

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

In the Matter of Application of)
TRANS VIDEO COMMUNICATIONS, INC.) File No. BMPLIF-19950914MF
For Modification of License of)
Instructional Television Fixed Service)
Station KVS31, Brooklyn, New York)

MEMORANDUM OPINION AND ORDER

Adopted: September 24, 2003

Released: September 25, 2003

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address the captioned application filed by Trans Video Communications, Inc. (TVC) for authority to construct and operate new Instructional Television Fixed Service (ITFS) on Channels F1-F4 in Brooklyn, New York. In this connection, TVC seeks a waiver of Section 74.902(c) of the Commission's Rules, which prohibits new ITFS applications for certain channels shared with the Multipoint Distribution Service (MDS). Additionally, we address a petition to deny the application filed by the Grand MMDS Alliance New York F/P Partnership Inc. (Grand Alliance). For the reasons stated below, we grant the Grand Alliance Petition and dismiss TVC's application.

II. BACKGROUND

2. In 1963, the Commission established ITFS in the 2500-2690 MHz band on a shared basis with existing Fixed Service stations. When the Commission established ITFS, it indicated that the service was envisioned to be used for transmission of instructional material to selected receiving locations in accredited public and private schools, colleges and universities for the formal education of students. It also permitted ITFS licensees to use the channels for incidental purposes. These incidental purposes

1 Application to Modify Transmitting Facilities - File No. BMPLIF-199950914MF (filed Sept. 14, 1995) (the application).

2 See 47 C.F.R. § 74.902(c).

3 Petition to Deny filed by Grand MMDS Alliance New York F/P Partnership Inc. (filed Jan. 11, 1996) (Petition).

4 See Educational Television Report and Order, Docket No. 14744, 39 FCC 846 (1963) (MDS R&O), recon. denied, 39 FCC 873 (1964) (ETV Decision).

5 Amendment of the Commission's Rules With Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service; and Applications for an Experimental Station and Establishment of Multi-Channel Systems, Report and Order, 48 Fed. Reg. 33873, 33875 ¶ 9 (1983) (1983 R&O) (citing ETV Decision, 39 FCC 846, 853 ¶ 25).

6 Id.

included the transmission of cultural and entertainment material to those receiving locations; special training material to selected receiving locations outside the school system (such as hospitals, nursing homes, training centers, clinics, rehabilitation centers, and commercial and industrial establishments); and special material to professional groups or individuals to inform them of new developments and techniques in their fields and instruct them in their use. ITFS licensees also could utilize the channels to perform other related services directly concerned with formal or informal instruction and training.⁷ In addition, when the ITFS facilities were not being used for such incidental purposes, the licensee could use them for administrative traffic (e.g., transmission of reports, assignments and conferences with personnel),⁸ however, individual stations, or complete systems could not be licensed solely for handling administrative traffic.⁹

3. An ITFS response station is authorized to provide communication by voice, video and/or data signals with its associated ITFS response station hub or associated ITFS station.¹⁰ Each main channel has an associated 125 kHz response channel¹¹ that may be used for response stations.¹² ITFS response stations may operate on either all or part of a 6 MHz channel assigned a licensee, and/or on any of the 125 kHz response channels assigned to a licensee.¹³

4. In 1983, the Commission redesignated the E Group and F Group channels from ITFS to the Multichannel Multipoint Distribution Service (MMDS).¹⁴ The Commission took that action in an effort to spur the development of competition to cable television systems and to promote effective and intense utilization of the spectrum.¹⁵ As part of its decision, the Commission allowed ITFS licensees currently operating on the E Group and F Group channels to remain operating, but placed the following limitations on such stations:

Grandfathered ITFS stations operating on the E and F channels will only be protected to the extent of their service that is either in the operation or the application stage as of May 26, 1983. These licensees or applicants will not generally be permitted to change transmitter location or antenna height, or to change transmission power. In addition, any new receive stations added after May 26, 1983 will not be protected against interference from MDS transmissions. In this fashion, all facets of grandfathered ITFS operations were frozen as of May 26, 1983.¹⁶

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ 47 C.F.R. § 74.939(a).

¹¹ The 125 kHz channels are located in the 2686-2690 MHz band. 47 C.F.R. § 74.939(j).

¹² *Id.*

¹³ *Id.*

¹⁴ In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1209 (1983) (*E and F Group Reallocation Order*).

¹⁵ *Id.*, 94 FCC 2d at 1228 ¶¶ 60-61.

¹⁶ In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Memorandum* (continued....)

Further, this limitation applies to ITFS use of the 125 kHz response channels associated with the E and F Group channels.¹⁷

5. The Commission stated that “there may be instances where the natural evolution of an ITFS may reasonably require the addition of receive stations without changing the nature or the scope of the ITFS operation” that would justify the addition of additional receive sites.¹⁸ In those instances, the Commission stated that the grandfathered ITFS licensee could request a waiver of Section 74.902(c).¹⁹

6. TVC, a wholly-owned corporate subsidiary of the Roman Catholic Diocese of Brooklyn, is licensee of grandfathered ITFS Station KVS31, Brooklyn, New York. On September 14, 1995, TVC filed the captioned application to relocate transmitting facilities of Station KVS31, which operates on the F Group channels, to the Empire State Building in New York City, New York.²⁰ TVC proposes to collocate Station KVS31 with the facilities of CAI Wireless Systems, Inc. (CAI), a wireless cable systems operator serving New York City from the Empire State Building.²¹ Under the proposal, excess capacity on the Station KVS31 would be used by other stations affiliated with CAI’s system at a central transmitting site.²² Because Section 74.902(c) of our rules restricts the ability of ITFS stations authorized on the E Group and F Group channels to modify their facilities, TVC seeks a waiver of this rule in connection with its application to modify Station KVS31. TVC states that a waiver of Section 74.902(c) is warranted because it will promote the “efficient utilization” of ITFS and MMDS spectrum in New York City by expanding TVC’s channel capacity for both instructional and commercial use.²³ TVC also claims that a grant of the application and waiver request will enhance rather than impair its ability to distribute instructional programming to New York City.²⁴

7. On January 11, 1996, Grand Alliance filed a petition to deny the application.²⁵ Grand Alliance is the Tentative Selectee for the MMDS license for the F Block channel in New York City, New York.²⁶ Grand Alliance states that the application (1) is inconsistent with Commission’s rules limiting new applications by grandfathered ITFS licensees, (2) fails to consider TVC’s obligations vis-à-vis a pending MMDS application filed by Grand Alliance in 1983, and (3) misconstrues the dual purpose of the Commission’s policy underlying Section 74.902(c); that is, to promote spectrum efficiency as well as to

(...continued from previous page)

Opinion and Order on Reconsideration, 98 FCC 2d 129, 132-33 ¶ 12 (1983) (*E and F Group Reallocation Reconsideration Order*).

¹⁷ 47 C.F.R. § 74.902(c).

¹⁸ *Id.* at n.8.

¹⁹ *Id.*

²⁰ *See* the application.

²¹ Request for Waiver Regarding Application to Modify Transmitting Facilities, *supra* note 1 at 2 (Waiver Request).

²² Several other ITFS and MMDS stations either are leasing time or are licensed to Atlantic Microsystems, Inc., an affiliate of CAI. *Id.* at Exhibit 1.

²³ Waiver Request at 3.

²⁴ *Id.*

²⁵ Petition to Deny filed by Grand MMDS Alliance New York F/P Partnership Inc. (filed Jan. 11, 1996) (Petition). On January 24, 1996, TVC filed an Opposition to Petition to Deny. On February 2, 1996, Grand Alliance requested an extension of time to file a reply to the Opposition to Petition to Deny. On February 12, 1996, Grand Alliance submitted its Reply to TVC’s Opposition to Petition to Deny.

²⁶ Petition at 1. Grand Alliance’s application is pending. (FCC File No. 5455-CM-P-83).

protect the interest of MDS applicants from grandfathered or new ITFS stations on E and F Channel Blocks.²⁷

III. DISCUSSION

8. The Commission may waive its rules “if good cause therefor is shown.”²⁸ Pursuant to Section 73.3566(a) of the Commission's Rules,²⁹ “[r]equests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.” “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.’”³⁰ Based upon the record before us, we conclude that TVC has not made a sufficient waiver showing.

9. A heavy burden traditionally has been placed upon those seeking waivers to demonstrate that their arguments are substantially different from those that were carefully considered in a relevant rulemaking proceeding.³¹ In the rulemaking proceeding reallocating the E Group and F Group channels (as well as the associated response channels) to MDS, the Commission clearly intended that “all facets of grandfathered ITFS operations [would be] frozen as of May 26, 1983.”³² In making that determination, the Commission determined that it would be in the public interest to allow MDS operators to use these channels, as opposed to allowing ITFS operators to modify or expand their systems. TVC fails to demonstrate how it is different from any other grandfathered E or F Group licensee in this regard.

10. We also reject TVC's argument that it should receive a waiver pursuant to the Commission's statement that it might consider waivers that were part of the “natural evolution” of an ITFS system. In making that statement, the Commission limited the “natural evolution” exception to changes that would not change “the nature or the scope of the ITFS operation.”³³ In this case, TVC proposes to relocate Station KVS31 to the Empire State Building and operate those facilities as part of a wireless cable system.³⁴ We consider TVC's proposed relocation to be a significant change to its currently authorized system. Moreover, TVC has failed to demonstrate otherwise.

11. We also find it significant that TVC has not shown the unavailability of a reasonable alternative. Specifically, we note that TVC is also licensed on the B Group channels under call signs KNZ69, KZE20, and WHR691. TVC has not explained why it could not design a system using the B Group channels and associated response channels to provide the services it seeks to offer. Accordingly, we conclude that TVC has not demonstrated that grant of a waiver of Section 74.902(c) with respect to the use of the response channels associated with the E and F Groups is warranted under the circumstances presented.

²⁷ Petition at 5-7.

²⁸ 47 C.F.R. § 1.3.

²⁹ 47 C.F.R. § 73.3566(a). This rule is applicable to ITFS licensees. See 47 C.F.R. § 74.910.

³⁰ *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*)).

³¹ *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970) (*per curiam*).

³² *E and F Group Reallocation Reconsideration Order*, 98 FCC 2d at 132-33 ¶ 12.

³³ *Id.*

³⁴ Waiver Request at 2.

IV. CONCLUSION AND ORDERING CLAUSES

12. For the reasons discussed herein, we conclude that grant of TVC's Waiver Request associated with the captioned application would not be consistent with the public interest. Because TVC's application was filed after the May 26, 1983, the date designated by the Commission after which no new applications for ITFS applications for the E and F Group channels would be accepted, we conclude that the application is defective pursuant to Section 73.3566 of the Commission's Rules.³⁵ We therefore dismiss the application.

13. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, the Request for Waiver filed by Trans Video Communications, Inc., on September 14, 1995 in connection with the captioned application, IS DENIED.

14. IT IS FURTHER ORDERED that, pursuant to Sections 21.30 and 74.912 of the Commission's rules, 47 C.F.R. §§ 21.30, 74.912, the Petition to Deny filed by the Grand MMDS Alliance New York F/P Partnership on January 11, 1996 IS GRANTED to the extent indicated herein.

15. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(f), and Sections 73.3566 and 74.912 of the Commission's Rules, 47 C.F.R. §§ 73.3566, 74.912, that the application filed by Trans Video Communications, Inc., FCC File No. BMPLIF-19950914MF on September 14, 1995 IS DISMISSED.

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
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³⁵ 47 C.F.R. § 73.3566.