

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

In the Matter of Applications of)	
)	
AIG RADIO HOLDING COMPANY, INC.)	File Nos. BLNPMD-20010731AAW,
)	BRMD-20010330AGU
To Modify and Renew Its License for Multipoint)	
Distribution Service Station WMI890, Bremerton,)	
Washington)	
)	

ORDER ON RECONSIDERATION

Adopted: October 21, 2004

Released: October 22, 2004

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

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address two petitions for reconsideration filed by Sherry Rullman (Rullman), licensee of Multichannel Multipoint Distribution Service (MMDS)¹ Station WHT657, Seattle, Washington. Rullman seeks reconsideration of the grant of the captioned applications seeking modification² and renewal³ of the license for MMDS Station WMI890, Bremerton, Washington, licensed to AIG Radio Holding Company, Inc. (AIG). We also address an informal objection filed against the captioned modification application filed by Stephanie Engstrom (Engstrom) and Lois Hubbard (Hubbard).⁴ For the reasons discussed below, we grant Rullman's Modification Petition, dismiss AIG's captioned application for modification of license, dismiss the E&H objection, and dismiss Rullman's Renewal Petition.

II. BACKGROUND

2. Station WMI890 is licensed to operate on the E group channels in Bremerton, Washington. American Telecasting Development, Inc. (American Telecasting), a Sprint Corporation

¹ On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing MDS and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. 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, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Once the new rules become effective, we will no longer refer to these services as MDS and ITFS.

² Petition for Reconsideration (filed Oct. 10, 2001) (Modification Petition).

³ Petition for Reconsideration (filed Sep. 25, 2001) (Renewal Petition).

⁴ Informal Objection, filed Nov. 6, 2001 (E&H Objection).

subsidiary, leased the Station from AIG.⁵ On February 14, 2000, KCPQ TV notified American Telecasting that all microwave antennas must be removed from its tower effective March 6, 2000.⁶ On March 1, 2000, after learning that its tower lease was being terminated, AIG notified the Commission that it would temporarily discontinue operation of the Station from this tower on March 6, 2000.⁷ AIG indicated that it was searching for a suitable alternative tower from which to operate the Station.⁸

3. Several months later, in the early fall of 2000, AIG began negotiations with the owner of another tower and contracted with a consulting engineer to prepare an interference analysis and a relocation application.⁹ AIG states that its proposed relocation would have substantially decreased existing interference to Rullman's adjacent-channel station but acknowledges that it would have caused a "minimal" increase in electrical interference at three points within the protected service area of Rullman's Station WHT657, which operates on the F Group channels.¹⁰ AIG had not obtained Rullman's consent and AIG's station had been dark for more than twelve months on March 30, 2001, when AIG filed a modification application seeking permission to relocate the Station (First Modification Application).¹¹ In the same filing AIG requested a waiver to extend the discontinuance period for an additional six months, under the procedures and before the deadline set out in Section 21.303(d) of the Commission's Rules.¹² AIG requested acceptance of the First Modification Application as proof of its desire to continue to operate the channels.¹³ AIG also filed a renewal application on March 30, 2001.¹⁴ The former Mass Media Bureau (MMB) issued public notices listing the renewal application and the First Modification Application as accepted for filing on July 3, 2001,¹⁵ and July 18, 2001, respectively.¹⁶

⁵ Letter from Suzanne S. Goodwyn, Counsel to American Telecasting Development, Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission (FCC), July 31, 2001; Sherry Rullman Reply to Opposition to Petition to Deny, File No. BLNPMD-20010731AAW, filed Nov. 5, 2001 (Rullman Reply to Opposition to Deny), at 1.

⁶ Letter from Larry Brandt, KCPQ-TV to Lee Haglund, American Telecasting dated Feb. 14, 2000.

⁷ Letter from William D. Freedman, counsel to AIG, to Magalie Roman Salas, Secretary, FCC, Mar. 1, 2000.

⁸ *Id.*

⁹ AIG Opposition to Petition to Deny (filed Oct. 5, 2001) at 2.

¹⁰ *Id.*

¹¹ Letter from Suzanne S. Goodwyn, American Telecasting, to Common Carrier Domestic Radio, FCC, Mar. 30, 2001 (Waiver Request); *see also* Mass Media Bureau Instructional Television Fixed Service Multipoint Distribution Service Actions, *Public Notice*, Report No. 438 (July 18, 2001) (First Mod PN); FCC File No. BLMPMD-20010330ADP.

¹² *See* Letter from Suzanne S. Goodwyn, American Telecasting, to Magalie Roman Salas, Secretary, FCC, Mar. 30, 2001. Section 21.303(d) provides that, if any radio frequency should not be used to render service as authorized during a consecutive period of twelve months at any time after construction is completed and a certification of completion of construction has been filed, the licensee must within thirty days thereafter either submit the station license for cancellation, seek deletion of the unused frequency from the license, or request waiver of the cancellation rule with required supporting information. 47 C.F.R. § 21.303(d). The Commission placed the First Modification Application on public notice as accepted for filing on July 18, 2001. *See* First Mod PN. In Section VIII, Question 3, AIG indicates that it submitted a waiver request as Exhibit 13.

¹³ Waiver Request.

¹⁴ File No. BRMD-20010330AGU.

¹⁵ Mass Media Bureau Instructional Television Fixed Service Multipoint Distribution Service Actions, *Public Notice*, Report No. 424 (Jul. 3, 2001).

¹⁶ First Mod PN.

4. AIG's efforts to induce Rullman to grant her consent to the First Modification Application proved unsuccessful.¹⁷ However, AIG was eventually able to negotiate a new lease with KCPQ TV to use the tower where AIG's original transmitter had been located, at a reduced antenna height.¹⁸ On that basis, four months into the requested six-month extension period, on July 31, 2001, AIG filed another modification application (Second Modification Application)¹⁹ to operate from the KCPQ TV tower. The Commission gave public notice of the Second Modification Application on August 27, 2001.²⁰ Simultaneously with the filing of the Second Modification Application, AIG withdrew the First Modification Application and requested expedited processing of the Second Modification Application in its stead.²¹

5. On August 16, 2001, with its Second Modification Application still pending and the deadline for resuming operations rapidly approaching, AIG filed an application for special temporary authority to operate at the reduced tower height as described in the Second Modification Application (STA Request).²² AIG stated that it intended to resume operations by September 6, 2001, the end of the six-month extension period that it had sought in its waiver request.²³ The MMB's Video Services Division granted the STA Request and the six-month extension request on August 28, 2001.²⁴ On August 29, 2001, the MMB granted AIG's renewal application,²⁵ and the Station resumed service on August 31, 2001.²⁶

6. On September 13, 2001, Rullman filed a petition to deny AIG's Second Modification Application (Petition to Deny).²⁷ The MMB granted AIG's Second Modification Application on September 18, 2001, and gave public notice of the grant on September 21, 2001.²⁸ Rullman maintains that this grant was premature because the MMB did not allow the pleading cycle on its Petition to Deny to be completed.²⁹

7. On September 25, 2001, Rullman filed the Renewal Petition.³⁰ On October 3, 2001, AIG filed a notice certifying that it had completed construction of the facilities proposed in the Second

¹⁷ *Id.* at 3.

¹⁸ Letter from Suzanne S. Goodwyn, American Telecasting, to Common Carrier Domestic Radio, FCC (dated Jul. 31, 2001) (Second Modification Letter).

¹⁹ FCC File No. BLNPMD-20010731AAW. *See*, FCC Public Notice Report No. 486 (Aug. 27, 2001).

²⁰ *Id.*

²¹ Second Modification Letter. The MMB accepted the Second Modification Application for filing on August 27, 2001. Mass Media Bureau Instructional Television Fixed Service Multipoint Distribution Service Actions, *Public Notice*, Report No. 438 (Aug. 27, 2001)

²² *See* Letter from Charles E. Dziejcz, Assistant Chief, Video Services Division, Mass Media Bureau to Kathleen E. Shannon, AIG Radio Holding Co., Inc. (Aug. 28, 2001) (STA Grant Letter).

²³ *Id.*

²⁴ *Id.*

²⁵ The MMB placed the grant of the renewal application on public notice on September 4, 2001. *See* FCC Public Notice Report No. 496, released Sept. 4, 2001.

²⁶ *See* AIG Opposition to Petition for Reconsideration, filed Oct. 11, 2001, at 3.

²⁷ Sherry Rullman Petition to Deny, filed Sept. 13, 2001 (Rullman Petition to Deny).

²⁸ Mass Media Bureau Instructional Television Fixed Service Multipoint Distribution Service Actions, *Public Notice*, Report No. 517 (Sep. 21, 2001)(Grant Notice).

²⁹ Modification Petition at 2.

³⁰ Renewal Petition.

Modification Application.³¹ Rullman filed the Modification Petition on October 10, 2001.³² On November 6, 2001, Engstrom Hubbard submitted their late-filed informal objection to the grant of AIG's Second Modification Application.³³

8. On July 26, 2004, AIG reported that its lease with American Telecasting had been terminated and that the station was being deconstructed.³⁴ AIG requested waiver of Section 21.44(a)(3) of the Commission's Rules to allow the station to be constructed for more than thirty days without resulting in cancellation of the license.³⁵ On September 24, 2004, the Broadband Division of the Wireless Telecommunications Bureau granted AIG's waiver request.³⁶

III. DISCUSSION.

A. Second Modification Application

9. As a threshold matter, we must determine whether or not the MMB provided an adequate opportunity, consistent with statutory requirements and the Commission's rules, for Rullman to contest its license grant to AIG. Subject to certain exceptions, Section 309(b) of the Communications Act (the Act) provides that no application for a radio license grant shall be granted by the Commission earlier than thirty days following issuance of a public notice of the acceptance for filing of the application.³⁷ Section 309(d)(2) further provides that, if the Commission decides to deny a petition to deny a license grant falling within specified categories, it must issue a concise statement of the reasons for denying the petition and, in doing so, dispose of all substantial issues raised by the petition.³⁸ The statute exempts from these requirements any application for minor changes in the facilities of an authorized station, however,³⁹ and the Commission's rules provide that an application for a minor change to an MDS station shall be deemed to have been authorized by the Commission as of the twenty-first day following the date of public notice unless the applicant is notified to the contrary by the Commission.⁴⁰ AIG characterized its Second Modification Application as a minor change application,⁴¹ and the MMB treated it as such, listing the license as granted on a public notice issued one day after the twenty-one days required for minor change applications had run their course.⁴²

10. Rullman contends that AIG's Second Modification Application involved more than a minor change and, thus, did not qualify for expedited treatment.⁴³ If Rullman's argument is correct, the

³¹ AIG Certification of Completion of Construction for MDS Station WMI890, File No. BLNPMD-20010731AAW (filed Oct. 3, 2001).

³² Modification Petition.

³³ E&H Objection.

³⁴ Request for Waiver of Section 21.44 (filed Jul. 26, 2004).

³⁵ *Id.*

³⁶ Wireless Telecommunications Bureau's Broadband Division Grants Requests for Waiver of MDS and ITFS Discontinuance of Service Rules, *Public Notice*, DA 04-3061 (rel. Sep. 24, 2004) (Waiver PN).

³⁷ 47 U.S.C. §309(b).

³⁸ 47 U.S.C. §309(d)(2).

³⁹ 47 U.S.C. §§309(c)(1) and 309(d)(1).

⁴⁰ 47 C.F.R. § 21.41(a).

⁴¹ Second Modification Application at 1.

⁴² *Grant Notice*.

⁴³ Rullman Petition to Deny at 8.

Commission's rules would have required MMB to allow ten days for AIG to file an opposition to Rullman's petition to deny, and then another five days for Rullman to file a reply to the opposition.⁴⁴ In addition, the Act would have required the Commission to issue a statement explaining why it was denying Rullman's petition.⁴⁵

11. Rullman argues that AIG's Second Modification Application does not qualify as a minor change application because AIG's Second Modification Application would increase existing interference to previously authorized licensees.⁴⁶ Section 21.902(b)(4) of the Commission's Rules requires that an applicant engineer its system to provide at least 0 dB of adjacent channel interference protection within the protected service area (PSA) of an adjacent channel authorized MDS system.⁴⁷ The protected service areas of Stations WMI890 and WHT657 overlap as a result of the expansion of MDS PSAs from 15 to 35 miles. Under those circumstances, the policy has been to allow modifications so long as the modifications do not create new areas of interference.⁴⁸ Because of the questions raised by Rullman, staff conducted an independent engineering analysis of the Second Modification Application. That study concluded that the Second Modification Application would cause an increase in interference within Rullman's PSA in a ring-shaped area approximately 2 ½ to 3 ½ miles from Station WMI890's transmitter site. Accordingly, AIG's application required a waiver of Section 21.902(b)(4) of the Commission's Rules and was not eligible to be treated as a minor modification. Furthermore, because AIG's application required a waiver of Section 21.902(b)(4) of the Commission's Rules, but no such waiver was sought, its application was defective and should have been dismissed. We therefore grant Rullman's Modification Petition, set aside the grant of the Second Modification Application, and dismiss the Second Modification Application.⁴⁹

12. We note that dismissal of the Second Modification Application will not have an impact at this time on the operations of Station WMI890. As noted above, AIG has sought and received permission to remain off the air.⁵⁰ In the *R&O & FNPRM*, the Commission instituted geographic area licensing for MDS and ITFS stations.⁵¹ Accordingly, once the new rules take effect, AIG will most likely be able to relocate Station WMI890's transmitter within its geographic service area without prior Commission approval, subject to compliance with the new technical rules.⁵² Until the new rules take effect, AIG has authority to remain silent.⁵³

⁴⁴ Rullman filed her petition to deny AIG's Second Modification Application on September 13, 2001. Oppositions would have been due 10 days later, with replies due five days after that. 47 C.F.R. § 1.45(b), (c).

⁴⁵ 47 U.S.C. §309(d).

⁴⁶ Rullman Petition to Deny at 6-7.

⁴⁷ 47 C.F.R. § 21.902(b)(4).

⁴⁸ See Amendment of Parts 1, 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 on Reconsideration*, 14 FCC Rcd 12764, 12796 ¶ 70 (1999).

⁴⁹ We dismiss the E&H Objection as untimely. Informal objections must be submitted at least one day before the Commission takes action on an application. 47 C.F.R. § 21.29(c)(1). The E&H Objection was submitted on November 18, 2001, which was after the date MMB acted on the application.

⁵⁰ See Waiver PN.

⁵¹ *R&O & FNPRM*, 19 FCC Rcd at 14189-90 ¶ 54.

⁵² *Id.*

⁵³ Waiver PN.

B. Renewal Application

13. When the MMB granted AIG's renewal application on August 29, 2001,⁵⁴ neither Rullman nor any other party had raised any objections. The station resumed operation under special temporary authority, the grant of which, on August 28, 2001, was also unopposed by Rullman or any other party.⁵⁵ Rullman filed her Renewal Petition on September 25, 2001.⁵⁶ Section 1.106(b)(1) of the Commission's rules provides that, if a petition for reconsideration is filed by a person who is not a party to a proceeding, the petition must show good reason why it was not possible to participate in the earlier stages of the proceeding.⁵⁷ Rullman has not provided an adequate explanation why she could not have participated earlier. A party's expectation that the Commission will not act in a manner that the party expects is not a valid excuse for its failure to file a timely petition to deny.⁵⁸ On that basis, we dismiss her Renewal Petition.

IV. CONCLUSION AND ORDERING CLAUSES

14. For the reasons stated above, we grant Rullman's Petition, reconsider the grant of AIG's Second Modification Application, and dismiss that application. We dismiss the E&H Objection and Rullman's Renewal Petition.

15. 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 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Sherry Rullman on October 10, 2001 IS GRANTED, and the grant of File No. BLNPMD-20010731AAW IS SET ASIDE.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 21.28 and 21.902 of the Commission's Rules, 47 C.F.R. § 21.28, 21.902, the licensing staff of the Broadband Division SHALL DISMISS File No. BLNPMD-20010731AAW.

17. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309 and Section 21.30 of the Commission's Rules, 47 C.F.R. § 21.30, that the Informal Objection filed by Stephanie Engstrom and Lois Hubbard on November 6, 2001 IS DISMISSED.

18. IT IS FURTHER 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

⁵⁴ FCC Public Notice Report No. 496, released Sept. 4, 2001.

⁵⁵ See STA Grant Letter.

⁵⁶ Renewal Petition.

⁵⁷ 47 C.F.R. § 1.106(b)(1).

⁵⁸ See *Committee for Community Access v. FCC*, 737 F.2d 74, 80 (D.C. Cir. 1984) (fact that a party is surprised by Commission action is not good cause for failure to participate in a proceeding prior to Commission action).

C.F.R. § 1.106, that the Petition for Reconsideration filed by Sherry Rullman on September 25, 2001 IS DISMISSED.

19. 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