

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Service to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems)	ET Docket No. 00-258
)	
Mass Media Bureau Multipoint Distribution Service and Instructional Television Fixed Service Applications Accepted for Filing)	Report No. 164
)	
Mass Media Bureau Provides Further Information Regarding Grants of ITFS and MDS Two-Way Applications)	DA 01-751
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 3, 2001

Released: April 4, 2001

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau ("Bureau") has before it an "Emergency Petition to Defer Action on Applications" filed by Verizon Wireless ("Verizon") pursuant to Section 1.41 of the Commission's Rules.¹ Verizon requests that the Commission defer action on pending applications for two-way authority that have been filed by Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees. The Wireless Communications Association International, Inc. ("WCA") filed an opposition to Verizon's petition. For the reasons set forth below, we deny Verizon's request to delay approval of pending MDS/ITFS applications for two-way authority.

2. *Background.* In March 1997, the WCA, along with over 100 participants, petitioned the Commission to grant the industry the right to use MDS and ITFS spectrum for two-way services. These services had historically operated as primarily one-way video transmission systems. Two-way authorization will effectively enable licensees to offer voice, video, and data services, such as high-speed Internet. In 1998, the Commission approved the use of two-way transmissions on MDS and ITFS frequencies.²

¹ 47 C.F.R. § 1.41.

² See *In the Matter of Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions ("Two-Way Order")*, 13 FCC Rcd 19112 (1998), *recon.*, 14 FCC Rcd 12764 (1999), *further recon.*, 15 FCC Rcd 14566 (2000).

3. In the initial filing window for two-way service, which was held August 14 - 18, 2000, MDS and ITFS licensees filed approximately 2,267 applications. On November 29, 2000, the Bureau issued a Public Notice listing the applications tendered for filing.³ At the conclusion of a 60-day amendment period, the Bureau issued a Public Notice on February 1, 2001, listing the applications that had been accepted for filing and announcing that all petitions to deny must be filed no later than the sixtieth day after the date of that public notice.⁴

4. On March 26, 2001, the Bureau released a Public Notice, *Mass Media Bureau Provides Further Information Regarding Grants of ITFS and MDS Two-Way Applications; Certain ITFS Major Modification Applications; and the Rolling One-Day Filing Window Procedure* (“*March Public Notice*”),⁵ reiterating that petitions to deny the applications accepted for filing must be filed no later than Monday, April 2, 2001. The Bureau expects to begin granting the applications shortly thereafter. Subsequent to this initial licensing process, two-way applications will be processed under a rolling one-day filing window procedure.

5. On January 5, 2001, the Commission issued a notice of proposed rulemaking that examined spectrum options for advanced wireless services, including third generation (“3G”) systems.⁶ The *Advanced Wireless Services NPRM* recognizes that a number of frequency bands are capable of supporting 3G, as well as future generations of mobile wireless systems. That proceeding will explore the possibility of introducing new advanced mobile and fixed services in frequency bands currently used for cellular, broadband Personal Communications Service, and Specialized Mobile Radio services, as well as in other frequency bands: 1710-1755 MHz, 1755-1850 MHz, 2110-2150 MHz, and 2160-2165 MHz. The *Advanced Wireless Services NPRM* also seeks comment on various approaches for the 2500-2690 MHz band, which is occupied by MDS and ITFS licenses.⁷

³ *Public Notice*, Report No. 148 (MMB November 29, 2000).

⁴ *Public Notice*, Report No. 164 (MMB February 1, 2001).

⁵ *Public Notice*, DA 01-751 (MMB March 26, 2001).

⁶ *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* (ET Docket No. 00-258), Notice of Proposed Rulemaking, FCC 00-455 (rel. January 5, 2001) (“*Advanced Wireless Services NPRM*”).

⁷ The 2500-2690 MHz band was one of several frequency bands specifically identified at the 2000 World Radiocommunication Conference (“WRC-2000”) for possible 3G use. As a result of WRC-2000, a Presidential Memorandum released on October 15, 2000 established guiding principles for the Executive Agencies to use in selecting spectrum for 3G wireless systems, and strongly encouraged independent federal agencies, such as the Commission, to follow the same principles in any actions taken related to the development of 3G systems. The U.S. Department of Commerce, National Telecommunications and Information Administration (“NTIA”) released a Study Plan on October 20, 2000 which adhered to the principles in the Presidential Memorandum. In order to have a full understanding of all options available, NTIA and the Commission were tasked with studying two frequency bands identified by WRC-2000 for possible 3G use. NTIA studied the 1755-1850 MHz band, and the Commission studied the 2500-2690 MHz band. The study of the 2500-2690 MHz band has been conducted in two stages. In the Interim Report, the Commission staff examined the nature and technical characteristics of planned 3G services, the current and planned use of the 2500-2690 MHz band by incumbent services, potential opportunities for sharing spectrum between 3G and incumbent services, and the potential impact on incumbent services of segmenting this band to provide separate spectrum for 3G and incumbent services. See *Interim Report on Spectrum Study of the 2500-2690 MHz Band*, ET Docket No. 00-232, DA 00-258 (Nov. 15, 2000) (“*Interim Report*”). The FCC staff’s Final Report, which was released on March 30, 2001, includes information on other bands, a description of alternate bands and relocation studies, and cost/benefit analyses of system (continued....)

6. Verizon argues that because the Commission is considering reallocation of the 2500-2690 MHz band for the provision of advanced mobile services, including 3G, the Bureau should defer any action on the MDS/ITFS applications for two-way authority until it resolves the reallocation issues raised in the *Advanced Wireless Services NPRM*. Verizon claims that “it makes no sense to grant applications to use certain bands, only to rescind those grants later on if reallocation so requires.”⁸ Verizon also argues that many comments in the *Advanced Wireless Services NPRM* consider grant of these applications as a “*fait accompli*” which compels the Commission to reject segmentation of this band.⁹ In response, the WCA argues that Verizon’s attempt to delay the deployment of broadband wireless services is anti-competitive, noting that MDS will directly compete against Verizon’s own Digital Subscriber Line (“DSL”) offerings.¹⁰ The WCA asserts that the “eleventh-hour” nature of the filing bolsters its argument that Verizon only filed the request as an anti-competitive measure. According to the WCA, Verizon cannot credibly claim that it has just become aware of the upcoming grants in light of the Commission’s many Public Notices and three-year old rules governing the filing of two-way applications.¹¹

7. *Discussion.* Verizon’s petition essentially requests a stay of the procedures set forth in the *Two-Way Order* and *March Public Notice*. In determining whether to stay the effectiveness of one of its orders, the Commission applies the four factor test established in *Virginia Petroleum Jobbers Association v. FCC*, 259 F. 2d 921 (D.C. Cir. 1958), modified in *Washington Metropolitan Transit Authority v. Holiday Tours*, 559 F. 2d 841 (D.C. Cir. 1977). Under this test, a petitioner must demonstrate that: (1) it is likely to prevail on the merits of its petition for review; (2) it will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest.¹²

8. We find that Verizon has not satisfied the legal requirements that would justify issuance of a stay. First, Verizon has not demonstrated that it will be irreparably harmed in the absence of a stay.¹³ Rather, Verizon’s vague arguments espouse conjecture about events that may or may not occur in the future. Verizon speculates on a number of issues, including that the 2500-2690 MHz band may be reallocated to accommodate 3G services, that the roll-out of two-way services may increase costs of any reallocation, and that the grant of two-way applications would compel the Commission to reject segmentation of this band. Significantly, Verizon has not requested that the Commission similarly restrict licensees’ use of other spectrum that is being considered for possible 3G use. Moreover, a stay in this proceeding could irreparably injure MDS and ITFS licensees that are ready to roll-out services and

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sharing, segmentation and relocation options. See *Staff Final Report on Spectrum Study of 2500-2690 MHz Band*, ET Docket No. 00-258, DA 01-786 (March 30, 2001) (“*Final Report*”).

⁸ Verizon’s Emergency Petition to Defer Action on Applications at 3.

⁹ *Id.* at 5-6.

¹⁰ WCA’s Opposition to Petition at 2.

¹¹ *Id.* at 3.

¹² *Washington Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985).

¹³ An injury qualifies as “irreparable harm” only if it is “both certain and great; it must be actual and not theoretical.” *Id.* at 674. Therefore, to demonstrate irreparable harm, Verizon must provide “proof indicating that the harm [it alleges] is certain to occur in the near future.” *Id.*

potentially disadvantage these licensees with regard to other broadband services, such as DSL service.¹⁴ MDS and ITFS operators have negotiated complex interference agreements and expended vast resources in anticipation of pending applications being acted upon. Finally, a stay in this proceeding would thwart the public interest by delaying the introduction of new competition and services anticipated by the Commission's rules.

9. For the foregoing reasons, we find that Verizon has not satisfied the legal requirements to grant its request to defer action on MDS and ITFS two-way applications. We therefore DENY Verizon's "Emergency Petition to Defer Action on Applications."

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

¹⁴ See, e.g., *Deferral of Licensing of MTA Commercial Broadband PCS*, 11 FCC Rcd 17052 (1996) (holding that even a temporary delay in the issuance of licenses would not be in the public interest when it would delay the introduction of new competition and services).