

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

In the Matter of Applications of)
MDS DIGITAL NETWORK, INC.)
For Renewal of License of Multipoint) File No. BRMD-20010330AHW
Distribution Service Station WPY40, Los)
Angeles, California)
For Renewal of License of Multipoint) File No. BRMD-20010330ADO
Distribution Service Station KFI79, Los)
Angeles, California)
For Renewal of License of Multipoint) File No. BRMD-20010330AHV
Distribution Service Station KFF79, Los)
Angeles, California)

ORDER ON RECONSIDERATION

Adopted: December 7, 2004

Released: December 7, 2004

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

I. INTRODUCTION

1. On December 17, 2003, MDS Digital Network, Inc. (MDS Digital) filed a petition seeking reconsideration of the action taken by the Public Safety and Private Wireless Division (Division) of the Wireless Telecommunications Bureau on November 17, 2003. The Division granted a Petition to Deny and Petition for Declaration of License Forfeiture filed by Southern Wireless Video, Inc. (Southern) against MDS Digital Network, Inc. (MDS Digital), thereby declaring that MDS Digital forfeited the licenses for Stations WPY40, KFI79, and KFF79, Los Angeles, California as of June 24, 2000. For the reasons discussed below, we deny the PFR.

1 MDS Digital Network, Inc., Petition for Reconsideration (filed Dec. 17, 2003) (PFR).

2 MDS Digital Network, Inc., Memorandum Opinion and Order, 18 FCC Rcd 24012 (WTB PSPWD 2003) (MO&O).

3 Southern Wireless Video, Inc., Petition to Deny and Petition for Declaration of License Forfeiture (filed Aug. 1, 2000 (Petition). The Petition was filed against applications filed by MDS Digital on March 30, 2001 for renewal of the licenses for Stations WPY40, KFI79, and KFF79, Los Angeles, California. See FCC File Nos. BRMD-20010330AHW; BRMD-20010330ADO; BRMD-20010330AHV (filed Mar. 30, 2001) (Applications).

4 See MO&O, 18 FCC Rcd at 24012 ¶ 1. Because the Division declared the licenses for Stations WPY40, KFI79, and KFF79 forfeit as of June 24, 2000, it dismissed MDS Digital's pending renewal applications. See id.

II. BACKGROUND

2. The Commission granted its consent to the assignment of Stations WPY40, KFI79, and KFF79 from Microband Corporation of America (Microband) on November 23, 1990.⁵ In 1999, Mr. Kim transferred the licenses to MDS Digital on a *pro forma* basis.⁶ Mr. Kim serves as the president and sole employee of MDS Digital. Mr. Kim and, subsequently, MDS Digital, have filed annual reports for each station since 1991 (for the calendar year of 1990).⁷

3. *Station KFF79.* According to the annual report filed for the year 1990 for Station KFF79, Mr. Kim transmitted Korean language programming “on a test basis on a twenty-four hour per day, seven day per week basis since the station was acquired.”⁸ In the following year, Station KFF79 transmitted Korean and Arabic language programming to approximately 1,300 subscribers “on a twenty-four hour per day, seven day per week basis” for a total of 8,760 hours of entertainment programming rendered during the calendar year.⁹ The number of subscribers to the programming transmitted by Station KFF79 greatly increased to approximately 5,000 for calendar years of 1992 and 1993.¹⁰ Although Mr. Kim reported that Station KFF79 retained 5,000 subscribers during the calendar year of 1994, Mr. Kim further reported that Station KFF79 only rendered 384 total hours of service in that calendar year due to heavy damage caused to station facilities by an earthquake on January 16, 1994.¹¹ Station KFF79 was returned to service in the following year and continued distributing programming to customers from 1995 through 1998.¹² However, according to the annual reports filed for the years of 1999 and 2000, Station KFF79 only operated in test mode, which resulted in approximately 168 hours of transmissions each year.¹³ Moreover, Mr. Kim conceded therein that for each year “there [were] numerous consecutive

⁵ See *Public Notice*, Report NO. D-569-A (rel. Dec. 5, 1990).

⁶ See *Notice of Consummation* (filed Dec. 9, 1999).

⁷ 47 C.F.R. § 21.911(a)(3) requires MDS licensees to file annual reports for each station listing the number of subscribers and the total hours of transmission service rendered during the calendar year in the following categories: entertainment, education and training, public service, data transmission, and other services.

⁸ See *Station KFF79 1990 Annual Report* (filed Mar. 26, 1991). Mr. Kim reported no subscribers for the calendar year of 1990. See *id.* Mr. Kim categorized the total hours of transmission service rendered during the calendar year of 1990 as approximately 720 hours of entertainment programming. See *id.*

⁹ See *Station KFF79 1991 Annual Report* (filed Mar. 5, 1992).

¹⁰ See *Station KFF79 1992 Annual Report* (filed Mar. 10, 1993); *Station KFF79 1993 Annual Report* (filed Mar. 25, 1994). The total hours of transmission service rendered during the calendar years of 1992 and 1993 were, respectively, 8,784 and 8,760 hours of entertainment programming.

¹¹ See *Station KFF79 1994 Annual Report* (filed Feb. 28, 1995). Mr. Kim stated that repairs were underway. See *id.* Mr. Kim reported that Station KFF79 was not operational due to the removal or alteration of equipment or facilities and did not render service from January 16 through December 31, 1994. See *id.*

¹² See *Station KFF79 1995 Annual Report* (filed Mar. 1, 1996); *Station KFF79 1996 Annual Report* (filed Mar. 12, 1997); *Station KFF79 1997 Annual Report* (filed Mar. 11, 1998); *Station KFF79 1998 Annual Report* (filed Jul. 12, 1999). According to the annual reports, Station KFF79 transmitted a total of 8,760 hours of entertainment programming to 1,050 subscribers in 1995, 8,784 hours of entertainment programming to 1,600 subscribers in 1996, and 8,088 hours of entertainment programming to 1,571 subscribers in 1997. According to the extremely late-filed 1998 annual report, Station KFF79 provided a total of 2,054 hours of transmission service, of which 1,704 hours were categorized as entertainment and 350 hours were categorized as other, to 2,066 subscribers.

¹³ See *Station KFF79 1999 Annual Report* (filed Mar. 29, 2000); *Station KFF79 2000 Annual Report* (filed Mar. 1, 2001). The annual reports state that, on April 14, 1999, U.S. Bankruptcy Court for the Northern District of Oklahoma entered a temporary restraining order, which restrained the lease or encumbrance of this license for any

periods greater than 48 hours in which the station rendered no service as authorized.”¹⁴ In annual reports filed for the calendar year of 2001, for Mr. Kim asserted that “[t]he equipment for Station KFF79 remains in place and, while the landlord has disconnected the power supply, Station KFF79 is operational. On more than one occasion during 2001 testing was done using Station KFF79.”¹⁵

4. *Station KFI79.* Station KFI79 provided news broadcast service to the Orange County News Service in 1990¹⁶ and subsequently simulcasted Korean and Arabic language programming originated on Station KFF79 from 1991 through 1994.¹⁷ However, in the 1995 annual report, Mr. Kim disclosed that Station KFI79 remained operational but provided no service to any subscribers “because the licensee has received interference complaints forcing the shutdown of the studio-to-transmitter link.”¹⁸ For various reasons, Station KFI79 thereafter operated in test mode from 1996 through 2000.¹⁹ Specifically, the testing of Station KFI79 resulted in approximately 4,392 hours of such transmissions in 1996, 350 hours in 1997, 330 hours in 1998, and 72 hours in both 1999 and 2000. In each annual report for the calendar years of 1996 through 2000, Mr. Kim further disclosed that there were numerous consecutive periods greater than 48 hours in which the Station KFI79 rendered no service as authorized.²⁰ In the 2001 annual report, for Mr. Kim asserted that “[t]he equipment for Station KFI79 remains in place and, while the landlord has disconnected the power supply, Station KFI79 is operational.”²¹

period in excess of 90 days. Accordingly, no parties were willing to commit the necessary financial resources for a short-term lease with no assurance of renewal.

¹⁴ See *id.*; Station KFF79 1999 Annual Report.

¹⁵ Station KFF79 2001 Annual Report (filed Mar. 1, 2002). Similarly, in the 2002 annual report, Mr. Kim reiterated that “[t]he essential equipment for operation of Station KFF79 remains in place although the landlord has disconnected certain of the equipment.” Station KFF79 2002 Annual Report (filed Feb. 28, 2003).

¹⁶ See Station KFI79 1990 Annual Report (filed Mar. 26, 1991). Specifically, Mr. Kim reports that Station KFI79 rendered approximately 600 hours of news programming since he acquired the station, via assignment, in November of 1990. See *id.*

¹⁷ See Station KFI79 1991 Annual Report (filed Mar. 5, 1992); Station KFI79 1992 Annual Report (filed Mar. 10, 1993); Station KFI79 1993 Annual Report (filed Mar. 25, 1994); Station KFI79 1994 Annual Report (filed Feb. 28, 1995). Indeed, the annual reports for Station KFI79 for the calendar years of 1991 through 1994 are effectively identical to the annual reports for Station KFF79, which are discussed above.

¹⁸ See Station KFI79 1995 Annual Report (filed Mar. 1, 1996). Accordingly, Mr. Kim disclosed that Station KFI79 provided no service, as authorized, for the period from January 1 through December 31, 1995. See *id.* Therefore, when taken in consideration with the prior annual report, Station KFI79 provided no service as authorized from January 16, 1994 through December 31, 1995.

¹⁹ Specifically, Mr. Kim operated Station KFI79 in test mode in 1996, 1997, and 1998 because Mr. Kim sought to use Station KFI79 as part of a network to provide Internet services throughout the greater Los Angeles area and, in so doing, experienced problems in securing the necessary link of Station KFI79’s transmitter to a host computer. See Station KFI79 1996 Annual Report (filed Mar. 12, 1997); Station KFI79 1997 Annual Report (filed Mar. 11, 1998); Station KFI79 1998 Annual Report (filed Jul. 12, 1999). Mr. Kim offers the same explanation for Station KFI79’s lack of service for calendar years of 1999 and 2000 as that discussed above with respect to Station KFF79. See Station KFI79 1999 Annual Report (filed Mar. 29, 2000); Station KFI79 2000 Annual Report (filed Mar. 1, 2001).

²⁰ See Station KFI79 1996 Annual Report; Station KFI79 1997 Annual Report; Station KFI79 1998 Annual Report; Station KFI79 1999 Annual Report; Station KFI79 2000 Annual Report.

²¹ Station KFI79 2001 Annual Report (filed Mar. 1, 2002). Similarly, in the 2002 annual report, Mr. Kim reiterated that “[t]he essential equipment for operation of Station KFI79 remains in place although the landlord has disconnected certain of the equipment.” Station KFI79 2002 Annual Report (filed Feb. 28, 2003).

5. *Station WPY40.* According to the annual reports, Station WPY40 operated from 1990 through 1994 on a test basis in preparation of simulcasting programming originated on Station KFF79.²² Thereafter, the annual reports filed for Station WPY40 for the calendar years of 1995 through 2002 are effectively the same as those filed for Station KFI79.²³

6. On March 30, 2001, MDS Digital filed applications to renew the licenses for Stations WPY40, KFI79, and KFF79. On August 1, 2001, Southern filed petitions to deny the pending renewal applications.²⁴ Southern alleges that the applications cannot be granted because MDS Digital's licenses for Stations WPY40, KFI79, and KFF79 "have been forfeited and/or canceled pursuant to Sections 21.44(a)(3) and 21.303(d) of the [Commission's] Rules."²⁵ According to Southern, "[t]he licenses should be deemed forfeited because the Stations have voluntarily been dismantled and have been non-operational for a period of over thirty continuous days."²⁶ Based on its field studies and on the annual reports submitted by Mr. Kim and MDS Digital, Southern contends that MDS Digital was required, pursuant to Section 21.303(d) of the Commission's Rules, to submit the licenses for cancellation, file a modification application, or request a waiver of the rule.²⁷ Southern therefore concludes that, because MDS Digital failed to take any of the permissible actions, the Commission should summarily dismiss the applications and deem the license forfeited.²⁸ MDS Digital filed numerous motions seeking additional time to file its opposition.²⁹

²² See Station WPY40 1990 Annual Report (filed Mar. 26, 1991); Station WPY40 1991 Annual Report (filed Mar. 5, 1992); Station WPY40 1992 Annual Report (filed Mar. 10, 1993); Station WPY40 1993 Annual Report (filed Mar. 25, 1994); Station WPY40 1994 Annual Report (filed Feb. 28, 1995). According to the annual reports, service to consumers could not begin until Mr. Kim secured the point-to-point microwave capacity needed to simulcast programming originating on Station KFF79. Because Mr. Kim never obtained the necessary link, Station WPY40 continued to operate in test mode through 1999. See PFR at 8-9.

²³ See Station WPY40 1995 Annual Report (filed Mar. 1, 1996) (reporting that the station rendered no service as authorized from January 1 through December 31, 1995); Station WPY40 1996 Annual Report (filed Mar. 12, 1997) (reporting that the testing of Station WPY40 resulted in approximately 72 hours of transmissions); Station WPY40 1997 Annual Report (filed Mar. 11, 1998) (reporting that the testing of Station WPY40 resulted in approximately 350 hours of transmissions); Station WPY40 1998 Annual Report (filed July 12, 1999) (reporting that the periodic testing of Station WPY40 resulted in approximately 330 hours of transmissions); Station WPY40 1999 Annual Report (filed Mar. 29, 2000) (reporting that the testing of Station WPY40 resulted in an approximately 72 hours of transmissions); Station WPY40 2000 Annual Report (filed Mar. 1, 2001) (same); Station WPY40 2001 Annual Report (filed Mar. 1, 2002); Station WPY40 2002 Annual Report (filed Feb. 28, 2003).

²⁴ See Petition. Southern is the licensee of the Los Angeles, California Basic Trading Area (BTA No. B262). Southern states that it is currently operating wireless cable systems throughout the Los Angeles area and, as the auction winner, it has the exclusive right to file a long-form application to operate an MDS Station in those portions of the BTA where the service area of a forfeited incumbent station has been merged with the BTA pursuant to 47 CFR 21.932(c). See Petition at 1-2.

²⁵ See Petition at 2.

²⁶ *Id.* (citing 47 CFR 21.44(a)(3)). Southern provides declarations by engineers stating that, during the months of June and July of 2001, engineers inspected and monitored MDS Digital's transmitter site and determined that the stations were not operating. See Petition, Exhibits A, B, and C; see also Petition, Exhibit D (appending field surveys that were performed on the three stations in 1999 and that indicate the stations have not been operational on numerous dates from January 27, 1999 through June 24, 1999).

²⁷ See Petition at 3.

²⁸ See Petition at 3.

²⁹ The Division incorrectly noted in the *MO&O* that, at the time of its release on November 17, 2003, the most recent request for an extension of time for MDS Digital to file its opposition brief had been submitted on September

7. The Division found no need to address the issue of whether MDS Digital's licenses were automatically forfeited pursuant to Section 21.44(a)(3) of the Commission's Rules³⁰ because it found that "the record clearly establishes that MDS Digital permanently discontinued operation of Stations WPY40, KFI79, and KFF79."³¹ Specifically, the Division noted that "MDS Digital's annual reports, as well as Southern's submissions in this proceeding, establish that neither Mr. Kim nor MDS Digital have used Stations WPY40 and KFI79 to render any service since the stations were acquired, nor have Mr. Kim or MDS Digital used Station KFF79 to render any service since early in 1999."³² Accordingly, the Division concluded that, pursuant to Section 21.303(d) of the Commission's Rules,³³ "the licenses for Stations WPY40, KFI79, and KFF79 cancelled as of June 24, 2000, the ending date of the twelve-month period following demonstration by the evidence before us of non-service by the stations."³⁴

III. DISCUSSION

8. MDS Digital contends that we should rescind the *MO&O*, deny Southern's Petition, and reinstate and renew MDS Digital's licenses for Stations WPY40, KFI79, and KFF79.³⁵ Specifically, MDS Digital asserts that the *MO&O* contains factual errors which unduly prejudice MDS Digital.³⁶ In addition, MDS Digital argues that the Division ignored the evidence on record, which, according to MDS Digital demonstrates that Mr. Kim expended extraordinary effort and resources in developing the stations.³⁷ MDS Digital maintains that the Division should not penalize Mr. Kim for his lack of success in this endeavor because it was due to matters outside of his control (*i.e.*, natural disaster, technological evolution, and orders of United States Bankruptcy Court).³⁸ MDS Digital further contends the Division

6, 2002 (requesting an extension of time through December 6, 2002). *See MO&O*, 18 FCC Rcd at 24014 n.11. However, we find that MDS Digital had filed subsequent motions seeking additional time to file its opposition. *See* MDS Digital Network, Inc., Consent Request for Additional Time to File Opposition to Petition to Deny and Petition for License Forfeiture (filed Aug. 18, 2003) (requesting through Nov. 18, 2003); MDS Digital Network, Inc., Consent Request for Additional Time to File Opposition to Petition to Deny and Petition for License Forfeiture (filed May 19, 2003) (requesting through Aug. 19, 2003); MDS Digital Network, Inc., Consent Request for Additional Time to File Opposition to Petition to Deny and Petition for License Forfeiture (filed Mar. 17, 2003) (requesting through May 19, 2003); MDS Digital Network, Inc., Consent Request for Additional Time to File Opposition to Petition to Deny and Petition for License Forfeiture (filed Jan. 17, 2003) (requesting through Feb. 17, 2003); MDS Digital Network, Inc., Consent Request for Additional Time to File Opposition to Petition to Deny and Petition for License Forfeiture (filed Dec. 17, 2002) (requesting through Jan. 17, 2003). We find that MDS Digital was not unduly prejudiced by the Division's failure to act on MDS Digital's motions for extensions of time to file its opposition brief. We therefore find it appropriate to consider the arguments raised by MDS Digital in the instant PFR.

³⁰ 47 C.F.R. § 21.44(a)(3); *see* Petition.

³¹ *MO&O*, 18 FCC Rcd at 24014-24015 ¶ 7 (internal citations omitted).

³² *Id.*

³³ 47 C.F.R. § 21.303(d).

³⁴ *MO&O*, 18 FCC Rcd at 24014 ¶ 7. The Division therefore also dismissed MDS Digital's applications for the renewal of the subject licenses. *See id.*

³⁵ *See* PFR at 4.

³⁶ *See id.* MDS Digital notes that the Division's most significant error was its finding that MDS Digital "had not sought an extension of time to file its opposition to the Petition beyond December 2002, when [MDS Digital] had filed additional content motions to extend the opposition deadline to November 18, 2003." PRF at 6. MDS Digital therefore concludes that the Division effectively denied MDS Digital the opportunity to respond to the PTD. *See id.*

³⁷ *See id.*

³⁸ *See id.*

unlawfully applies a strict enforcement and automatic cancellation standard without providing due notice and fails to treat similarly situated parties the same.³⁹

9. MDS Digital argues that the *MO&O* improperly interprets Section 21.303(d) to authorize automatic cancellation without fair notice.⁴⁰ MDS Digital contends that the Division's strict enforcement and automatic cancellation in this context is unprecedented.⁴¹ MDS Digital finds that "[n]othing in express terms of the rule contemplates automatic cancellation."⁴² MDS Digital maintains that the Commission clarified "that Section 21.303(d) required a 'licensee to submit for cancellation' a license not used for 12 consecutive months."⁴³ MDS Digital further asserts that it "had a reasonable basis to believe that the operational status of the Stations was sufficient under Section 21.303(d)."⁴⁴ Moreover, MDS Digital alleges that the "extreme penalty" of license cancellation "is particularly inappropriate in consideration of prior Commission actions relating to potential violations of Section 21.303(d)."⁴⁵ Lastly, MDS Digital argues that, even if the Commission were to find MDS Digital in violation of Section 21.303(a), good cause exists for the Commission to grant MDS Digital a waiver for six months consistent with the waiver granted CMTI.⁴⁶

³⁹ See *id.* at 5.

⁴⁰ See *id.* at 14. MDS Digital also argues against the application of 47 CFR 21.44(a)(3) to effectuate the automatic cancellation of the subject licenses, even though the Division found no need to reach this issue. See *id.* at 12-14. MDS Digital contends that 47 CFR 21.44(a)(3) "bars only the 'voluntary removal or alteration of the facilities, so as to render the station not operational for period of 30 days or more.'" PFR at 13 (*citing* 47 CFR 21.44(a)(3)). In contrast, MDS Digital alleges that there is nothing "voluntary" about the landlord disconnecting the Stations' power and equipment. See PFR at 13.

⁴¹ See *id.* at 14.

⁴² *Id.*

⁴³ See PFR at 15 (*citing* Revision of Part 21 of the Commission's Rules, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶¶ 81-83 (1987) (*Part 21 Report and Order*). MDS Digital notes that, while the Division may be correct that imposing strict enforcement and automatic cancellation, pursuant to 47 CFR 21.303(d), is reasonable, the Division is not free to impose that interpretation absent reasonable notice to MDS Digital. See PFR at 15 (*citing* *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987)).

⁴⁴ PFR at 16 (emphasis added). MDS Digital takes the position that the stations were "operational" to the extent that the critical equipment remains in place and capable of being used to transmit a signal. See PFR at 14. In discussing the meaning of the term "operational" under 47 CFR 21.44(a)(3), MDS Digital asserts that "[t]he term "operational" is not defined for this provision and nowhere does the Commission assert that Section 21.44(a)(3) requires licensees to be providing service to customers." PFR at 13.

⁴⁵ PFR at 17. According to MDS Digital, on February 23, 1995, the Video Services Division of the Mass Media Bureau refused to deny a renewal application filed by Cleveland Microband Teleservices, Inc. (CMTI) for MDS Station WQQ66, even though the licensee admitted that it had not been utilizing the stations to provide service to customers over a twelve-month period. See PFR at 17 (*citing* Letter from Lynne Milne, Senior Attorney, MDS Section, Video Services Division, Mass Media Bureau to Mr. William K. Hoffman, Cleveland Microband Teleservices, Inc. (dated Feb. 23, 1995) (*CMTI Letter*)). MDS Digital also relies on a staff letter, dated March 29, 1996, to Mr. Robert J. Rini, Esq., that found that no further Commission action was warranted after a number of licensees, including Wireless Holdings, Inc. (Wireless Holdings), disclosed various violations of Section 21.303. See PFR at 17 (*citing* Letter from Daniel R. Ball, Attorney, MDS Section, Video Services Division, Mass Media Bureau to Robert J. Rini, Esq. (dated Mar. 29, 1996) (*Wireless Holdings Letter*)).

⁴⁶ PFR at 18. MDS Digital concedes that, while it has not formally sought waiver under 47 CFR § 21.303(d), it has made every effort before the Commission to maintain the subject licenses. *Id.* Therefore, MDS Digital requests that the Commission "deem these actions sufficient to constitute a constructive request for waiver. In the alternative, the Division should deem this filing to be a late-filed request for waiver under Section 21.303(d)." *Id.* at 18 n.68.

10. We reject MDS Digital's argument that it had insufficient notice of what constituted service under Section 21.303(d) of the Commission's Rules. The U.S. Court of Appeals for the District of Columbia Circuit has held in determining whether a party has fair notice, the critical inquiry is whether "by receiving the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform."⁴⁷ In *Trinity Broadcasting*, the District of Columbia Circuit also explained that a licensee may not be penalized when the rules in question were unclear, the "agency itself struggles to provide a definitive reading of the regulatory requirements," and the licensee's interpretation of those rules was reasonable.⁴⁸ We therefore disagree, as explained below, with MDS Digital's contention that Section 21.303(d) of the Commission's Rules was unclear because, according to MDS Digital, the Commission did not formally address what sort of use was required to avoid license cancellation.

11. On September 25, 1987, the Commission released the *Part 21 Report and Order* revising Part 21 of the Commission's Rules, which governs the construction, licensing, and operation of common carrier domestic fixed radio facilities, including MDS. In the *Part 21 Report and Order*, the Commission expressly changed Commission policy regarding unused licenses in the domestic public fixed radio services. Before the *Part 21 Report and Order* was released, the Commission did not require licensees to submit an unused license for cancellation.⁴⁹ In changing this policy, the Commission stated that "[t]he comments have failed to convince us that requiring a licensee to submit an unused license for cancellation is, in and of itself, unreasonable."⁵⁰ The Commission further explained that while it did not desire to discourage risk taking in the development of new technologies, it had, at the same time an obligation to ensure that spectrum is used efficiently.⁵¹ Consequently, the Commission added Section 21.303(d) to Part 21.

12. The plain language of the rule requires an applicant to render service once within a twelve month period.⁵² Although MDS Digital contends that the Commission failed to articulate what constitutes "service," we find that this is not a close case. In particular, we agree with the Division that it was clearly unreasonable for MDS Digital to believe that the periodic broadcasting of signals that nobody received constituted "service" within the meaning of the rule.⁵³ Such an interpretation is unreasonable; in order to provide a service, a provider would, at a minimum, need a customer or other person to serve. Moreover, under MDS Digital's interpretation of the rule, a licensee could avoid license cancellation by broadcasting a signal once a year that nobody receives.⁵⁴ This construction, however, is plainly inconsistent with the Commission's underlying purpose of ensuring that spectrum is used efficiently and

⁴⁷ *General Electric Co. v. Environmental Protection Agency*, 53 F.3d 1324, 1329 (D.C. Cir. 1995); see also *Trinity Broadcasting of Florida, Inc. et al. v. FCC*, 211 F. 3d 618, 628 (D.C. Cir. 2000) ("*Trinity Broadcasting*").

⁴⁸ *Trinity Broadcasting*, 211 F.3d at 632.

⁴⁹ *Part 21 Report and Order*, 2 FCC Rcd at 5724 ¶ 82.

⁵⁰ *Id.* at ¶ 83.

⁵¹ *Id.* at ¶ 82.

⁵² *Id.*

⁵³ See *MO&O*, 18 FCC Rcd at 24104 n.24. Indeed, MDS Digital takes the position that the stations were "operational" to the extent that the critical equipment remains in place and capable of being used to transmit a signal. See PFR at 14.

⁵⁴ Indeed, MDS Digital seems to suggest that a licensee could avoid cancellation by simply maintaining critical equipment at the station site that, even if disconnected and without power, is capable of being used to transmit a signal.

effectively.⁵⁵ We also note that while MDS Digital discusses at length the efforts it made to establish service on the stations, the plain language of the rule requires that a licensee provide service, as opposed to attempting to provide service.

13. MDS Digital asserts that it was treated differently than similarly situated parties.⁵⁶ We disagree. The cases referenced by MDS Digital are significantly, factually distinct from the present matter.⁵⁷ With respect to CMTI, the waiver request was untimely filed and should have been dismissed by Commission staff on that basis.⁵⁸ We also note that the staff letter granting the waiver did not address the definition of what constitutes service pursuant to Section 21.303(d) of the Commission's Rules.⁵⁹ Due process does not compel the Commission to follow erroneous decisions by Commission staff, particularly when the rulings in question do not analyze the relevant issues.⁶⁰ In addition, we do not believe that MDS Digital's situation is similar to that addressed in the *Wireless Holdings Letter*. The staff therein addressed the disclosure by licensees of periodic transmission outages that lasted less than twelve consecutive months, thus not implicating the requirements of Section 21.303(d) of the Commission's Rules.⁶¹ Moreover, at the time of the disclosure, the subject stations had already resumed providing "continuous service" to the public.⁶²

14. As the Division noted in the *MO&O*, after twelve consecutive months of non-use, Section 21.303(d) of the Commission's Rules explicitly required MDS Digital to submit its license for cancellation, file an application for modification of the license to delete the unused frequency, or request a waiver and demonstrate that the frequency will be used (as evidenced by appropriate requests for service) within twelve months of the end of the period of non-use.⁶³ In the instant case, the Division found that the twelve-month period of non-use concluded on June 24, 2000.⁶⁴ However, as explained above, Station WPY40 has never provided service to subscribers since Mr. Kim acquired the facility via assignment in

⁵⁵ See *Part 21 R&O*, 2 FCC Rcd at 5724 ¶82.

⁵⁶ PFR at 17-18.

⁵⁷ See PFR at Exhibit C (Cleveland Microband Teleservices, Inc., Request for Waiver of Section 21.303(d) of the Commission's Rules (filed Apr. 5, 1991)); PFR at Exhibit D (Letter from Mr. Robert J. Rini, Rini, Coran and Lancellotta, to Mr. Charles Dziedzic, Video Services Division, Mass Media Bureau, FCC (dated Mar. 6, 1996) (*Rini Letter*)).

⁵⁸ Whereas CMTI's request for waiver was simply untimely filed, MDS Digital did not even seek a waiver until filing the instant PFR on December 17, 2003.

⁵⁹ See *CMTI Letter*.

⁶⁰ See e.g., *See Jelks v. FCC*, 146 F.3d 878, 881 (1998) (a subordinate body like the Division cannot alter a policy set by the Commission itself), *cert. den.* 119 S.Ct 1045 (1999); *Amor Family Broadcasting Group, v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990) (even if internal inconsistency at a subordinate level were shown, the Commission itself would not be acting inconsistently) *citing Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987); *Continental Cellular*, 6 FCC Rcd. 6834, 6836 n.25 (1991) (The Commission is not bound to apply a decision issued on delegated authority that is contrary to the Commission's Rules); *North Texas Media, Inc. v. FCC*, 778 F.2d 28, 33 (D.C. Cir. 1985) ("The initial improvident grant of a [short-spacing] waiver ... now described as an error, does not deprive the agency of authority to require future applicants to meet certain standards, in order to obtain such a waiver.")

⁶¹ See *Wireless Holdings Letter*; see also *Rini Letter*.

⁶² See *Rini Letter* at 3.

⁶³ *MO&O*, 18 FCC Rcd at 24014 ¶ 7.

⁶⁴ See *id.*

1990.⁶⁵ Although Station WFI79 provided service to subscribers until January 16, 1994, the annual reports disclose that it was not operational due to the removal or alteration of equipment or facilities from January 16, 1994 through December 31, 1995 and resumed transmitting “periodic” test signals in 1996 and each year thereafter until the landlord disconnected the equipment. Indeed, only Station WFF79 provided service to subscribers after January 16, 1994. However, even with regard to Station WFF79, the annual reports confirm that the facility was only used to transmit test signals in 1999 and 2000.⁶⁶ We therefore find that this is not even a close case. By June 24, 2000, all of the subject stations’ periods of non-use far exceeded twelve months in duration. Nevertheless, MDS Digital failed to submit its license for cancellation, file a modification application, or seek a waiver of the rule within the period specified in Section 21.303(d) of the Commission’s Rules.⁶⁷

15. As noted above, MDS Digital’ waiver request was untimely. Even if we reached the merits of the waiver request, however, it would be denied. Under Section 21.19 of the Commission’s Rules, the Commission may grant a request for a waiver if it is shown that: (i) the underlying purpose of the rules(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁶⁸ MDS Digital failed to demonstrate that the underlying purpose of Section 21.303(d) of the Commission’s Rules, to prevent spectrum warehousing, would be frustrated with the application of the rule in this instance.⁶⁹ As explained above, MDS Digital did not provide service for years, which prevented someone else from using this spectrum. We also disagree with MDS Digital that there are unique factual circumstances in this case that render the application of section 21.303(d) inequitable, unduly burdensome, and contrary to the public interest. MDS Digital’s argument that application of this rule does “not support the public interest but simply punishes an individual and a company for struggling to maintain operating an MDS network in the face of overwhelming barriers none of which one to the control of Mr. Kim or [MDS Digital]”⁷⁰ ignores the Commission’s statements and rationale in the *Part 21 Report and Order*. Risk-

⁶⁵ Rather, Station WPY40 only “periodically” transmitted test signals from November of 1990 until January 16, 1994; was not operational due to the removal or alteration of equipment of facilities from January 16, 1994 through December 31, 1995; and resumed transmitting “periodic” test signals in 1996 and each year thereafter until the landlord disconnected the equipment.

⁶⁶ Thereafter, Station KFF79 only transmitted test signals “[o]n more than one occasion during 2001.” See Station KFF79 2001 Annual Report (emphasis provided). MDS Digital concedes that the equipment and power to Station KFF79’s facilities were disconnected by the landlord in 2001 and that, therefore, Station KFF79 did not even transmit test signals for the remainder of 2001 and 2002.

⁶⁷ MDS Digital concedes that it did not seek a waiver pursuant to 47 CFR § 21.303(d) until it filed the instant PFR on December 17, 2003. See PFR at 18 n.68. Thus, we conclude that MDS Digital’ waiver request was untimely filed.

⁶⁸ 47 CFR § 21.19. MDS Digital does not address the standard provided for in 47 CFR § 21.19 but, rather, cites that discussed in *WAIT v. FCC*, 418 F.2d 1153 (D.C. Cir. 1980). See PFR at 18. According to the MDS Digital, a waiver is appropriate if (1) special circumstances warrant a deviation from the general; and (2) a deviation would not disserve the rule’s underlying purpose and would better serve the public interest than would enforcement. *Id.* (citing *WAIT*, 418 F.2d at 1157).

⁶⁹ MDS Digital argues that the commission should provide it with the same flexibility that the Commission “previously provided Digital Television licensees to come into compliance with its construction and operational rules.” PFR at 19 (citing Remedial Steps for Failure to Comply with Digital Television Construction Schedule 18 FCC Rcd 7174 (2003)). However, the Commission already considered the amount of time and the degree of flexibility appropriate for MDS licensees to come into compliance with the Commission’s Rules in adopting 47 CFR § 21.303(d).

taking in the wireless industry is not a unique factual circumstance. In fact, the Commission stated in the *Part 21 Report and Order* that “[w]e have no desire to discourage risk taking in new technologies”⁷¹ The Commission, however, found that the adoption of Section 21.303(d) was necessary to allow others to use the spectrum that was not being used to provide service and to allow the Commission to ascertain when spectrum is not being utilized or is being under utilized.⁷² Therefore, even if we were to consider the untimely filed waiver request, a waiver would not be warranted in this instance.

IV. CONCLUSION AND ORDERING CLAUSES

16. For the reasons discussed above, we deny the PFR, thereby affirming the forfeiture of MDS Digital’s licenses for Stations KFF79, KFI79, and WPY40 for failure to comply with Section 21.303(d) of the Commission’s Rules. We further dismiss MDS Digital’s request for waiver as untimely.

17. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 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 MDS Digital Network, Inc. on December 17, 2003 IS DENIED.

18. 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

⁷⁰ PFR at 14.

⁷¹ *Part 21 Report and Order*, 2 FCC Rcd at 5724 ¶ 82.

⁷² *Id.*