

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 |) | |

PETITION FOR RECONSIDERATION

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.106 of the Commission's Rules,¹ hereby petitions the Commission to expeditiously reconsider and reverse its decision in last week's *Notice of Proposed Rulemaking and Memorandum Opinion and Order* ("NPRM/MO&O")² to impose an immediate freeze on the filing of applications for new or modified facilities in the Instructional Television Fixed Service ("ITFS") and, apparently, Multipoint Distribution Service ("MDS").³ For the reasons set forth below, WCA urges the Commission to limit the freeze so that only applications for new ITFS

¹ 47 C.F.R. § 1.106.

² See *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, FCC 03-56 (rel. April 2, 2003)[*"NPRM/MO&O"*].

³ WCA is the trade association of the wireless broadband industry. Its members include, among others, licensees in the MDS and ITFS, system operators that lease capacity on MDS and ITFS systems to provide broadband services to the public, and vendors that provide the hardware, software and services necessary for the provision of wireless broadband services. WCA, along with the National ITFS Association and the Catholic Television Network, submitted the comprehensive proposal for revising the MDS/ITFS regulatory regime that was assigned RM-10586 and is at the heart of the *NPRM/MO&O*. See *NPRM/MO&O* at ¶¶ 1, 30. Thus, WCA clearly has standing to petition for reconsideration of the *NPRM/MO&O*.

stations located outside existing protected service areas (“PSAs”)⁴ – those seeking licenses for what is now ITFS spectrum “white space” – are banned.

WCA is not questioning the Commission’s authority to suspend the filing of applications for new or modified facilities. However, it does question the wisdom of that action under the circumstances present here. Quite frankly, WCA finds it impossible to square the Commission’s broad suspension of applications with the Commission’s recognition that:

This proceeding provides us with another opportunity to help meet our statutory duty to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms). . . .” This proceeding also provides us with the opportunity to further our goal to “establish regulatory policies that promote competition, innovation, and investment in broadband services and facilities while monitoring progress toward the deployment of broadband services in the United States and abroad.”⁵

The crux of WCA’s position is that, while the *NPRM/MO&O* is purportedly designed “to promote competition, innovation and investment in wireless broadband services,” the freeze on applications for new or modified stations (other than applications for stations located in ITFS “white space”) is contrary to those objectives.⁶

As a preliminary matter, the scope of the freeze is far from clear. Paragraphs 226-229 of the *NPRM/MO&O*, in which the substance of the freeze is discussed, only speak of a freeze on ITFS applications.⁷ However, in the summary of the decision set forth in Paragraph 4, the Commission references a suspension on the acceptance of applications for new ITFS stations or

⁴ For purposes of this Petition, “PSA” is used to denote the 35 mile radius circle afforded to each incumbent MDS and ITFS licensee under Section 21.933(b) of the Commission’s Rules, as well as the service area afforded MDS auction winners pursuant to Section 21.924(c).

⁵ *NPRM/MO&O* at ¶ 32 (footnotes omitted).

⁶ *Id.* at ¶ 1.

⁷ *See id.* at ¶ 226 (“In light of our actions described above, and effective as of the date of the release of this *NPRM & MO&O*, we will suspend acceptance of applications for ITFS channels for new licenses, amendments or modifications for any kind of station temporarily, except as provided below.”).

for modifications to either ITFS stations or MDS stations in the 2500-2690 MHz band.⁸ And, further confusing the situation, the ordering clause in Paragraph 260 expands the freeze from the applications referenced in Paragraph 4 to also include applications for new MDS stations and applications for new or modified stations in the 2150-2162 MHz band (none of which are referenced in Paragraph 4 or Paragraphs 226-229).⁹ Whichever paragraph truly reflects the Commission's intent, any freeze on the filing of applications (other than applications for unassigned ITFS spectrum) is unnecessary to achieve the Commission's legitimate concerns and is contrary to the public interest.

Any consideration of the merits of a freeze on applications must necessarily weigh the benefits of the freeze against the costs.¹⁰ The benefits, however, appear to be ephemeral. The *NPRM/MO&O* fails to explain the rationale for the freeze in any detail, other than to assert that:

We take this action to permit the orderly and effective resolution of issues in this proceeding. Absent this action, applications for new licenses, amendments, and modifications might limit the effectiveness of the decisions made and the standards developed in this proceeding.¹¹

WCA certainly understands that the Commission would not want at this juncture to accept applications for new ITFS stations designed to serve the "white space" that is currently unlicensed. As the *NPRM/MO&O* recognizes, applications for new ITFS stations designed to

⁸ See *id.* at ¶ 4 ("In the *MO&O*, we . . . [t]emporarily suspend, until the completion of this rulemaking proceeding, acceptance of applications for new ITFS licenses and applications to amend or modify either ITFS or MDS stations in the 2500-2690 MHz band, subject to certain exceptions.").

⁹ See *id.* at ¶ 260 ("[a]pplications for new MDS or ITFS licenses, major modifications of MDS stations, or major changes to ITFS stations other than applications for license assignments or transfers of control WILL NOT BE ACCEPTED until further notice").

¹⁰ See, e.g., *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995), citing *Cities of Carlisle and Neola v. FERC*, 741 F.2d 423, 433 (D.C. Cir. 1984) (agency not entitled to deference when it has "stopped shy of carefully considering the disputed facts"); *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (agency must "demonstrate that a reasonable person upon consideration of all the points urged pro and con the rule would conclude that it was a reasonable response to a problem that the agency was charged with solving").

¹¹ *NPRM/MO&O* at ¶ 226.

serve that “white space” have been barred since 1995.¹² The proposal submitted by WCA, the National ITFS Association and the Catholic Television Network that led to the *NPRM/MO&O* (the “Coalition Proposal”) recognizes that applications for authority to serve these areas should not be accepted until new rules providing for the auctioning of unassigned ITFS spectrum are adopted.¹³ As such, WCA has no objection to continuing the ban on applications proposing to construct and operate new ITFS facilities in the “white space” that currently exists. Moreover, to the extent the Commission is concerned that licensees filing other sorts of applications after the release of the *NPRM/MO&O* (e.g., applications for modifications to licensed stations or for new response station hubs and boosters within existing PSAs) will secure some sort of “grandfathered” preference that may be included under new rules adopted in this proceeding, the Commission can avoid such a result simply by limiting any such preference to those facilities applied for prior to the release of the *NPRM/MO&O*.¹⁴

Subject to the above, it is difficult to envision a scenario under which the licensing of new or modified facilities (whether main stations, booster stations, or response station hubs) within the PSAs already afforded existing licensees would in any material way undermine the objectives of this proceeding. It is important to recognize that every existing licensee (whether an ITFS licensee, an incumbent MDS licensee or a holder of a MDS Basic Trading Area

¹² See *id.* at ¶ 21.

¹³ See, e.g., “A Proposal for Revising the MDS and ITFS Regulatory Regime,” submitted by the Wireless Communications Association International, Inc., the National ITFS Association and the Catholic Television Network, RM-10586, at 42 (filed Oct. 7, 2002).

¹⁴ Whether to extend any grandfathered status to facilities applied for after the release of the *NPRM/MO&O* is an issue that commenting parties would be free to address in their comments responsive to the *NPRM/MO&O*.

authorization) has an existing service area in which it, and only it, is free to add new facilities.¹⁵ Under the current rules, any application for new or modified facilities must comply with certain rules designed to mitigate interference, the most important of which for present purposes are the requirements that the signal strength at the boundary of the PSA not exceed -73 dBW/m² absent the consent of the neighboring licensee.¹⁶ Not surprisingly, then, neither the Coalition Proposal nor any of the sixty filings responding to the Coalition Proposal listed in Appendix D to the *NPRM/MO&O* sought a freeze on the filing of applications for new or modified facilities within existing PSAs.

The relief WCA now seeks is consistent with the approaches taken by the Commission in two of the cases cited in *NPRM/MO&O* as precedent for the freeze.¹⁷ More specifically:

- In its *Notice of Proposed Rulemaking* in WT Docket No. 96-18, the Commission imposed a limited freeze on the filing of applications for paging systems.¹⁸ Under the licensing system in effect at the time, most licensees were awarded for exclusive use of a channel within a protected service area based upon the specific location and other parameters of the station.¹⁹ Although the Commission proposed to adopt a more traditional geographic service area licensing scheme and imposed a freeze on the filing of some new applications, the Commission specifically limited that freeze so as to permit existing

¹⁵ The only exception is those cases where two or more protected service areas overlap. As recognized in the *NPRM/MO&O*, as a practical matter in such overlap areas no licensee can deploy facilities absent consent of the other(s). See *NPRM/MO&O* at ¶ 87.

¹⁶ See 47 C.F.R. §§ 21.41(b)(7), 21.42(b)(4), 21.902(b)(5)(i), 21.909(d)(2)(iii), 21.913(a), (b)(2) and (e)(4)(vi), 21.938(b) and (c)(4), 74.939(d)(2)(iii), and 74.985(a), (b)(4) and (e)(4)(vi).

¹⁷ See *NPRM/MO&O* at ¶ 226 n. 541. In the third case cited by the Commission, *Amendment of the Commission's Rules Regarding Multiple Address Systems*, 12 FCC Rcd 7973 (1997), the Multiple Address System licenses in issue were granted purely on a site-specific basis using mileage separations to protect stations against interference. See *id.* at 7983-7984. Because the Commission proposed to require the licensee of any new geographic service area overlay to protect incumbent stations based on the mileage separation criteria, allowing additional stations would have had an adverse impact, as it would have reduced the spectrum available to the auction winner. In this case, however, allowing the filing of applications for new or modified stations within existing protected service areas and subject to compliance with the current interference protection rules (including the limit on signal strength at the border) would not have adverse consequences.

¹⁸ See *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, 11 FCC Rcd 3108 (1996).

¹⁹ See *id.* at 3111.

licensees to file for new or modified facilities within their existing protected service areas, so long as the 21 dBu/m interference contour that defined the protected service area was not exceeded at the boundary.²⁰

- In its *Second Report and Order and Second Further Notice of Proposed Rule Making* in PR Docket No. 92-257, the Commission imposed a limited freeze on the filing of applications for new VHF public coast stations while it considered alternative licensing schemes.²¹ At the time, the Commission noted that each licensee was entitled to a service area that “is applicant-defined based on predicted signal strength over the waterway to be served. The size of each station’s service area also determines the mileage separation between co-channel assignments.”²² Although the Commission imposed a freeze on the filing of applications for new service areas pending consideration of whether to utilize geographic service areas for future licensing, the Commission specifically allowed the filing of applications that did not expand a station’s existing service area.²³

Thus, the decision in the *NPRM/MO&O* to ban all MDS and ITFS applications, without regard to whether they encroach on the “white space” that is currently unlicensed, cannot be squared with the very precedent cited by the Commission.

While the benefits of the broad freeze appear to be slim, the costs to the wireless broadband industry and, more important, to consumers, will be significant. As WCA has advised the Commission on several occasions, despite the well-documented difficulties associated with licensing MDS/ITFS facilities that can be used to deploy wireless broadband services, a small but not insignificant number of system operators have chosen to undertake the costly and unnecessarily burdensome licensing process rather than await new rules.²⁴ Particularly now that

²⁰ See *id.* at 3136-37.

²¹ See *Amendment of the Commission’s Rules Concerning Maritime Communications*, 12 FCC Rcd 16949, 17015 (1997).

²² *Id.* at 16987 (footnote omitted).

²³ See *id.* at 17015.

²⁴ See, e.g., *NPRM/MO&O* at ¶ 25 (“By September 2002, our Broadband Licensing System showed about eighty-seven operators are deploying data-only MDS or ITFS services in the U.S.”); Barthold, “W.A.T.C.H. Out!” *Telephony* (Aug. 27, 2001) (MDS/ITFS broadband service provided by W.A.T.C.H. TV, a wireless cable operator serving approximately 11,000 subscribers in rural communities in northwest Ohio); Mansell, “IPWireless Gaining Customers,” *Kagan Broadband Fixed Wireless*, at 6 (May 6, 2002) (launch of MDS/ITFS-based 3G wireless broadband service in Missoula, Montana); “Rioplex Wireless Deploying World’s Largest Next-Generation Wireless Broadband Network,” *PR Newswire* (Jan. 8, 2003)

next generation MDS/ITFS non-line-of-sight technologies are proving themselves in trials and initial deployments,²⁵ several system operators were well on their way towards deploying new wireless broadband systems prior to the release of the *NPRM/MO&O*. And, although the Commission may not have been aware of it, substantial time and money must be devoted to system development long before the first application is filed with the Commission. Because a system operator must lease or purchase spectrum, secure financing, select a technology provider and design its system based on that particular technology's capabilities and a detailed assessment of local demand, the actual filing and prosecution of applications is one of the last steps in the process of deploying a new wireless broadband system.

Thus, the Commission's imposition of a freeze threatens to leave a wide variety of interests in the proverbial lurch. Based on a preliminary canvas of its membership over the three business days since the release of the *NPRM/MO&O*, WCA can attest that the following will occur unless the freeze is lifted:

- Licensees will be unable to deploy planned new wireless broadband systems, many of which are currently funded and in the network design stage or application preparation stage. WCA is aware of approximately two dozen wireless broadband systems that were under development for deployment in 2003 but will be unable to launch as a result of the Commission's action;²⁶

(announcement by Navini Networks, Inc. and Rioplex Wireless, Ltd. of plans to deploy a non-line-of-sight ("NLOS") MDS/ITFS-based wireless broadband network to serve customers in the lower Rio Grande Valley, an area covering much of South Texas).

²⁵ See, e.g. Mansell, n.24 *supra* ("Sprint . . . along with [MDS/ITFS operator] Nucentrix, are now trialing a new generation of [MDS/ITFS broadband equipment] suppliers led by the likes of Navini, IPWireless, Vyyo, Iospan, BeamReach and NextNet."); Marek, "Houston Trial Tests MMDS' Limits," *Wireless Week*, at 1, 34 (September 23, 2002); Flynn, "Broadband Goes Mobile," *PC Magazine* (Mar. 4, 2003) (launch of Clearwire's MDS/ITFS broadband service in Jacksonville, FL); "NextNet and Evertex Expand Plug-and-Play Broadband Wireless System to Five New Markets, Covering Over 19,000 Subscribers," *Business Wire* (Nov. 11, 2002) (expansion of MDS/ITFS broadband service in rural Iowa); "NextNet and Grand Forks Wireless Deliver Broadband Wireless Access to Yuma, Arizona," *Business Wire* (June 25, 2002).

²⁶ The Commission has recognized that "[i]n recent years, the MDS industry has invested several billion dollars to develop broadband fixed wireless data systems in this band, including high-speed access to the

- Infusions of capital into the wireless broadband industry will be put on hold as investors react adversely to the uncertainty as to when their new investments will be put to productive use;
- Pending acquisitions of MDS licenses and leases of ITFS excess capacity by new entrants looking to deploy wireless broadband systems will be deferred until the new entrants can deploy facilities. WCA is aware of at least two transactions scheduled to close within the next two weeks where the acquiring party is threatening not to close because of the freeze; and
- Operators of existing wireless broadband systems will be unable to add cells or to sectorize antenna systems at existing cells in order to expand capacity to meet existing demand. As a result, operators will be unable to serve consumers for no reason other than a lack of network capacity. Nor will operators be able to add cells to existing systems designed to fill in unanticipated “dead zones” in coverage or to expand coverage within existing protected service areas. Several of WCA’s members who are wireless broadband system operators have already raised this concern.

These consequences of the freeze are not only bad for licensees, system operators and equipment vendors, but they are clearly adverse to the best interests of consumers of broadband services. As the Commission is well aware, MDS/ITFS based wireless broadband systems “offer a significant opportunity to provide competition to cable and (Digital Subscriber Line) DSL services in the provision of broadband services in urban and rural areas . . . which may lead to reduced prices and more competition in the delivery of high-speed internet access services.”²⁷ If the Commission prevents deployment by those willing to proceed under the Commission’s current rules, the ultimate losers will be consumers who either have no source of broadband service or are forced to pay too much for wired service because a wireless competitor is not available.²⁸

Internet for residential customers, small and medium businesses, and educational institutions.” *NPRM/MO&O* at ¶ 33. A not insubstantial portion of that investment has been devoted to laying the groundwork for the next generation systems that system operators are hoping to deploy in 2003 and early 2004 if the freeze is lifted.

²⁷ *Id.* at ¶¶ 33-35.

²⁸ See, e.g., Lane, “Consumers Ask for Investigation of Comcast Internet Pricing,” *Communications Daily*, at 5-6 (Mar. 27, 2003) (“Consumer groups asked federal antitrust regulators to investigate Comcast’s bundling of Internet and basic cable service for potential anticompetitive practice[s]. . . In

The Commission should also recognize that the freeze may have a disproportionate impact in rural areas, where DSL and cable modem services are often not available and thus the need for wireless broadband deployments is particularly great.²⁹ As the *NPRM/MO&O* acknowledges, the deployment of wireless broadband under the current rules is most prevalent in more rural areas of the country, where the number of cells required to provide service is relatively small (reducing the burden of an overly-complex application system) and the larger distances between cochannel stations tends to minimize the adverse impact of the current overly-conservative interference protection rules.³⁰ At a time when the Commission seeks “to foster service to rural areas,”³¹ forcing rural wireless broadband deployment plans to be delayed for a year or more seems counterproductive.³²

several markets, customers who were paying about \$45 per month for cable Internet service received a rate increase to \$60.”).

²⁹ The Commission’s third annual Section 706 Report highlighted the need for aggressive oversight of the problem:

Despite the upward trend in [broadband] subscription rates for rural communities, we note that a positive correlation persists between population density and the presence of high-speed subscribers. In addition, there continues to be a significant disparity in access to advanced services between those living in rural population centers and those living in sparsely-populated outlying areas. As a result, we believe that it is important to closely monitor the availability of advanced services for rural Americans, especially those living outside of the rural population centers, in order to ensure that they receive timely access to advanced services.

Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 (Third Report), 17 FCC Rcd 2844, 2888 (2002).

³⁰ See *NPRM/MO&O* at ¶¶ 25, 28.

³¹ See *id.* at ¶ 67.

³² WCA is troubled that, despite having solicited public comment on the Coalition Proposal and despite a record that was generally supportive of that approach, the Commission has set an unusually lengthy pleading cycle of approximately five months. This exacerbates the adverse impact of the freeze, as it makes it highly unlikely that this proceeding will be completed by the end of the first quarter of 2004, much less by the end of 2003 as WCA had once hoped.

In sum, Commissioner Abernathy put it succinctly in her separate statement supporting adoption of the *NPRM/MO&O* – “the public interest is best served by creating regulatory policies that foster effective investment and stimulate the delivery of service to the public.”³³ WCA agrees. Yet, a freeze on applications for new or modified stations within existing protected service areas is an anathema to both investment in the industry and to the delivery of broadband services to the public. Thus, WCA urges the Commission to reconsider and reverse the decision to suspend for the duration of this proceeding the filing of applications for any new or modified MDS and ITFS facilities, and to instead limit its freeze to applications proposing new ITFS stations in areas that are outside the protected service areas of currently licensed or applied-for stations.

Respectfully submitted,

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April 7, 2003

³³ See *NPRM/MO&O*, Separate Statement of Kathleen Q. Abernathy, at 1.

CERTIFICATE OF SERVICE

I, LaTashia T. Williams, hereby certify that copies of the foregoing Petition for Reconsideration have been served by hand this 7th day of April, 2003, on the following:

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