

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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| In the Matter of |) | |
| |) | |
| Amendment of Parts 1, 21, 73, 74 and 101 of |) | WT Docket No. 03-66 |
| the Commission's Rules to Facilitate the |) | RM-10586 |
| Provision of Fixed and Mobile Broadband |) | |
| Access, Educational and Other Advanced |) | |
| Services in the 2150-2162 and 2500-2690 |) | |
| MHz Bands |) | |

To: The Secretary

Attn: The Commission, *en banc*

PETITION FOR RECONSIDERATION

AD HOC MDS ALLIANCE (Ad Hoc), by its attorney, respectfully petitions the Federal Communications Commission for reconsideration and/or clarification, in limited part, of the Third Memorandum Opinion and Order in the captioned proceeding, included in FCC 06-46 adopted April 12, 2006, released April 27, 2006 and published in the Federal Register at 71 Fed. Reg. 35178 (June 19, 2006).¹ In support thereof, Ad Hoc respectfully states:

Introduction

In this proceeding, the Commission is establishing rules for the rebanding of 2500-2690 MHz, and fostering the development of advanced telecommunications in the rebanded spectrum. Necessarily, however, the issues under consideration in this proceeding are interrelated to issues under consideration separately in ET Docket No. 00-258, particularly as they relate to the reloca-

¹ Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order. Ad Hoc's petition is directed at issues discussed in the Third Memorandum Opinion and Order portion of the consolidated order, cited hereinafter as "Third MO&O" for convenient reference.

tion of licensees of former Channels MDS 1 and 2/2A (now “BRS 1” and “BRS 2/2A”) from 2150-2160/62 MHz to 2496-2502 MHz (BRS 1) and 2618-2624 MHz (BRS 2).²

Ad Hoc is comprised of minority and small business enterprises holding licenses for MDS Channel 1 and MDS Channel 2 in 16 major markets³ covering a population of nearly 80 million persons throughout the United States. It has been an active participant and commenting party throughout the AWS and related proceedings, encouraging the Commission to adopt policies that mitigate the harm to minority and small business license holders arising from the reallocation of the 2150-2162 MHz band for advanced wireless services.⁴

Additionally, all of the MDS Channel 2 stations licensed to Ad Hoc members in its markets are licensed as “Primary MDS Stations,”⁵ in contrast to other MDS Channel 2 stations that are licensed as “Secondary MDS Station.”⁶

² See generally, e.g., *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems; Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands (Ninth Report and Order and Order)*, FCC 06-45, adopted April 12, 2006 and released April 21, 2006, 71 Fed. Reg. 29818 (May 24, 2006) (the “AWS Ninth Report”).

³ Atlanta, GA; Chicago, IL; Columbus, OH; Detroit, MI; Houston, TX; Indianapolis, IN; Los Angeles, CA; Milwaukee, WI; Minneapolis, MN; New York, NY; Oklahoma City, OK; Phoenix, AZ; Sacramento, CA; San Francisco, CA; St. Louis, MO; and Washington, DC.

⁴ See, e.g., Comments of the Ad Hoc MDS Alliance on the Further Notice of Proposed Rule Making, ET Docket No. 00-258, *et al.*, October 22, 2001 (the “Ad Hoc Comments”); Reply Comments of the Ad Hoc MDS Alliance on the Further Notice of Proposed Rule Making, ET Docket No. 00-258, *et al.*, November 8, 2001 (the “Ad Hoc Reply Comments”). See also Comments of the Ad Hoc MDS Alliance Supporting the NTIA Report, ET Docket No. 00-258, August 8, 2002; and Comments of the Ad Hoc MDS Alliance in Response to Third Notice of Proposed Rule-making, ET Docket No. 00-258, April 14, 2003.

⁵ See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems; the Establishment of Policies and Service Rules for the Mobile-Satellite Service in the 2 GHz Band; Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690 MHz Frequency Bands for the Mobile-Satellite Service; Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service; Petition for Rule Making of UTStarcom, Inc., Concerning the Unlicensed Personal Communications Service (Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order)*, 18 FCC Rcd 2223, at Appendix E (FCC 2003).

⁶ See, e.g., *id.*

Ad Hoc appreciates the substantial efforts by the Commission to accomplish this complex and ambitious task under terms and conditions fair to all of the affected parties, and accordingly seeks only limited clarification and/or reconsideration of the Third MO&O as it relates to the determination of the Geographic Service Area of incumbent site-based licensees of BRS 2. Specifically, Ad Hoc requests that the Commission clarify (or modify Section 27.1206 to provide) that provisions requiring adjacent licensees to “split the football” do not apply *either* to (a) overlapping areas between primary BRS 2 licensees and secondary BRS 2/2A licensees, *or* to (b) the 2622-2624 MHz band where a primary BRS 2 licensee overlaps with a primary BRS 2A licensee.

Argument in Support of Clarification or Reconsideration

Although the Commission does not explicitly so state, it appears that the Commission contemplates that MDS Channel 2A licensees (2156-2160 MHz) will be afforded a windfall during their relocation by being upgraded from a four MHz channel at 2.1 GHz to a full six MHz channel (2618-2624 MHz) at 2.6 GHz. Ad Hoc believes this feature of the Commission’s plan is at best of questionable legality, since the Commission has never discussed why Channel 2A licensees should receive such an upgrade or made any determination that affording a windfall uniquely to Channel 2A licensees is in the public interest.⁷

Nonetheless, Ad Hoc’s concern is not the upgrade of Channel 2A to a full six MHz channel *vel non*, but rather is the potential for infringement of service areas of “grandfathered” Channel 2 stations, after the relocation, by application Section 27.1206(a) of the rules governing split-

⁷ *Cf.*, e.g., 47 U.S.C. §303(c), limiting the Commission’s power to “[a]ssign bands of frequencies to the various classes of stations, and assign frequencies for each individual station” to those situations where “public convenience, interest, or necessity requires”. The Commission has never determined that “public convenience, interest, or necessity requires” Channel 2A licensees to receive an upgrade to a full six MHz channel as part of their relocation to 2.6 GHz; and the Commission otherwise has made emphatically clear that licensees are entitled only to *comparable* facilities and not to a windfall.

ting the football between adjacent Channel 2 and Channel 2A licensees. If the football is split throughout the entire 2618-2624 MHz after relocation of Channel 2/2A stations, the primary BRS 2's service area is downgraded or reduced in the 2622-2624 MHz band from its properly authorized 35 mile radius, notwithstanding that the former Channel 2A licensee never had any legitimate expectation of operating in the 2622-2624 MHz band to begin with.

As an illustrative case in point, Ad Hoc invites the Commission's attention to the overlap between primary MDS Channel 2 licensed to Washington MDS Company, Call Sign WHT747, and MDS Channel 2A licensed to Sprint/Nextel, Call Sign WLK242. While splitting the football between WHT747 and WLK242 in the 2618-2622 MHz band is a reasonable accommodation of conflicting interests, requiring WHT747 to forego *any* of its previously authorized service area in the 2622-2624 MHz band plainly is not. Accordingly, the Commission should clarify on reconsideration that in the 2622-2624 MHz band, an MDS Channel 2A licensee is not entitled to the provisions of Section 27.1206(a) of the rules governing the allocation of overlapping service areas, when the overlap is with a BRS 2 station previously afforded primary status on MDS Channel 2.

In this regard, Ad Hoc points out that WHT747 also overlaps with another primary Channel 2 station in Baltimore, Call Sign WHT571. Ad Hoc does not dispute the football concept with its overlap of the Sprint/Nextel Baltimore channel, as both are primary stations and "splitting the football" is the fairest way to resolve that overlap.

The Commission similarly should clarify that if one of the BRS 2 stations with a service area overlap had secondary status as an MDS Channel 2 station, such secondary stations likewise are not entitled to the football splitting provisions of Section 27.1206(a). A secondary station by definition may not cause interference to a station licensed on a primary basis, and it follows,

therefore, that a secondary MDS Channel 2 station should not be entitled to infringe upon the 35-mile radius service area of a BRS 2 station in the 2622-2624 MHz band.

Conclusion

MDS Channel 2A stations and MDS Channel 2 stations licensed as “Secondary MDS Stations” have no legitimate expectation of being licensed at 2622-2624 MHz on a primary, co-equal basis with MDS Channel 2 stations licensed as “Primary MDS Stations”. Accordingly, on reconsideration the Commission should clarify that Channel 2A and secondary Channel 2 stations are not entitled to define their service areas pursuant to Section 27.1206(a) of the rules in the 2622-2624 MHz band to the extent their otherwise applicable 35 mile radius service area overlaps the 35 mile radius service area of a BRS 2 station previously licensed as a Primary MDS Station.

Respectfully submitted,

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