

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

In the Matter of Application of)
TEKKOM, INC.) File No. 50301-CM-P-83
For a New Multipoint Distribution Service Station)
on Channel 1 in La Jolla, California)

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 2003

Released: September 29, 2003

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

1. In this Memorandum Opinion and Order, we address the petition for reconsideration¹ filed by Tekkom, Inc. ("Tekkom").² Tekkom seeks reconsideration of a December 13, 1995 letter of the Video Services Division (Division) of the former Mass Media Bureau dismissing the captioned application for a new Multipoint Distribution Service (MDS) station on Channel 1 at La Jolla, California. For the reasons stated below, we grant Tekkom's Petition in part and deny the Petition in part.

2. Background. On July 13, 1983, Tekkom filed the above-captioned application.³ The application appeared on public notice as accepted for filing on October 19, 1983.⁴ On December 13, 1995, the Division dismissed Tekkom's application as unacceptable for filing.⁵ The Division determined that Tekkom's applications had several defects. First, the Division found that Tekkom had failed to demonstrate site availability as required by Section 21.15(a) of the Commission's Rules.⁶ Second, it found that Tekkom had failed to include an interference study for adjacent channel Station WHT559, San Diego, California, as required by Section 21.902(c) of the Commission's Rules.⁷ Third, the Division concluded that Tekkom had failed to engineer its station to provide sufficient interference protection to Stations WHT559, San Diego, California, and WPX85, San Marcos, California and WFY655, San Clemente, California, as required by Sections 21.902(b)(3) and 21.902(b)(4) of the Commission's Rules.⁸ Finally, the Division found that Tekkom had failed to serve all affected parties with an interference

¹ Petition for Reconsideration (filed January 16, 1996) (Petition).

² Tekkom is currently named Via/Net Companies, Inc. Petition at 1.

³ Petition at 2.

⁴ See Public Notice, Report No. D-830-A (released Oct. 19, 1983) at 2.

⁵ Letter from Patrick E. Forster, Electronics Engineer, MDS Section, Video Services Division, Mass Media Bureau to Carl B. Hilliard, Jr., Tekkom, Inc. (Dec. 13, 1995) (Dismissal Letter). See also Public Notice, Report No. D-830-A (released Dec. 13, 1995) at 2.

⁶ 47 C.F.R. § 21.15(a). See Dismissal Letter at 1.

⁷ 47 C.F.R. § 21.902(c). See Dismissal Letter at 1-2.

⁸ 47 C.F.R. §§ 21.902(b)(3) and (4). See Dismissal Letter at 2.

analysis, as required by Section 21.902(g) of the Commission's Rules.⁹ Tekkom filed the instant Petition on January 16, 1996.¹⁰

3. *Discussion.* Tekkom first argues that it should receive a waiver of Sections 1.4 and 1.106 of the Commission's Rules,¹¹ which require that Tekkom file its petition for reconsideration within thirty days of when public notice was given of the Division's action. Tekkom states that though the *Dismissal Letter* is dated December 13, 1995, Tekkom had yet to receive a copy of the *Dismissal Letter*.¹² Tekkom notes that its counsel was not sent a copy of the *Dismissal Letter* because Tekkom's current counsel is not listed on the dismissed application.¹³ Tekkom speculates that because the *Dismissal Letter* is dated December 13, 1995 and that the Commission "has effectively been closed since December 15, 1995, due to the partial government shutdown and inclement weather," the *Dismissal Letter* may in fact have not yet been mailed to Tekkom.¹⁴ Due to these same circumstances, Tekkom was not able to obtain a copy of the *Dismissal Letter* until January 16, 1996, the date a petition for reconsideration would be due had the *Dismissal Letter* been timely mailed.¹⁵ Tekkom argues that it should be afforded thirty days from the date it received actual notice of the *Dismissal Letter* on January 16, 1996, but filed the instant petition out of an abundance of caution.¹⁶

4. Substantively, Tekkom argues that dismissing its application for inadequate site certification is a drastic change in Commission policy from the commonplace practice of allowing MDS conditional licensees to submit leases or options for leases within ninety days of being issued the conditional license.¹⁷ Tekkom contends that it is unlawful to treat it differently from these other applicants, without advance notice or explanation.¹⁸ Tekkom also argues that it need not have provided an interference study of or demonstrated interference protection for Station WFY655 at San Clemente for that license was not listed in either the June 6, 1992 MDS inventory nor the November 29, 1995 MDS inventory.¹⁹ Tekkom states that it has not had sufficient time to respond to the issues raised by the Division concerning Stations WHT559 and WPX85, but contends that the topography surrounding Tekkom's proposed station indicates that both Stations WHT559 and WPX85 are terrain blocked and would not receive interference from Tekkom's proposed station.²⁰ Tekkom further states that in an amendment to its application filed on January 13, 1984, Tekkom demonstrated that all of the service area associated with its proposed station is blocked from San Marcos, the site of Station WPX85.²¹ Finally,

⁹ 47 C.F.R. § 21.902(g). *See Division Letter* at 2.

¹⁰ *See* note 1, *supra*.

¹¹ 47 C.F.R. §§ 1.4, 1.106.

¹² Petition for Reconsideration at 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1-2.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 3-4.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 6-7.

²¹ *Id.* at 7.

Tekkom states that due to the Commission's closure, it has been unable to verify whether Tekkom made the required service upon the affected parties.²²

5. Tekkom's request for waiver of the timeliness requirement of Section 1.106 of the Commission's Rules is moot because Tekkom's Petition was timely. Section 1.106(f) provides, in relevant part, that a petition for reconsideration "shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules"²³ Pursuant to Section 1.4(b)(4) of the Commission's Rules, the date of public notice of the dismissal of Tekkom's application was the date on which the *Public Notice* announcing this action was released.²⁴ That date was December 13, 1995.²⁵ Accordingly, Tekkom was required to file its Petition thirty days thereafter. This date was January 12, 1996. However, the Commission was closed that day due to inclement weather. The next business day was January 16, 1996.²⁶ Since Tekkom's Petition was filed on January 16, 1996, it was timely.²⁷

6. Turning to the substance of Tekkom's Petition, we agree with Tekkom that it was error for its application to be dismissed because it did not provide a copy of a site lease or option to purchase the site. The Commission has recently held that a failure to submit the site lease with the original application alone is insufficient ground for returning an MDS application and that an applicant should be given the opportunity either to amend its applications to provide the site lease or to provide such information by a date certain post-conditional license grant.²⁸ Since Tekkom was never given an opportunity to supplement its application to provide the site lease prior to dismissal, we reverse the dismissal of its application on that basis.

7. We find no basis, however, for reversing the Division's determination that Tekkom's application failed to provide interference studies or to serve its application on other licensees. While Tekkom claims that Station WFY655 may have expired subsequent to Tekkom's filing its application,²⁹ we note that Tekkom was required to comply with all requirements at the time of the filing of its application.³⁰ With respect to Station WHT559, Tekkom makes an unsupported claim based upon "knowledge of the topography surrounding the Station"³¹ that there is terrain blockage between Tekkom's

²² *Id.*

²³ 47 C.F.R. § 1.106(f).

²⁴ 47 C.F.R. § 1.4(b)(4).

²⁵ *Public Notice*, Report No. D-830-A (released Dec. 13, 1995).

²⁶ January 13, 1996 was a Saturday; January 14, 1996 was a Sunday; and January 15, 1996 was the Martin Luther King, Jr. Birthday holiday.

²⁷ Tekkom's speculation that the *Dismissal Letter* may not have been mailed to it on or around December 13, 1995 is incorrect. The Commission's records contain a copy of the letter date-stamped by the FCC Mail Room at 2:25 pm on December 13, 1995. Moreover, Tekkom received notice that its application had been dismissed because the *Public Notice* announcing the dismissal of the application was also released that day.

²⁸ Mester's TV, *Memorandum Opinion and Order*, 18 FCC Rcd 13453, 13455 ¶ 6 (2003) (*recon. pending*).

²⁹ Petition at 6.

³⁰ See, e.g., Champion Industries, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 16040, 16041 ¶ 5 (2001); McDougald Broadcasting Corporation, *Memorandum Opinion and Order*, 12 FCC Rcd 10034 (1997); Edna Cornaggia, *Order on Reconsideration*, 8 FCC Rcd 5442 (1993).

³¹ *Id.*

proposed site and Station WHT559. Since Tekkom did not provide any engineering statement or other information supporting its claim of terrain blockage, we affirm the Division's dismissal of Tekkom's application for that reason.³² Finally, Tekkom's only response to the finding that Tekkom failed to serve all parties with appropriate interference studies is a statement that counsel was not aware of any such deficiencies but that he has been unable to verify such failure because the Commission was closed.³³ Since Tekkom has not alleged that it did serve its interference studies on all required parties, we affirm the Division's conclusion in that regard.³⁴

8. In view of the foregoing, we grant Tekkom's Petition to the extent that we conclude that it was error to dismiss the application for failure to submit a site lease or option. In all other respects, however, we conclude that reconsideration is not warranted under the circumstances presented. Thus, we affirm the Division's dismissal of the application for the other stated reasons.

9. Accordingly IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.41 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.106, the petition for reconsideration filed by Tekkom, Inc. on January 16, 1996 IS GRANTED IN PART and is otherwise DENIED.

10. 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

³² See *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405, 407 n.2 (D.C. Cir. 1991) (engineering study purporting to show lack of Grade B signal rejected because engineer did not provide data or methodology).

³³ Petition at 7.

³⁴ See *Oklahoma Western Telephone Company, Memorandum Opinion and Order*, 18 FCC Rcd 7565, 7567 ¶ 6 (2003); In the Matter of 4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites, *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 1335, 1471 ¶ 219 (1994). We note that while counsel stated that he was unable to investigate this issue because of the Commission's closure (Petition at 7), Tekkom never requested leave to supplement its Petition to provide additional information on this issue.