
Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Petition for Waiver of the Part 15 UWB) ET Docket No. 04-352
Regulations Filed by the Multi-band OFDM)
Alliance Special Interest Group)

To: The Commission

PETITION FOR RECONSIDERATION

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Cingular Wireless LLC (“Cingular”) hereby petitions the Commission, pursuant to 47 U.S.C. § 405(a) and 47 U.S.C. § 1.106, for reconsideration of the Commission’s March 11, 2005 *Order* in this proceeding.¹

SUMMARY

The *Order* grants an open-ended blanket waiver of the Commission’s standards for measuring the power of a wide variety of ultra-wideband (“UWB”) devices, substituting a new standard for the ones established by Commission rules and policies. In so doing, the Commission effectively adopted a rule in violation of the notice-and-comment rulemaking requirement of the Administrative Procedure Act. The *Order* acknowledges that “codifying” the rule change would require rulemaking, but the Commission cannot avoid that requirement by cloaking the rule in the guise of an open-ended prospective “waiver” of general applicability. By denying it was promulgating a rule, the Commission also evaded other statutory requirements that govern the establishment of rules of general applicability.²

¹ *Waiver of the Part 15 UWB Regulations*, ET Docket 04-352, *Order*, FCC 05-58 (Mar. 11, 2005).

² *See* Congressional Review Act, 5 U.S.C. §§ 801-08 *et seq.*, Regulatory Flexibility Act, 5 U.S.C. §§ 601-12.

Whether or not rulemaking was required, the *Order*'s change in measurement standards eviscerates the rules through waiver and cannot be squared with the "conservative," "cautious" approach to potential interference announced in the UWB rulemaking. Additionally, the policy prescribed by the *Order* will have the effect of significantly increasing the danger of harmful interference from UWB devices beyond that contemplated in the UWB rulemaking. The change in power measurement will allow UWB devices to use transmit at EIRP levels that are 6 dB higher than previously allowed, without any basis in the record for allowing this power increase. Further, it may be possible to increase the transmit EIRP even more if the duty cycle is altered from what is currently envisioned for MB-OFDM devices. Thus, by approving the waiver, the Commission has opened the door to further additional increases in transmit EIRP without any testing or actual measurements.

Moreover, the *Order* is arbitrary and capricious in that it neither responds meaningfully to Cingular's comments nor explains its conclusion that the interference concerns raised had been adequately addressed. For all these reasons, the *Order* should be vacated.

DISCUSSION

I. THE COMMISSION VIOLATED THE APA AND OTHER STATUTES BY PROMULGATING A NEW RULE IN THE GUISE OF GRANTING A "WAIVER" OF GENERAL APPLICABILITY

A. The Administrative Procedure Act

The *Order* claimed that no "rules" were adopted, but the so-called waiver is in fact a rule. The Administrative Procedure Act ("APA") defines a rule as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" ³ The fact that the Commission chooses not to "codify" its policy determination by

³ 5 U.S.C. § 551(4).

amending the Code of Federal Regulations at this time does not determine whether it must comply with the APA's rulemaking procedures to adopt it. Likewise, the fact that the Commission called its decision an "order" instead of a "report and order" is not determinative.⁴ Here, the "waiver" supplants the specific provisions of existing rules henceforth and is intended to be binding, so it constitutes a rule for purposes of the APA.⁵

While agencies have the discretion to develop policies through rulemaking and adjudication,⁶ their discretion in this regard is limited. In particular, if an agency wishes to adopt a new standard prospectively, it must do so through rulemaking, because the objective is "the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct."⁷ Adjudications, by contrast, are generally "concerned with the determination of past and present rights and liabilities" in light of existing law.⁸

When the Commission grants a waiver, it uses adjudication to determine that certain parties should be exempted from a valid, generally applicable rule based on a determination that application of the rule is unwarranted due to "special circumstances" in "particular, individualized cases."⁹ The waiver process, thus, is not an appropriate vehicle for changing the requirements of a rule for all who are subject to the rule as a blanket matter, prospectively and without any consideration of a party's "particular, individualized" circumstances: "a waiver is appropriate only if *special circumstances* warrant a deviation from the general rule and such deviation

⁴ See, e.g., *Central Texas Telephone Cooperative, Inc. v. FCC*, No. 03-1405, slip op. at 11 (D.C. Cir. Mar. 11, 2005) ("And it may be so considered [as a rulemaking] despite the Commission's calling what it did here an 'Order.' Although the APA defines "order" as a final disposition other than in a rulemaking, 5 U.S.C. § 551(6), the Commission uses the designation "order" even when it issues legislative rules after overt § 553 rulemaking.").

⁵ See *Public Citizen, Inc. v. United States Nuclear Regulatory Commission*, 940 F.2d 679, 681-82 (D.C. Cir. 1991); see also *United States Telephone Association v. FCC*, 28 F.2d 1232 (D.C. Cir. 1994) (reversing FCC for failure to comply with APA).

⁶ See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

⁷ *American Airlines v. CAB*, 359 F.2d 624, 629 (D.C. Cir.), cert. denied, 385 U.S. 843 (1966).

⁸ *Id.*

⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

will serve the public interest.”¹⁰ The Commission has made clear that proceeding by waiver is inappropriate when the grounds for the waiver “are such that to grant the relief requested would involve a fundamental change in the rule itself rather than the creation of a limited exception due to particular unique circumstances or other considerations which make application of the general policy of the rule inappropriate.”¹¹

When the Commission wishes to change the requirements imposed by a rule, as it has done in the *Order*, it cannot simply waive the rule for all comers. It must conduct a rulemaking proceeding in accordance with the requirements of the APA, because such a change effectively repeals the rule that is on the books.¹² Under the APA, the Commission may not promulgate a rule without publishing a notice of proposed rulemaking that contains “either the terms or substance of the proposed rule or a description of the subjects and issues involved,”¹³ and providing an opportunity for public comment after publishing such notice.¹⁴

Here, the Commission did not follow this requirement. It gave notice — without the Federal Register publication required for a rulemaking — only that it was considering a waiver request by MBOA-SIG, which had asked for a waiver based on the specifics of a particular technology. The *Order*, however, not only granted the “waiver” MBOA-SIG had requested, but overrode the provisions of the Commission’s rules prospectively for all UWB devices, without any consideration of particulars. The Courts have made clear that when an agency “effectively

¹⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (emphasis added) (reversing Commission grant of waiver).

¹¹ *CBS, Inc.*, 87 F.C.C.2d 587, 593 (1981).

¹² *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983)(notice and comment rulemaking procedures pursuant to 5 U.S.C. § 553 must be followed to repeal rules).

¹³ 5 U.S.C. § 553(b)(3).

¹⁴ *See* 5 U.S.C. § 553(c).

amends” an existing rule, as the *Order* did, notice-and-comment rulemaking is required.¹⁵ Indeed, the Supreme Court has held that rulemaking is required before an agency can adopt “a new position inconsistent with” an existing rule or effectuate “a substantive change in the regulation.”¹⁶

The Commission has effectively conceded the need for a rulemaking to accomplish its desired result. The *Order* stated that the Commission would “make appropriate modifications to our rules in the future” and said it would “initiate a rule making to codify the provisions of this waiver,” after further tests had been conducted and after NTIA had determined whether the waiver should be expanded to the 5.03-5.65 GHz band.¹⁷ This procedure — adopt binding standards, then test, and only then “codify” the standards through rulemaking — stands the APA on its head and is arbitrary and capricious in its own right.

B. The Congressional Review Act and Regulatory Flexibility Act

The Commission failed to follow not only the requirements of the APA, but also those of other statutes governing the adoption of rules. In particular, the Commission cannot make its decision effective without complying with the Congressional Review Act (“CRA”)¹⁸ and the Regulatory Flexibility Act (“RFA”)¹⁹.

The *Order* states that the Commission will not send a copy of the decision to Congress or the Government Accountability Office, as the CRA requires when the FCC adopts rules, “be-

¹⁵ *USTA v. FCC*, No. 03-1414, slip op. at 11 (Mar. 11, 2005) (“We have, for example, held that ‘new rules that work substantive changes,’ *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (emphasis added), or ‘major substantive legal addition[s],’ *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (emphasis added), to prior regulations are subject to the APA’s procedures.”).

¹⁶ *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995).

¹⁷ *Order* at ¶ 19.

¹⁸ 5 U.S.C. §§ 801-08.

¹⁹ 5 U.S.C. §§ 601-12.

cause no rules are being adopted.”²⁰ That statute, however, employs the APA’s definition of a “rule,” subject to certain exceptions not relevant here.²¹ Under the CRA, no agency rule, so defined, can become effective until it has been sent to the House of Representatives, the Senate, and the Comptroller General.²²

The legislative history of the CRA makes clear that it must “be interpreted broadly with regard to the type and scope of rules that are subject to congressional review.”²³ In fact, Congress adopted a broad definition of a “rule” specifically to deter agencies from attempting to circumvent the statute.²⁴ As a result, the Comptroller General has determined that it covers “not only formal rulemaking, but also . . . rules that are not subject to notice and comment requirements of the APA, informal rulemaking under 5 U.S.C. § 553(c), rules that must be published in the Federal Register before taking effect (5 U.S.C. § 552(a)(1) and (2)), and other guidance documents.”²⁵ The CRA’s focus, he stated, “is to require congressional review of agency actions that substantially affect the rights or obligations of outside parties.”²⁶ Further, to constitute a rule for purposes of the CRA, an agency action need not affect the public at large; “all that is required is a finding that it has general applicability within its intended range, regardless of the magnitude of that range.”²⁷ As a result, an agency document will constitute a rule if it prescribes “procedures [that] differ significantly from those contained in the existing regulations,” because this

²⁰ *Order* at ¶ 20 n.50.

²¹ 5 U.S.C. § 804(3) provides, in relevant part: “The term ‘rule’ has the meaning given such term in section 551”

²² 5 U.S.C. § 801(a)(1)(A).

²³ 142 Cong. Rec. S3687 (daily ed. Apr. 18, 1996) (Joint Explanatory Statement of Senate sponsors); 142 Cong. Rec. E578 (daily ed. Apr. 19, 1996) (Joint Explanatory Statement of House sponsors).

²⁴ *Id.*

²⁵ *Whether Trinity River Record of Decision is a Rule*, Opinion B-287557, 2001 U.S. Comp. Gen. LEXIS 218, *13-14 (May 14, 2001) (emphasis added)

²⁶ *Id.* at *14.

²⁷ *Id.* at *19.

will effectively “alter the existing regulation and give to recipients significant rights that they did not previously possess.”²⁸

Under these standards, there can be no doubt that the *Order* sets forth a “rule” subject to the CRA. By expanding the scope of the “waiver” beyond what MBOA-SIG had requested, to “allow[] any UWB device, not just MB-OFDM, to be measured under normal operating conditions,”²⁹ the Commission intentionally established a standard of general applicability to all manufacturers of UWB devices that sets forth procedures at variance with the rules that give UWB manufacturers “significant rights” that they did not have under the established rules. Because this constitutes a “rule” for purposes of the CRA, it may not become effective until the Commission has complied with the requirements of the CRA.

The Commission’s *Order* also violates the RFA. Under the RFA, the Commission is required to issue an Initial Regulatory Flexibility Analysis (“IRFA”) when it issues a notice of proposed rulemaking and a Final Regulatory Flexibility Analysis (“FRFA”) when it adopts a rule that is subject to the APA’s notice and comment rulemaking requirement.³⁰ As discussed above, the *Order* constitutes a “rule” that is subject to the latter requirement. The Commission did not issue either an IRFA or a FRFA. As a result, the Commission’s *Order* is legally defective. The D.C. Circuit recently remanded a portion of a number portability decision to the Commission and stayed its enforcement against certain parties because of a similar failure to prepare a FRFA.³¹

²⁸ *Whether Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits is a Rule*, Opinion B-281575, 1999 U.S. Comp. Gen. LEXIS 255, *11-12 (Jan. 20, 1999).

²⁹ *Order* at ¶ 17.

³⁰ See 5 U.S.C. §§ 603(a) (IRFA requirement), 604(a) (FRFA requirement); *cf. id.* § 601(2) (defining “rule” consistent with APA).

³¹ *USTA v. FCC*, No. 03-1414, slip op. at 28 (D.C. Cir. Mar. 11, 2005).

II. THE *ORDER* EVISCERATES THE RULES THROUGH WAIVER AND CONTRAVENES THE COMMISSION’S ANNOUNCED COMMITMENT TO A “CONSERVATIVE” AND “CAUTIOUS” APPROACH TO UWB

Waivers are an appropriate way for the Commission to handle unusual situations where enforcement of a rule would cause hardship or disserve the public interest, but the obligation to consider waivers “does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.”³² The decision here does just that. Whether or not the *Order* violates the APA’s rulemaking requirement, it surely removes all UWB devices from the coverage of the plainly applicable rules governing power measurement and substitutes an altogether different standard. The rule, in short, no longer applies due to the waiver. The waiver utterly eviscerates the rule.

The waiver also contravenes the Commission’s announced policy of proceeding cautiously and conservatively with respect to UWB, due to its interference potential. The Commission used terms such as “conservative,” “cautious,” or “an abundance of caution” dozens of times to describe its UWB policies throughout its decisions in the UWB rulemaking.³³ In keeping with this approach, the Commission said that the UWB rules were intended to govern UWB devices as written, even though they might rule out some UWB applications. It stated:

We recognize that our initial restrictions on applications, operating frequencies and emission levels may limit some UWB applications. However, we believe that we should be cautious until we have gained further experience with this technology. Once addi-

³² *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

³³ *Ultra-Wideband Transmission Systems*, ET Docket 98-153, *First Report and Order*, 17 F.C.C.R. 7435 (2002) (*UWB Order*), *erratum*, 17 F.C.C.R. 10505 (2002), *clarified*, 17 F.C.C.R. 13522 (OET 2002) (*UWB Clarification Order*), *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 3857 (2003) (*UWB Recon Order*), *Second Report and Order and Second Memorandum Opinion and Order*, FCC 04-285 (Dec. 16, 2004) (*Second UWB Recon Order*). (The *UWB Order* used such terms to describe the Commission’s approach in 44 separate paragraphs, the *UWB Recon Order* in eight paragraphs, and the *Second UWB Recon Order* in ten paragraphs.)

tional experience has been gained with UWB operation, we may consider whether more flexible standards are appropriate.³⁴

Although the *Order* alludes to the Commission's policy of proceeding cautiously, the grant of the waiver cannot be squared with this policy. When the Commission was faced with claims that its regulations restricted some devices under development, it responded by providing even "more flexible standards" than requested, although it had not yet gained any experience with UWB.³⁵ To date, only one UWB communications device has been certificated by the Commission — a device from Xtreme Spectrum/Motorola/Freescale — and it is a wireless developers' kit rather than a finished product.³⁶ With this single direct-sequence device having been certified, and no OFDM devices certified, the FCC clearly was not acting cautiously and on the basis of experience in granting the waiver. Indeed, in the *Order*, the Commission acknowledged that it was deviating from the cautious approach it had announced, stating that it was waiving rules that added an "unnecessary level of conservatism."³⁷ The level of conservatism embodied in its power measurement rules, however, is fundamental to all of the interference analyses in the UWB rulemaking.

Furthermore, the OFDM waveform that is now being considered was not envisioned during the original rulemaking. There were no measurements or tests with this technology, and there was no analysis of its interference potential. Rather, the OFDM waveform has only been developed to fit under the UWB rules because it meets the Commission's UWB definition as having a bandwidth greater than 500 MHz. It is clearly not the impulse form of UWB that the

³⁴ *UWB Order*, 17 F.C.C.R. at 7444-7445.

³⁵ As Freescale noted, "there has been no experience as yet, because there are no communications UWB products on the market." Reply Comments of Freescale at 3 (filed Oct. 21, 2004).

³⁶ This is based on an April 11, 2005 search of the Commission's online equipment certification database for UWB transmitters; only one of the 43 devices certified to date, FCC ID "RUN-XSUWBWDK," was a communications device; all of the others are non-communications devices, such as ground penetrating radars.

³⁷ *Order* at ¶ 13.

Commission and the NTIA originally had in mind. Furthermore, if multiple MB-OFDM devices are actively transmitting within a small area, then each device will choose a different hopping pattern and effectively “fill up” the periods when a single device would not be transmitting. Thus, the averaging that is done in the measurement has been effectively removed in this case leading to an increased risk of *continuous* interference.³⁸ Accordingly, to grant the waiver without additional testing is anything but cautious and conservative.

III. THE COMMISSION HAD NO RECORD BASIS FOR EFFECTIVELY INCREASING UWB POWER LIMITS, AND THE RISK OF INTERFERENCE, ABOVE THE LEVELS SET IN THE UWB RULEMAKING

The *Order* will have the effect of significantly increasing the danger of harmful interference from UWB devices beyond that contemplated in the UWB rulemaking, because the power of UWB devices will now be measured in a different manner. By changing the way UWB power levels are measured, the Commission has effectively discarded the power (EIRP) limits adopted in that proceeding and replaced them with new, less conservative limits — as much as 6 dB higher, or more, depending on the duty cycle of the waveform.³⁹ As Freescale pointed out in an *ex parte* filing concerning the MBOA-SIG petition, waiving the power measurement rules has an effect “virtually the same as raising [the] UWB limits.”⁴⁰ For wide bandwidth radio receivers, in particular, this increase in allowed EIRP may introduce additional interference that cannot be mitigated through error correction coding or other means. Here again, this approach to rulemaking does not represent a cautious and conservative approach. Even though one of the central, hotly contested, issues in the UWB rulemaking was the power (EIRP) limit on UWB emissions, the Commission has now, after the fact, raised the power (EIRP) limit by changing the way

³⁸ November 5, 2004 letter from Mitchell Lazarus, counsel for Freescale, to Marlene H. Dortch (“Freescale *ex parte*”), at Slide 6.

³⁹ See Reply Comments of Freescale at 7.

⁴⁰ Freescale *ex parte* at Slide 4.

power levels are to be measured. It has done so without revisiting the record of that proceeding to determine what power (EIRP) levels are justified in light of the new measurement scheme and has failed to explain its conclusions.

IV. THE *ORDER* ARBITRARILY AND CAPRICIOUSLY FAILED TO ADDRESS CONCERNS RAISED BY COMMENTERS

The *Order* summarizes all of the comments opposing the waiver in a single paragraph. The only point Cingular is described as having raised was that the waiver could not be granted “without tests comparing the measurements that would result with and without the frequency hopping stopped.”⁴¹ It briefly summarizes interference claims by others, including that the change will permit a “four-fold increase” (*i.e.*, 6 dB) in UWB power levels.⁴²

The *Order*’s only response to these points is as follows:

The MBOA-SIG members conducted simulated and actual testing of devices employing the MB-OFDM format to demonstrate that, under normal operating conditions, there is no greater interference potential from an MB-OFDM UWB waveform than from an impulse-generated UWB waveform, even when compliance with the emission limits is demonstrated with the frequency hop or step function active.⁴³ These simulations and tests address the interference concerns expressed by Cingular . . . and other commenting parties.⁴³

The “simulations and tests” referred to in this passage, however, were those contained in the petition for waiver.⁴⁴ There were no simulations or tests addressing Cingular’s objection; that would have required tests comparing power measurements using the method prescribed in the rule and the method requested in the waiver, which were not included in the waiver request. Accordingly, the Commission’s *Order* was not responsive to Cingular’s comments, which

⁴¹ *Order* at ¶ 11, citing Cingular comments at 5.

⁴² *Order* at ¶ 11.

⁴³ *Order* at ¶ 12.

⁴⁴ *See Order* at ¶ 12 n.38.

renders the decision arbitrary and capricious. Furthermore, as explained above, additional testing should be carried out to address the impact on wide bandwidth receivers. As the Commission is aware, Cingular intends to deploy UMTS (WCDMA) which has a 5 MHz bandwidth. Other new technologies, as well as many satellite receivers, may use even larger bandwidths such as 10 MHz, 20 MHz, or more.

The Commission also does not explain how the waiver petition “addressed” the various objections concerning increased interference. It offers only the conclusion that the concerns were addressed, without explaining how it resolves the issues raised by the comments. It is well established that a Commission decision will not be sustained when it states only its conclusions, without explaining how it reached those conclusions and how it weighed any conflicting evidence.⁴⁵ It cannot simply refer to the fact that another party has addressed the issue.⁴⁶ The D.C. Circuit has made clear that the Commission must explain its rationale in some detail:

Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review. Basic principles of administrative law require the agency to “ ‘examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’ ”⁴⁷

The failure to explain therefore renders the Commission’s conclusion arbitrary and capricious.

⁴⁵ *AT&T Wireless Services, Inc. v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001) (“[T]he Commission’s succinct statement fails to provide a reasoned justification The only other clarification that the Commission provided was a conclusory assessment Obviously, this does not fill the void.”).

⁴⁶ *Id.* (the fact that an opposing party used a particular rationale does not “suffice to explain the Commission’s choice”).

⁴⁷ *Id.*, quoting *USTA v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000), in turn quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983)).

CONCLUSION

For the foregoing reasons, the *Order* should be vacated and the waiver rescinded.

Respectfully submitted,

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