Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Part 2 of the Commission's Rules	)	ET Docket No. 00258
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	)	
	)	
Petition for Rulemaking of the Cellular	)	RM-9920
Telecommunications Industry Association	)	
Concerning Implementation of WRC-2000:	)	
Review of Spectrum and Regulatory Requirements	)	
for IMT-2000	)	
	)	
Amendment of the U.S. Table of Frequency	)	RM-9911
Allocations to Designate the 2500-2520/2670-2690	)	
MHZ Frequency Bands for the Mobile-Satellite	)	
Service	)	

To: The Commission

JOINT COMMENTS OF HUBBARD TRUST,
WIRELESS WORLD, L.L.C., AND
CENTIMETERWAVE TELEVISION, INC.

Wireless World, L.L.C.
Centimeter Wave Television, Inc.
Hubbard Trust

February 22, 2001

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SUMMARY

The Supreme Court's recent interpretation of the limits of the FCC's authority to "modify" serves to prevent any reallocation of MDS licenses to other parts of the spectrum band. Under the Act's "modification" authority – whether in Section 316 or 203 – a "modification" may not effect a radical change.

Where spectrum has been auctioned, as in the case of MDS BTAs, the winning bidders have a property interest in the use of the spectrum which cannot be divested without just compensation. To do so would constitute a "taking" under the Fifth Amendment. In any case, having awarded licenses by auction, almost any action by the Commission to radically devalue those licenses would be arbitrary and capricious.

Apart from these legal impediments, the heavy usage to which the MDS channels have been put over the last 20 years, as well as the planned two-way usage which is in the early stages of implementation, create a deeply embedded infrastructure which will be extremely costly to uproot and replace.

If reallocation occurs, the MDS BTA licenses should become the licensees of the present ITFS spectrum, retain their MDS licenses, and provide 3G services themselves, if demand warrants. If demand does not warrant, they would continue to provide the services currently provided. The market would thus determine the most efficient use of the spectrum.

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WIRELESS WORLD, L.L.C., AND
CENTIMETERWAVE TELEVISION, INC.

The Hubbard Trust, Wireless World, L.L.C. ("Wireless World"), and Centimeterwave Television, Inc. ("CWTV") hereby submit these joint comments in response the Commission's NPRM in the captioned docket. Because the three commenters have some commonality of interest in the proposed disposition of the MDS spectrum, they are filing these comments jointly. All three commenters acquired their MDS BTA licenses by participation in the MDS auction in 1995/6. The Hubbard Trust

also holds a number of legacy MDS licenses stemming from the Trustee's involvement in the MDS industry since its very inception. The Joint Commenters offer these comments on the Commission's 3G proposals.

A. The Commission May Not Modify Licenses by Material Changes in Frequency.

1. Historically the FCC has approached the reallocation of spectrum from existing uses to other uses with caution. In a mature service such as broadcasting or MDS, there are likely to be thousands of existing licensees with heavily imbedded investment in the particular use of the frequency which existed when they were issued their licenses. In the case of subscription-type services such as MDS, there are likely to be *hundreds of thousands* of end-users who have invested in their own home reception equipment or otherwise have come to depend on the service. There is a basic unfairness to all concerned in changing the groundrules under which a license was issued and on which reasonable people have reasonably relied. We appreciate that the courts have generally upheld the Commission's power to modify licenses through rulemaking or adjudication, but it is a power which the FCC wields with great discretion because of the patent inequity to the existing licensees. The instant proceeding is the first instance in which the FCC has proposed the reallocation of spectrum which was originally licensed by competitive bidding, and that circumstance very materially limits the FCC's discretion to reallocate spectrum.

2. While the Communications Act and legal precedents make clear that radio licenses issued by the FCC do not represent an ownership interest in the spectrum itself, see, *e.g.*, Revision of Rules and Policies for Direct Broadcast Satellites, 1 CR 928, 963

(1995), the Act also seems to suggest that licensees do have vested rights to use the license for the term thereof. Section 301 provides, for example, that "no such [radio] license shall be construed to create any right, *beyond the terms, conditions and period of the license.*" Similarly, Section 309(h) provides that station licenses shall be subject, *inter alia*, to the following condition: "The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license *beyond the term thereof* nor in any manner other than authorized therein . . . ." Emphasis added. In both paragraphs, Congress seems to have been at pains to limit the right of usage to the term of a particular license with no permanent vesting of ownership in the spectrum itself; in both sections, the implication is that a license *does* convey a right of usage during the license period – otherwise the italicized language would be unnecessary.[1]

3. Here the Commission is contemplating not a mere modification of the MDS holders' licenses, as contemplated by Section 316 of the Act, but a wholesale evisceration of the license itself. As every contract to assign or transfer an FCC license

[1] We note that many legacy MDS licenses are coming up for renewal in May. It would be improper for the Commission to delay action on these renewal applications pending its decision in this proceeding for two reasons. First, if the incumbent MDS licenses are not renewed for some reason, the affected spectrum falls by law to the BTA owners who have an additional five years or so on their licenses. So this gambit would not achieve an immediate clearing of the spectrum. In addition, the Commission has previously declared that MDS licensees are entitled to a renewal expectancy under certain circumstances. Amendment of Parts 21 and 74 of the FCC Rules, 10 FCC Rcd. 13821, 13822 (1995) To retroactively eliminate that renewal expectancy after they have invested time and money in developing their systems in reliance on the expectancy would require a very strong justification.

proclaims, a radio license is a unique commodity. The right to transmit at a particular power on a particular segment of the electromagnetic spectrum in a particular geographic area is not remotely fungible. Because of the irreplaceability of radio licenses with anything comparable, courts routinely accord breaches of radio license contracts the status of being unsusceptible to adequate damages "at law" and thus eligible for specific performance as a remedy. For the Commission to "modify" the MDS licenses by relocating them to a different part of the spectrum is not a modification at all. It is a fundamental transformation of the license, and nothing in the Act permits the Commission to go so far.

4. The Supreme Court had occasion not long ago to visit this issue recently in connection with the Commission's proposed "modification" of its tariff rules. MCI v. AT&T, 512 U.S 218 (1994). There the Commission argued that it had the right under the Act to "modify" the requirement that carriers file tariffs by doing away with the tariff requirement altogether. The Court examined the definition of the word "modify" and concluded that Congress could not possibly have intended to permit the Commission, through its modification authority, to do away with an entire facet of the common carrier regulatory scheme. *Id*. "'Modify" in the Supreme Court's view, "connotes moderate change." MCI v. AT&T, supra, at 228. Any action by the Commission that radically alters something under the guise of "modification" must therefore be ultra vires.

5. Here the Commission proposes to relocate existing users of the spectrum at issue under the powers afforded by Section 316 of the Act to "modify" their licenses. Because the very essence of a radio license is the specific frequency on which operation is permitted, any change in that license parameter to a different segment of the radio band

would, under the Supreme Court's analysis, overreach the limited authority granted by Congress. This is particularly so where none of the equipment associated with the

original license would be operable and reception characteristics at the new frequency would be markedly different.[2]

B. **The Commission May Not Reallocate Auctioned Spectrum.**

[2] The Commission sometimes relocates broadcast licensees to other broadcast frequencies, but in such cases the main users of the license – the listeners – can simply tune their radios to the new channel. Arguably, a frequency relocation on that modest order would meet the Supreme Court's definition of a "modification."

1. The discussion above makes clear that the Commission does not have unlimited discretion to modify licenses whether they are auctioned or not. This is particularly so, however, for auctioned spectrum. Each of the joint commenters acquired some or all of their existing MDS licenses by competitive bidding. The Commission offered to sell them the rights to use a specific frequency for a ten-year term; they bid for and won the rights to use those frequencies; the Commission took their money and issued them their licenses. Now the Commission proposes to take away the frequencies whose use they bought and paid for and to substitute a different and, almost inevitably, inferior frequency. On late night television or at a carnival barker's stand, this would be recognized as a classic "bait and switch" ploy. It's a ploy that has been used by con men for years: offer the suckers one thing and then, after you've got their money, deliver them something else. Bait and switch scams are morally reprehensible at a minimum. At most, they are potentially actionable in nature. That the Commission would propose a policy that would be condemned as abusive to consumers by the Federal Trade Commission[3] is extraordinary. The Commission itself should have the conscience to apprehend the serious wrongfulness of selling frequency rights and then reneging on the sale. This is especially so since the "Bidder's Package" for the MDS Auction gave no warning to bidders that the auctioned spectrum would or could be reallocated.

2. Quite apart from the gross impropriety of the action from the standpoint of consumer fairness, there are other serious implications to such a relocation. First, by selling buyers the rights to use specific radio frequencies, the FCC necessarily vested a

[3] See FTC Policy Statement on Deception, rel. Oct. 14, 1983. http://www.ftc.gov/bcp/policystmt/ad-decept.htm

property right in the usage of the spectrum – not in the spectrum itself, we repeat, but in the usage of that spectrum for at least one license term. In Connolly v. Pension Guaranty Benefit Corp., 475 U.S. 211(1986), the Supreme Court examined how to determine whether a property interest had been created which would trigger Fifth Amendment compensation rights if the property right were taken away. The Court articulated a three-part inquiry: 1) the economic impact of the regulation on the claimant, 2) the extent to which the regulation has interfered with distinct investment-backed expectations, and 3) the character of the governmental action. Connolly, at 224-5, citing Penn Central Transportation Company v. New York City, 438 U.S. 104, 124 (1978). Here the economic impact of the proposed relocation on the existing licensees is drastic. Depending on where they are moved, it may eliminate their ability to do business altogether. As noted in more detail below, the existing licensees have expended large sums not only on their existing operational infrastructures but also on planning for the new two-way uses which the Commission has made possible in the last few years. Those investment-backed expectations would be wholly destroyed. And, finally, the governmental action would constitute a permanent and fundamental expropriation of the licensees' licenses. In Fifth Amendment terms, therefore, the property interests of the

licensees in the use of the spectrum would clearly be "taken," necessitating some form of compensation to the divested licensees.

3. We know of no other instance where the Commission has proposed to radically modify licenses which have been awarded by auction, so this is a case of first impression. But the entire nature of the license award is akin to the purchase of a commodity at an auction and creates the reasonable expectation on the part of the licensee that the commodity bid on at the auction will actually be delivered by the selling agent. The structure of the auction is fundamentally contractual in nature: once a bidder enters the auction and places a bid, it is legally and enforceably bound to pay the amount it bid (or the difference between that bid and the amount which the Commission can salvage by a reauctioning). If the bidders at an FCC auction are subject to an enforceable obligation to pay the bid amount, there must be a concomitant obligation on the FCC to deliver the commodity which has been offered.

4. Consider, for example, whether the Commission, at the end of the MDS auction, could have announced that it was changing the license term, the geographic area and the frequencies which the bidders had just bid on. No one would seriously claim that the bidders could then be compelled to pay for something completely different from what they had just bid on. Yet the FCC here proposes to do that well after the fact when the licensees have not only paid for the auctioned items but have invested large additional sums in the infrastructure necessary to put the frequencies to use. At a minimum, therefore, the relocation of auctioned licenses to some other frequency band would constitute a taking compensable by the Fifth Amendment. The Commission would have

to justify its effective seizure of the property under the rules applicable to eminent domain.

5. Considered solely in administrative law terms, the circumstances of having auctioned these frequencies off limit the FCC's options in being able to strip the auctionees of their prizes. Having established a process whereby people pay for the usage of these frequencies, it is clearly arbitrary and capricious for the FCC to then take the frequencies away. What might be conscionable or fair in a situation where the licenses had been awarded for free becomes grossly punitive and unjust when applied to people who have duly anted up the funds demanded by the FCC for the use of the spectrum. The Joint Commenters are cognizant that the Commission is trying to make spectrum available for 3G uses which will ultimately benefit the public. The problem is that having once augmented the Federal treasury by auctioning off the licenses, the Commission cannot now renege on the deal it made with the purchasers. Joint Commenters suggest a solution to this quandary below.

C. **The MDS Bands Are Currently Heavily Used.**

1. One element to which the Commission normally accords great weight is the historical use of the spectrum for which a reallocation is being considered. Obviously, the greater the use and investment in a particular band for a particular purpose, the greater the disruption which will be occasioned by a change. Here the MDS band has been in use for some 25 years, primarily as a source of video entertainment. While the industry has struggled somewhat in the past, the initiatives which the Commission took in the 80's and 90's to expand channel availability made MMDS a potential video competitor to cable in some markets. Wireless World, for example, uses its E, F and H group frequencies to

transmit the only serious competition to cable in the Virgin Islands. It has just made a heavy investment in the equipment necessary to digitalize its operation in order to expand service options for its customers. CWTV has arranged the launch of a 19-channel competitive video service in the Chico, CA area.[4] The Hubbard Trust provides service to a customer in two of its single channel MDS markets which provides data and Internet services to its own customers.[5] These services have all been designed and engineered to the specifications of a 2 GHz operation. None of the coverage characteristics of these systems would be duplicated at higher frequency bands and it is not even clear that the presently offered services would be feasible or viable at much higher frequencies. As noted before, bandwidth for these purposes is not fungible. At a minimum, there would be very serious disruption to existing users and almost certainly a loss of service to many current users. Much of the existing infrastructure would simply have to be scrapped.

2. At the same time, many MDS licensees have been hanging on for years in anticipation of offering two-way uses for MDS channels. Hundreds of licensees including Wireless World have spent large sums engineering two- way systems in reliance on the Commission's Digital Declaratory Ruling and preparing and filing applications seeking authority for such operations. In particular, much of the industry has specified MDS channel 1 as the uplink band for two-way operations. Reallocation of that channel would seriously undermine the design of our two-way system and most of the other two-way systems of which we are aware. The disruption of both existing operations and planned operations would therefore be severe. Our own perspective is fully corroborated by the

[4] The launch of the system has been delayed, inter alia, by the inability of the company to obtain the necessary consents from adjacent operators.

OET Interim Report issued by the Chief Engineer on November 15, 2000. That Report details the current and imminent heavy usage of the band and the serious disruption that any reallocation would occasion.

D. **If the Commission Nevertheless Decides That Reallocation of the MDS Band Is Justified, Two Remedial Steps Are Suggested.**

[5] The contract in one of these markets was recently terminated but a new lease is under negotiation.

1. The Joint Commenters recognize that there will be intense pressure to reallocate spectrum for 3G purposes despite the factors set out above. In that event, the Joint Commenters have two suggestions which would vastly ameliorate the effect of the reallocation. First, the ITFS spectrum should be reallocated from ITFS use to the MDS BTA holders unless the ITFS licensees are using more than 25% of their spectrum for educational purposes.[6] It is our experience that most ITFS licensees operate primarily as adjuncts to MDS operators. Without the MDS operator most of them would not be providing service at all. The allocation of these frequencies to educational uses has in practical effect become a kind of hidden subsidy for educators; commercial operators have to pay them a fee or provide them free services as the price of using the spectrum which they are supposed to be using for educational purposes. With the adoption of generally subsidized educational access to the Internet through the universal service fund and e-rates, there is no longer any need for MDS operators to bear the burden of subsidizing educational television.

2. It makes far more sense for the educational community – unless they are really using the ITFS spectrum for its intended educational purpose on any substantive basis – to be relocated to another part of the band. The A, B, C, D, and G ITFS channel groups which are primarily used by MMDS operators anyway, could then default to the MDS BTA holders to use in the manner described below. Not only would this eliminate the hidden subsidy issue, but it would also greatly simplify the ability of MDS operators to coordinate and design complex two-way systems without the Balkanization of the band

[6] Usage would be measured by both percentage of time used and amount of spectrum used.

which the ITFS allocation has created. In addition, because most ITFS licensees have not bought the equipment used in their existing operations, they would not experience the loss of a major financial investment. In the new band, they could simply decide whether or not they want to provide over-the-air educational services based on the real economics of the system rather than the false economics engendered by the MDS subsidy program.

3. Secondly, if the Commission reallocates the MDS spectrum to 3G uses, the existing licensees should not be stripped of their licenses. Rather, they should keep their licenses. They would then have the option of either providing 3G services themselves, or selling or leasing their licenses to other companies who want to provide those services, or not providing 3G services at all[7]. The latter option would, of course, be decided by market considerations if demand for the current usage of the spectrum exceeded that for 3G service (as it well might in rural parts of the country), the licensee would maintain its present service. Leaving the spectrum in the hands of the present MDS licensees would have a number of salutary effects:

a. The issue of the Commission's authority to effect a radical license modification would be eliminated because the change in authorized usage of a licensee's existing frequency would probably fall within the definition of a "modification" while a change in designated frequency would not.

b. The issue of a Fifth Amendment taking would also be eliminated since the licensee would not have suffered a loss of the value of what it had purchased in

[7] Given the Commission's policy of flexible usage of allocated spectrum, we understand the Commission's present plan to permit 3G operation in the chosen band but not to mandate it.

the auction. Arguably, the value of the purchase might even be enhanced by the change, thus eliminating any liability of the government to the licensees.

c. There would no longer be any issues of how and under what timeframes and conditions existing licensees should be relocated to different spectrum. Licensees would either provide the 3G services themselves (and some of the Joint Commenters are prepared to do exactly that) or they would voluntarily sell their spectrum to others who do want to provide 3G services. No intervention from the Commission would be necessary since the marketplace would sort out who ultimately provides the 3G services. To the extent there is the demand which the Commission would have to find in order to do the reallocation in the first place, either the existing licensees or someone else would clearly step up to supply the demand. All of this would be done without forced relocation, expense allocation, and all the other issues which arose in the process of clearing the PCS spectrum of microwave users – issues which are far more complex here given the current widespread usage of the MDS spectrum.

4. In short, much of the pain and most of the grave legal impediments associated with a reallocation of the MDS spectrum could be ameliorated by leaving the spectrum in the hands of the existing licensees and then letting the market sort out how the 3G services actually are provided.

Conclusion

For the reasons set forth above, the Joint Commenters urge the Commission not to reallocate the MDS/ITFS spectrum. If it nevertheless does so, the rights of the existing

MDS licensees should be preserved by leaving them as the licensees while relocating ITFS licensees to a different band.

Respectfully submitted,
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