emphasis added)

¹³³ *MDS BTA Auction Order*, 10 FCC Rcd at 9604.

¹³⁴ *Id.*

¹³⁵ *Id.* at 9656.

assignment or transfer of previously authorized channels.”¹³⁶ Accordingly, the Commission specifically provided for the assignment of the licenses for incumbent stations to BTA authorization holders and for the assignment of BTA authorizations to incumbent licensees:

The holders of BTA authorizations and **MDS** incumbents may negotiate mergers, buyouts, channel swaps, channel splits or make similar arrangements on a voluntary basis Both parties are generally permitted to buy from and sell authorizations to each other and to third parties, with few limitations. Additional spectrum may be acquired by the holder of a BTA authorization through buyouts of incumbent licensees within their authorized BTA service area. . . . The holder of the BTA authorization may assign or transfer control of its entire BTA, which will include all authorized stations.”¹³⁷

Moreover, where the license for an incumbent station is acquired by the holder of the BTA authorization, the Commission has specifically provided that “the protected service area of the acquired station will extend to the BTA boundary or the existing 35-mile protected circular area (from the incumbent), whichever is larger.”¹³⁸ Because the protected service area of incumbent stations acquired by the BTA authorization holder extends to the boundary of the BTA, the Commission could not possibly have intended that the service areas of such stations would be excluded from the area for which the BTA holder must demonstrate service or that signals from such stations would not be counted toward compliance with the build-out requirement. The upcoming proceeding will provide the Commission an opportunity to affirm this analysis.

Furthermore, the Commission should clarify that the relevant area includes not only the service areas of incumbent stations which are directly owned by the entity which holds the BTA authorization, but also the service areas of incumbent stations which are owned by any entity which is controlled by the same ultimate parent company as is the BTA authorization holder. The Commission already permits the BTA holder to submit a showing “demonstrating that it is providing a signal level sufficient to provide adequate service to approximately two-thirds of the population of the area *within its control* in the licensed BTA.”¹³⁹ However, because incumbent **MDS** stations and the **MDS** BTA authorization are often owned by distinct subsidiaries of the same ultimate corporate parent and because the current wording of the Commission’s rule on **MDS** BTA build-out could potentially be interpreted otherwise, the Commission should specifically clarify that the service areas of incumbent stations licensed to affiliates of the BTA authorization holder would be included within the area the BTA authorization holder must serve. Such a clarification will help to avoid any misconception on the part of BTA authorization holders that only the service areas of incumbent stations that are directly owned would be

¹³⁶ *Id.* at 9607.

¹³⁷ *Id.* at 9613-14.

¹³⁸ *Id.*

¹³⁹ *MDS BTA Auction Order*, 10 FCC Rcd at 9613 (emphasis added).

counted within the area the BTA holder must serve, and will thereby conserve Commission resources by preventing the filing of otherwise unnecessary applications for assignments of licenses.

In sum, the Commission has freely acknowledged that “in a substantial number of BTAs, it may be difficult, if not impossible, for an auction winner to locate a station anywhere in the BTA . . . unless either the auction winner is the incumbent, negotiates an interference agreement with the incumbent or would acquire the authorization of the incumbent.”¹⁴⁰ It is therefore “difficult, if not impossible” to imagine that the Commission intended to count towards the build-out requirement of the BTA authorization holder only the signals from new stations licensed directly to the BTA authorization holder pursuant to its BTA authorization, where service is provided within the BTA by incumbent stations licensed to the BTA authorization holder or an affiliate of the BTA authorization holder. In other words, just as the Commission anticipated when it auctioned MDS BTA authorizations, “market forces [have led] to the accumulation of channels into one operating system.”¹⁴¹ Accordingly, there is no plausible public interest reason for the Commission to effectively force operators to focus their broadband build-out plans initially on areas served by BTA-authorized stations, rather than on areas served by incumbent facilities. Thus, compliance with MDS BTA build-out requirements (whether embedded in a “substantial service” test or otherwise) should be evaluated on the basis of the entire operating system within the BTA, rather than excluding incumbent stations owned or affiliated with the BTA authorization holder.

C. The Commission Should Immediately Suspend The MDS BTA Build-Out Period Until It Revisits That Policy

Just as they have requested the Commission to suspend existing individual MDS and ITFS station construction deadlines, WCA, NIA and CTN request that the Commission immediately suspend the MDS BTA build-out deadline in Section 21.930, as extended by the *MDS Build-Out Extension Order*. Again, the Commission’s treatment of IVDS provides the relevant precedent. There, a group of entities who had won licenses in the IVDS lottery filed a Petition for Rulemaking seeking review of the Commission’s IVDS rules, including the Commission’s IVDS build-out requirements.¹⁴² The Wireless Telecommunications Bureau subsequently suspended the three-year construction benchmark for IVDS lottery winners while the IVDS build-out policy remained subject to pending rulemaking proceedings.¹⁴³ Thereafter,

¹⁴⁰ *Id.* at 9604. *See also id.* at 9656 (stating that, where it did not already own the incumbent MDS stations within the **BTA**, the **BTA** holder’s objective in acquiring “such a heavily encumbered BTA would likely be to purchase the previously authorized or proposed MDS stations within the **BTA** and to maintain full flexibility to make modifications”).

¹⁴¹ *Id.* at 9607

¹⁴² *See Requests by Interactive Video and Data Service Auction Winners to Waive the January 18, 1998, and February 28, 1998, Construction Deadlines*, DA 98-59, ¶3 (rel. Jan. 14, 1998)[“*IVDS Build-Out Extension Order*”].

¹⁴³ *Requests by Interactive Video and Data Service Lottery Winners to Waive the March 28, 1997 Construction Deadline*, 12 FCC Red 3181 (1997).

the Bureau issued a similar suspension of the three-year build-out for IVDS auction winners, noting that “the subject rule directly impacts IVDS system planning and implementation,” and that a suspension was “consistent with prior Commission action suspending a deadline while relevant policy is subject to pending rule making proceedings.”¹⁴⁴ For the reasons discussed above, that reasoning applies with equal force to MDS auction winners and militates heavily in favor of suspending the MDS build-out deadline under the circumstances described herein.

VI. REMOVAL OF REGULATORY UNDERBRUSH AND CONFORMANCE TO WTB STANDARDS

One of the objectives WCA, NIA and CTN share is to promote elimination of unnecessary complexity in the regulatory regimes applicable to MDS and ITFS. In this final section of the white paper, they will advance a series of miscellaneous suggestions of rule changes the Commission can adopt that will eliminate unnecessary burdens, reduce transaction costs for MDS and ITFS licensees and channel lessees, and generally bring the MDS and ITFS rules into closer compliance with Part 27. Indeed, while there clearly is a need for special rules due to the educational nature of ITFS spectrum (such as eligibility, and minimum educational usage requirements, for which no changes are proposed), the Commission should closely examine all Part 21 and Part 74 MDS/ITFS rules that do not have an analog in Part 27 and generally conform the MDS/ITFS regulatory regime to that for WCS.

A. The Commission Should Eliminate Restrictions On Grandfathered E And F Channel Licensees

In connection with the transition to the new bandplan, WCA, NIA and CTN urge the Commission to eliminate the current policy of restricting the technical modifications that a so-called “grandfathered” E or F Group ITFS licensee is permitted to make. That policy was first adopted in 1983, and was designed to minimize the adverse interference impact that ITFS licensees on the E and F Group channels granted prior to the reallocation of those channels to MDS would have upon MDS lottery winners.¹⁴⁵ The technical rules WCA, NIA and CTN are proposing for operations under the new bandplan are amply protective of MDS and ITFS licensees alike, and there is no longer any need to impose special restrictions on E and F Group licensees.

B. Elimination of Customer Equipment Ownership and Control Requirements

Section 21.903(b)(1) requires a common carrier MDS station operator to “control[] the operation of all receiving facilities,” including any equipment necessary to convert an MDS signal to a standard television channel (excluding the television receiver). Section 21.903(b)(2) requires a common carrier MDS station operator to give a subscriber the option of owning his or her receiving equipment (except for the decoder) so long as (i) the subscriber provides the type of equipment specified in the MDS operator’s tariff; (ii) the equipment is in suitable condition

¹⁴⁴ *IVDS Build-Out Extension Order*, at ¶¶ 6, 7.

¹⁴⁵ *See Docket 80-112 R&O*, 94 F.C.C.2d at 1206-07.

for the rendition of satisfactory service; and (iii) such equipment is installed, maintained and operated pursuant to the MDS operator's instructions and control. These requirements (which are now over twenty-five years old) are not imposed on MDS stations that elect to operate in the non-common carrier mode, nor are they imposed on fixed wireless providers in other frequency bands that provide identical services, common carrier or otherwise (e.g., WCS, LMDS, 24 GHz and 38 GHz).¹⁴⁶ Moreover, for the reasons set forth below, these rules have become irrelevant in the wake of recent regulatory and marketplace developments, and thus should be eliminated entirely.

The Commission initially mandated operator control over MDS receiving equipment because, in the Commission's view at that time, MDS receiving equipment required "professional installation and maintenance in order to insure satisfactory quality of service and reasonable privacy of the transmission."¹⁴⁷ At the same time, the Commission wanted to preserve an MDS subscriber's right to own his or her receiving equipment, provided that it was compatible with the MDS operator's system and subject to the operator's control.¹⁴⁸ However, to the extent that MDS receive-only equipment is used to receive multichannel video programming service, these policies have been superseded by the Commission's rules for "navigation devices," which are defined to include any type of device used by consumers to access multichannel video programming and other services over multichannel video systems, including, *inter alia*, MDS antennas, downconverters and set-top boxes.¹⁴⁹ Those rules require that subscribers be permitted to own and attach MDS antennas, downconverters and set-top boxes, unless the attachment causes electronic or physical harm or would facilitate theft of service.¹⁵⁰ The Commission's rules for navigation devices thus reject Section 21.903(b)(1)'s "operator control" requirement for MDS receiving equipment, but preserve Section 21.903(b)(2)'s subscriber ownership requirement. As such, they render both rules superfluous where MDS receiving equipment is used to access multichannel video programming.

Furthermore, the rules are equally superfluous where MDS receiving equipment has a transmit function that enables a subscriber to transmit information "upstream" to an MDS base station. As a general matter, given that MDS providers are competing in a marketplace already dominated by incumbent cable operators and landline telephone companies, they already have more than enough incentive to exercise whatever control over their facilities is necessary to

¹⁴⁶ See 47 C.F.R. §§ 27.2, 101.511, 101.1013.

¹⁴⁷ *Initial MDS Order*, 45 F.C.C.2d at 625.

¹⁴⁸ *Id.*

¹⁴⁹ 47 C.F.R. § 76.1200(c); see also *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Report and Order*, 13 FCC Rcd 14775, 14784 (1998); *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Device?, Order on Reconsideration*, 14 FCC Rcd 7596, 7618 (1999).

¹⁵⁰ 47 C.F.R. § 76.1201. Similarly, an MDS operator that provides multichannel video programming generally may not take any action that prevents a subscriber from acquiring a navigation device from retailers, manufacturers or other unaffiliated sources, provided that the device does not perform conditional access or security functions. *Id.* § 76.1202.

ensure a high quality of service to the customer, without Commission regulation. Moreover, to the extent that concerns about professional installation were the primary rationale for Section 21.903(b)(1), those concerns can be addressed as proposed herein – just like they are addressed for WCS and other wireless broadband services. Finally, in view of the Commission’s desire to transform MDS into a “fully flexible service in which licensees can provide either one-way or two-way service in response to the demands of the marketplace,”¹⁵¹ it simply makes no sense for the Commission to continue imposing an antiquated subscriber ownership requirement on MDS transceivers. As it has already done for fixed wireless providers in other frequency bands, the Commission should give MDS operators the flexibility to customize their equipment ownership policies in a manner that is best suited to the marketplace and the technical and security needs of their networks.

C. The Commission Should Eliminate Obsolete MDS Filing Requirements

Scattered throughout Part 21 are a variety of filing requirements that are obsolete, yet impose burdens on licensees to file unnecessary documentation and on Commission staff that must process filings that are no longer applicable to any regulatory objective.

For example, take Section 21.937(a)(3) of the Rules, which requires that an MDS licensee file an interference consent agreement upon the earlier of the passage of thirty days from its ratification or the submission of an application dependent upon the agreement.¹⁵² In the ***MDS/ITFS Two-Way Report and Order***, the Commission adopted a procedure under which applicants need only certify that they had obtained any necessary interference consents, but are not be required to submit those consents to the Commission.¹⁵³ Apparently due to an inadvertent oversight, however, Section 21.937(a) was not deleted. To rectify that error, Section 21.937(a)(3) should be eliminated because it is obsolete.

The Commission would also do well to eliminate the annual filing by MDS licensees of a letter as to status of the licensee’s FCC Form 430 Licensee Qualification Report. That form is required of all new applicants for MDS facilities. Section 21.11(a) mandates that no later than March 31st of any given year, each filer of an FCC Form 430 must submit a revised FCC Form 430 if any changes in the reported information occurred during the prior year. WCA, NIA and CTN have no objection to these requirements. However, they believe that the Commission should eliminate the provision of Section 21.11 of the Rules that requires the annual submission by March 31 of a letter advising the Commission that no change to the FCC Form 430 information on file occurred during the prior year. Since Section 21.11(a) requires the submission of a revised form when changes have occurred, the Commission can and should assume that the failure to file such a report on FCC Form 430 by March 31st is a representation by the entity that no changes occurred during the preceding year.

¹⁵¹ *MDS/ITFS Two-Way Report and Order*, 13 FCC Red at 191 19 (emphasis added).

¹⁵² See *MDSBTA Auction Order*, 10 FCC Red at 9589.

¹⁵³ *MDS/ITFS Two-Way Report and Order*, 13 FCC Red at 19146-50.

Along similar lines is Section 21.13(f) of the Rules, which states in relevant part that "Whenever an individual applicant or a partner (in the case of a partnership) or a full time manager (in the case of a corporation) will not actively participate in the day-to-day management and operation of proposed facilities, the applicant or licensee will submit a statement containing the reasons therefore and disclosing the details of the proposed operation, including a demonstration of how control over the radio facilities will be retained by the applicant." The rule also requires the filing of management agreements or similar contracts where operation of the subject **MDS** facility has been delegated to an unaffiliated third party. WCA appreciates that the Commission must assure that a licensee retains the requisite control over its station. However, as the Commission recognized in the *MDS/ITFS Two-Way Report and Order*, the increasing cellularization and sectorization of MDS/ITFS systems utilizing spectrum licensed to multiple licensees make it increasingly likely that no licensee (other than the system operator) will have any day-to-day involvement in the operation and maintenance of the station. As a result, what had once been unusual (a licensee not controlling its facility on a day-to-day basis) has now become commonplace. To minimize filing burdens on licensees and the Commission's staff, the Commission should merely require applicants to certify that they will maintain the requisite control, rather than requiring the submission of demonstrative statements and copies of management contracts as is currently mandated by Section 21.13(f).

Finally, although not required by any specific rule, until recently many of the application forms filed by **MDS** applicants required them to have on file with the Commission copies of their articles of incorporation, partnership agreements or other underlying organizational documents. With the release over the past several years of new **MDS** application forms (specifically, FCC Forms 304, 305, 306, 33I and 430), those requirements have been eliminated. However, Section 21.305 of the Rules still requires that amendments to these sorts of organizational documents be filed. Given that the Commission no longer requires the filing of organizational documents, it should eliminate the requirement in Section 21.305 that amendments to such documents be filed.

D. The Commission Should Eliminate The Section 21.911 Annual Report

Since the days when **MDS** licensees were required to provide service pursuant to tariff as common carriers, Section 21.911 and a predecessor rule have required licensees to annually report to the Commission such information as the total hours of transmission service devoted to each of entertainment, education and training, public service, data transmissions and other services.¹⁵⁵ While it was not unduly difficult to comply with this requirement when **MDS** stations were used for the downstream transmission of cable-like video programming on a twenty-four hour a day, seven day a week basis, it has become virtually impossible for licensees to provide the required data now that **MDS** facilities are being used for two-way, digital wireless broadband services. An **MDS** licensee offering such service is transmitting digital bits, and whether those bits are being used to provide entertainment, education, data, or one of the other categories is unknown and, as a practical matter, unknowable to the licensee. Particularly since

¹⁵⁴ *Id.* at 19147.

¹⁵⁵ The requirements set forth in Section 21.911 were initially set forth in Section 43.72 of the Commission's Rules. See *Initial MDS Order*, 45 F.C.C.2d at 616; *1990 MDS/ITFS Report and Order*, 5 FCC Rcd at 6431-32.

the Commission has never articulated any purpose for collecting this categorized usage data, and to the best knowledge of WCA, NIA and CTN, has never made any use of this data, there is no reason to burden MDS licensees with the obligation to provide it. Moreover, it should be noted that, like other broadband service providers, those using MDS/ITFS to provide broadband services must submit on a semi-annual basis an FCC Form 477 to provide basic information about deployment of broadband service. This new requirement further obviates the need for imposing a separate Section 21.911 reporting requirement on MDS licensees (and MDS licensees alone among all broadband service providers).

E. The MDS “One-to-a-Market” Rule Should Be Repealed

Section 21.915 of the Rules provides that “[e]ach applicant may file only a single [MDS] application for the same channel or channel group in each area.” That rule was intended to avoid “stuffing the ballot box” by lottery hopefuls when the Commission utilized random selection to choose from among mutually-exclusive applicants.¹⁵⁶ Given that the Commission has recently gone to great lengths in the *MDS/ITFS Two-Way Order* to promote the cellularization of MDS usage in urban areas (which by its very nature requires multiple applications for the use of a given channel within the same area), and that the Commission long-ago ceased using lotteries to select from among mutually-exclusive applicants, this rule has outlived its usefulness and should be eliminated. Although WCA, NIA and CTN anticipate that most highly-cellularized services will be on non-MBS spectrum and thus no applications will be filed, continued retention of Section 21.915 could retard efforts by some MDS licensees to deploy downstream cellular operations in the MBS, where multiple applications for new facilities within a GSA may be necessary.

F. The Commission Should Substantially Modify or Eliminate The ITFS “Four Channel” Rule

Section 74.902(d)(1) provides that ITFS licensees are limited to the assignment of no more than four 6 MHz channels (and their associated I channels) in any area of operation, all of which are to be selected from the same channel group. WCA, NIA and CTN believe that this “Four Channel Rule” has outlived its usefulness, and should be substantially modified or eliminated.

In reality, in many markets the Commission routinely granted waivers of the rule *so* that educators choosing to work together could apply for, construct and operate ITFS stations to serve varied educational needs under the direction and control of a single licensee. The licensee was often a governmental entity (such as the state public television commission or a state university system) which would hold the license for and operate multiple stations to serve the needs of K-12, secondary, community college, university and adult learners. In other cases, the FCC granted waivers to particular licensees who demonstrated that they needed more than four channels in the market to serve their own transmission needs. Furthermore, licensees commonly applied for and

¹⁵⁶ See Amendment of Parts 2, 21, 74, and 94 of the Commission’s Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, Second Report and Order, 51 RR 2d, 943, 950-51 (1985).

were granted one or two channels from more than one group in a market, often because they originally used channels from one group as a studio to transmitter link to feed programming to channels from a second group. Given the current state of ITFS licensing patterns, and the expectation that existing ITFS licensees will often seek in upcoming ITFS BTA auctions to expand geographically the service areas of their existing channels by acquiring BTA licenses on those same channels, the continued existence of the Four Channel Rule would only frustrate legitimate expectations and/or require the Commission to review and act on numerous waiver requests. WCA, NIA and CTN believe that the rule would better be substantially modified or eliminated.

G. The Commission Should Require The Use of North American Datum (NAD) 83 Coordinate Data In AN MDS And ITFS Applications And Certifications.

Currently, coordinate data is supplied in NAD83 for applications utilizing FCC Form 331 but in NAD 27 for other MDS and ITFS application forms. For example, NAD 27 coordinate data is used even when certifying the completion of construction of MDS and ITFS facilities applied for using NAD83 coordinate data on FCC Form 331. For the sake of consistency, and because the Commission's antenna structure registration database utilizes NAD83 coordinate data, NAD83 coordinate data should be required for all MDS and ITFS applications and all Commission databases should be converted to NAD83.¹⁵⁷ In addition, the Commission should revise BLS so that all coordinate data is in NAD83, rather than the current hodge-podge of NAD27 and NAD83 data.

H. The Commission Should Amend Its Rules Applicable To Assignments And Transfers To Promote Secondary Market Transactions

1. Amend Sections 21.11(d) and (e) to extend consummation deadlines. Under Section 21.11(d), an assignment of an MDS license must be completed within 45 days from the date of authorization; Section 21.11(e) applies the same 45-day consummation deadline to MDS transfers of control. Invariably, however, the 45-day time period proves to be insufficient and the parties to the underlying assignment or transfer must seek the Commission's approval for an extension of time. For example, extensions are frequently required because the parties prefer to delay consummation until after the Commission consent becomes "final," *i.e.*, no longer subject to reconsideration or review. Because a petition for reconsideration can be filed 30 days after the Commission gives public notice of the grant (which notice can occur somewhat after the grant itself),¹⁵⁸ and the Commission itself has 40 days in which to review the grant,¹⁵⁹ consent does not become "final" until just before (and in some cases, after) the 45 day period to consummate has expired. In this situation, the parties have little choice but to request an extension of time to ensure that they have adequate time to close the underlying assignment or transfer. Since such

¹⁵⁷ Recognizing that the conversion may result in inconsistencies between the location and licensed facilities in the MBS and the Commission's antenna database, the Commission should consider affording all MDS and ITFS licensees an opportunity to bring their BLS station records into conformity with the antenna database without the need to formally apply for a new station license.

¹⁵⁸ See 47 C.F.R. § 1.104(b).

¹⁵⁹ See 47 C.F.R. § 1.102(a)(2).

extension requests are routinely granted (WCA, NIA and CTN are unaware of any instance to the contrary), they merely impose additional paperwork burdens on applicants and the Commission's staff that can be eliminated simply by extending the 45-day consummation period.

Accordingly, it is requested that the Commission amend Sections 21.11(d) and (e) to routinely afford parties 75 days in which to consummate assignments and transfers of control.¹⁶⁰ It should be noted that the Commission, on its own motion, has already amended its rules to extend the consummation deadlines for assignments and transfers of licenses in the Wireless Radio Services, citing reasons similar to those given above.¹⁶¹ Amending Sections 21.11(d) and (e) as requested herein would be entirely consistent with that decision.

2. Amend Section 21.38 to eliminate prior approval requirement for *pro forma* assignments and transfers of control. In its 1998 *Memorandum Opinion and Order* granting the Federal Communications Bar Association's Petition for Forbearance (the "FCBA Petition") regarding non-substantial assignments and transfers of wireless licenses, the Commission permitted *pro forma* transfers and assignments without prior consent (subject to after-the-fact notice to the Commission) and declared that "[w]e will apply forbearance from section 310(d) requirements for pro forma applications *uniformly* to telecommunications carriers licensed under Part 21 (domestic public fixed radio services), Part 22 (public mobile radio services), Part 24 (personal communications services), Part 27 (wireless communications services), Part 90 (private land mobile radio services), and Part 101 (fixed microwave services) of our rules."¹⁶² However, the Commission amended the relevant Part 22, Part 24, Part 27, Part 90 and Part 101 Rules, but not Section 21.38.¹⁶³ Accordingly, it is requested that Section 21.38 be amended to give full effect to the Commission's ruling on the FCBA Petition.

3. Amend all restrictions on assignments and transfers. Subject to limited exceptions for *pro forma* and involuntary transactions, Section 21.39(a) states that an MDS conditional license "may not be assigned or transferred prior to the completion of construction of the facility and the timely filing of the certification of completion of construction." Hence, absent a Commission waiver, the rule prohibits assignments or transfers of new MDS stations for which an application remains pending, or of new MDS stations which have been authorized by the Commission but remain unbuilt.¹⁶⁴ The rule, however, predates the Commission's adoption of its BTA licensing

¹⁶⁰ Parties would be required to notify the Commission of consummation within ten (10) days thereof, as currently specified in the rule.

¹⁶¹ *Amendment of Section 1.948(d) of the Commission's Rules to Extend the Time for Consummation and Notification of Wireless Transfers and Assignments*, 14 FCC Rcd 18828 (1999)(extending consummation deadline for assignments and transfers of Wireless Radio Service licenses from 60 to 180 days).

¹⁶² *Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licensees and Transfers of Control Involving Telecommunications Carriers and Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd 6293,6306-07 (1998) (emphasis added).

¹⁶³ See *id.* at 6314-18.

¹⁶⁴ 47 C.F.R. § 21.39(b)(1). The rule also requires the Commission to undertake an "anti-trafficking" review of an assignment or transfer of an MDS station that has been operational for less than one year where (i) the station was

system for MDS, in which it specifically exempted assignments and transfers of BTA and PSA MDS authorizations from the anti-trafficking provisions of Section 21.39.¹⁶⁵ Moreover, as MDS operators move towards constructing integrated, highly cellularized facilities, their networks will consist of any number of cell sites, each at different stages of construction and controlled by a different call sign. Where an MDS licensee seeks to assign or transfer its system in whole or in part, it simply makes no sense to prohibit such transactions solely because some cell sites are built and others are not. There appears to be a similar policy with respect to ITFS facilities. Accordingly, all restrictions on assignments and transfers applicable to MDS and ITFS should be eliminated.¹⁶⁶

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authorized pursuant to a comparative hearing or (ii) the station was authorized following a random selection proceeding in which the winning applicant received preference. *Id.* § 21.39(b)(1), (3).

¹⁶⁵ See 47 C.F.R. § 21.934(c) (“Transfers of control or assignments of BTA or PSA authorizations are subject to the limitations of §§ 21.4, 21.900 and 21.912 of this subpart) and § 21.934(c) (“The anti-trafficking provision of § 21.39 does not apply to the assignment or transfer of control of a BTA or PSA authorization, which was granted pursuant to the Commission’s competitive bidding procedures.”). The purpose of the exemption was to accord BTA authorization holders and MDS incumbents greater flexibility when buying and selling their facilities. See *MDS BTA Auction Order*, 10 FCC Rcd at 9613 (“The holders of BTA authorizations and MDS incumbents may negotiate mergers, buyouts, channel swaps, channel splits or make similar arrangements on a voluntary basis, pursuant to the general assignment and transfer provisions of 47 C.F.R. § 21.38. Both parties are generally permitted to buy from and sell authorizations to each other and to third parties, with few limitations.”).

¹⁶⁶ Cf. *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 13 FCC Rcd 23056, 23070 (1998) (elimination of anti-trafficking rule for unbuilt broadcast stations).