

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

In the Matter of the Application of)	
)	
CHAMPION INDUSTRIES, INC.)	File No. CIP-9201297
)	
For a New Commercial Instructional Television)	
Fixed Service Station on the A Group Channels)	
at Provo, Utah)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: July 15, 2003

Released: July 22, 2003

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order (MO&O)*, we consider an Application for Review filed on September 13, 2001, by Champion Industries, Inc. (Champion).¹ Champion requests review of an August 14, 2001 letter ruling of the Video Services Division of the former Mass Media Bureau (Bureau), which denied reconsideration of the Bureau's previous dismissal of the above-captioned application for new commercial Instructional Television Fixed Service (ITFS) facilities on the A Group channels at Provo, Utah.² Champion also requests that the Commission reinstate and process the subject Provo application *nunc pro tunc*. For the reasons stated below, we deny Champion's Application for Review.

II. BACKGROUND

2. On October 25, 1991, the Commission adopted a rule permitting wireless cable entities to use ITFS channels.³ To ensure that wireless cable use of these channels did not adversely affect ITFS operations, the Commission established a series of requirements that had to be met before ITFS channels could be used for wireless cable purposes. The instant case involves two of the requirements in effect

¹ Champion Application for Review, File No. CIP-9201297 (filed September 13, 2001) (Champion AFR).

² See Letter dated August 14, 2001, from Charles E. Dziedzic, Assistant Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Champion Industries, Inc., regarding File Nos. CIP-92-01297 and CIP-01294 (Provo, Utah) (VSD Aug. 14, 2001, Letter); see also Letter dated September 1, 1999, from Sharon Bertelsen, Supervisory Attorney, MDS Section, Video Services Division, Mass Media Bureau, Federal Communications Commission to Ronald D. Maines, Esq., Counsel to Champion Industries, Inc., regarding File No. CIP-92-01297 (Provo, Utah) (VSD Sept. 1, 1999, Letter).

³ Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Cable Television Relay Service, Gen. Docket No. 90-54, *Second Report and Order*, 6 FCC Rcd 6792, 6801-6806 (1991) (*Second Report and Order*). See also 47 C.F.R. § 74.990 (1991).

when Champion filed its application. First, a wireless cable operator proposing to use ITFS channels was required to demonstrate that, if its application was granted, at least eight ITFS channels would remain “available” in the community for ITFS use.⁴ For these purposes, channels were considered “available” if there were no co-channel licensees or applicants within fifty miles of the proposed wireless cable site and if the applicant represented that its proposed transmitter would remain available for use by new ITFS applicants for three years after the wireless cable entity commenced operation.⁵ Second, a wireless cable applicant was required to demonstrate that there were no Multipoint Distribution Service (MDS)⁶ channels available that could be used in lieu of the ITFS frequencies for which it had applied.⁷

3. Champion’s Provo Application. In 1992, there were twenty ITFS channels (five groups – A, B, C, D, and G – of four channels each) for which wireless cable entities could apply.⁸ On February 3, 1992, Champion filed applications for new facilities on the A and D Channel Groups at Provo, Utah.⁹ Under Section 74.990(a) of the Commission’s Rules, Champion was required to show that at least eight of the remaining twelve ITFS channels were available in Provo for future ITFS use.¹⁰ In its applications, Champion conceded that the B Group channels were unavailable for future ITFS use because harmful interference would occur to the University of Utah’s previously filed application for a new ITFS station on the B Channel Group at Magna, Utah,¹¹ located 34.1 miles away from Champion’s proposed Provo station.¹² Champion represented that there were no ITFS stations on the G Group channels within fifty miles of its proposed stations, hence making the four channels in the G Group available for a future ITFS system in Provo. Assuming that Champion was correct in claiming the G Group channels were available, the G group channels would only have supported the availability of four of the requisite eight channels.¹³

4. In an attempt to show that four additional channels were available, Champion sought a waiver of Section 74.990(a) of the Commission’s Rules with respect to the C Group channels.

⁴ See 47 C.F.R. § 74.990(a) (1992).

⁵ *Id.*

⁶ Herein, the term “MDS” is generally used to refer, collectively, to both the single-channel MDS and the Multichannel Multipoint Distribution Service (MMDS). However, when the context requires, there is specific reference to the individual service, *i.e.* MDS or MMDS.

⁷ See 47 C.F.R. § 74.990(d) (1992).

⁸ See 47 C.F.R. § 74.902. Depending on the market involved, there are either 12 or 13 channels available for full-time wireless cable. Eleven of these are MMDS Channels E1-E4, F1-F4, and H1-H3, (reallocated in the *Second Report and Order*, see paras. 7-10). In 50 cities, two single-channel MDS channels are also available, Channels 1 and 2. In the rest of the country, one single-channel MDS channel (Channel 1) is available. In addition, 20 ITFS channels, Channels A1-A4, B1-B4, C1-C4, D1-D4 and G1-G4, may be leased by wireless cable operators on a part-time basis (more than 75% of ITFS channel time could be leased, depending upon the intensity of use by the ITFS licensee). *Second Report and Order*, 6 FCC Rcd at 6792, ¶ 1. MMDS and ITFS share the E and F channel groups, but no applications for new ITFS stations on these channels could be filed after May 25, 1983. See 47 C.F.R. §§ 74.902(b) and (c) (1991).

⁹ See File Nos. CIP-0201294, CIP-9201297. The A channel group consists of the frequencies 2500-2506, 2512-2518, 2524-2530, and 2536-2542 MHz. The D channel group consists of the frequencies 2554-2560, 2566-2572, 2578-2584, and 2590-2596 MHz. See 47 C.F.R. § 74.902 (1992). Champion did not file for review of the dismissal of its D Group application; hence, the order dismissing that application is now final and not subject to review.

¹⁰ See 47 C.F.R. § 74.990(a) (1992).

¹¹ File No. BLIF19871116DA.

¹² See Champion Application Waiver Request at Exhibit 4

¹³ *Id.*

Specifically, Champion requested that the Commission consider the C group channels to be available despite the existence of a C Group application from the Instructional Telecommunications Foundation (ITF), only 33.7 miles away in Salt Lake City, Utah.¹⁴ In support of its waiver request, Champion argued that the same channel may in fact be assigned to more than one station in the same area if the geometric arrangement of the transmitting and receiving points is such that interference is not likely to occur. Champion further asserted that the transmitter site of the Salt Lake City application was separated from Champion's proposed site by a mountain range. Thus, according to Champion, any potentially interfering signal would be blocked in whole by the intervening mountains, and no objectionable interference would occur from Champion's proposed station.¹⁵

5. On September 1, 1999, the Mass Media Bureau dismissed Champion's applications because: (1) Champion failed to show that there were eight ITFS channels available in Provo for future ITFS use as of the date of the VSD Aug. 14 2001, Letter;¹⁶ (2) Champion had not justified a waiver of the eight-channel requirement; and (3) the Commission's licensing records showed that when Champion filed its applications, MDS Channel 2A was available for application in Provo.¹⁷ On October 1, 1999, Champion filed a Petition for Reconsideration.¹⁸ On August 14, 2001, the Assistant Chief of the Bureau's Video Services Division concluded that the dismissal of Champion's applications was correct and denied Champion's reconsideration petition.¹⁹ On September 13, 2001, Champion filed the instant AFR with respect to the A Group application.

III. DISCUSSION

6. Champion makes a two-fold argument: (1) its waiver request should not have been denied because Champion's reference to a mountain range separating the Provo and Salt Lake City sites was an adequate showing that Provo and Salt Lake City C Group ITFS stations would not interfere with one another;²⁰ and (2) that there were no technically suitable MDS or MMDS channels available in Provo that could be used in lieu of the ITFS frequencies applied for by Champion.²¹

A. Section 74.990(a)'s Eight-Channel ITFS Requirement and the Fifty-Mile Standard

7. Champion claims that the Bureau did not provide an adequate explanation of why Champion was not entitled to a waiver of Section 74.990(a) of the Rules.²² We agree with the Bureau's action in this case and conclude that the defects in the Champion waiver request were evident on the face of Champion's Provo application because it lacked sufficient technical information to demonstrate that the C group channels would be available for future ITFS use in Provo were Champion's application

¹⁴ *Id.* The Salt Lake City applicant had application File No. BPIF-19831108DC. It is now licensed as Station WLX699.

¹⁵ *Id.*

¹⁶ The Division stated: "Even if the Commission staff processed the application on the day it was filed, the application would have been returned as unacceptable for filing because the proposal did not meet the eight-channel preservation requirement." VSD Sept. 1, 1999, Letter at 1.

¹⁷ See VSD Sept. 1, 1999, Letter.

¹⁸ Champion *Petition for Reconsideration*, File No. CIP-9201297 (filed October 1, 1999) (Champion PFR).

¹⁹ See VSD Aug 14, 2001 Letter.

²⁰ See Champion AFR at 1.

²¹ See Champion AFR at 1-10; see also ¶ 2 *supra*.

²² See AFR at 2.

granted. However, in the interest of fully addressing Champion's AFR, we discuss, in further detail, the reasons Champion's application was defective and subject to dismissal.

8. As noted *supra*, Champion relied on availability of the G Group and C Group channels to show that, if its application was granted, at least eight channels would remain available for future use in Provo.²³ Champion claimed that the G Group met the fifty-mile criterion for deeming the G Group "available in the future" for ITFS use in Provo.²⁴ However, the G Group yielded only four of the requisite eight channels; hence Champion needed four additional channels, which necessarily had to come from the C Group, which did not meet the fifty-mile spacing criterion relative to the Salt Lake City C Group station. Accordingly – in an effort to show that eight channels would remain available for ITFS use in Provo – Champion sought waiver of Section 74.490(a) of the Rules with respect to the C Group channels.²⁵

9. There is a decisionally significant difference between the showings an applicant must make relative to its proposed facilities' effect on nearby ITFS stations and applications and the showings necessary to demonstrate that at least eight other channels would be available for future ITFS stations at the wireless cable applicant's proposed site. The availability of the channels on which the applicant proposes to operate is determined by evaluating predicted interference to specific receive sites or the protected service area of nearby stations.²⁶ The determination of whether a particular channel group is available for future ITFS use is based on the fifty-mile spacing criterion – a showing of no interference is not sufficient.²⁷ This difference in the two standards stems from the fact that demonstrating that a hypothetical future ITFS station would not cause interference as of a given date (in this instance the date of Champion's application) is no guarantee that the channel group would remain available in the future, because, in the interim, other receive sites associated with nearby co-channel or adjacent channel stations could be activated. In that event, availability of the channel group for a future ITFS facility could be precluded. The fifty-mile criterion, however, limits the possibility that later-added receive sites at other facilities would preclude use of the channel group by a future ITFS licensee.

10. Champion's waiver request attempted to show that later-added receive sites at the Salt Lake City C Group ITFS facility would not preclude future use of the C Group channels at Provo because interference between a Provo station and the co-channel facilities specified in the Salt Lake City application would be "virtually impossible." The impossibility argument rested on Champion's assertion that the Provo and Salt Lake City transmitter sites would be in valleys separated by the Wasatch Mountains, which have an average elevation of 7,000 feet. This, Champion avers, gives "geographic uniqueness" to the region.²⁸

11. In evaluating waiver requests, we are mindful of the principle enunciated by the U.S. Court of Appeals for the District of Columbia Circuit: "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

²³ See 47 C.F.R. § 74.990(a) (1992). See also ¶ 2 *supra*.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See n. 30 *infra*.

²⁷ See 47 C.F.R. § 74.990(a) (1992).

²⁸ Champion AFR at 7-8. Champion also notes that there were no objections from other parties; and that, as of 1996 – well after filing of the Champion application and waiver request – the Salt Lake City ITFS licensee and Champion mutually consented to each other's operations.

and circumstances which warrant such action.”²⁹ In this case, we agree with the Bureau that Champion fell far short of meeting that standard because it did not supply, with the required particularity, technical facts sufficient to permit the Commission to evaluate the merits of Champion’s waiver request.

12. As an initial matter, we note that Champion’s no-interference claim focused on the terrain between its transmitter site and the transmitter site specified in the Salt Lake City application. Interference, however, does not develop between ITFS transmitters; it develops between the transmitter of one station and the protected service area or receive sites of another.³⁰ There is no showing – or even an assertion – in the Champion waiver request to the effect that the mountain range with an “average” 7,000-foot elevation would intervene between a Provo C Group station and the protected service area or discrete receive sites associated with a Salt Lake City C Group station. Moreover, we fail to see the relevance of the average elevation of a mountain range in the context of terrain blockage. The average elevation of the mountain range notwithstanding, the terrain could well deviate from its average value on discrete propagation paths between a Provo C Group station and the receive sites or protected service area of a Salt Lake City station. However, the Champion waiver request is devoid of any technical analysis of discrete propagation paths, signal levels or other such parameters necessary to evaluate Champion’s bare claim that interference would be impossible because of the geographical uniqueness of the region. Finally, even had Champion considered the Salt Lake City receive sites in existence at the time Champion filed its waiver request, it could not anticipate receive sites that the Salt Lake City licensee might activate subsequently. The existence of such subsequent receive sites could preclude implementation of a future Provo C Group ITFS facility because of interference considerations.

13. In sum, we find that Champion did not provide sufficient technical data to allow the Bureau to conclude that, because of terrain conditions, the C Group channels should be deemed available for future ITFS use in Provo, despite the presence of Salt Lake City co-channel station 33.7 miles away – a sixteen-mile derogation of the fifty-mile spacing requirement set forth in Section 74.990(a) of the Commission’s Rules.³¹ With approval of the Champion waiver request, eight ITFS channels would not have remained available for future ITFS use in Provo, as Section 74.990(a) of the Commission’s Rules³² requires. Accordingly, we conclude that the Bureau was correct when it dismissed Champion’s application for failure to meet the eight-channel requirement.

B. Applicability of the Requirement to Use MDS or MMDS Channels if Available.

14. Although Champion’s failure to meet the eight-channel requirement of Section 74.990(a) of the Commission’s Rules³³ is dispositive of the merits of Champion’s AFR, we nonetheless will address, in the interest of completeness, Champion’s argument that Section 74.990(d) of the Commission’s Rules was not an obstacle to grant of its application. Section 74.990(d) provides in pertinent part “that to be licensed on ITFS channels, a wireless cable applicant must show that there are

²⁹ *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*).

³⁰ Section 74.990(f) of the Commission’s Rules states that “the interference protection provided to wireless cable applicants and licensees of instructional television fixed service facilities will be that described in § 21.902 of this chapter.” 47 C.F.R. § 74.990(f) (1992). At the time Champion’s application was filed, Section 21.902(c) of the Commission’s Rules required, in relevant part, that the applicant must include an analysis of the potential for harmful interference with any authorized or previously proposed station(s) if the applicant’s proposed transmitting antenna has an unobstructed electrical path to any part of the protected service area of any other authorized or previously proposed cochannel or adjacent channel station(s). See 47 C.F.R. § 21.902(c) (1992).

³¹ 47 C.F.R. § 74.990(a) (1992).

³² *Id.*

³³ 47 C.F.R. § 74.990(a) (1992).

no MDS or MMDS channels available for application, purchase or lease that could be used in lieu of the Instructional Television Fixed Service frequencies applied for.”³⁴ The VSD Sept. 1, 1999, and VSD Aug. 14, 2001, letters both concluded that Champion’s applications did not comply with Section 74.990(d) of the Commission’s Rules because MDS Channel 2A was available for application in Provo.³⁵

15. Champion agrees that MDS Channel 2A was unused in Provo when it submitted its application, but argues that Channel 2A was not technically suited to Champion’s proposed operations.³⁶ Champion states that it intended to use the requested ITFS channels to transmit video programming and that the Commission has recognized that the 4 MHz bandwidth of Channel 2A is inadequate for conventional video distribution, which requires a bandwidth of 6 MHz.³⁷ We agree with Champion’s contention. In 1998, the Commission stated that, in the MDS and ITFS rules, channels have fixed bandwidths of 6 MHz for downstream (*i.e.*, point-to-multipoint) transmissions and 125 kHz for upstream (*i.e.*, point-to-point) response signals. MDS Channel 2A, however, has a bandwidth of only 4 MHz, which will not support such analog video and response transmissions.³⁸ Accordingly, because MDS Channel 2A would not suffice to meet Champion’s intended and proposed use of its system for analog video transmission – a use specifically permitted by the Rules³⁹ – we cannot agree that MDS Channel 2A was “available” to Champion within the meaning of Section 74.990(d).⁴⁰ Consequently, we agree with Champion that the Bureau erred when it concluded that Champion’s application was inconsistent with Section 74.990(d) of the Commission’s Rules. This determination, however, does not change the ultimate conclusion we reached earlier herein that Champion’s A Group application was properly dismissed for Champion’s failure to provide a sufficient showing demonstrating that grant of a waiver of the fifty-mile spacing rule was warranted under the circumstances presented.

IV. CONCLUSION AND ORDERING CLAUSES

16. In light of the foregoing, we conclude that Champion did not meet its burden of demonstrating, with particularity, in its waiver request, that waiver of the fifty-mile spacing criterion set forth in Section 74.990(a) of the Commission’s Rules⁴¹ was warranted. Without the waiver, Champion was unable to demonstrate that its application was acceptable for filing pursuant to the criteria set forth in Section 74.990 of the Commission’s Rules.⁴² Consequently, we affirm the Bureau’s dismissal of Champion’s application and denial of Champion’s petition for reconsideration.

³⁴ 47 C.F.R. § 74.990(d) (1992).

³⁵ See VSD Sept. 1, 1999, Letter and VSD Aug. 14, 2001, Letter.

³⁶ See Champion AFR at 10.

³⁷ *Id.*

³⁸ The 6 MHz bandwidth was selected several decades ago because it represented the common bandwidth then necessary to accommodate NTSC analog video signals and high quality FM audio signals. In typical ITFS systems, licensees are assigned the use of one or more non-contiguous 6 MHz channels and the associated (paired) 125 kHz response channels, and do not alter their channel bandwidths or otherwise deviate from the mandated channelization scheme. See 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, 19119-20 at ¶ 19 (1998).

³⁹ See 47 C.F.R. § 74.931 (1992).

⁴⁰ 47 C.F.R. § 74.990(d) (1992).

⁴¹ 47 C.F.R. § 74.990(a) (1992).

⁴² 47 C.F.R. § 74.990 (1992).

17. ACCORDINGLY, IT IS ORDERED that pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, Section 74.990 of the Commission's Rules, 47 C.F.R. § 74.990 (1992), the Application for Review filed by Champion Industries, Inc. on September 13, 2001 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary