

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
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Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands)	WT Docket No. 03-66 RM-10586
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Part 1 of the Commission's Rules - Further Competitive Bidding Procedures)	WT Docket No. 03-67
)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions)	MM Docket No. 97-217
)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico)	WT Docket No. 02-68 RM-9718

COMMENTS

Grand MMDS Alliance New York F/P Partnership (“Grand Alliance”), by its attorneys, hereby files these comments in the above-captioned rulemaking proceeding.¹ Grand Alliance applauds the FCC’s effort to better manage valuable and underutilized Instructional Television Fixed Service (“ITFS”) and Multichannel Multipoint Distribution Service (“MMDS”) spectrum.

¹ See *In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 6722 (2003) (“*NPRM*”).

Grand Alliance strongly supports the Commission's proposal to permit only low-power operations in the ITFS and MMDS spectrum. The use of the spectrum, even partially, for video transmission over high-powered facilities in these bands is inefficient and not financially viable as a commercial enterprise. Reasonable compromises may be possible to permit some continued non-commercial, high-power video operation, but only if such compromises do not jeopardize the ability of the remaining spectrum to be put to better use as soon as possible.

Grand Alliance encourages the FCC to require a mandatory and rapid transition for all licensees to any new technical rules by a date certain, within no more than two to five years. Although the details remain somewhat unclear, Grand Alliance is impressed by the potential of a two-sided auction to facilitate the transition. It is critically important to any expeditious transition that the Commission establish and maintain clear and consistent policies regarding the relative rights of the licensees. In that regard, Grand Alliance urges the Commission, consistent with its original orders reallocating E and F group channels to MMDS, not to diminish the rights of grandfathered MMDS licensees on the E and F group channels relative to those of the grandfathered ITFS licensees on the same E and F group channels.

Background

Grand MMDS Alliance New York F/P Partnership. Grand Alliance operates an MMDS station from the Empire State Building in New York City, providing west-facing service on the F group channels.² It took Grand Alliance over ten years to begin operations of even these limited facilities in large part because of difficulties in negotiating with the incumbent ITFS licensee. The incumbent ITFS licensee holds licenses in the New York City area for both the B and F

² See Letter to Grand MMDS Alliance New York F/P Partnership from Charles E. Dziedzic, Assistant Chief, Video Services Division, Reference No. 1800E6, File No. 5455-CM-P-83, at 4 (May 6, 1997).

group channels.³ Its main station operates on the B group channels, and it uses its F channel stations merely as relays to provide service to a limited number of receive sites that are allegedly shadowed from service by the B channel transmitter.⁴ Grand Alliance has offered to transition the ITFS licensee to more efficient operations that would be maintained by Grand Alliance and would permit the ITFS licensee to provide at least the same level of service and compensate the ITFS licensee monetarily, but those negotiations have not been successful.⁵ At one time, a deal was blocked by third parties objecting to potential technical interference.⁶ More recently, the ITFS licensee decided to negotiate a more lucrative deal with another MMDS operator that included leased use of the F group channels for commercial purposes that is mutually exclusive with full deployment of facilities by Grand Alliance.⁷

With additional flexibility and the legal ability to provide service within its full protected service area, Grand Alliance expects to use its F group channels to deploy low-power facilities capable of providing two-way, high-speed mobile services to a variety of mobile terminals, including PDAs, laptops and mobile video phones. This is the most efficient and highest value use for this spectrum. *See, e.g., NPRM*, at ¶¶ 26-46. Once regulations are in place that clearly

³ *See, e.g., In the Matter of Trans Video Communications, Inc.*, DA 03-2793, at ¶ 1 n.1 (September 5, 2003).

⁴ *See, e.g., Grand Alliance, Consolidated Petition to Deny*, File Nos. BPIFH-20000818AJP *et al.* (April 2, 2001); *Grand Alliance, Petition to Deny Application*, File No. BMPIF-19950914MF (January 11, 1996).

⁵ *See, e.g., Grand Alliance, Informal Comments of Grand Alliance*, File No. BMLIF-870429DF, at 3 (March 14, 1996) (“As envisioned, [the incumbent ITFS licensee] would consolidate its B Channel operations on the [Empire State Building] in order to reach all of its receive sites, thus leaving the F Channel Block free for Grand Alliance commercial service.”).

⁶ *Id.* at 2-3.

⁷ *Id.* at 4.

and definitively permit the spectrum to be used for such operations, Grand Alliance believes that it would be able to begin operations within two to five years.

Notice of Proposed Rulemaking. In the *NPRM*, the Commission seeks comments regarding proposals to change substantially the ITFS and MMDS service rules in order to increase the efficient use of spectrum, promote competition, and increase licensee flexibility. *See NPRM*, at ¶¶ 1, 3. The Commission initiated the *NPRM*, in part, as a result of a white paper submitted by representatives of licensees of ITFS and MMDS spectrum (collectively, the “Coalition”).⁸ Given the evidence of the continued decline for use of the spectrum for video services, the Commission acknowledges a need for rule changes to facilitate other uses of the spectrum, in particular two-way broadband services. *See NPRM*, at ¶ 27.

In the *NPRM*, the Commission proposes a variety of changes to the relevant service rules to facilitate such transition. For instance, the Commission proposes reconfiguring the 2500-2690 MHz band to provide greater contiguous blocks of spectrum,⁹ imposing uniform low-power operations or significantly reducing the amount of spectrum allocated for high-power video transmissions,¹⁰ and licensing applicants on a geographic basis and converting site-based licenses to geographic licenses.¹¹ The Commission also raises the possibility of protecting additional, incumbent ITFS receive sites, beyond those covered by the 1983 reallocation rules,¹² and

⁸ *See* “A Proposal for Revising the MDS and ITFS Regulatory Regime,” RM-10586 (October 7, 2002) (“Coalition Proposal”).

⁹ *See NPRM*, at ¶¶ 49-59.

¹⁰ *Id.* at ¶¶ 56-57.

¹¹ *Id.* at ¶¶ 85-88.

¹² *Id.* at ¶ 88; *see In the Matter of 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*

permitting the *pro rata* apportionment of spectrum shared in a channel group (i.e. Safe Harbor #4).¹³ Additionally, while not mentioned in the *NPRM*, the Coalition proposed removing the technical restrictions on grandfathered E and F group ITFS licensees.¹⁴

With respect to the mechanism to transition existing licensees to the new rules, the Commission asks for comments on the Coalition’s recommendation for a market-by-market approach, where any MMDS or ITFS licensee or lessee having a geographic service area (“GSA”) within 150 miles of another licensee’s GSA could trigger a transition process. *See NPRM*, at ¶¶ 98-101. MMDS licensees would be required to pay for their own conversion cost; the licensee triggering the transition process (“Proponent”) would be required to pay the conversion costs for ITFS operators; any party offering commercial service using MMDS or ITFS spectrum would be required to reimburse the Proponent for the party’s *pro rata* share of the cost of transitioning facilities. *Id.* at ¶ 99. Under the Coalition’s proposal, there are no fixed deadlines, the triggering party could halt the transition process at any time, and the Commission must enact detailed “safe harbors” describing nine different kinds of proposals that licensees subject to transition would have to accept. *Id.*

The Commission also requests comments on its general proposal to conduct a two-sided auction. *NPRM*, at ¶¶ 232, 241-46. In such an auction, both unlicensed and licensed spectrum

Service, the Multipoint Distribution Service and the Private Operational Fixed Microwave Service, Memorandum Opinion and Order on Reconsideration, 98 FCC 2d 129, at ¶ 12 (1983);

¹³ *See NPRM*, Appendix C, at pp. 132-133.

¹⁴ *See Coalition Proposal*, at p. 51. The Coalition has expressed no view regarding eliminating the non-technical restrictions on grandfathered ITFS licensees. *See Reply Comments of WCA, NIA and CTN, RM-10586*, at 4 nn. 9-10 (November 29, 2002).

would be available to eligible bidders. *Id.* at ¶ 232. Proceeds attributable to previously licensed spectrum would be distributed to the respective incumbent licensee(s). *Id.* at ¶ 244. According to the Commission, such an auction could facilitate the transition to a more efficient use of the spectrum. *Id.* at 243.

Discussion

I. THE NEW TECHNICAL RULES SHOULD PROVIDE FOR MORE SPECTRUM EFFICIENT OPERATIONS

Grand Alliance strongly supports the Commission's proposal to transition all use of the ITFS and MMDS spectrum to low-power operations. Uniform low-power operations are the most efficient way to use the spectrum, and they permit provision of new, advanced broadband services for which additional spectrum is sorely needed if the United States is to stay in the forefront of technology development.¹⁵ In contrast, as has been amply demonstrated by experience, the use of these bands for high-power video is both inefficient and of diminishing value.¹⁶

Despite billions of dollars of investment, the existing high-power services have failed to establish any clear commercial value. The non-commercial value for transmission of instructional programming remains, but such programming can be provided far more efficiently using alternative technologies and without using dedicated spectrum. For instance, instructional programming can be provided using high-speed Internet connections, which is particularly

¹⁵ See *NPRM*, at ¶¶ 32-46.

¹⁶ *Id.* at ¶¶ 26-27; *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112, at ¶ 7 (1998).

accessible in urban markets where there are generally several facility-based alternatives. *See NPRM*, at ¶ 114. Without in any way casting aspersions on the value of the services provided by ITFS licensees, it makes no sense for such licensees to use significant blocks of prime spectrum in a high-power mode in order to transmit a few hours a week of instructional programming. (In the case Grand Alliance has had to deal with, involving the use of the F group channels as relays, the underutilization ties up 48 MHz of spectrum in the middle of the most densely-populated and spectrum-hungry area in the United States.) Moreover, the instructional programming that these licensees provide also can be offered in a low-power environment, as a conventional Internet service. Thus, the Commission should be able to transition all licensees to a low-power environment without in any way compromising the Commission's commitment to protecting the continued provision of instructional programming.

If, nonetheless, the Commission decides that it must maintain some flexibility for continued high-power operations, Grand Alliance urges the Commission to do so in a way that is least problematic for the development of widespread low-power operations. As discussed below, this means requiring all licensees to participate in a transition to any new technical rules by a date certain. It also should mean that any compromise resolves the kinds of problems that have prevented grandfathered MMDS licensees operating on the E and F group channels from fully developing their facilities.

One way to do this would be to preclude grandfathered ITFS licensees on the E and F group channels from continuing to use their frequencies inefficiently, as relays for other ITFS

operations in the same service area.¹⁷ If a grandfathered MMDS licensee on these channels is willing to provide the necessary facilities, the ITFS licensees should be required to transition to high-power facilities on other frequencies, thus permitting the MMDS licensees to use the E and F group channels exclusively for low-power operations.

Another reasonable compromise that is based on the Coalition's proposal would be to require E and F group channel MMDS licensees to transition respective incumbent ITFS licensees to digital operations on a channel in the high-power portion of the reconfigured band.¹⁸ Under digital operations, an ITFS licensee would be able to provide on one channel at least the same amount of programming that it currently provides using four channels.¹⁹

II. THE TRANSITION PROCESS SHOULD BE SWIFT AND CERTAIN, REQUIRING ALL LICENSEES TO COMPLY BY A DATE CERTAIN

If Grand Alliance's own experience has taught anything, it is that reliance on voluntary negotiations without any firm deadlines is a prescription for deadlock. Where there are overlapping rights in a geographic area, as there are for grandfathered MMDS and ITFS licensees on the E and F group channels, the Commission must require a transition to new technical rules by a date certain. In this case, because of the importance that this spectrum be made available as soon as possible for two-way broadband, Grand Alliance urges the Commission to transition all licensees to the new rules within two to five years.

¹⁷ This situation is distinct from the legitimate one (which is more typical in rural markets) in which an ITFS licensee uses a second set of frequencies to extend the reach of its signal, beyond its main market, into low density areas.

¹⁸ See *NPRM*, at ¶¶ 49-57.

¹⁹ See, e.g., *In the Matter of Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Services Stations*, 11 FCC Rcd 18839 (1996) (“[A] highly compressed ratio permits the operator to offer six program channels over one 6 MHz channel”).

The Coalition proposal for transition is problematic because of its emphasis on market-by-market transitions, without any deadlines or any clear requirement that all licensees participate. Moreover, it does not clearly explain how competing proposals or proponents will be handled, that a proponent demonstrate sufficient financial ability,²⁰ what will happen if a proponent withdraws, or how daisy chains will be avoided.²¹

The two-sided auction method appears capable of providing for a swift and certain transition. All licensees should be required to participate in the auction. An ITFS licensee that is using its grandfathered E or F group channels only as relays inside the same market in which it operates its main station should be entitled to benefit only from the sale of the channels it uses for its main station.

In any transition, the Commission must be fair in establishing the rights of grandfathered MMDS licensees on the E and F group channels. Such licensees should have clear rights to provide low-power service throughout their service area, subject only to resolution of overlapping service areas with other MMDS licensees and protecting any remaining co-channel, pre-1983 ITFS receive sites.²² Co-channel ITFS licensees or their lessees should not be accorded any new rights to additional protection (including any new receive sites), or, as suggested by the Coalition, have the technical (or other) restrictions on their grandfathered operations lifted. Any other conclusion would be inconsistent with the Commission's stated intent in the original orders

²⁰ See Coalition Proposal, Appendix B, at 20 (proposing only generally that the "Transition Plan ... provide for the establishment of an escrow or other appropriate mechanism for ensuring completion of the transition.").

²¹ See, e.g., Comments of MMDS Licensee Coalition (November 14, 2003).

²² Thus, the Commission should reject any interpretation of Safe Harbor #4 which permits *pro rata* apportionment of spectrum between grandfathered, co-channel MMDS and ITFS licensees operating on the E and F group channels.

reallocating the E and F group channels to MMDS and “freezing” incumbent ITFS operations on those channels,²³ and would divest such MMDS licensees of their reasonable investment-backed expectations.²⁴

²³ As the Commission stated clearly when it assigned MMDS licenses for the E and F group channels:

Grandfathered ITFS stations operating on the E and F channels will only be protected to the extent of their service that is either in the operation or the application stage as of May 26, 1983. These licensees or applicants will not generally be permitted to change transmitter location or antenna height, or to change transmission power. In addition, any new receive stations added after May 26, 1983 will not be protected against interference from MDS transmissions. In this fashion, all facets of grandfathered ITFS operations were frozen as of May 26, 1983.

See In the Matter of 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, Memorandum Opinion and Order on Reconsideration, 98 FCC 2d 129, at ¶ 12 (1983); see also In the Matter of Trans Video Communications, Inc., DA 03-2793, at ¶ 11 (September 5, 2003) (affirming the quoted language and stating that “[i]n making that determination, the Commission determined that it would be in the public interest to allow MDS operators to use [the E and F group] channels, as opposed to allowing ITFS operators to modify or expand their systems”).

²⁴ *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Conclusion

Therefore, consistent with the above comments, Grand Alliance respectfully requests that the Commission adopt new rules for the ITFS and MMDS spectrum that mandate a speedy transition to low-power operations.

Respectfully submitted,

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