



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

DA 05-15
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WIRELESS TELECOMMUNICATIONS BUREAU'S BROADBAND DIVISION GRANTS REQUESTS FOR WAIVER OF MDS AND ITFS DISCONTINUANCE OF SERVICE RULES

In this *Public Notice*, the Broadband Division grants waivers of the Commission's discontinuance of service rules for the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS) stations, in order to facilitate the transition to new rules.¹

Section 21.44(a)(3) of the Commission's Rules provides that an MDS license shall be automatically forfeited upon the voluntary removal or alteration of facilities, so as to render the station not operational for a period of 30 days or more.² Section 21.303(d) of the Commission's Rules requires the licensee to take one of three actions "if any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed..."³ The three potential actions are (1) submitting its station license for cancellation, (2) filing an application for modification of the station license to delete the unused frequency, or (3) requesting a waiver and an extension in the time permitted for resuming operation, pursuant to Section 21.303(d)(3).⁴ For ITFS stations, Section 74.932(d) of the Commission's Rules requires a licensee to forward a license to the Commission for cancellation in case of permanent discontinuance of operation.⁵ A station which has not operated for one year is considered to have permanently discontinued operation.⁶

The attachment to this public notice lists timely-filed requests pending before the Broadband Division for waiver of Section 21.44(a)(3) of the Commission's Rules or Section 21.303(d) of the Commission's Rules. Grant of these waivers would allow the stations to remain silent beyond the time contemplated in the rules. For MDS licensees, pursuant to Section 21.19 of the Commission's Rules,⁷ an 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

¹ The Broadband Division recently granted similar requests for discontinuance waivers. See Wireless Telecommunications Bureau's Broadband and Division Grants Requests for Waiver of MDS and ITFS Discontinuance of Service Rules, *Public Notice*, 19 FCC Rcd 18752 (WTB BD 2004).

² 47 C.F.R. § 21.44(a)(3).

³ *Id.*

⁴ See 47 C.F.R. § 21.303(d)(1)-(3).

⁵ 47 C.F.R. § 74.932(d).

⁶ *Id.*

⁷ 47 C.F.R. § 21.19.

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. Applicants must also show the lack of a reasonable alternative.⁸ For ITFS licensees, “An 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.’”⁹ Furthermore, “the applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary.”¹⁰ Based upon the record before us, we conclude that the waiver requests listed in the appendix have made a sufficient showing to justify a waiver.¹¹

On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rule Making* that fundamentally restructured the band to provide MDS (renamed the Broadband Radio Service, or BRS) and ITFS (renamed the Educational Broadband Service, or EBS) licensees with greater flexibility, and took numerous steps to promote competition, innovation, and investment in wireless broadband services and educational services.¹² Among other actions, the *MDS/ITFS R&O & FNPRM* eliminated the discontinuance of service rules for the new BRS and EBS.¹³ Once the rules adopted in the *MDS/ITFS R&O & FNPRM* become effective, the discontinuance of service rules will no longer apply to non-common carrier BRS and EBS licensees. In order to facilitate the transition to the new rules, we will grant a waiver of the existing rules until the effective date of the new rules.

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 21.44 and 21.303 of the Commission’s Rules, 47 C.F.R. §§ 21.44, 21.303, the waiver requests listed in the Appendix to this Public Notice ARE GRANTED, and the MDS and ITFS stations listed in the Appendix ARE AUTHORIZED to remain silent until the effective date of the new rules adopted in WT Docket No. 03-66.

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.

Action by the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau

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⁸ *Id.*

⁹ *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*)).

¹⁰ *Id.* at 1157 n.9.

¹¹ Our decision to grant these waiver requests should not be construed as evidence that the Broadband Division agrees with the arguments made in the waiver requests. Instead, our decision to grant these waiver requests is based upon our independent review of the record as a whole.

¹² 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, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (*MDS/ITFS R&O & FNPRM*).

¹³ *Id.*, 19 FCC Rcd at 14255-57 ¶¶ 231-239.

ATTACHMENT – GRANTED WAIVER REQUESTS

Licensee	Call Sign	Community of License	Date Waiver Request Filed
American Telecasting of Nebraska	WMH768	Geneva, Nebraska	10/26/2004
Cotopaxi Communications Corporation	WNTB262	Driver, Virginia	11/08/2004
David Wiechman	WMH573	Lexington, Kentucky	11/19/2004
Fixed Wireless Holdings	WGW513	Ripon, California	11/08/2004
Fixed Wireless Holdings	WHT786	Ripon, California	11/08/2004
Fixed Wireless Holdings	WNTJ742	Ripon, California	11/08/2004
Fixed Wireless Holdings	WNTJ715	Ripon, California	11/08/2004
Fixed Wireless Holdings	WNTJ756	Ripon, California	11/08/2004
Floyd Municipal Schools	WNC215	Clovis, New Mexico	10/06/2004
G & Y Communications	WNTH387	Metropolis, Illinois	10/04/2004
Gadsden Independent School District	WNC259	Las Cruces, New Mexico	02/06/2004
James Mastorakos	WNTM582	Alexandria, Louisiana	12/13/2004
Loving Municipal Schools	WNC378	Carlsbad, New Mexico	10/06/2004
Melrose Municipal Schools	WLX932	Clovis, New Mexico	10/06/2004
Minnesota Tele-Media	WHR663	Magnolia, Minnesota	01/30/2003
National Conference on Citizenship	WLX828	Burlington, Vermont	11/19/2004
North American Catholic Educational Programming Foundation	WLX648	Mobile, Alabama	12/02/2004
Portales High School	WLX958	Clovis, New Mexico	10/06/2004
Red New York E Partnership	WLR500	New York, New York	10/18/2004
St. Edward's School	WNC631	Carlsbad, New Mexico	10/06/2004
Texico Municipal School	WNC268	Clovis, New Mexico	10/06/2004
Veritas LLC	WNEK864	Boston, Massachusetts	10/18/2004
Victory Christian Academy	WLX961	Carlsbad, New Mexico	10/06/2004