

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

In the Matter of Application of )
)
HISPANIC INFORMATION AND ) File No. BPLIF-19951016BH
TELECOMMUNICATIONS NETWORK, INC. ) Facility ID No. 84574
)
For Authority to Construct New Instructional )
Television Fixed Service Station On the D Group )
Channels, Winston-Salem, North Carolina )
)

ORDER ON RECONSIDERATION

Adopted: September 24, 2003

Released: September 25, 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 May 11, 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 Winston-Salem, North Carolina. For the reasons stated herein, we grant the Petition in part and deny the Petition in part.

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 the National

1 Petition for Reconsideration (filed May. 11, 1998) (Petition).

2 Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Service Division, Mass Media Bureau, Federal Communications Commission to HITN. (Apr. 3, 1998) (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).

Telecommunications and Information Administration (NTIA) for construction funds. This exception was granted because NTIA required applicants to file applications with the Commission before seeking funding.<sup>7</sup> The Commission stated that such applications would be cut-off as of the end of the first filing window.<sup>8</sup>

4. On May 12, 1994, HITN filed an application for a new ITFS station on the D Group channels<sup>9</sup> at Winston Salem, North Carolina.<sup>10</sup> Because HITN's new station application for Winston Salem 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.<sup>11</sup>

5. On April 3, 1998, the Acting Chief of the Branch dismissed the application.<sup>12</sup> The HITN application was dismissed because its proposed facility was predicted to cause harmful interference to the receive sites of ITFS Station WHR683, licensed to North Carolina A & T University (NCA&T), and to the protected service area (PSA) of Multichannel Multipoint Distribution Service (MMDS) Station WMH597, Greensboro, North Carolina, licensed to Greensboro Wireless, Inc.

6. On May 11, 1998, HITN filed the instant Petition. Concurrent with the filing of its Petition, HITN submitted an amendment to its application requesting the deletion of Channel D1 from HITN's original proposal.<sup>13</sup>

7. *Discussion.* With regards to Station WMH597, HITN argues that it should only be required to protect a 15-mile radius PSA around Station WMH597 (which was the rule when HITN submitted its application) as opposed to the 35-mile radius PSA standard in effect during the filing window in which the HITN application was considered filed.<sup>14</sup> With respect to Station WHR683, HITN admits that it overlooked the potential interference to the receive sites of Station WHR683.<sup>15</sup> HITN argues that the proposed May 11, 1998 amendment deleting Channel D1 would resolve that problem. It also contends that acceptance and grant of the amendment would serve the public interest by allowing HITN to provide service on channels D2 through D4 while ensuring interference-free operation by NCA&T on Channel C1.<sup>16</sup>

8. Based upon the record before us, we agree with HITN that the Branch erred by requiring HITN to provide protection to the 35-mile PSA of Station WMH597. At the time HITN submitted its

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> The D Group channels are located at 2554-2560 MHz (D1), 2566-2572 MHz (D2), 2578-2584 MHz (D3), and 2590-2596 MHz (D4). *See* 47 C.F.R. § 74.902(a).

<sup>10</sup> File No. BPLIF-19951016BH (filed May 12, 1994).

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

<sup>12</sup> *See* Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to HITN (dated Apr. 3, 1998). Public notice of the dismissal was given on April 9, 1998. *See* Broadcast Actions, Report No. 44216, *Public Notice* (rel. Apr. 9, 1998).

<sup>13</sup> *See* Amendment (filed May 11, 1998) (Petition, Exhibit 2).

<sup>14</sup> *See* Petition at 4.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

application, MDS licensees were only entitled to a 15-mile radius PSA.<sup>17</sup> While the Commission indicated that applications filed pursuant to an exception to the freeze would be considered cut off as of the first filing window, the Commission did not indicate that it would deviate from the normal rule that applicants would have to comply with the interference criteria as of the time it filed its application. Moreover, when the Commission adopted the 35-mile radius PSA standard in June 1995, over one year after HITN filed its application, it stated that the revised PSA standard would apply to applications filed after the effective date of the new PSA rule.<sup>18</sup> Since HITN filed its application before the 35-mile PSA rule became effective, we conclude that it was error for the Branch to dismiss HITN's application on that basis.

9. With respect to Station WHR683, HITN does not dispute the finding that the proposal contained in its original application would cause interference to that station. Instead, HITN claims that the amendment it submitted with its Petition would avoid interference to Station WHR683's licensed facilities.<sup>19</sup> Thus, HITN argues that its application should be reinstated.<sup>20</sup>

10. Taking into consideration the record before us, we affirm the Branch's dismissal of HITN's application. 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 WHR683. 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.<sup>21</sup> HITN provides no basis on which to conclude that the dismissal of its application with respect to Station WHR683 was improper. Consequently, we find that HITN has failed the threshold requirement to obtain reconsideration.

11. We nonetheless note that HITN contends we should reinstate its application due to the proposed amendment.<sup>22</sup> 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;<sup>23</sup> (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;<sup>24</sup> or (3) the designated authority determines that consideration of the facts relied on is required in the public interest.<sup>25</sup> In this case, we find none of these circumstances present. HITN could have readily determined that its originally proposed facilities would have caused interference to Station WHR683 and timely submitted a

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<sup>17</sup> See 47 C.F.R. § 21.902(d)(1) (1994).

<sup>18</sup> 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, Instructional Television Fixed Service, and Cable Television Relay Service, GN Docket Nos. 90-54, 80-113, *Second Order on Reconsideration*, 10 FCC Rcd 7074, 7085 ¶ 29 (1995).

<sup>19</sup> Petition at 2.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> 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).

<sup>22</sup> See Petition at 2.

<sup>23</sup> 47 C.F.R. § 1.106(c)(1)(i).

<sup>24</sup> 47 C.F.R. § 1.106(c)(1)(ii).

<sup>25</sup> 47 C.F.R. § 1.106(c)(2).

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.

12. Inclusion of Channel D1 in HITN's original application caused that application to be unacceptable for filing (due to adjacent channel interference to Station WHR683). Pursuant to Section 74.903 of the Commission's Rules,<sup>26</sup> 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,<sup>27</sup> 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.'"<sup>28</sup> We consider the fact that HITN's amendment was proffered after the application was dismissed and four 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.

13. For the reasons discussed herein, we agree with HITN's arguments concerning Station WMH597, but conclude that HITN has failed to meet the standard for reconsideration with respect to Station WHR683. We therefore grant HITN's Petition in part and deny the Petition in part.

14. 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 May 11, 1998 IS GRANTED IN PART and is otherwise DENIED.

15. 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

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<sup>26</sup> 47 C.F.R. § 74.903.

<sup>27</sup> 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).

<sup>28</sup> 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).