

April 23, 2003

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

Re: *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 --  
**WRITTEN EX PARTE PRESENTATION**

Dear Ms. Dortch:

I am writing on behalf of the Wireless Communications Association International, Inc. (“WCA”) in response to an informal inquiry from the staff of the Wireless Telecommunications Bureau for certain additional information regarding the impact of the freeze adopted in the *Memorandum Opinion and Order* (“*MO&O*”) on the filing of most applications involving the Instructional Television Fixed Service (“ITFS”) and, apparently, Multipoint Distribution Service (“MDS”).

In its Petition for Reconsideration of the *MO&O*, WCA urged the Commission to 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.<sup>1</sup> Although the Petition was filed just days after the release of the *MO&O*, WCA demonstrated that the broad freeze would have a significant adverse impact on the deployment of planned MDS/ITFS-based wireless broadband systems.<sup>2</sup> WCA also established (i) that the more limited freeze proposed by WCA would protect the Commission’s legitimate interest in preserving the auctionable ITFS “white space” from encroachment, while allowing current licensees to deploy new wireless broadband systems and expand existing ones consistent with Commission precedent; and (ii) that the Commission could avoid unrealistic expectations by licensees by clarifying that should the final rules provide

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<sup>1</sup> See Petition of Wireless Communications Ass’n Int’l, WT Docket No. 03-66, at 1-2, 4, 10 (filed April 7, 2003)[“WCA Petition”].

<sup>2</sup> See *id.* at 6-9.

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for “grandfathering” of some facilities, the Commission might not extend that relief to facilities applied for following the release of the *MO&O*.<sup>3</sup>

Subsequent to the filing of WCA’s Petition, the staff requested further information regarding the applications that would likely be submitted absent the freeze, and WCA has canvassed its membership in an effort to respond. Before discussing the results of that survey, one caveat is necessary. Because the freeze, by its terms, is not to be lifted until new rules are adopted in response to the *Notice of Proposed Rulemaking* (“*NPRM*”) in this docket, WCA asked those polled to assume that the freeze will be in effect for twelve months. If the freeze actually lasts longer (and it might, given that the Commission has set an extraordinarily long pleading cycle that will not require the filing of reply comments until late summer), the number of planned wireless broadband systems that will be adversely impacted will be greater than discussed below.

The bottom line is this – the application freeze imposed by the *MO&O* will adversely impact the ability of approximately thirty broadband system operators to deliver high-speed, wireless broadband service to at least eighty markets across the United States in the coming year.<sup>4</sup> This includes approximately twenty-eight markets where the established wireless broadband system operator will be unable to implement plans either to add the cells necessary to expand network capacity within its existing service area and/or to expand its service area to meet demand in areas not presently served. The others are markets where MDS/ITFS-based wireless broadband services are not currently available to the public (although the system operator has already spent substantial time and funds to complete many of the pre-application activities identified in WCA’s Petition).<sup>5</sup> In addition, although it is not positioned to canvas the entire

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<sup>3</sup> See *id.* at 4-6. Of course, the white paper submitted by WCA, the Catholic Television Network (“CTN”) and the National ITFS Association (“NIA”) that led to the release of the *Notice of Proposed Rulemaking* (“*NPRM*”) in this proceeding called for only very limited grandfathering of facilities that do not comport with the new rules, and WCA continues to believe that, regardless of whether applied for before or after the release of the *MO&O*, most facilities should be required to operate under the new regulatory regime. See “A Proposal for Revising the MDS and ITFS Regulatory Regime,” RM-10586 (filed Oct. 7, 2002)[“WCA-CTN-NIA White Paper”].

<sup>4</sup> It is not possible at this juncture to state with any precision the number of licensees that are impacted by the freeze. As discussed below, in most of these markets the system operator was planning to utilize one or two channel groups. WCA does not believe that in any case more than four channel groups will be used. Nonetheless, as recognized in the *NPRM*, in many cases the ability to utilize a given channel group depends on the willingness of co-channel and adjacent channel licensees to grant their consent. See *NPRM*, at ¶ 48. Thus, final selection of channels cannot occur until after the system operator has completed the process of securing consents. And, until the final channel selection is made, it is impossible to determine the number of licensees impacted. If, however, one assumes that on average two channel groups will be used per market and that, as is often the case, the groups are held by different entities, the freeze will impact 160 different licensees in the approximately eighty markets. WCA would reduce this estimate somewhat, since it is likely that there will be some duplication of licensees, and thus an estimate of 125-150 licensees is probably more realistic.

<sup>5</sup> See WCA Petition, at 7.

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ITFS community, WCA has identified two situations in which ITFS licensees have been frustrated in their plans to deploy non-commercial two-way broadband systems for their own use.

The characteristics of the markets adversely impacted by the freeze run the gamut from remote rural areas to towns with a few hundred homes, small cities and major metropolitan areas. Although WCA would vigorously oppose any effort to limit the freeze to only markets of a particular size, it is fair to say that the majority of the approximately eighty markets impacted by the freeze are outside the largest 100 markets and include homes and businesses that do not have access to cable modem or DSL service.<sup>6</sup> At the same time, the record before the Commission also reflects that new system deployments had been planned in at least two major markets,<sup>7</sup> and WCA has been advised that new deployments in three additional major markets and expansions of existing systems in two major markets have been frustrated by the freeze.

Given that the majority of the markets involved tend to be smaller, WCA anticipates that the lifting of the freeze will not result in a torrent of applications. Given that the capacity needs in smaller markets are limited, system operators proposing to operate in smaller markets have advised WCA they are planning to utilize all or parts of just one or two channel groups and deploy as few as one to three cells.<sup>8</sup> The number of applications that can be anticipated for a given system within the months following a lifting of a freeze will depend upon whether the operator is using time division duplex (“TDD”) technology that requires two applications per channel group per cell site (one to license the cell to transmit and one to license it to receive upstream transmissions from subscribers) or frequency division duplex (“FDD”) technology that requires one application per channel group per cell site. Thus, for example, it will take eight applications to license a TDD system that uses all or part of two channel groups at two cells. WCA’s survey indicates that approximately two-thirds of the markets will be utilizing TDD

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<sup>6</sup> This should come as no surprise to the Commission. Indeed, the agency has previously concluded that “in rural or otherwise underserved markets in the country, ITFS/MDS may be the sole provider of broadband service.” See “Interim Report – Spectrum Study of the 2500-2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems,” ET Docket No. 00-232, at 22 (November 15, 2000). Moreover, WCA has already provided the Commission with information regarding the deployment of MDS/ITFS-based services in rural areas. See, e.g., Comments of Wireless Communications Ass’n Int’l, WT Docket No. 02-381, at 3-4 (filed Feb. 3, 2003).

<sup>7</sup> See Letter of IPWireless to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66, at 2 (filed April 17, 2003)(explaining that the freeze is preventing the deployment of an MDS/ITFS-based wireless broadband service in a “top-30 MSA”); Comments of Sprint Corp. in Support of Petition for Reconsideration, WT Docket No. 02-66, at 3 (filed April 17, 2003)(“Sprint is preparing to bring next generation broadband service to at least one major market and one smaller market before the end of the year.”)

<sup>8</sup> Because of the interleaved nature of the channel band, a system operator might choose to utilize two channels each in two channel groups to create a contiguous block of 24 MHz, rather than use the four channels in a single group, which results in four non-contiguous 6 MHz channels. For example, an operator in need of 24 MHz for a TDD system might use channels E1, F1, E2 and F2 (which are contiguous) rather than the four E Group channels, which are separated by 6 MHz from each other.

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technology, and one-third will be utilizing FDD technology.<sup>9</sup> Of course, with respect to the larger markets WCA's members are reporting plans to use more channel groups (although four appears to be the maximum) and to deploy more cells in order to achieve the network capacity and ubiquitous coverage necessary to succeed (with it appearing that operators plan initially to deploy, on average, approximately a dozen cells in the largest markets at issue).

Under these circumstances, WCA does not believe that the public interest would be served by retaining the broad freeze but freely granting waiver requests. Chairman Powell already has acknowledged in this proceeding that the MDS/ITFS regulatory regime can be "stifling."<sup>10</sup> The public interest is not served by requiring licensees to spend resources on preparing waiver requests and suffer the delays in application processing that will inevitably result.<sup>11</sup>

Moreover, WCA's analysis shows that lifting the freeze on MDS filings but retaining the current broad freeze on applications for new ITFS boosters and response station hubs and on applications to modify licensed ITFS facilities would not solve the problem. Again, it must be stressed that WCA is not seeking a lifting of the freeze on applications for new ITFS stations outside of existing protected service areas. However, the broader freeze that is currently in place is adversely affecting broadband system operators that rely on leased excess ITFS capacity to provide service. The simple fact is that in many markets these system operators either do not have access to alternative MDS spectrum or are unable to secure the consents necessary under the current overly-conservative interference protection rules to deploy cellularized two-way services utilizing the MDS channels that are available. Thus, if the broad freeze on ITFS applications is retained, system operators in facing these circumstances will be unable to expand existing wireless broadband systems or introduce new ones.

Finally, WCA must respond to the suggestion that WCA's request for a lifting of the freeze is somehow inconsistent with its call for the Commission to suspend build-out requirements and construction deadlines during the pendency of this proceeding. WCA

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<sup>9</sup> In a few cases, operators have indicated a desire to utilize both TDD and FDD technologies, using TDD on some channels and FDD on others.

<sup>10</sup> *NPRM*, Separate Statement of Chairman Michael K. Powell, at 1.

<sup>11</sup> Admittedly, the case for waiver would not be difficult to make. An applicant would merely be required to (1) note what is a matter of record before the Commission, *i.e.*, there is a demand for the applicant's broadband service either as an initial entrant or a competitor to incumbents; (2) establish (as it must do anyway as part of the application) that the proposed facilities comport with the dual requirements under the current rules that new or modified facilities be within the applicant's existing protected service area and not exceed a -73 dBW/m<sup>2</sup> power flux density at the border of that area absent the consent of a neighboring licensee, and that as a result there will be no encroachment into auctionable ITFS "white space"; and (3) acknowledge that the Commission may require modification of the facilities applied for upon the adoption of new rules. The fact that the merits of a waiver request would be so simple to establish demonstrates that requiring a waiver request would serve no purpose other than burdening applicants and the Commission's processing staff alike with the costs and delays of waiver processing.

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respectfully rejects that notion. Two simple facts must be understood: (i) even without the freeze, many system operators would not be deploying broadband services; and (ii) those operators have very legitimate reasons for not doing so. The WCA-CTN-NIA White Paper provides a detailed discussion of the problems presented by the current regulatory regime, ranging from overly-protective interference protection rules that preclude licensing of viable broadband systems to a crushing paperwork burden associated with licensing broadband systems with more than a handful of cells.<sup>12</sup> That discussion need not be repeated here. Clearly, however, *the fact that thirty system operators believe they can overcome these problems in eighty markets does not mean that all system operators can overcome them in all markets.* To cite just one example, most of the eighty markets in which activity is anticipated are in relatively isolated areas of the country where non-affiliated cochannel stations are quite distant from one another. Because of the vast distances between unaffiliated co-channel facilities, many of the licensing problems identified by the WCA-CTN-NIA White Paper that stem from overly-conservative interference protection rules simply are not present in these areas.<sup>13</sup> Yet, it is an undisputed matter of record in this proceeding that in more congested areas of the country these rules preclude viable system deployment and thus the relief sought by WCA from build-out and construction deadlines is appropriate.

In conclusion, there is perhaps no better argument for WCA's proposed lifting of the freeze than the words of Chairman Michael K. Powell:

Introducing a third broadband pipe to the home as a competitor to cable modems and digital subscriber lines is among the FCC's highest priorities -- and there is no better candidate than spectrum-based services. Though wireless broadband is available in some markets, this potential pipe now merely trickles. My goal is to foster a regulatory environment in which this trickle can become a rushing torrent, raging over and through obstacles to provide vital competition and reach unserved homes and communities.<sup>14</sup>

WCA remains convinced that MDS/ITFS-based services will not be able to turn the current trickle into the desired "rushing torrent" until the new rules proposed by WCA, CTN and NIA are adopted in response to the *NPRM*. The trickle, however, can become a steady stream of

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<sup>12</sup> See WCA-CTN-NIA White Paper, at 7-10.

<sup>13</sup> See *id.* at 8-10.

<sup>14</sup> Powell, "FCC wireless spadework in '02 to bear fruit in '03," *RCR Wireless News* (March 17, 2003).

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wireless broadband deployments over the course of the next year if the freeze imposed by the *MO&O* is lifted immediately.

Respectfully submitted,

/s/ Paul J. Sinderbrand

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Attachment

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