

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

In the Matter of Application of)
HISPANIC INFORMATION AND) File No. BPLIF-19951016BW
TELECOMMUNICATIONS NETWORK, INC.)
For Authority to Construct New Instructional)
Television Fixed Service Station On the C Group)
Channels, Milwaukee, Wisconsin)

ORDER ON RECONSIDERATION

Adopted: September 24, 2003

Released: September 29, 2003

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

1. Introduction. In this Order on Reconsideration, we address a petition for reconsideration filed on January 22, 1998, by Hispanic Information and Telecommunications Network, Inc. (HITN). HITN seeks reconsideration of an action by the Distribution Services Branch (Branch) of the Video Service Division of the former Mass Media Bureau dismissing the above-captioned application (application) for authority to construct a new Instructional Television Fixed Service (ITFS) station at Milwaukee, Wisconsin. For the reasons stated below, we deny the Petition.

2. Background. ITFS stations are intended primarily to provide a formal educational and cultural development in aural and visual form. ITFS licensees make use of the spectrum to provide formal classroom instruction, distance learning, and videoconference capability to a wide variety of users. In 1998, the Commission adopted technical rule changes designed to provide ITFS licensees flexibility to employ digital technology in delivering two-way communications services including high-speed and high-capacity data transmission and Internet service on a regular basis.

3. On February 25, 1993, the Commission imposed a freeze on the acceptance of new and major change ITFS applications. As an exception to that freeze, however, the Commission stated that it would continue to accept (but not process) applications in which the applicant relies on NTIA for

1 Petition for Reconsideration (filed January 22, 1998) (Petition).

2 Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Service Division, Mass Media Bureau, Federal Communications Commission to HITN. (Dec 17, 1997) (Dismissal Letter) at 1.

3 47 C.F.R. § 74.931.

4 Id.

5 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 (1998).

6 Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, Notice of Proposed Rulemaking, 8 FCC Rcd 1275, 1277 ¶ 9 (1993).

construction funds. This exception was granted because NTIA required applicants to file applications with the Commission before seeking funding.⁷ The Commission stated that such applications would be cut off as of the end of the first filing window.⁸

4. On May 12, 1994, HITN filed an application for a new ITFS station on the C Group channels⁹ at Milwaukee, Wisconsin.¹⁰ Because HITN's new station application for Milwaukee was filed under the filing exception and during the filing freeze, it was determined that it would be considered filed during the October 16 - October 20, 1995 filing window. The application was given a filing date of October 16, 1995. On November 9, 1995, along with all the applications received during this filing window, HITN's application appeared on Public Notice as tendered for filing.¹¹

5. On December 17, 1997, the Acting Chief, Distribution Services Branch, Video Services Division, former Mass Media Bureau (Branch) dismissed the above-referenced application.¹² The HITN application was dismissed because its proposed facility was predicted to cause co-channel interference to Station WAU27, Milwaukee, Wisconsin, licensed to Milwaukee Regional Medical Instructional (MRMI).¹³ On January 22, 1998, HITN filed the instant Petition. On the same date, HITN submitted an amendment to its application requesting the deletion of channels C2 and C3.¹⁴

6. *Discussion.* HITN does not dispute the finding that the proposal contained in its original application would cause interference to Station WAU27. Instead, HITN claims that the amendment it submitted with its Petition would avoid interference to Station WAU27's licensed facilities.¹⁵ Thus, HITN claims its application should be reinstated.¹⁶

7. We note, as an initial matter, that HITN does not challenge the Branch's ruling that its proposed facility (prior to amendment) would cause interference to Station WAU27. Section 1.106 of the Commission's Rules requires petitions to cite the findings of fact and/or conclusions of law that the petitioner believes are erroneous, and state with particularity the respects in which such findings and conclusions should be changed.¹⁷ HITN provides no basis on which to conclude that the dismissal of its application was improper. Consequently, we find that HITN has failed the threshold requirement to obtain reconsideration.

⁷ *Id.*

⁸ *Id.*

⁹ The C Group channels are located at 2548-2554 MHz (C1), 2560-2566 MHz (C2), 2572-2578 MHz (C3), and 2584-2590 MHz (C4). See 47 C.F.R. § 74.902(a).

¹⁰ Application for New ITFS Station at Milwaukee, Wisconsin, File No. BPLIF-19951016BW, Facility ID No. 81093 (filed May 12, 1994).

¹¹ See ITFS Public Notice, Report No. 23631A, *Public Notice* (rel. Nov. 9, 1995).

¹² See Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to HITN (dated Dec. 17, 1998) (Dismissal Letter). Public notice of the dismissal was given on December 23, 1997. See Broadcast Actions, Report No. 44144, *Public Notice* (rel. Dec. 23, 1997).

¹³ See Dismissal Letter.

¹⁴ See Exhibit A, FCC Form 330 filed with Petition. Thus, this application as amended seeks to license only channels C1 and C4.

¹⁵ Petition at 2.

¹⁶ *Id.* at 3.

¹⁷ See Mike Gruss, *Order on Reconsideration*, 17 FCC Rcd 466 ¶ 3 (WTB PSPWD 2002); Federal Express Corporation, *Order*, 15 FCC Rcd 4289, 4293 n.40 (WTB PSPWD 2000). 47 C.F.R. § 1.106(d)(1).

8. We nonetheless note that HITN contends we should reinstate its application due to the proposed amendment.¹⁸ Section 1.106(c) of the Commission's Rules provides that we will accept a petition for reconsideration relying on facts not previously presented to the Commission only in one of three circumstances: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;¹⁹ (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity;²⁰ or (3) the designated authority determines that consideration of the facts relied on is required in the public interest.²¹ In this case, we find that none of these circumstances is present. HITN could have readily determined that its originally proposed facilities would have caused interference to Station WAU27 and timely submitted a proposal that complies with the Commission's Rules. Accordingly, we conclude that Section 1.106(c) of the Commission's Rules is therefore not applicable.

9. Inclusion of Channels C2 and C3 in HITN's original application caused that application to be unacceptable for filing (due to co-channel interference to Station WAU27). Pursuant to Section 74.903 of the Commission's Rules,²² an application for an ITFS station must protect previously proposed facilities from interference and will not be granted if interference is predicted to occur. Given that applications must be filed only during designated filing windows,²³ it is vital that applicants demonstrate compliance with Section 74.903 at the time the original application is filed. As the Commission has stated before, "[w]e cannot allow a party to 'sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.'" ²⁴ We consider the fact that HITN's amendment was proffered after the application was dismissed and almost five years after the subject application was initially filed to be decisionally significant. We believe that such time frame is inconsistent with the applicable provisions of the Commission's Part 74 rules regarding the substance of ITFS applications. We therefore decline to consider HITN's amendment at this juncture

¹⁸ See Petition at 2.

¹⁹ 47 C.F.R. § 1.106(c)(1)(i).

²⁰ 47 C.F.R. § 1.106(c)(1)(ii).

²¹ 47 C.F.R. § 1.106(c)(2).

²² 47 C.F.R. § 74.903.

²³ See Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, *Report and Order*, MM Docket No. 93-24, 10 FCC Rcd 2907 (1995).

²⁴ See Canyon Area Residents, *Memorandum Opinion and Order*, 14 FCC Rcd 8153, 8154 ¶ 7 (1999) quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

10. For the reasons discussed herein, we conclude that HITN has failed to meet the standard for reconsideration. We therefore deny HITN's Petition.²⁵

11. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Hispanic Information and Telecommunication Network, Inc. on January 22, 1998 IS DENIED.

12. 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

²⁵ In light of our conclusion that HITN's application was properly dismissed as defective, we need not address HITN's argument that its amended application should be considered filed in the same filing window (mutually exclusive) as a major modification application filed by MRMI on September 14, 1995. See Petition at 2.