

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

In the Matter of Applications of)	
)	
THE TRUSTEES OF INDIANA UNIVERSITY)	File Nos. 20030710AAA, 20030710AAB,
)	20030710AAC, 20030710AAD
To Add Booster and Hub Stations to Instructional)	
Television Fixed Service Stations WBX257 and)	
WHR808, Indianapolis, Indiana)	
)	
WIRELESS CABLE OF INDIANAPOLIS, INC.)	File Nos. 20030703AAB, 20030703AAC
)	
To Add Booster and Hub Stations to Multipoint)	
Distribution Service Station WHT673,)	
Indianapolis, Indiana)	
)	
ALDA WIRELESS HOLDINGS, INC.)	File Nos. 20030703AAD, 20030703AAE
)	
To Add Booster and Hub Stations to Multipoint)	
Distribution Service Station WHT674,)	
Indianapolis, Indiana)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 1, 2003

Released: October 2, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we consider the above-captioned applications and waiver requests filed by the Trustees of Indiana University (IU), Wireless Cable of Indianapolis, Inc. (WCI), and Alda Wireless Holdings, Inc. (Alda) (collectively, the Applicants) to construct and to operate booster stations and hub stations within the protected service areas (PSAs) of their respective stations. In that regard, applicants have filed requests for waiver of various Commission rules, as well as a freeze on the filing of applications that was in effect at the time the applications were filed. For the reasons stated herein, we grant the waiver requests.

II. BACKGROUND

2. On April 2, 2003, the Commission instituted a freeze on applications for new Multipoint Distribution Service (MDS) or Instructional Television Fixed Service (ITFS) licenses, major modifications of MDS stations, or major changes to ITFS stations other than applications for license

assignments or transfers of control.¹ On August 8, 2003, in response to two petitions for reconsideration of the *MO&O portion of the NPRM*, the Commission found that it would be in the public interest to modify the freeze established by the *MO&O* by eliminating it for MDS stations, and by allowing the filing of major change applications for ITFS licensees and permittees.²

3. The Applicants are working with Sprint Corporation (Sprint) to deploy a high-speed wireless broadband network in the Indianapolis area using innovative next generation technology.³ The Applicants explain that equipment vendors have developed a new generation of equipment that does not require (1) an unobstructed path between the base station, (2) high-power, high-site base stations, or (3) high-gain outdoor antennas at subscriber locations.⁴ Sprint has been testing this new generation of equipment in Houston and Montreal.⁵ Sprint now wishes to proceed with commercial deployment of this next generation equipment in the Indianapolis area.⁶

4. The captioned applications were filed on July 3, 2003, except for the IU applications relating to Station WBX257, which were filed on July 10, 2003. In those applications, the Applicants seek leave to construct and to operate response station hubs, response stations, and high-power booster stations within a portion of the protected service area (PSA) of each station referred to as the Response Service Area (RSA) without obtaining prior Commission approval for each individual response station hub, response station, or high-power booster station.⁷ The Applicants represent that they have obtained the consent of every co-channel or adjacent channel licensee that could be impacted by grant of the requested relief.⁸ The Applicants represent that they will submit the requisite notices and registrations if they desire to construct a station at a location or in a manner that would require FAA notification under Section 17.7

¹ 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; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; WT Docket Nos. 03-66, 03-67, 02-68, MM Docket No. 97-217, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722, 6825 ¶ 260 (2003) (*NPRM*).

² 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, *Second Memorandum Opinion and Order*, FCC 03-194 at ¶ 13 (2003) (*Second MO&O*).

³ Waiver Requests (Applications, Exhibit 1) at 1. The waiver requests submitted with each response station hub application and booster station make the same arguments and are essentially identical except for call signs and other minor information specific to each application. Accordingly, we will refer the waiver requests submitted with each application collectively as "Booster Waiver Requests" and "Hub Waiver Requests," respectively.

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.* at 3.

⁷ *Id.* at 2. See Applications, Figure 1. The Response Service Area is defined as the somewhat circular in shape, relatively concentric with respect to, and covering almost 60% of the Protected Service Area listed in the instant applications.

⁸ *Id.* at 6.

of the Commission's Rules.⁹ The Applicants also state that they will submit an individual application for any station that would require the submission of an environmental assessment.¹⁰ The Applicants acknowledge that any facilities they construct may have to be modified at such time as the Commission adopts final rules in the pending rulemaking proceeding that is comprehensively examining the rules relating to MDS and ITFS.¹¹ The Applicants are not requesting that any response station hubs or booster stations they construct receive interference protection pursuant to the provisions of the rules specifically relating to such stations.¹² Instead, the Applicants are willing to rely on the protection afforded by their existing main station licenses.¹³

5. The subject applications were placed on public notice as accepted for filing on July 16, 2003.¹⁴ No petitions or oppositions were filed against the Applications.

III. DISCUSSION

6. The Applicants seek a waiver of the filing freeze that was in effect at the time the applications were filed. The Applicants also seek waiver of a series of rules that collectively require them to file applications for and obtain prior Commission approval for installing response station hubs and booster stations. In particular, the Applicants seek a waiver of the rules that require individual applications for booster stations and response station hubs.¹⁵ In support of these waiver requests, the Applicants argue that it would be impractical to individually license a single market to use this new generation of technology because of the large number of stations necessary.¹⁶ The Applicants also contend that they will have to constantly modify their base stations to ensure optimal service because base stations are closer to ground level and subscriber antennas are often at ground level.¹⁷ While the Applicants state that they cannot precisely estimate how many applications they must file to individually license each response station hub and booster station, they predict the number would exceed 100.¹⁸ The Applicants also

⁹ *Id.* at 4.

¹⁰ *Id.* at 4-5.

¹¹ *Id.* at 8. 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; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; WT Docket Nos. 03-66, 03-67, 02-68, MM Docket No. 97-217, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003) (*NPRM*).

¹² Booster Waiver Requests at 8, Hub Waiver Requests at 7.

¹³ *Id.*

¹⁴ Wireless Telecommunications Bureau Accepted for Filing, Report No. 1549, *Public Notice* (rel. Jul. 16, 2003).

¹⁵ See 47 C.F.R. §§ 21.15 (general application requirements for the technical content of applications), 21.909(c) (application filing requirements for MDS response stations), 21.913 (application filing requirements for MDS booster stations), 74.939 (application filing requirements for ITFS response stations), 74.985 (application filing requirements for ITFS booster stations).

¹⁶ Booster Waiver Request at 3, Hub Waiver Request at 3.

¹⁷ Booster Waiver Request at 4, Hub Waiver Request at 4.

¹⁸ Booster Waiver Request at 3, Hub Waiver Request at 3.

emphasize that they have obtained the consent of every co-channel and adjacent channel licensee that could receive interference from their proposed operations.¹⁹ Applicants also seek a waiver of the requirement that they use directional antennas for response stations with an effective isotropic radiated power (EIRP) greater than -6 dBW per 6 MHz channel.²⁰

7. An MDS applicant seeking a waiver must make an affirmative showing that: (a) the underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or (b) the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest.²¹ Applicants must also show the lack of a reasonable alternative.²² Moreover, “[a]n applicant for waiver faces a high hurdle even at the starting gate. ‘When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.’”²³

8. In this case, based upon the record before us, we conclude that the Applicants’ submission contains a sufficient showing that grant of the requested waiver is warranted under the circumstances presented. In this connection, we conclude that a waiver will serve the public interest by facilitating the introduction of advanced wireless broadband service in the Indianapolis area. The Commission has recently emphasized that MDS and ITFS can play an important role in promoting the availability of broadband to all Americans, including broadband technologies for educators.²⁴ The Commission also noted that wireless broadband service in the 2500-2690 MHz band may offer consumers another broadband alternative, which may lead to reduced prices and more competition in the delivery of high-speed internet access.²⁵ We believe that the Applicants’ effort to deploy, commercially, an advanced broadband wireless system in the Indianapolis market has the potential to provide another means of providing broadband to consumers in the Indianapolis area.

9. Under the facts presented to us, we conclude that waiver of the specific rules requiring the filing of individual applications for each response station hub and booster station would be in the public interest. The rules in question were designed to ensure that potentially affected applicants could review proposed stations and determine whether the proposed facilities would interfere with their existing operations.²⁶ In this case, however, the Applicants represent, and our independent analysis confirms, that the Applicants have obtained the consent of every licensee, permittee, or proponent of any prior-filed application that could be entitled to interference protection under the current MDS and ITFS rules. MDS and ITFS licensees have always had the option of obtaining consent from an affected licensee in lieu of

¹⁹ Booster Waiver Request at 6, Hub Waiver Request at 5-6.

²⁰ 47 C.F.R. §§ 21.906(d) (MDS), 74.937(b) (ITFS).

²¹ 47 C.F.R. § 21.19.

²² *Id.*

²³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968) (*per curiam*)).

²⁴ *NPRM*, 18 FCC Rcd at 6740 ¶ 33.

²⁵ *NPRM*, 18 FCC Rcd at 6741 ¶ 35.

²⁶ Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112, 191148 ¶¶ 66-67 (1998).

demonstrating that they would provide interference protection to that licensee.²⁷ Since the licensees that the rules were designed to protect have consented to the Applicants' proposal, we believe that a waiver of the pertinent rules would be consistent with the underlying purposes of the rule. We note, however, that the Applicants still have a duty under our rules to remedy promptly any interference that does occur or immediately cease operations.²⁸ In granting the Waiver Requests, we rely upon the representations of the Applicants that they understand their duties under these rules and will act promptly to cure any such interference.²⁹

10. We also find that grant of waivers could result in substantial public interest benefits. As the Applicants note, strict application of our rules would require the filing and processing of a large number of applications every time they needed to make a change to their systems. Because the Applicants have obtained the consent of every co-channel or adjacent channel licensee or applicant that could be adversely affected by the operation of the proposed facilities, we believe the burden of preparing such applications far outweighs the benefit of having such information on file at the Commission. Moreover, given that the system will require frequent modifications as it is being designed, we believe that allowing Applicants to modify their system without prior Commission approval would give the applicants greater flexibility in responding to customer needs and avoid the expense and inherent delay that would result from having to file repeated modification applications.

11. We also conclude that a waiver of the rules requiring the use of directional antennas at customer locations is appropriate in this instance. Given that this system may allow the use of portable services where the physical relationship between the customer and a base station is dynamic,³⁰ requiring the use of directional antennas may make it unduly difficult to provide such services. The requirement was designed to provide protection from harmful interference.³¹ Because the Applicants have obtained consent from all potentially affected licensees, we believe the potential benefits of allowing omnidirectional antennas would outweigh any potential harm to neighboring licensees.

12. With regard to the Applicants' request to waive the application freeze imposed by the Commission in the *NPRM*,³² we conclude that such a waiver is in the public interest because, as noted above, the Commission subsequently modified the freeze on August 8, 2003 to permit the filing of MDS applications and major change applications for ITFS licensees and permittees.³³ As a result, we find that the applications filed on July 3, 2003 by the Applicants to modify MDS Station WHT673, MDS Station WHT674, and on July 10, 2003 to modify ITFS Station WBX257 can be accepted and processed.

²⁷ 47 C.F.R. §§ 21.902(c)(2)(i), 74.903(b)(4).

²⁸ 47 C.F.R. §§ 21.909(g)(7), 21.913(g), 74.939(f), 74.985(g).

²⁹ Booster Waiver Request at 7, Hub Waiver Request at 7.

³⁰ Waiver Requests at 8.

³¹ Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order on Reconsideration*, 14 FCC Rcd 12764, 12781 ¶ 34 (1999).

³² *NPRM*, 18 FCC Rcd at 6825 ¶ 260.

³³ 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, *Second Memorandum Opinion and Order*, FCC 03-194 (2003) (*Second MO&O*).

IV. CONCLUSION AND ORDERING CLAUSES

13. For the reasons discussed above, we grant the Applicants' waiver requests. We emphasize, however, that as the Commission stated in the *Second MO&O*, we caution the Applicants that they will be required to conform all facilities to any new rules that the Commission subsequently adopts for the 2500-2690 MHz Band.³⁴

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 21.19 and 73.3566 of the Commission's Rules, 47 C.F.R. §§ 21.19, 73.3566 the requests for waiver associated with the captioned applications filed by the Trustees of Indiana University, Wireless Cable of Indianapolis, Inc., and Alda Wireless Holdings, Inc. on July 3, 2003 and July 10, 2003 **ARE GRANTED** to the extent indicated.

15. **IT IS FURTHER ORDERED** that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309 that the Licensing and Technical Analysis Branch SHALL PROCESS File Nos. 20030703AAB, 20030703AAC, 20030703AAD, 20030703AAE 20030710AAA, 20030710AAB, 20030710AAC, and 20030710AAD consistent with this *Memorandum Opinion and Order* and the Commission's Rules.

16. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

³⁴ *Id.*, ¶ 1.