

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

In the Matter of Application of)
TRANS VIDEO COMMUNICATIONS, INC.) File No. BMPLIF-19950728ER
For Modification of License of)
Instructional Television Fixed Service)
Station KNZ70 in Queens, New York)

ORDER ON RECONSIDERATION

Adopted: September 21, 2004

Released: September 21, 2004

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On October 6, 2003, Grand MMDS Alliance New York F/P Partnership (Grand Alliance) filed a Petition for Clarification or Limited Reconsideration. Grand Alliance requests clarification or limited reconsideration of a Memorandum Opinion and Order released by the former Public Safety and Private Wireless Division (Division) on September 5, 2003 granting Grand Alliance's petition to deny and dismissing the above-captioned application filed by Trans Video Communications, Inc. (TVC). For the reasons set forth below, we dismiss the Petition.

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 included the transmission of cultural and entertainment material to those receiving locations; special

1 Petition for Clarification or Limited Reconsideration (filed Oct. 6, 2003) (Petition). TVC filed an opposition on October 21, 2003. Opposition to Petition for Clarification or Limited Reconsideration (filed Oct. 21, 2003) (Opposition). Grand Alliance filed a reply on October 31, 2003. Reply (filed Oct. 31, 2003).

2 Trans Video Communications, Inc., Memorandum Opinion and Order, 18 FCC Rcd 18211 (WTB PSPWD 2003) (MO&O).

3 See Educational Television Report and Order, Docket No. 14744, 39 FCC 846 (1963), recon. denied, 39 FCC 873 (1964) (ETV Decision).

4 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 at 853 ¶ 25).

5 Id.

training material to selected receiving locations outside the school system (such as hospitals, nursing homes, training centers, clinics, rehabilitation centers, 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.⁶ ITFS licensees also could utilize the channels to perform other related services directly concerned with formal or informal instruction and training. 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);⁷ however, individual stations, or complete systems could not be licensed solely for handling administrative traffic.⁸ 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.⁹

3. TVC is the licensee of grandfathered ITFS Station KNZ70 authorized to operate on the F-Group channels in Queens, New York,¹⁰ and Grand Alliance is the licensee of Multichannel Multipoint Distribution Service (MMDS) WMY467, New York, New York, which also operates on the F Group channels.¹¹ TVC currently leases excess airtime capacity on this station.¹² On July 28, 1995, TVC filed an application¹³ requesting a protected service area (PSA) during leased air time transmissions for Station KNZ70.¹⁴ The application appeared on public notice as accepted for filing on August 28, 1995. On September 27, 1995, Grand MMDS Alliance filed a Petition to Deny against TVC's application.¹⁵ Grand Alliance contended that the Application should be denied because grant of the Application would disrupt the interference resolution between Grand Alliance and TVC.¹⁶

4. On September 5, 2003, the Division released the *MO&O*, which granted Grand Alliance's petition to deny and dismissed TVC's application.¹⁷ The Division held that TVC's application was defective because it did not submit a request for waiver of the prohibition on the modification of

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 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 Red 19112 (1998) (*Two-Way Order*).

¹⁰ This station serves as repeater for TVC's main station, KNZ69, which operates on the B Channel Group in Brooklyn, New York.

¹¹ FCC File No. 5455-CM-P-83 (filed September 9, 1983). This application, as amended on December 31, 1986, proposed operations from a transmitter site located on the Empire State Building in Manhattan.

¹² TVC entered into a "Channel Coordination and Excess Channel Capacity Lease Agreement" (Agreement) with CAI Wireless Systems, Inc. (CAI), a provider of entertainment programming. TVC filed a copy of the Agreement with the Commission as an amendment to its license for ITFS Station KNZ-69 for Brooklyn, New York, on February 3, 1995. Under the terms of the Agreement, CAI would broadcast its programming via TVC's facilities at such time as TVC is not engaged in its educational broadcast activities.

¹³ FCC File No. BMPLIF-19950728ER (filed Jul. 28, 1995)

¹⁴ Application at Exhibit 1 (ITFS Application File No. BMPLIF-19950728ER) (filed Jul. 28, 1995).

¹⁵ Petition to Deny filed by Grand MMDS Alliance New York F/P Partnership (filed Sep. 27, 1995).

¹⁶ *Id.* at 1-2.

¹⁷ *MO&O*.

grandfathered E- and F-Group channel ITFS stations.¹⁸ The Division also held that TVC's request for a protected service area was moot because the Commission had granted all ITFS licensees a PSA in 1998.¹⁹

5. On October 6, 2003, Grand Alliance filed the instant Petition. Grand Alliance requests clarification that the grant of a PSA to station KNZ70 by the *Two-Way Order* does not abolish its rights as a co-channel MMDS licensee.²⁰ As an alternative to the request for clarification, Grand Alliance asks the Division to reinterpret the *Two-Way Order* that the grandfathered ITFS stations operating on E and F group channels do not have PSAs.²¹ Grand Alliance asserts that the Commission did not intend to grant PSAs to grandfathered ITFS stations operating on E and F group channels.²² TVC argues that Grand Alliance's Petition should be dismissed as an untimely request for reconsideration of the *Two-Way Order*.²³ TVC also contends that the Commission "unambiguously granted" protected service areas to grandfathered ITFS stations.²⁴

III. DISCUSSION

6. We note that the *MO&O* granted Grand Alliance the relief it sought and dismissed TVC's application. Section 1.106(b)(1) of the Commission's Rules states, in pertinent part, that "any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken."²⁵ To determine if a party's interests have been adversely affected, the Commission frequently relies upon the three-pronged standing test under which a party must establish: (1) a distinct and palpable personal injury-in-fact that is (2) traceable to the respondent's conduct and (3) redressable by the relief requested.²⁶ In this case, Grand Alliance did not suffer an injury-in-fact from the *Memorandum Opinion and Order*. Indeed, the *MO&O* granted Grand Alliance's request for relief and dismissed the TVC application. Accordingly, we dismiss Grand Alliance's Petition.

7. We also decline to address Grand Alliance's request for clarification. The *MO&O* did not purport to establish a protected service area for TVC. Instead, the *MO&O* described actions the Commission took in the *Two-Way Order* to establish PSAs for all ITFS stations. Stated another way, any injury TVC suffered would be traceable to the *Two-Way Order*, not the *MO&O*. To the extent Grand Alliance takes issue with the *MO&O*'s description of TVC's entitlement to a protected service area, we do not believe clarification is appropriate in the context of this proceeding. We note that the Commission has sought comment on clarifying and/or modifying the rights of grandfathered ITFS stations on the E and F channel groups.²⁷ We believe that any further elaboration or modification of the respective rights of TVC and Grand Alliance should take place in the context of the pending rulemaking proceeding.²⁸

¹⁸ *Id.*, 18 FCC Rcd at 18214 ¶ 8.

¹⁹ *Id.*, 18 FCC Rcd at 18214 ¶ 9.

²⁰ Petition at 2.

²¹ *Id.*

²² *Id.* at 5-8.

²³ Opposition at 3-5.

²⁴ *Id.* at 5-9.

²⁵ 47 C.F.R. § 1.106(b)(1).

²⁶ See Instapage Network, Ltd.'s Informal Request for Retroactive Bidding Credits, *Order on Reconsideration*, DA 04-1498 (rel. May 27, 2004) at ¶ 7.

²⁷ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, (continued....)

IV. CONCLUSION AND ORDERING CLAUSE

8. For the reasons discussed herein, we determine that Grand Alliance was not injured by the *MO&O*, since the *MO&O* granted Grand Alliance's request. We also conclude that clarification of the *MO&O* is not appropriate at this time. We therefore dismiss Grand Alliance's Petition.

9. 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 Sections 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Clarification or Limited Reconsideration filed by the Grand MMDS Alliance New York F/P Partnership on October 6, 2003 IS DISMISSED.

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

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau

(...continued from previous page)

et al.; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) at ¶¶ 333-343.

²⁸ Grand Alliance contends that the Commission has a policy of correcting erroneous *dicta*. Petition at 9 n.26, *citing* Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech – Illinois, *Declaratory Ruling and Order*, 10 FCC Rcd 4596, 4600-01 ¶ 9 n.18 (1995); National Association of Broadcasters, *Memorandum Opinion and Order*, 9 FCC Rcd 5778, 5780 ¶ 11 (1994). Neither of the cases Grand Alliance cites supports its request for relief. In the cases Grand Alliance cites, the Commission was explaining that prior *dicta* was inconsistent with its current statement of policy. In both of those cases, the Commission needed to resolve the contradiction between the *dicta* and its current statement of policy in order to resolve the current controversy before it. In this case, however, no purpose would be served by addressing Grand Alliance's arguments. As we have noted, TVC's application was dismissed, and that action is final. We have also concluded that the pending rulemaking proceeding, not this proceeding, is the appropriate forum for any modification or clarification of the respective rights of Grand Alliance and TVC.